No. _____

# In The
# Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

*Petitioners,*

v.

RICK HOMANS and SANDER RUE,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Did the Tenth Circuit erroneously conclude, in conflict with the Second Circuit, that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), precludes the constitutionality of Albuquerque's limits on candidate campaign spending in municipal elections, even though the spending limits are justified by new factual circumstances and compelling governmental interests not addressed by the Court 28 years ago in *Buckley*?

2. If the Tenth Circuit correctly read *Buckley* to hold that any limit on campaign spending is *per se* unconstitutional under the First Amendment, should the Court revisit its holding in *Buckley* to permit a showing that Albuquerque's campaign expenditure limits satisfy constitutional requirements?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties were defendants below and are petitioners here:

In *City of Albuquerque v. Homans*:

Judy N. Chavez, in her capacity as Clerk of The City of Albuquerque

In *City of Albuquerque v. Rue*:

Judy N. Chavez, in her capacity as Clerk of the City of Albuquerque, and The City of Albuquerque Board of Ethics and Campaign Practices, a Board of the City of Albuquerque

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1) is reported at 366 F.3d 900 (10th Cir. 2004). The opinion of the District Court in *Homans v. City of Albuquerque* (App. 42) is reported at 217 F. Supp. 2d 1197 (D. N.M. 2002). The opinion of the District Court in *Rue v. City of Albuquerque* (App. 63) is unpublished.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Tenth Circuit entered judgment on April 27, 2004. A petition for rehearing or rehearing en banc was denied on May 25, 2004. App. 68. Justice Breyer granted petitioners' request for an extension of time to file a petition for writ of certiorari to and including September 22, 2004 (No. 04A104). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

The pertinent provisions of the City of Albuquerque's election code, Article XIII, § 4(d)(1) and (2), Albuquerque City Charter, are reprinted in the Appendix at App. 70.

## STATEMENT OF THE CASE

These two cases present an issue of critical importance to the governance of The City of Albuquerque, and one of profound national importance as well: whether state and local governments may employ reasonable limits on

candidates' campaign spending to protect the integrity of their elections and their governments. The Tenth Circuit majority resolved this issue by concluding that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), forecloses the possibility that such limits could be justified by compelling governmental interests. The Tenth and Second Circuits have split on this critical issue; the Second Circuit has held that campaign expenditure limits may satisfy First Amendment strict scrutiny based on factual circumstances and compelling governmental interests not addressed in *Buckley*. *Landell v. Sorrell*, No. 00-9159(L), 2004 WL 1837394 (2d Cir. Aug. 18, 2004), *petition for rehearing en banc filed* (2d Cir. Sept. 1, 2004).

## I. Factual Background

The City of Albuquerque adopted limits on contributions to and spending by candidates for city office through an amendment to the city charter in 1974, which Albuquerque voters approved by a vote of over 90%. App. 3. In 1999, pursuant to an amendment to the City Election Code, the applicable spending limits were doubled to an amount equal to twice the annual salary of the office. App. 48. The spending limits applicable to the October 2, 2001 elections for mayor and city councilor – the races at issue here – were $174,720 and $17,059, respectively. App. 4.

Albuquerque's spending limits have served the City well in deterring the appearance of corruption and promoting public confidence in the integrity of City government. Survey research showed that, by a margin of over 2-1 (68%), voters believe the spending limits have improved the honesty and integrity of city elections. Homans App.

352.[1] Fifty-seven percent of City voters strongly believe that elections for federal office (in which spending is unlimited) are overly influenced by special interest money, while only 23% say the same of City elections. App. 50. On the other hand, if spending limits are removed, the great majority of voters (59%) say that they will have "less faith in the integrity of the election process in Albuquerque." Homans App. 353.

The nation's experience with federal elections since 1976 demonstrates that the voters' distrust of a political system driven by unlimited campaign spending is well-founded. Since this Court's decision in *Buckley,* congressional elections have been conducted subject to limits on individual contributions to candidates but no limits on candidate spending. As found by the *Homans* District Court, limits on contributions alone, without limits on candidates' overall spending, have been ineffective in deterring the appearance and reality of corruption and undue influence in federal elections in the 28 years since *Buckley*. App. 51. The absence of spending limits in congressional elections has resulted in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. Homans App. 206, 214. A regime of unlimited spending leads to practices such as "bundling," which render contribution limits alone insufficient to deter the corrupting influence of special interest money. App. 51.[2]

[1] References to "Homans App." or "Rue App." are to the Defendants-Appellants' Appendix in the Court of Appeals.

[2] State Senator Dede Feldman, who had experience running both in Albuquerque elections (where spending has been limited) and state legislative elections (where it has not), testified that "unlimited spending in campaigns for state legislature has made a difference in

(Continued on following page)

The record further demonstrated that, when campaign spending is unlimited, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending. "As the cost of elections rise, candidates for office at every level of federal, state and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors." App. 49 (*Homans* district court opinion); *see* Homans App. 473-482 (interviews with former members of Congress describing how demands of unlimited fundraising draw time and attention of members of Congress away from their duties as legislators); Homans App. 212-213 (not unusual for members of Congress to attend three or four fundraising events a night during peak fundraising season).

Unfortunately, with the court-ordered suspension of the City's spending limits shortly before the 2001 election, the same preoccupation with fundraising emerged in Albuquerque. Jim Baca, then the Mayor of Albuquerque, stated: "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career." (Homans App. 512).

While protecting the City's elections from the corrosive effects of unlimited campaign spending for over a quarter-century, Albuquerque's spending limits have not prevented candidates from running vigorous, effective

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decisions made in the state legislature. . . . You can see this influence with the alcohol and gambling industries." Rue App. 0710. In city elections, on the other hand, "[h]aving spending limits in place has constrained the really big contributors, like the developers and the big vested interests, from having undue influence on the City Council." *Id.*

campaigns for office in Albuquerque. Homans App. 316-320, 325 (expert report of Anthony Gierzynski); Rue App. 701, 705, 707-708, 716, 721-722 (declarations of council candidates). On every measure of the health of an electoral system – whether it be voter confidence in government, competitiveness of elections, ability of challengers to take on incumbents, extent of voter turnout, or participation of small donors – Albuquerque measures well.[3]

## II. Proceedings Below

**A. *Homans* District Court Proceedings.** Rick Homans, a candidate for mayor in the 2001 mayoral election, filed suit on August 10, 2001, alleging that Albuquerque's limit on candidates' campaign expenditures in mayoral elections violated his rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. He subsequently sought, and the district court granted, a motion for a temporary restraining order. He also filed a motion for a preliminary injunction, seeking to enjoin enforcement of the spending limit for the upcoming October 2001 mayoral election. After a hearing at which the City presented extensive evidence in support of the spending limit, the district court denied the motion in a decision and order dated September 1, 2001, finding that Albuquerque's mayoral spending

[3] Undisputed evidence establishes that Albuquerque mayoral elections have been far more competitive, and challengers have been far more successful against incumbents, than is true of mayoral elections in other cities without spending limits. App. 48. *See also* Homans App. 318-319, Rue App. 441-443 (voter turnout in Albuquerque mayoral and city council elections healthy compared to other cities); Homans App. 234-237 (small donors play much bigger role in campaign financing in Albuquerque than in comparable city without spending limits).

limit was narrowly tailored to serve compelling governmental interests. *See Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266 (D. N.M. 2001).

A motions panel of the Court of Appeals granted Homans' request for an injunction pending appeal on September 6, 2001. *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001). The parties subsequently submitted the case to the district court for a ruling on the merits on the record compiled at the preliminary injunction hearing, together with additional evidence submitted by stipulation.

On August 22, 2002, the district court entered findings of fact and conclusions of law. App. 42. The court found that the City's spending limits

> are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition.

Despite these findings, the district court entered judgment in favor of Homans' First Amendment claim, granting a permanent injunction against further enforcement of the spending limit. App. 61-62. The district court viewed the Tenth Circuit ruling granting an interlocutory injunction to Homans as precluding any other determination. App. 61.

**B. *Rue* District Court Proceedings.** Following completion of the preliminary injunction proceedings in *Homans*, respondent Sander Rue, a candidate for city

councilor, filed suit on September 6, 2001, alleging that the limit on campaign expenditures in city council races violated his rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

Following discovery, the district court granted Rue's motion for summary judgment on October 11, 2002. App. 63. The district court's decision did not discuss the factual evidence submitted by the parties, holding that the constitutionality of the spending limit was foreclosed as a matter of law by the decision of the Tenth Circuit granting an injunction pending appeal to *Homans*, and by the *Homans* district court's subsequent final judgment. App. 66-67.

**C. The Tenth Circuit's Decision.** The Court of Appeals consolidated the two cases for purposes of argument and decision, and affirmed. App. 1-41. Judge Lucero wrote the opinion of the court as to parts I, II, and III, which addressed only procedural issues and the standard of review. App. 1-9. He addressed the merits in Part IV. App. 9-27. Judge Tymkovich wrote a separate opinion addressing the merits, which was joined by Judge O'Brien. App. 27-42. Judge Tymkovich's opinion thus constitutes the majority opinion on the merits of the constitutional issue before the court, despite being styled as a concurrence.

Judge Tymkovich's opinion (hereafter referred to as the majority opinion) viewed *Buckley* as an absolute bar to spending limits regardless of the factual circumstances and legal interests supporting the limits. As the majority stated, "under *Buckley* such restrictions cannot be supported

as a matter of law." App. 28.[4] The majority held that neither the interest in deterring corruption and its appearance, the interest in protecting the time of officeholders and candidates from the burdens of fundraising, nor the interest in encouraging a robust debate of the issues through electoral competition could provide a legally sufficient basis for expenditure limits. App. 34, 36, 40.

The third member of the panel, Judge Lucero, would have held that the interests identified by the City could provide a sufficient basis for the limits. App. 14. ("*Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances"); App. 22 (*Buckley* did not address the "wholly separate" interest in preserving officeholders' time); App. 26 ("nothing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits").

Judge Lucero concluded, however, that the City's factual evidence was insufficient to document these interests. App. 26. Because the *Rue* case was decided on a motion for summary judgment, without a trial or factual findings by the district court, Judge Lucero acknowledged that the evidence should be viewed "in the light most favorable to the City." App. 6. Judge Lucero nevertheless

[4] Elsewhere, the majority opinion states: "I agree that the *Buckley* Court did not adopt a *per se* rule against spending limits." App. 30. Nevertheless, the majority's analysis of the issues clearly demonstrates that it rejected, as a matter of law, the possibility that spending limits could be sustained under the First Amendment. After noting the governmental interests on which the City relied to support its expenditure limits, the opinion states: "Since all . . . of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City." App. 28.

proceeded to weigh conflicting evidence in the record in concluding that the City's evidence was insufficient to demonstrate the constitutionality of the city council expenditure limit. App. 23 (noting conflict in evidence concerning effect of unlimited spending on officeholders' time); App. 19 (noting conflict in evidence concerning implications of survey results).

Although the record in the *Homans* case differs in certain respects from that in the *Rue* case,[5] Judge Lucero concluded that separate consideration of the *Homans* record was unnecessary. App. 26. He reasoned that *Homans* was not decided on a motion for summary judgment and the standard of review would be less favorable to the City in *Homans* than in *Rue*. *Id*. Accordingly, he did not separately address the evidence in *Homans* or the factual findings of the *Homans* district court.

## REASONS FOR GRANTING THE WRIT

These cases present a constitutional question of exceptional importance to local governments and to the state of American democracy, on which Courts of Appeals for different circuits have issued conflicting decisions.

In the 28 years since *Buckley v. Valeo* struck down limits on candidates' campaign spending in congressional elections, the nation has witnessed the effects of a system in which campaign contributions are limited while overall

[5] For example, respondent Homans submitted no expert witness affidavits seeking to dispute the City's five expert witness reports. While respondent Rue did present conflicting expert reports in support of his motion for summary judgment, all such conflicts should have been resolved in favor of the City in determining whether summary judgment was appropriate.

campaign spending remains unlimited. It has created relentless pressure on officeholders to become full-time fundraisers, interfering with their ability to carry out the duties for which they were elected.[6] It has fueled the dominance of special interests in generating the sums candidates need to compete in the campaign funding arms race, fostering public cynicism about government and the value of the vote.[7] It has diminished robust public debate of the issues as incumbents build ever-larger war chests that deter competitors and leave many elections effectively uncontested.[8]

Although this Court in recent years has addressed the constitutionality of limits on campaign contributions and independent expenditures in a variety of contexts, the Court has not reviewed the constitutionality of limits on candidates' campaign expenditures in light of this nation's experience with unlimited spending since *Buckley. Cf. Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 443 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit *Buckley*'s general approach to expenditure limits, "some have argued that such limits could be justified in

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[6] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994), and discussion at Point I.B.2 of this Petition, *infra.*

[7] *See* Homans App. 229-230 (because of pressure to raise funds, elected officials must develop "a second set of constituents. You may call them the cash constituents." On many less-publicized issues that come before Congress, "the only people paying attention are the cash constituents. . . . The more it costs [to win election], the more any legislator has to think about – very deep[ly] about . . . – how they're going to vote."). *See also* discussion at Point I.B.1 of this Petition, *infra.*

[8] *See* discussion at n.17 of this Petition, *infra.*

light of post-*Buckley* developments in campaign finance") (citations omitted). These cases squarely present the question of whether states and municipalities, in the face of new factual developments and legal interests not addressed in *Buckley*, may demonstrate the necessity of reasonable campaign spending limits to protect the integrity of their elections and their governments.

Courts of Appeals are in conflict on the important question presented here. The Tenth Circuit's ruling striking down the City of Albuquerque's expenditure limits views *Buckley* as forever foreclosing the constitutionality of such limits, improperly treating First Amendment strict scrutiny as an automatic death knell for expenditure limits. In sharp contrast to the Tenth Circuit's ruling, the Second Circuit recently held that the constitutionality of campaign spending limits enacted by Vermont is not foreclosed by *Buckley*:

> [T]he *Buckley* Court did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits.

*Landell*, at *12 (quoting *Buckley*, 424 U.S. at 55).[9]

[9] The Sixth Circuit, like the Tenth, has held that *Buckley* precludes the constitutionality of campaign expenditure limits as a matter of law. *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-919 (6th Cir.), *cert. denied,* 525 U.S. 1001 (1998). A concurring opinion in that case, however, would have held that campaign expenditure limits may survive exacting scrutiny based on facts and legal interests not addressed in *Buckley. Kruse*, 142 F.3d at 920 ("The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional") (Cohn, D.J., concurring).

As a result of the Second Circuit's ruling, states and municipalities within the Second Circuit may enact mandatory limits on campaign expenditures if they can demonstrate that the limits are narrowly tailored, in light of post-*Buckley* factual developments, to further the compelling governmental interests in (1) deterring the reality and appearance of corruption and (2) preserving the time of officeholders and candidates from the burdens and distractions of endless fundraising. *Landell* at *26. However, because the Tenth Circuit majority below characterized these same legal interests as "constitutionally incapable of justifying spending restrictions as a matter of law[,]" App. 28, states and localities within the Tenth Circuit are permanently barred from employing even the most carefully tailored limit.

Because different Courts of Appeals have reached conflicting conclusions on this question, and because the question is of immense national importance, this Court should grant the petition for certiorari.

## I. THE RULING BELOW CONFLICTS WITH *BUCKLEY V. VALEO* AND WITH THE SECOND CIRCUIT'S RECENT RULING ON VERMONT'S CAMPAIGN SPENDING LIMITS.

### A. *BUCKLEY* DOES NOT FORECLOSE THE CONSTITUTIONALITY OF SPENDING LIMITS.

The Tenth Circuit majority, in striking down the campaign expenditure limits enacted by petitioner City of Albuquerque, erroneously concluded that *Buckley* forecloses "as a matter of law" the possibility that expenditure limits may be upheld consistent with the First Amendment. App. 28. The Tenth Circuit's ruling misapprehends

*Buckley* and conflicts with the Second Circuit's ruling in *Landell*. As the Second Circuit held:

> [T]he Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.

*Landell* at *2.

In contrast to the ruling below, the Second Circuit found that, on a factual record distinct from that presented in *Buckley,* two compelling interests supported Vermont's expenditure limits: "preventing the reality and appearance of corruption and protecting the time of candidates and elected officials." *Landell* at *26. The Second Circuit specifically noted the Tenth Circuit's conclusion, and an earlier ruling by a divided panel of the Sixth Circuit, that *Buckley* "categorically prohibits expenditure limitations," but stated "[w]e disagree." *Landell* at *11 (citing *Homans v. City of Albuquerque*, 366 F.3d at 914-921; *Kruse*, 142 F.3d at 918-919).[10] The conflict between

[10] After concluding that Vermont's mandatory campaign spending limits are supported by sufficiently compelling governmental interests, the *Landell* Court remanded the case to the district court for further factual findings on whether Vermont's spending limits are sufficiently narrowly tailored – in the Court's words, whether they constitute "the least restrictive alternative" for achieving the state's interests. *Landell* at *2. The Tenth Circuit majority, in contrast, held that the City could not demonstrate the narrow tailoring of its limits as a matter of law, App. at 28, affirming a grant of summary judgment to petitioner *Rue* and pretermitting any factual investigation of the narrow tailoring of the city council spending limit at trial. The Tenth Circuit also never addressed the factual question of whether the specific mayoral spending limit at issue in *Homans* was sufficiently tailored so as to permit

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courts of different circuits on this critically important question of constitutional law warrants review by this Court.

An examination of *Buckley* confirms the correctness of the Second Circuit's analysis and the error of the Tenth Circuit's contrary holding. In *Buckley*, this Court addressed the constitutionality of 1974 amendments to the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq*. Among other provisions, FECA placed limits on the amounts that donors could contribute to candidates and on the amount that candidates could spend on their campaigns. The *Buckley* Court acknowledged that government has a compelling interest in deterring corruption and the appearance of corruption of elected officials, 424 U.S. at 23-29, and on that basis upheld FECA's limits on the amount that donors could contribute to candidates. *Id.* The Court nevertheless struck down the limits on candidates' campaign spending, concluding, on the record before it, that FECA's contribution limits alone would be sufficient to deter corruption and its appearance. 424 U.S. at 55-56.

The proposition that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. In rejecting the argument that spending limits were necessary to reduce the incentive to circumvent direct contribution limits, this Court found: "There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56. Because *Buckley*'s analysis was

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effective campaigns and communication with the electorate, nor did the *Homans* district court make specific findings on that issue.

factually dependent, it left the door open for a determination that expenditure limits might be justified upon a factual record different from that presented in *Buckley*.

*Buckley* also rejected, as legally insufficient, two other specific interests advanced by the government as justifying FECA's expenditure limits: (1) equalizing the financial resources of candidates; and (2) restraining the cost of election campaigns for its own sake. *See Buckley*, 424 U.S. at 56-57. While rejecting these specifically identified interests, the Court did not hold that consideration of new and different governmental interests was foreclosed for all time. Rather, the Court stated: "No governmental interest *that has been suggested* is sufficient to justify [FECA's spending limits]." 424 U.S. at 55 (emphasis added).

Thus, despite its application of exacting scrutiny to FECA's expenditure limits, *Buckley* did not close the door to consideration of new facts and legal interests that could justify limits on campaign spending. *Landell* *12 ("after *Buckley,* there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.")

The Tenth Circuit's contrary view that *Buckley* forever precludes the constitutionality of any campaign expenditure limit is at odds with this Court's teachings about the nature of judicial review. As this Court observed in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, ___, 124 S.Ct. 619, 688 (2003):

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States v. Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us

> to consider the case that is actually before us." (*quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J. dissenting)).

Both in the First Amendment context and in constitutional review generally, strict scrutiny is still *scrutiny*, not "a straightjacket that disables Government from responding to serious problems." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (discussing requirement of close judicial scrutiny in First Amendment challenge to regulations governing cable television programming). As the Court has cautioned: "[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)). *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (applying strict scrutiny to statute restricting independent expenditures by corporations in political campaigns, but upholding restriction); *Burson v. Freeman*, 504 U.S. 191, 198-211 (1992) (plurality opinion) (applying strict scrutiny to ban on electioneering activity near polling places, but upholding ban).

Thus, as the Second Circuit correctly recognized, *Buckley*'s requirement of strict scrutiny should be only the beginning, not the end, of the inquiry for courts assessing the constitutionality of expenditure limits. *Landell* at *15 ("we disagree [with plaintiffs' argument] that the high level of protection accorded political speech or the money enabling it dictates that the provision must automatically be struck down"). The Tenth Circuit's contrary holding misapprehends *Buckley* and "disables [the City of Albuquerque] from responding to serious problems." *Denver Area Educ. Telecommunications Consortium,* 518 U.S. at 741.

### B. THE GOVERNMENTAL INTERESTS SUPPORTING ALBUQUERQUE'S LIMITS ARE SUFFICIENTLY COMPELLING TO SATISFY EXACTING SCRUTINY UNDER *BUCKLEY*.

#### 1. The Tenth Circuit Erred in Rejecting the City's Compelling Interest In Deterring the Reality and Appearance of Corruption.

*Buckley* and subsequent decisions of this Court recognize the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption and undue influence. *Buckley*, 424 U.S. at 26-27; *McConnell,* 124 S.Ct. at 660-666. The *Buckley* Court, however, predicted that contribution limits alone would be sufficient to deter the appearance and reality of corruption, even if spending remained unlimited. 424 U.S. at 55-56. *Buckley*'s judgment was necessarily a predictive one, because neither campaign contributions *nor* spending were subject to meaningful limitations prior to enactment of the FECA provisions reviewed in *Buckley*.

The record here demonstrates that, in the 28 years since *Buckley*, the Court's prediction about contribution limits has been proven wrong. App. 51. The federal experience with unlimited campaign spending has resulted in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. Homans App. 206, 214 (Testimony of Larry Makinson).[11] Candidates' unlimited need for funds makes them particularly dependent on

[11] Larry Makinson is Senior Researcher at the Center for Responsive Politics in Washington, D.C., and one of the nation's foremost experts on campaign finance.

special interests that can generate large aggregate contributions. The absence of spending limits has therefore fostered the growth of practices such as "bundling" which effectively circumvent contribution limits. *Id.* at 216-222.

For example, a particular corporation can encourage its officers and employees to send their donations to a candidate during a certain time period, or a company or industry group can sponsor an event where donors with the same interests can make individual contributions at the same time. Donors may even be instructed to place tracking numbers on their checks to assure proper "credit" for the coordinator of the donations. Homans App. 219; *see also* Nancy Watzman & Micah L. Sifry, *O Pioneers!*, Harper's Magazine, September 2003, at 55 (quoting memorandum by Edison Electric Institute chief Tom Kuhn urging use of tracking code on individual checks "to insure that our industry is credited"). Moreover, even without formal coordination, well-heeled interests, such as industry groups with a stake in particular legislative battles, can generate multiple contributions that are collectively quite large, and candidates are aware of the sources of the largesse.[12] Thus, limits on the contributions that may be made by a particular individual or corporation do not address the concentrated financial power that well-funded interests

[12] For example, in the 2000 presidential election, MBNA America, the nation's largest credit card company, bundled over $240,000 in donations to a presidential campaign through donations by MBNA employees and officers and their families, even though individual contributions were limited to $1,000. Homans App. 218-219, 600-607. MBNA had a critical legislative goal: pushing through a bankruptcy bill that would make it more difficult for debtors to declare bankruptcy. Homans App. 220.

can exert when candidates face an unlimited need for funds.

The Tenth Circuit majority did not discuss the evidence that has undermined *Buckley*'s predictive judgment during the last 28 years. Instead, it simply reiterated that, based on *Buckley,* "campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption" (App. 34) and that "'campaign spending limitations cannot be justified by the anti-corruption rationale.'" *Id.* (quoting *Kruse*, 142 F.3d at 915).

As explained above, the proposition that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. Accordingly, the City's evidence demonstrating that *Buckley*'s predictive judgment was wrong cannot be addressed merely by reiterating *Buckley*'s prediction, on the record then before the Court, that contribution limits alone would be adequate to deter corruption. As this Court only recently noted, courts cannot adequately assess the constitutionality of campaign finance regulations while turning a blind eye to developments in campaign financing since *Buckley*. *See McConnell,* 124 S.Ct. at 689 (holding that *Buckley*'s "express advocacy" test had not "aided the legislative effort to combat real or apparent corruption," and that Congress was entitled to respond to post-*Buckley* developments). The Tenth Circuit therefore should have addressed the *reality* of how limited contributions and unlimited spending have operated in practice over the past 28 years.

In sharp contrast to the Tenth Circuit, the Second Circuit has rejected a "static" view of *Buckley, Landell* at *14, and in doing so has held that a legislature is entitled

to take account of post-*Buckley* developments in determining whether spending limits are necessary to deter corruption and its appearance. *Id.* at *20-21 & n.13. Vermont elections, like those at the federal level, have been conducted with limits on contributions but no limits on spending in the years following *Buckley.* The Second Circuit's decision recognized that, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns." *Landell* at *21 (emphasis original); *see also id.* (noting that "'bundling' smaller contributions from a particular company or industry" is one practice through which concentrated financial interests leverage their influence with elected officials despite contribution limits). The *Landell* Court further explained,

> [B]ecause of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds.

*Id.* at *20.

The Second Circuit thus concluded, in direct conflict with the Tenth Circuit majority, that spending limits may be sustained based on the governmental interest in "preventing the reality and appearance of corruption," together with the interest in candidate time-protection (discussed *infra* at Point I.B.2). *Landell* at *26.[13] Because the City of

[13] In the case at bar, Judge Lucero's opinion, unlike that of the majority, recognized that *Buckley* does not preclude reliance on the anti-corruption interest as a basis for expenditure limits. App. 14. He held,

(Continued on following page)

Albuquerque's interest in safeguarding its political process is no less compelling than Vermont's, this Court should grant the petition to address this critical issue.

### 2. The Tenth Circuit Erred in Rejecting the City's Compelling Interest in Preserving the Time of Officeholders and Candidates.

As the Second Circuit recently noted in *Landell, Buckley* did not foreclose consideration of the compelling governmental interest in preserving the time of officeholders and candidates from the demands of fundraising, so as better to perform their duties as representatives, as a basis for spending limits. *Landell* at *22-24. The concurring opinion in *Kruse* is in accord. 142 F.3d at 920 (Cohn, D.J., concurring) ("It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest."). *Cf. Nixon v. Shrink Missouri Gov't PAC* ("*Shrink*"), 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a

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however, that the City's evidence was insufficient to justify spending limits, concluding that the record in Albuquerque contained less evidence of actual corruption than the record in *Buckley*. App. 20-21. This analysis is mistaken. *Buckley* rejected spending limits as an anti-corruption measure *not* because evidence of corruption was insufficient, but instead because the *Buckley* Court believed that contribution limits alone (without spending limits) would provide an adequate means of deterring corruption – a predictive judgment proven wrong by the City's evidence.

system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising").

The record here demonstrates that, when campaign spending is unlimited, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending. Jim Baca, then the Mayor of Albuquerque, attested: "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career. . . . When I call people who are doing business with the city, I often am concerned about the possibility of their misperception that they are being shaken down." Homans App. 512. A former city councilor who had no trouble raising the necessary funds from small donors under spending limits described how her tactics changed when running for state senate, with no spending limit: "I spent a lot more time fundraising. . . . I went to coffee with the trial lawyers or with the big contributors, rather than just trying to solicit small contributions from a broad spectrum of people." Rue App. 708.[14]

[14] Unlimited spending in federal elections means "[y]ou're constantly drawn by the siren song of trying to raise money for your race. . . . A very real distraction from the real business of legislating." Homans App. 474 (interview with former Rep. Leslie Byrne (D-Virginia)). *See also id.* 478-479 ("The system is horrendous at the present time because the candidates have to spend so much of their time raising the money in order to remain in the House and the Senate. . . . You'd like to be spending your time on legislation – on the floor of the Senate, in committees, with staff, deciding what other projects you want to be involved in. But the end-all and be-all is to have sufficient money to run your campaign.") (interview with former Sen.

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Survey research shows that Albuquerque citizens are concerned about this very issue. Seventy-eight percent of voters said that, if Albuquerque's spending limits were removed, it was likely that "elected officials will have to spend more time raising campaign money and less time on their official duties." Homans App. 353.

The Tenth Circuit majority reasoned that states have no legitimate interest in preventing the monopolization of candidates' time by fundraising because such monopolization is a "mere consequence" of the growth in the cost of campaigns, App. 35, and *Buckley* held that the "mere growth" in the cost of campaigns, by itself, was an insufficient basis for spending limits. *Id.* This reasoning is flawed. It is akin to saying that because government may not employ racial classifications for their own sake, government also may not take race into account in order to achieve the compelling interest in diversity in education – after all, a lack of diversity would be a "mere consequence" of refusing to take race into account. *But see Grutter v. Bollinger*, 539 U.S. 306 (2003) (although racial classifications are subject to strict scrutiny, fostering diversity is a sufficiently compelling governmental interest to justify properly tailored admissions plan that takes into account race and ethnicity).

Clearly, the rejection of one interest as a basis for governmental action does not imply rejection of all other

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Howard Metzenbaum (D-Ohio)); *id.* at 474 ("With the increasing cost of campaigns, a member spends far more time and effort and thought to raising money. And usually the effort is directed not so much at the individuals in his congressional district, but at the PACs, the special interests. . . .") (interview with former Rep. Guy Vander Jagt (R-Michigan)).

interests that may support the same action. Thus, the fact that *Buckley* found the mere desire to restrain campaign costs – without more – to be an inadequate basis for spending limits does not mean that *Buckley,* without addressing the issue, also permanently foreclosed any recognition of the compelling state interest in preserving the time of elected officials to govern.[15]

As the Second Circuit has recognized, the interest in preserving the time of elected officials and candidates clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. *Landell* at *23. The former is based not on an arbitrary view of how much spending is "too much," but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are

[15] Judge Lucero's opinion recognized that preserving the time of officeholders from the burdens of fundraising may be a compelling governmental interest supporting spending limits. App. 22. Judge Lucero's opinion, however, imposed an impossible evidentiary burden on the City to invoke that interest. Judge Lucero found insufficient evidence that Albuquerque candidates spent more time on fundraising in the absence of limits than was true when limits were in place. App. 23. Not only did his analysis improperly resolve factual conflicts in the *Rue* record against the City, *id.,* but it ignored the fact that Albuquerque had yet to experience a full election cycle without spending limits when the cases were litigated, and thus was only beginning to see the impact of unlimited spending on candidates' time. Albuquerque was entitled to rely on the extensive federal experience with unlimited campaign spending to support the need for regulation. *See Shrink,* 528 U.S. at 393 n.6 (states entitled to rely on experience of other jurisdictions in determining need for reforms); *cf. Colorado Republican Federal Campaign Comm.,* 533 U.S. at 457 (noting difficulty of proving harms that would exist in absence of long-enforced statute).

not in essence representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising,* 94 Colum. L. Rev. at 1283. *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1769-1770 (2001).[16]

The Tenth Circuit majority also suggested that the City's concerns about excessive time spent on fundraising are not important because officeholders "are not required to run for reelection if they feel it interferes with their ability to represent their constituents." App. 37 n.3. By this logic, Albuquerque must resign itself to a government composed solely of officeholders who do not mind if their time is devoted nonstop to courting donors rather than to governing – precisely the scenario the citizens of Albuquerque, for good reason, wish to avoid.

Indeed, the Tenth Circuit's reasoning, if accepted, would do away with all restrictions on campaign financing. For example, officeholders who do not wish to feel beholden to $100,000 donors are not required to run for reelection; accordingly, under the Tenth Circuit's analysis, there would be no compelling interest in limiting the size of individual contributions to candidates. In an ideal world, all candidates for office might voluntarily refrain from actions contrary to the public interest, but that

[16] The Tenth Circuit majority cites a passage from one of the briefs filed in *Buckley* as evidence that *Buckley* must have addressed and rejected the officeholder time-protection rationale as a compelling governmental interest. App. 36. The scope of a Supreme Court opinion, however, must be determined by the text of the opinion, not by parsing isolated sentences from a party's brief. This Court's careful description in *Buckley* of the governmental interests proffered in support of spending limits, 424 U.S. at 55-57, makes no mention of the time-preservation interest and the opinion cannot fairly be read to have ruled upon it. *See Landell* at *23.

should not disable government from taking more concrete action to avoid such harms. As James Madison observed in Federalist No. 51, "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary." Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 319 (Clinton Rossiter, ed., Signet Classics 2003) (1788).[17]

## II. THE QUESTION OF WHETHER STATE AND LOCAL GOVERNMENTS MAY ENACT PROPERLY TAILORED LIMITS ON CAMPAIGN SPENDING IS OF EXCEPTIONAL NATIONAL IMPORTANCE.

In recent years, state and local governments in three Circuits have determined that unlimited campaign expenditures by candidates have harmed critical governmental

[17] In addition to deterring corruption and preserving the time of officeholders and candidates, Albuquerque's spending limits serve other compelling governmental interests. Electoral competition is the indispensable condition for holding elected officials accountable to the voters, because without competition the voters have no choice. Homans App. 322-323, 493. High-spending campaigns that deter challengers from entering a race effectively censor political speech and defeat accountability by eliminating the conditions for a meaningful debate of the issues. *Id.*; *see also* Homans App. 226-228 (documenting lack of competition in congressional elections conducted without spending limits); Richard Briffault, *The Beginning of the End of the Buckley Era?,* 85 Minn. L. Rev. at 1766 ("The burdens of fundraising may not just limit challenger finances, but may also discourage many potential challengers from entering the race altogether.")

Although *Buckley* held that spending limits could not be justified by an interest in "equaliz[ing] the relative ability of individuals and groups to influence the outcome of elections" 424 U.S. at 48, the *Buckley* Court did not confront a record showing that the First Amendment goal of robust public debate and accountability of elected officials has been undermined by the effects of unlimited spending on electoral competition.

interests in a manner not foreseen by the *Buckley* Court, and have sought to enforce mandatory limits on campaign expenditures as a means of redressing these harms. In addition to Albuquerque and Vermont, the Supreme Court of Ohio sought to protect its judicial elections from the corrosive effects of unlimited fundraising by amending its judicial code of ethics to set campaign expenditure limits for Ohio's judicial elections in 1995,[18] and the City of Cincinnati enacted spending limits for candidates seeking municipal office that same year.[19] The United States Congress also has demonstrated interest in employing campaign spending limits for federal elections.[20]

The view that *Buckley* automatically invalidates spending limits endangers the ability of Congress, states and municipalities to respond to serious threats to their democratic processes.

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection."

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[18] *See Suster v. Marshall,* 149 F.3d 523 (6th Cir. 1998) (affirming grant of preliminary injunction against spending limit), *cert. denied,* 525 U.S. 1114 (1999).

[19] Cincinnati Ordinance 240-1995 (struck down in *Kruse v. City of Cincinnati*).

[20] Members of Congress have introduced campaign spending limit bills at least fifteen times since this Court's ruling in *Buckley.* S. 1684 and S. 1185 (98th Congress); S. 59 (99th Congress); H.R. 2473 (100th Congress); H.R. 1456 (101st Congress); H.R. 3571 and H.Res. 168 (103rd Congress); H.R. 3651 and H.R. 3658 (104th Congress); S. 1057, H.R. 77, H.R. 243, H.R. 1366, H.R. 3851 (105th Congress); S. 1502 (106th Congress).

*McConnell,* 124 S.Ct. at 706 (*quoting Burroughs v. United States,* 290 U.S. 534, 545 (1934)). That observation aptly summarizes the importance of revisiting the constitutionality of campaign spending limits in light of the lessons learned from the nation's experience with unlimited spending since 1976.

While the Court has had numerous opportunities in recent years to review limits on contributions in light of the nation's post-*Buckley* experience,[21] the Court has not reviewed a statute limiting candidates' campaign expenditures in the 28 years since *Buckley.* Nevertheless, members of this Court have suggested, in other cases, that the Court may need to undertake such a review, further underscoring the importance of the issue.[22]

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[21] *See, e.g., McConnell*, 124 S.Ct. at 654-684 (addressing regulation of soft-money contributions to political parties); *Shrink*, 528 U.S. 377 (addressing limits on contributions to candidates).

[22] *See Shrink,* 528 U.S. at 405 (concurring opinion of Breyer, J., joined by Ginsburg, J.) (calling for approach that balances competing constitutional interests and stating "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy . . . making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns"); *id.* at 409 (Kennedy, J., dissenting) (noting difficulty of constitutional issues surrounding campaign regulation but stating, "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 649-650 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of

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Finally, extensive and thoughtful academic commentary on *Buckley* has illustrated the serious costs to democratic values of unlimited campaign spending, and has urged re-examination of the constitutionality of campaign spending limits.[23]

Petitioners believe that nothing in *Buckley* forecloses examination of new facts and legal interests supporting the City of Albuquerque's spending limits. If, however, the Tenth Circuit correctly concluded that *Buckley* must be overruled in order to permit such examination, petitioners submit that the post-*Buckley* developments canvassed in this record merit this Court's reconsideration of *Buckley*. As this Court has noted:

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

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repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.").

[23] *See*, *e.g.*, Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. at 1769-1770; Mark Alexander, *Campaign Finance Reform: Central Meaning And A New Approach*, 60 Wash. & Lee L. Rev. 767, 827-834 (2003); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising,* 94 Colum. L. Rev. at 1288-1289; Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & Pol'y 111, 111-117 (1997); Peter M. Shane, *Commentary, Back To The Future Of The American State: Overruling Buckley v. Valeo And Other Madisonian Steps*, 57 U. Pitt. L. Rev. 443, 446-447 (1996); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1406-1408, 1415 (1986).

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CITY OF ALBUQUERQUE

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366 F.3d 900

United States Court of Appeals,
Tenth Circuit.

Rick HOMANS, Plaintiff-Appellee,
v.
The CITY OF ALBUQUERQUE, a municipal corporation; Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque, Defendants-Appellants.
Sander Rue, Plaintiff-Appellee,
v.
The City of Albuquerque, a municipal corporation; Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque; the City of Albuquerque Board of Ethics and Campaign Practices, a board of the City of Albuquerque, Defendants-Appellants.

**Nos. 02-2244, 02-2316.**

April 27, 2004.

Brenda Wright (Lisa J. Danetz, National Voting Rights Institute, Boston, MA; Robert M. White, City Attorney, and Randy M. Autio, Deputy City Attorney, Albuquerque, NM, with her on the briefs), National Voting Rights Institute, Boston, MA, for Defendants-Appellants in 02-2244.

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Before LUCERO, O'BRIEN, and TYMKOVICH, Circuit Judges.

LUCERO, Circuit Judge.

In response to the increasingly apparent need to reform the ways in which political campaigns are financed, the city of Albuquerque implemented a campaign-finance reform system in 1974. It adopted limits on campaign expenditures and contributions in municipal elections. In 2001, mayoral candidate Rick Homans brought a challenge under the First and Fourteenth Amendments[1] to the mayoral-candidate expenditure restriction; ruling in favor of Homans, the district court permanently enjoined enforcement of this limit. City-council candidate Sander Rue brought a similar suit challenging the expenditure limit for city-council candidates and obtained a favorable summary judgment as well. Both cases are before us on review, and because they present similar issues, we consolidate them for review. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. The following expresses the opinion of the court as to parts I, II, and III. As to part IV, it concurs in part with the opinion of Judge Tymkovich,

[1] Protections afforded under the First Amendment have been incorporated into the Fourteenth Amendment to apply against the states. *Everson v. Bd. of Educ.,* 330 U.S. 1, 13-15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

which constitutes the majority opinion of the court as to part IV.

## I

As part of an overall restructuring of its city government in 1974, Albuquerque amended its city charter and implemented an election code imposing disclosure requirements and limiting expenditures and contributions for municipal elections. More than ninety percent of voters approved these reform measures. As it reads today, the election code provides:

> No candidate shall allow or accept contributions or make expenditures in excess of the following for any election:
>
> 1. To a candidate for the office of Councillor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy.
>
> 2. To a candidate for the office of Mayor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

Albuquerque City Charter, art. XIII, sec. 4(d).[2] Candidate-expenditure restrictions were in effect for each mayoral

[2] Albuquerque's city charter also caps individual contributions at five percent of the annual salary of the office. *Id.* at sec. 4(e). The propriety of the contribution limits, which theoretically would appear to allow twenty individual contributors to fund one hundred percent of a campaign at the full expenditure limitation level, is not before us.

and city-council election from 1974 to 1995. Limits on the 1997 election were temporarily enjoined pursuant to a court order; however, parties to that litigation stipulated dismissal of the lawsuit, and the spending limits were restored for the 1999 election. For the 2001 elections, the mayoral-campaign expenditure limit was $174,720; city-council candidates were limited to spending a maximum of $17,056. Violation of these limits carries a fine of up to $500 per violation, removal from office, and/or public reprimand.

After filing suit in federal district court on August 10, 2001, plaintiff Rick Homans filed a motion for a preliminary injunction, which was denied on September 1, 2001. *Homans v. City of Albuquerque,* 160 F.Supp.2d 1266 (D.N.M.2001) ("*Homans I*"). He then filed an interlocutory appeal on September 4, 2001, seeking an emergency injunction pending appeal. Two days later, a two-member motions panel of this court granted the request and enjoined enforcement of the expenditure limit pending review of the merits. *Homans v. City of Albuquerque,* 264 F.3d 1240, 1245 (10th Cir.2001) (per curiam) ("*Homans II*"). In doing so, the motions panel held that Homans established a likelihood of success on the merits regarding his claim that the expenditure limit violated the First and Fourteenth Amendments under *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). *Homans II,* 264 F.3d at 1243-44.

On February 13, 2002, the parties filed a joint motion for stipulated admission of evidence and expedited determination on the merits in district court. The district court entered a declaratory judgment in favor of Homans and permanently enjoined enforcement of the provision in August 2002. *Homans v. City of Albuquerque,* 217 F.Supp.2d 1197

(D.N.M.2002) ("*Homans III*"). While the court stated its own view that the expenditure limitations restriction survives exacting scrutiny under *Buckley,* it found the contrary conclusion mandated by the motions-panel's ruling in *Homans II*. *Homans III,* 217 F.Supp.2d at 1206. Albuquerque appeals.

Plaintiff Sander Rue was a duly qualified candidate for District Five City Councillor who also ran in the October 2001 election. In his suit filed in federal district court in September, 2001, he claimed that the city-council campaign-expenditure limitation violates *Buckley.* The district court granted summary judgment in favor of Rue and permanently enjoined enforcement of the city-council restriction on October 11, 2002, relying on the motions-panel's ruling in *Homans II* and the district court's decision in *Homans III*. *Rue v. City of Albuquerque,* Civ. No. 01-1036 JP/LFG (D.N.M. Oct. 11, 2002). Albuquerque appeals.[3]

## II

As to the grant of summary judgment in Rue's case, we review the district court's decision de novo, applying the same standards used by the district court and construing the facts in the light most favorable to Albuquerque. *See Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.,* 165 F.3d 1321, 1326 (10th Cir.1999).

[3] Although the elections have passed, this does not render the cases moot because the issues raised are "capable of repetition, yet evading review." *See First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Suster v. Marshall,* 149 F.3d 523, 527 (6th Cir.1998).

With regard to the final decision in *Homans III,* we ordinarily review the district court's legal conclusions de novo, *Dang v. UNUM Life Ins. Co. of Am.,* 175 F.3d 1186, 1189 (10th Cir.1999), and its factual findings for clear error. Fed.R.Civ.P. 52(a). Because this case implicates First Amendment concerns, however, we have "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quotations omitted). We therefore view the evidence objectively rather than in the light most favorable to the City.

Our standard in reviewing Rue's case is thus more favorable to the City than our standard in Homans' case. For this reason, with respect to each claim, we evaluate the evidence first in the light most favorable to the City to determine whether summary judgment was proper in *Rue.* Only if this less stringent standard is satisfied will we conduct an independent and objective examination of the evidence to review whether the permanent injunction in Homans' case was proper.

## III

As an initial matter, we determine whether the *Homans II* decision, in which a motions panel of this court granted an injunction pending appeal against the expenditure limit, has binding effect. *See Homans II,* 264 F.3d at 1243, 1245. Attempting to leverage this interlocutory decision to its maximum possible effect, Homans argues that the *Homans II* ruling constitutes the law of the case

and restricts us in our merits determination.[4] The district court agreed, stating that although it was inclined to conclude that the expenditure limit for mayoral campaigns survives the exacting scrutiny required under *Buckley,* it was bound by the motions-panel ruling to conclude otherwise. *Homans III,* 217 F.Supp.2d at 1206. We disagree.

In general, the law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Law of the case "is solely a rule of practice and not a limit on the power of the court." *Mason v. Texaco, Inc.,* 948 F.2d 1546, 1553 (10th Cir.1991) (citing *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912)). Thus, the doctrine is discretionary rather than mandatory. *Kennedy v. Lubar,* 273 F.3d 1293, 1299 (10th Cir.2001); *Stifel, Nicolaus & Co. v. Woolsey & Co.,* 81 F.3d 1540, 1544 (10th Cir.1996).

In the instant matter, the two judge panel decision of our court constituted an interlocutory ruling, and its holding was limited to the conclusion that Homans had shown a likelihood of success on the merits of his claim.[5] *Homans II,* 264 F.3d at 1243-44. Courts repeatedly have emphasized that a decision as to the likelihood of success

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[4] In similar fashion, Rue argues that the *Homans II* order binds review of the merits of the city-council limits.

[5] To the extent that any language in *Homans II* can be read as an assessment of the actual merits of Homans' claim, as opposed to his likelihood of success on the merits, such language is dicta. Dicta is not subject to the law of the case doctrine. *See In re Meridian Reserve, Inc. v. Bonnett Res. Corp.,* 87 F.3d 406, 410 (10th Cir.1996).

is tentative in nature and not binding at a subsequent trial on the merits. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Southco, Inc. v. Kanebridge Corp.,* 324 F.3d 190, 195 (3d Cir.2003); *A.M. Capen's Co. v. Am. Trading & Prod. Corp.,* 202 F.3d 469, 473 (1st Cir.2000). Were the opposite true, an unacceptable conflation of the merits decision and the preliminary inquiry would result. Moreover, if the district court were bound in the manner suggested, then the decision of the motions panel would also bind the appellate panel reviewing the merits. This is not the rule. When reviewing a decision by a prior motions panel, we are "uninhibited by the law of the case doctrine." *Stifel,* 81 F.3d at 1544.

Our own circuit precedent expressly rejects the proposition urged by Homans and articulates the rationale for doing so. *See id.* at 1543-44. As we have explained, "a motions panel's decision is often tentative because it is based on an abbreviated record and made without the benefit of full briefing and oral argument." *Id.* at 1544. In the instant case, the motions panel did not hear oral argument, and briefing proceeded on an expedited schedule in light of the impending election. Homans filed his motion on September 4, 2001, and the City was required to submit its response the next day; the motion was granted on the following day, September 6, 2001. In light of this truncated schedule and the "avowedly preliminary [and] tentative" nature of the emergency-injunction ruling, *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64, 69 (3d Cir.1999) (quotation omitted), a motions-panel ruling does not establish the law of the case; therefore,

neither the district court nor this court is constrained in its review of the merits by the September 6 ruling.[6] Accordingly, we reject Homans' argument and hold that the district court erred in concluding that it was bound by the law of the case doctrine.

## IV

We proceed to the merits of Homans' and Rue's claims. Although the two cases stand in differing procedural postures, they raise an identical substantive claim: that the campaign-expenditure limits in the Albuquerque City Charter violate the First and Fourteenth Amendments.

Every challenge to campaign-finance reform provisions must begin with an analysis of the watershed case of *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Analyzing the 1974 amendments to the Federal Election Campaign Act ("FECA"), the Supreme Court developed a jurisprudential distinction between restrictions on campaign expenditures and restrictions on campaign contributions. Although both types of restrictions limit core political speech and are therefore subject to "exacting scrutiny," *id.* at 16, 96 S.Ct. 612, the Court concluded that expenditure limits impose "significantly more severe restrictions on protected freedoms" than limits on contributions. *Id.* at 22, 96 S.Ct. 612. As the Court explained, a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of

[6] From this it follows that neither the district court considering Rue's claim nor this court in reviewing that decision is constrained by the *Homans II* ruling.

expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19, 22, 96 S.Ct. 612. For this reason, expenditure limits raise graver constitutional concerns and are invalidated more frequently. *Id.* at 55-56, 59, 96 S.Ct. 612 (upholding contribution limits but invalidating expenditure limits); *see also McConnell v. Fed. Election Comm'n,* 540 U.S. ___, 24, 124 S.Ct. 619, 655, 157 L.Ed.2d 491, (2003) ("In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 440, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado Republican II*") ("[L]imits on political expenditures deserve closer scrutiny than restrictions on political contributions."); *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 387-88, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) ("*Shrink Missouri*") (concluding that differing standards govern review of contribution limits and expenditure limits, and that contribution limits may be justified when they are "closely drawn" to serve a "sufficiently important interest"); *Fed. Election Comm'n v. Mass. Citizens for Life,* 479 U.S. 238, 259-60, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

Although a less stringent standard of review applies to limits on political contributions, we conclude that the standard for expenditure limits operates identically to strict scrutiny review. To be upheld, therefore, the campaign-expenditure restrictions must be both narrowly tailored, *Fed. Election Comm'n v. Nat'l Conserv. Political Action Comm.,* 470 U.S. 480, 496, 105 S.Ct. 1459, 84

L.Ed.2d 455 (1985) ("*NC-PAC*"), and necessary to serve a compelling state interest, *Mass. Citizens for Life,* 479 U.S. at 251-52, 107 S.Ct. 616. *See also Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (applying strict scrutiny to review state restrictions on corporate political expenditures); *Kruse v. City of Cincinnati,* 142 F.3d 907, 912-13 (6th Cir.1998) (holding that municipal restrictions on candidate expenditures are subject to strict-scrutiny review).

In conducting strict scrutiny review, it is essential to acknowledge that such scrutiny is not "strict in theory, but fatal in fact." *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 2338, 156 L.Ed.2d 304 (2003). Despite this repeated admonition by the Supreme Court, appellees insist that *Buckley* imposes a per se ban on all candidate-expenditure restrictions. Given the Supreme Court's distaste for "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems," *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,* 518 U.S. 727, 741, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996), we are obliged to disagree.

In *Buckley,* defenders of FECA's restrictions on candidate expenditures proffered various rationales to justify the limits, 424 U.S. at 55-57, 96 S.Ct. 612;[7] nonetheless, the Court invalidated the expenditure cap, holding that "[n]o governmental interest *that has been suggested* is sufficient to justify the restriction." *Id.* at 55, 96 S.Ct. 612

[7] The three rationales proffered were as follows: (1) to deter corruption and the appearance of corruption; (2) to equalize candidates' resources; and (3) to contain the skyrocketing costs of political campaigns.

(emphasis added). The Court's chosen language leaves open the possibility that at least in some circumstances expenditure limits may withstand constitutional scrutiny. *See Kruse,* 142 F.3d at 920 (Cohn, J., concurring) (stating that "*Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional," and that it remains possible to develop a factual record that would sustain such restrictions). Concluding that it might be possible to devise a system of campaign-expenditure limits that would survive exacting scrutiny, we evaluate Albuquerque's attempt to do so.

**A**

To satisfy strict scrutiny review, Albuquerque must establish that its candidate-expenditure restrictions are necessary to further a compelling state interest. Albuquerque sets forth the following rationales to justify the limits: (1) deterrence of corruption and enhancement of public confidence in the electoral process; (2) preservation of officeholders' ability to perform their duties without devoting excessive time to fundraising; and (3) encouragement of electoral competition. We address each rationale.

**1**

Speaking nearly five decades ago, Justice Frankfurter made the following assessment of the corruption and public confidence issue:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign

> contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

*United States v. United Auto. Workers,* 352 U.S. 567, 576, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quotation omitted). Some time later, the Supreme Court explained:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

*Shrink Missouri,* 528 U.S. at 390, 120 S.Ct. 897 (quotation omitted). Most recently, the Supreme Court reiterated the importance of preventing corruption or its appearance in the context of political contribution limits. *See McConnell,* 540 U.S. at 33, 124 S.Ct. at 660 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."). Despite this precedent, Homans argues to no avail that as a matter of law *Buckley* mandates that expenditure limits can never be justified by the anti-corruption rationale.

It is well-established that the deterrence of corruption constitutes a compelling state interest. *See Austin,* 494 U.S. at 657-60, 110 S.Ct. 1391; *NC-PAC,* 470 U.S. at 496-97, 105

S.Ct. 1459. The question remains whether Albuquerque's expenditure limits are *necessary* to serve this end. *See Burson v. Freeman,* 504 U.S. 191, 198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (noting that exacting scrutiny requires that the regulation be *necessary* to serve a compelling state interest). In the particular circumstances of *Buckley,* the Court rejected the anti-corruption rationale in reviewing FECA's campaign-expenditure limits, concluding that the interest in preventing corruption was served adequately in that case by the federal contribution limits and disclosure provisions. Rejecting the corollary argument that expenditure limits were necessary to prevent circumvention of permissible campaign-finance provisions, the Court relied on the factual conclusion that "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient." 424 U.S. at 26, 55-56, 96 S.Ct. 612. Attaching significance to the fact that FECA permitted successful candidates to retain contributions in excess of expenditure limits and to use these funds for any lawful purpose, the *Buckley* Court explained: "This provision undercuts whatever marginal role the expenditure limits might otherwise play in enforcing contribution ceilings." *Id.* Contrary to appellees' contention, *Buckley* does not preclude the use of expenditure limits to further a state's anti-corruption interest in all circumstances. *Cf. Kruse,* 142 F.3d at 915 (acknowledging that *Buckley* may be interpreted to leave open the possibility that the anti-corruption rationale may, under some circumstances, justify candidate-expenditure caps).

Nor are we persuaded that subsequent case law prohibits the use of expenditure caps to deter corruption

as a matter of law. In *Kruse,* the Sixth Circuit reached the opposite conclusion and held that *NC-PAC* and *Colo. Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) ("*Colorado Republican I*") "make eminently clear that spending limits . . . are unconstitutional not simply because of the presence of contribution limits but because they are not narrowly tailored to serve this interest." 142 F.3d at 915. We conclude that this view reads too much into *NC-PAC* and *Colorado Republican I.*

In *NC-PAC,* the Court invalidated restrictions on political action committees' independent expenditures when the spending was not coordinated with a campaign; the court did not address the permissibility of restrictions on candidate expenditures. 470 U.S. at 496-98, 105 S.Ct. 1459. Even were *NC-PAC*'s reasoning to apply to restrictions on candidate expenditures, its holding would be limited to the facts in that case. The Court's explicit holding was that "*[o]n this record,* . . . an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *Id.* at 498, 105 S.Ct. 1459 (emphasis added). Similarly fact-bound is the holding in *Colorado Republican I,* in which the Supreme Court invalidates limits on spending by political parties, which are treated as "independent expenditures." 518 U.S. at 613-19, 116 S.Ct. 2309. The Court based its conclusion on the absence of coordination between the candidate and the source of the expenditure, which prevented the Court from assuming, "*absent convincing evidence to the contrary,* that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." *Id.* at 617-18, 116 S.Ct. 2309 (emphasis added). Both *NC-PAC* and *Colorado*

*Republican I* thus explicitly leave open the possibility that in certain circumstances, a factual record may establish "convincing evidence" and thus justify the need for expenditure limits to reduce corruption or the appearance of corruption.

Unfortunately for Albuquerque, we conclude that the record in this case does not aggregate to such "convincing evidence." As a consequence, we are bound to reject the contention that the City's expenditure limits are *necessary* to deter corruption. The City submits the following as evidence to support its position: (1) evidence demonstrating the ease with which contribution limits are circumvented; (2) voter turnout statistics; (3) voter surveys; and (4) anecdotal evidence of corruption.

As to the first category of evidence, the City focuses on the use of tactics such as "bundling" at the federal level, arguing that expenditure limits are necessary to prevent circumvention of contribution limits. Assuming that such evidence could demonstrate that expenditure limits are necessary to reduce corruption,[8] we are not persuaded that

[8] Notably, evidence of circumvention of contribution limits, *standing alone,* could not sustain the more onerous burdens imposed by expenditure limits:

> The discussion in [the earlier section of the *Buckley* Opinion] explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by [FECA's independent expenditure provision] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.

*Buckley,* 424 U.S. at 44, 96 S.Ct. 612; *see also Kruse,* 142 F.3d at 915-16 (holding that *Buckley* expressly rejects the argument that spending caps are justified by the need to enforce contribution limits).

bundling practices at the federal level are comparable to those at the local level. Although the City is entitled to rely on evidence from other jurisdictions to justify campaign-finance reform measures, *Shrink Missouri,* 528 U.S. at 394 & n. 6, 120 S.Ct. 897 (citing *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)), it may only do so if the evidence relied upon is "reasonably believed to be relevant to the problem that the city addresses." *Id.* The City does not proffer any argument, much less evidence, suggesting that local bundling practices are analogous to federal ones.

But the City's evidence of the need to deter corruption is not limited to documenting bundling at the federal level – the City introduces additional, independent evidence of the public appearance of corruption. Submitting statistics on Albuquerque voter turnout, the City argues that, contrary to common claims that expenditure limits suppress voter turnout, Albuquerque voters are more likely to vote when expenditure limits are imposed. Recognizing a positive relationship between voter turnout and the public perception of corruption is not unprecedented; as earlier noted, the Supreme Court has articulated, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri,* 528 U.S. at 390, 120 S.Ct. 897.[9] To establish the relationship in the instant case, the

[9] This statement suggests that turnout rates correlate with expenditure limits because expenditure limits decrease the perception of corruption, which in turn increases turnout. Albuquerque, however, suggests another reason for the relationship between turnout rates and expenditure limits – one which does not implicate the anti-corruption rationale. It proffers the somewhat counterintuitive claim that expenditure

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City submits that in Albuquerque elections from 1974 until 2001, an average of 40.3% of registered voters participated in all city elections for which the spending limits were in place.[10] This figure is particularly impressive when compared to the 25 to 35% turnout rate for city elections nationally. This comparison figure, however, is based on the percentage of the voting-age population, not the percentage of registered voters as it was in the Albuquerque figure; indeed, a calculation of Albuquerque voter turnout as a percentage of the voting age population reveals a turnout rate of only 28.3% between 1984 and 1989. While these figures may cast doubt on the suggestion that spending limits *inhibit* turnout rates, they assuredly do not establish the affirmative of the proposition: that Albuquerque's spending limit actually *increases* turnout rates, as the City's own expert readily concedes.[11]

Telephone survey results[12] are submitted by Albuquerque in support of its argument that expenditure limits

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limits improve the public's knowledge base, which in turn increases turnout. Implicitly, then, Albuquerque suggests that expenditure limits are necessary not only to further an interest in deterring corruption, but also to further an interest in enhancing the electorate's knowledge.

[10] The data for the two elections for which spending limits were enjoined are as follows: in the 1997 election, only 33% of registered voters turned out; in the 2001 election, however, an impressive 42.4% voted.

[11] *Kruse* implicitly rejected a similar argument that turnout rates might be used to demonstrate the need to further an interest other than anti-corruption. 142 F.3d at 916. Because we are unpersuaded that turnout rates in fact correlate with expenditure limits, we have no occasion to reach this issue.

[12] Survey results are an acceptable form of evidence to demonstrate the need for campaign-finance reform measures. *Shrink Missouri,* 528

(Continued on following page)

are necessary to combat the public perception of corruption.[13] This survey evidence does suggest that Albuquerque voters have more confidence in the integrity of local elections than federal elections, which have no spending limits. On the other hand, appellees' evidence also suggests that voters generally trust local government more than state and federal government, regardless of spending limits. Albuquerque's survey results demonstrate that voters think that the removal of spending limits increases the potential for corruption. By contrast, appellees' evidence suggests that the amount of spending in an election does not affect voter cynicism when other variables are controlled.

Anecdotal evidence supports Albuquerque's contention that special interests are perceived to exercise an undue influence in elections. For example, a New Mexico State Senator described the local influence of contributions from certain industries. Specifically, she cited the influence of the alcohol industry in delaying legislation to prohibit "drive-up windows" for the purchase of alcohol, and the influence of the gambling industry in obtaining favorable revenue-sharing compacts with the state. An expert in the

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U.S. at 394, 120 S.Ct. 897; *Mont. Right to Life Ass'n v. Eddleman,* 306 F.3d 874, 882 (9th Cir.2002); *Daggett v. Comm'n on Governmental Ethics and Elections,* 205 F.3d 445, 457-58 (1st Cir.2000).

[13] The City's evidence is the result of a telephone survey conducted in August 1998 by Lake Snell Perry & Associates of 400 registered voters who reside in Albuquerque. These results have a margin of sampling error of +/-4.9%.

Appellees' argument that majoritarian views cannot dictate the bounds of First Amendment protections is misplaced. Such barometers of public sentiment are relevant in the campaign-finance context, to the extent that they show the need to remedy a public perception of corruption. *See, e.g., Shrink Missouri,* 528 U.S. at 394, 120 S.Ct. 897.

field of campaign-finance, Larry Makinson, testified to a correlation between legislative voting and campaign-contributions at the federal level,[14] citing as an example the Tauzin-Dingell bill.

While recognizing the possibility that the government may provide sufficient evidence of the need for candidate-expenditure caps to prevent corruption, we nonetheless conclude that the evidence before us, even viewed in the light most favorable to Albuquerque, is no more compelling than the evidence the Court effectively rejected in *Buckley*, 424 U.S. at 29, 96 S.Ct. 612. In *Buckley,* FECA's defenders also submitted survey evidence suggesting that the public perceived undue influence by special interests and anecdotal evidence of corruption surrounding the 1972 election; indeed, the *Buckley* evidence was of a far greater magnitude than that presented here and smelled of actual quid pro quo. *See id.* at 27 n. 28, 96 S.Ct. 612 (referencing *Buckley v. Valeo,* 519 F.2d 821, 839-40, & nn. 36-38 (D.C.Cir.1975) for evidence documenting the undue influence of the dairy industry, illegal corporate contributions, and promise of diplomatic posts in exchange for hefty campaign contributions). While undoubtedly troubling, Albuquerque's evidence does not approach the palpable sense of corruption prompting the federal amendments in 1974. Because the *Buckley* evidence was held insufficient to demonstrate that FECA's candidate-expenditure limits were necessary to serve the compelling state interest in deterring corruption, we are compelled to conclude that

[14] Neither the utilization of candidate issue questionnaires as a tool to achieve such correlation nor the propriety of such questionnaires in the fundraising and lobbying process was presented to the district court and we do not reach the issue.

Rue is entitled to summary judgment. A fortiori, we hold that the evidence in Homans' case, which need not be viewed in the light most favorable to the City, fails to sustain the City's burden.

**2**

Thus far, the Supreme Court has recognized the existence of but one state interest sufficiently compelling to justify campaign-finance regulation: the anti-corruption rationale. *See NC-PAC,* 470 U.S. at 496-97, 105 S.Ct. 1459. This initial recognition does not, of course, foreclose the possibility that other compelling state interests may be identified in future cases, and in the case on review Albuquerque submits evidence of additional interests that it claims justify campaign expenditure caps. The City argues that the caps are necessary to serve the compelling state interest of preserving officeholders' time and enabling them to perform official duties. Claiming that "when campaign spending is unlimited, as is true for congressional elections, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending," the city submits evidence documenting the fundraising burdens of candidates and officeholders. (Homans Appellant's Br. at 52; Rue Appellant's Br. at 54.)

In *Kruse,* the Sixth Circuit concluded that the need to preserve officeholders' time and ability to perform official duties is merely a restatement of the containing-skyrocketing-campaign-costs rationale rejected in *Buckley:*

> The need to spend a large amount of time fundraising is a direct outgrowth of the high cost of campaigns. However, because the government cannot constitutionally

> limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

142 F.3d at 916-17. We view the *Kruse* court's conflation of the two rationales as inaccurate and conclude that the preservation of officeholders' time is wholly separate. In *Buckley,* the Court rejected the proffered rationale of containing the skyrocketing costs of campaigns as follows: "[T]he *mere* growth in the cost of federal election campaigns *in and of itself* provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." 424 U.S. at 57, 96 S.Ct. 612 (emphasis added). Albuquerque does not merely rely on the skyrocketing costs of campaigns in and of themselves; rather, the City cites an additional reason why increasingly expensive campaigns hurt the electoral system: the woes of poor challengers aside, such campaigns distract *officeholders* from performing their official duties. *Buckley* makes no mention of this rationale and thus does not necessarily preclude the recognition of this as a compelling state interest.

To show that its campaign-expenditure limits are *necessary* to further this interest, Albuquerque submits excerpts from the book *Speaking Freely* containing interviews of retired congressional representatives that present a disturbing view into the fundraising pressures imposed on federal candidates. Additionally, the City cites statements made by local officials describing the time pressures imposed by fundraising in the absence of expenditure limits. Dede Feldman, a New Mexico State Senator who also ran for Albuquerque City Council in 1995, compares

the differences in state campaigns versus Albuquerque campaigns:

> Campaigning with and without spending limits is very different. . . . Because there was unlimited spending and I had to raise more money in the Senate races, I spent a lot more time fund-raising and I tried to raise money from larger contributions. . . . Doing so much fund-raising was incredibly time-consuming and cut into my other campaigning and my regular job. The fund-raising had to be done during the day and I therefore had less time to do my regular job. In addition, I had less time to engage in direct contact with the voters by going door-to-door.

(2 Rue R. Doc. 47 at 708-09.) In discussing the fundraising burden imposed during the recent election for which spending limits were enjoined, former mayor Jim Baca comments, "As a result of this new money chase in this year's mayoral election in Albuquerque, I am now forced to spend three hours every day making fundraising phone calls. I have never before had to do this in my political career." (2 Homans Doc. 24 at 512.) On the other hand, other evidence in the record suggests that the strain on Albuquerque officials' time in the absence of spending limits is not significantly greater than when a spending limit is in place. For example, Michael Guerrero, who entered the 1999 City Council race while the spending limit was in place, testified that he spent between ten to fifteen hours per week raising funds.

Limited to the record before us, we cannot conclude that Albuquerque has submitted sufficient evidence to demonstrate that candidate-expenditure caps are necessary to further the state's interest in protecting officials' abilities to conduct their jobs. While it may seem so to

candidates at the time, we are not convinced that the burdens imposed on Albuquerque officeholders' time amounts to a problem of constitutional proportions. The claim that fundraising prevents officeholders from engaging in alternative campaign tactics such as individual door-to-door contact is interesting. Albuquerque does not articulate any reason why there is a compelling state interest in channeling campaign resources to favor individual voter contact rather than fundraising tactics. There is no indication in the record that, for example, the added burden of fundraising events and phone calls is more demanding on an officeholder's time than the burden of individual voter contact.

Nor does the record persuade us that individual voter contact is a fundamentally superior campaign strategy because fundraising efforts compromise an officeholder's ability to communicate with the public. Given the individual contribution-limits in Albuquerque, officeholders are likely to communicate with a broad swath of potential fundraisers in much the same way they would communicate with the public through door-to-door contact; records of past campaign contributors do not suggest that the target for contribution solicitations differs significantly from the general Albuquerque public at large. On the contrary, candidate Guerrero states that time spent on fundraising cannot be distinguished from time spent on other campaign tactics because "a lot of times when you're fund-raising, you're also campaigning." (3 Rue R. Doc. 52 at 760.) We take this to mean that the message disseminated in fundraising efforts often coincides with the message disseminated through voter contact – they are generally one and the same; the City makes no effort to rebut this assumption. For these reasons, we hold that

Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to demonstrate that expenditure limits are necessary to further a compelling state interest in preserving officeholders' time.

**3**

Finally, the City argues that campaign-spending limits are necessary to further the state interest in promoting electoral competition. One expert in the field of campaign-finance reform explains:

> Electoral competition is another central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable. . . . High levels of campaign spending poses a threat to such competition because large incumbent war chests tend to discourage serious challengers.

(2 Rue R. Doc. 43 at 674.) Homans argues that this merely rehashes the equalization-of-candidate-resources rationale rejected in *Buckley.*[15] *See Buckley,* 424 U.S. at 56, 96 S.Ct. 612 (rejecting the argument that equalizing candidates' resources constitutes a compelling state interest). In *Buckley,* however, the Court spoke solely to the equalization of candidate *resources;* it did not address the possible rationale of improving electoral competition. *Id.* at 48-49, 56-57, 96 S.Ct. 612. We are persuaded that the improvement of electoral competition constitutes an interest distinct from the equalization-of-candidate-resources rationale rejected

[15] Notably, Rue does not raise this argument.

in *Buckley.* Thus, nothing precludes this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits.

We do not resolve this question because there is insufficient evidence in the record, even when viewed in the light most favorable to the City, to establish that spending limits actually enhance electoral competition. While the City's statistical evidence does tend to undercut the doomsday prediction that spending limits discourage competition by insulating incumbents, it falls short of proving the contrary – that spending limits actually *improve* electoral competition – as the City's own expert admits. Even were we to assume that enhancement of electoral competition constitutes a compelling state interest, there is insufficient evidence in this record to show that expenditure limits serve this end.

**B**

We conclude that Albuquerque's evidence, even when viewed in the light most favorable to the City, fails to establish that its candidate-expenditure limits are necessary to serve a compelling state interest. Thus, summary judgment in favor of Rue was proper. It follows that the City's evidence in *Homans III,* which need not be viewed in the light most favorable to Albuquerque, fails to sustain its burden, and the permanent injunction was appropriately granted. Given these holdings, we have no occasion to determine whether the expenditure limits are narrowly tailored. It is clear from the record, and from the many other cases dealing with the problem, that there is an increasing drive, and need, for campaign finance reform. We do not intend by our holding – that Albuquerque has

failed in the instant case to demonstrate a compelling state interest for its expenditure provisions – to discourage future efforts in reforming our electoral system; we merely hold that on the record before us, Albuquerque has failed to justify its expenditure limits.

Other jurisdictions have attempted alternative measures to eradicate corruption: limiting the size of campaign contributions, improvement of electoral competition, enhancement of voter participation, and preservation of candidates' scarce time resources, and they have done so within constitutional bounds. Notably, the Court has stated that public financing measures including expenditure limits may be implemented to achieve these ends without running afoul of the First Amendment. *See Buckley,* 424 U.S. at 57 n. 65, 96 S.Ct. 612 ("Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."). As for the prescription before us – a rigid limitation of campaign expenditures – Albuquerque has failed to submit sufficient evidence of a compelling state interest justifying such limits.

For the foregoing reasons, we **AFFIRM** both decisions of the district court.

TYMKOVICH, J., affirming, concurring in part and concurring in the result. O'BRIEN, J. joins.

I agree with much of Judge Lucero's analysis and with the ultimate disposition of the issues on appeal. Specifically, I concur with Parts I, II, and III, and with the analysis of Part IV that is not inconsistent with the

following.[1] I write separately for two reasons: First, to explain what I view as the Supreme Court's narrow application of *Buckley's* anti-corruption rationale in campaign expenditure cases. Second, to demonstrate why the other rationales submitted by the City – preservation of officeholder time and promoting electoral competition – are fundamentally at odds with *Buckley* and its progeny.

The principal opinion's careful analysis of the evidence presented by Albuquerque leads it to the undoubtedly correct conclusion that the City's campaign spending restrictions are unconstitutional. I, however, would agree with the Sixth Circuit's holding that under *Buckley* such restrictions cannot be supported as a matter of law. *See Kruse v. City of Cincinnati,* 142 F.3d 907, 915-19 (6th Cir.1998). In particular, I would hold that while prevention of corruption has been recognized as a compelling interest justifying campaign contribution limits, it was specifically rejected by *Buckley* as a sufficient reason to limit direct campaign spending. Further, in my view the two "new" interests the City asserts in defense of the statute are neither new nor compelling, nor are the spending caps tailored narrowly to serve them. Since all three of the asserted interests are thus constitutionally incapable of justifying spending restrictions as a matter of law, the court need not entertain the evidence submitted by the City.

[1] I refer to Judge Lucero's opinion as the "principal opinion" because the three judge panel is unanimous in its agreement on the result, and note that this opinion is the majority only as to Part IV.

*Strict Scrutiny and Buckley v. Valeo*

It is true that strict scrutiny does not require automatic invalidation of governmental regulations. *See Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 2338, 156 L.Ed.2d 304 (2003). Nevertheless, where core First Amendment principles are at stake, courts must bring a healthy skepticism to claims that individuals spend too much time and money on the political process. Unless the City convinces us that its regulations are necessary to serve a compelling interest, *see Federal Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 251-52, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and are narrowly tailored to serve that interest, we must invalidate them. *See Federal Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) ("NCPAC").

While I agree it is theoretically possible to bring evidence of corruption in support of spending limitations under *Buckley,* we should be careful not to credit attempts to reformulate arguments that the Supreme Court rejected long ago. *Buckley's* strong affirmation of the free speech rights associated with campaign spending has remained essentially untouched for nearly thirty years. *See McConnell v. Fed. Election Comm'n,* ___ U.S. ___, 124 S.Ct. 619, 655, 157 L.Ed.2d 491 (2003) (reemphasizing heightened level of scrutiny for restrictions on campaign expenditures). Its central holding on expenditures has stood the test of time, both from judicial tinkering and legislative onslaught. That Albuquerque's spending caps have evaded judicial review for more than 25 years is quite a feat. After careful deliberation, however, the City's limits cannot stand under well-established precedent.

I agree that the *Buckley* Court did not adopt a per se rule against campaign spending limits. The Court began by explaining the particular importance of First Amendment rights in the arena of political campaigning:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

*Buckley,* 424 U.S. at 14-15, 96 S.Ct. 612.

The Court went on to address specifically how spending limits impinge upon this right:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

*Id.* at 19, 96 S.Ct. 612 (footnote omitted). It concluded with a broad holding that government does not have the right to pass judgment on how or why a person expends campaign resources:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but

> the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

*Id.* at 57, 96 S.Ct. 612.

As Justice White observed in dissent, this is not the language of a Court limiting its decision to the facts before it, or interested in encouraging governments to enact similar restrictions with more elaborate justifications. *See id.* at 266, 96 S.Ct. 612 ("The Court . . . holds that a candidate has a constitutional right to spend unlimited amounts of money, mostly that of other people, in order to be elected.") (White, J., dissenting).

The hundreds of pages of campaign finance opinions written by the Supreme Court beginning with *Buckley* and culminating most recently with *McConnell* may not have left us with many clear rules, but one remains intact: "The central holding in [*Buckley*] is that spending money on one's own speech must be permitted. . . . " *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,* 518 U.S. 604, 627, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (Kennedy, J., concurring in part and dissenting in part). Thus, the Supreme Court has "*routinely* struck down limitations on independent expenditures by candidates." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 441, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("*Colorado II*") (emphasis added); *see also McConnell,* 124 S.Ct. at 655 (reiterating that expenditure limitations will be more closely scrutinized).

One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored

to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented. In short, the City must do more than offer academic distinctions of the rationales rejected in *Buckley.* Albuquerque failed to do so here.

*Corruption and Campaign Expenditures*

While I agree with the principal opinion that strict scrutiny does not establish a "per se" restriction on campaign spending schemes, it does set a high standard. The Supreme Court likens "corruption" to the "subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC,* 470 U.S. at 497, 105 S.Ct. 1459. Nevertheless, while the Supreme Court has routinely upheld contribution limits under the corruption rationale, it has equally routinely struck down spending restrictions. *See Colorado II,* 533 U.S. at 440-41, 121 S.Ct. 2351. The reason for the difference is the Court's determination – grounded in law and common sense – that expenditures by a candidate to promote the candidate's political agenda do not pose a particular risk of corrupting the *candidate* making the expenditure.

While more recent cases appear to have taken a slightly broader view of the corruption rationale on the contribution limits side of the equation, *see, e.g., Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (expressing concern about

"the broader threat from politicians too compliant with the wishes of large contributors"), the Supreme Court as a whole has not yet shown any willingness to do so on the spending side. The Supreme Court's skeptical view of spending limitations in *Buckley* is based on a realistic appraisal of modern campaigning. Conveying a campaign message to a large electorate can be costly, whether it is by direct mail, television, radio, or staged events. *See Buckley,* 424 U.S. at 19-20, 96 S.Ct. 612. While technological innovations such as the internet may make it more economical to reach some segments of the electorate, overall costs are unlikely to go down anytime soon. The bottom line is that political speech can only be communicated where a candidate has the resources to get his views out. *See id.* at 19, 57, 96 S.Ct. 612.

The quality of contemporary political communications may give us pause, but the First Amendment does not have an exception for messages we find repetitive, in poor taste, or too hard-hitting. The answer to concerns about political campaigning, however, does not rest in arbitrary limits that reduce the amount of speech available to the public with no reduction in real or perceived corruption by candidates or elected officials.[2] The Supreme Court has made it clear that a *candidate's* expressing his political views is not corrupting: "There is nothing invidious,

[2] This is to say nothing of the inevitable unintended consequences. Some commentators suggest that a possible consequence of spending restrictions will be to drive political spending further out of the control of candidates and into the hands of independent groups. *See generally* Lillian R. BeVier, *Money and Politics, A Perspective on the First Amendment and Campaign Finance Reform,* 73 Calif. L.Rev. 1045 (1985) (noting that campaign finance reform has increased influence of interest groups).

improper, or unhealthy in permitting [legally-raised] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56, 96 S.Ct. 612. In other words, the candidate's spending does nothing to corrupt the candidate. "If a[ ] candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?" *Id.* at 56 n. 64, 96 S.Ct. 612 (quoting *Buckley v. Valeo,* 519 F.2d 821, 917 (D.C.Cir.1975) (Tamm, J., dissenting in part)). Thus, candidate spending limitations cannot be justified by the anti-corruption rationale. *Id.* at 55-57, 96 S.Ct. 612. This is because "[t]he markedly greater burden on basic freedoms caused by [spending limits] cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limits." *Id.* at 44, 96 S.Ct. 612.

There is no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption. I therefore agree with the Sixth Circuit that "campaign spending limits cannot be justified by the anti-corruption rationale." *Kruse,* 142 F.3d at 915. Thus, while Judge Lucero is correct in finding that Albuquerque put forth insufficient evidence to show that its spending limits were necessary to prevent corruption, I doubt that any evidence would sustain such limitations under *Buckley.*

*Fund-raising Burdens on Candidates*

Albuquerque advances a second rationale for spending caps: they relieve elected officials of the heavy burden of raising the money they need to spend to get reelected. The

principal opinion disagrees with Homans's and Rue's argument that this is simply a reformulation of the cost-control rationale considered and rejected by the Supreme Court in *Buckley.* The opinion distinguishes *Buckley*'s holding that the "allegedly skyrocketing cost of political campaigns" is not an interest that can support spending restrictions, 424 U.S. at 57, 96 S.Ct. 612, by concluding that the *Buckley* Court was concerned only with "the woes of poor challengers," not the distractions faced by office-holders. *Supra* at 912.

It is true that the woes of underfunded challengers and the distractions of officeholders are not the same, and *Buckley* does not explicitly mention the latter. Both concerns are, however, aspects of the broader interest in controlling the costs of campaigns, an issue the *Buckley* Court did consider and firmly reject. The Court said, "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley,* 424 U.S. at 57, 96 S.Ct. 612. This is not limited to protecting the interests of underfunded challengers. The Court is clearly and explicitly addressing whether the government may wrest from "the people – individually as citizens and candidates and collectively as associations and political committees – control over the quantity and range of debate on public issues in a political campaign" because it feels the time and money spent on campaigns could be better utilized on other endeavors. *Id.* If the "*mere* growth" of the cost of campaigns "provides *no* basis for governmental restrictions on the quantity of campaign spending," *see id.* (emphasis added), a mere consequence of that growth – more time spent fund-raising – certainly cannot provide such a basis. This is so even if Albuquerque's city councilors believe

candidates are spending wasteful, excessive, or unwise amounts of money on their campaigns or if candidates would prefer to have more time for other activities.

Because *Buckley* rejected this broad argument in favor of spending caps, it did not need to address each of the numerous subordinate arguments the parties in that case put forth. But it is worth noting that contrary to the City's contention the *Buckley* Court did consider the exact argument made here, that the "thirst for money has forced candidates to divert time and energy to fund-raising and away from other activities, such as addressing the substantive issues." *Buckley,* Br. of Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States at 72-73 (quoting Senator Humphrey: "Campaign financing is a curse. It's the most disgusting, demeaning, disenchanting, debilitating experience of a politician's life. It's stinky. It's lousy. I just can't tell you how much I hate it.").

Since *Buckley* is directly controlling, I would again agree with the Sixth Circuit and reject this proposed justification without reaching the details of Albuquerque's arguments. *See Kruse,* 142 F.3d at 916-17 ("[T]he need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.").

The principal opinion nonetheless deals effectively with the City's factual arguments on this point. That legislators might wish to free themselves from the pressures of fund-raising is not surprising. Fund-raising is hard work and can be quite time consuming. Few candidates reportedly like it. What is surprising is that many commentators, normally so exacting in their criticism of

the self-dealing of the political branches, are willing to accept the most optimistic projections about reform proposals' likely effects. *See generally* Lillian R. BeVier, *What Ails Us?,* 112 Yale L.J. 1135, 1138 (2003) (commenting on how most campaign finance proposals miss the reformers' target).

The principal opinion is quite right that the City presented no plausible evidence that the quality of municipal governance or legislation had been harmed by inattentive law makers, nor that elected officials' work product would substantially improve because the officials could spend more time on the job. It is doubtful that Albuquerque's elected officials would admit that they have been unable to provide quality governance despite the rigors of campaigning. In any event, courts are not in a position to make such judgments about the quality of legislation based on such an illusory rationale. *See Buckley,* 424 U.S. at 57, 96 S.Ct. 612.

Furthermore, contrary to former Mayor Baca's concerns about the increased burdens of fund-raising (itself an echo of the complaints of the appellees in *Buckley*), officeholders are not "forced" to spend any time making calls or otherwise seeking funds.[3] That they choose to do so (allegedly at the expense of their other duties) seems to be a rather weak reason to override core First Amendment

[3] Not only are officeholders not required to run for reelection if they feel it interferes with their ability to represent their constituents, but if political advertisements are as ineffectual at informing voters as the City here seems to claim, *see* Rue Appellant's Br. at 15-17, then surely a rational candidate would not waste much time raising money to pay for them.

concerns. Freeing politicians from having to make that choice is not a compelling governmental interest.

Finally, of course, whatever the merits of spending limits, they must be narrowly tailored to further the constitutional justification. By way of example, as the principal opinion notes, an approach whose constitutionality has been sanctioned by *Buckley* is an obvious solution. *Buckley* upheld voluntary spending limits on presidential campaigns where the candidate accepts public funds. 424 U.S. at 85-86, 96 S.Ct. 612. If the City's elected officials and its voters truly feel obliged to limit campaign spending, they should be willing to put their money (tax dollars) where their mouths are. A public funding scheme would presumably take fund-raising pressure off of elected officials and also allow challengers to forego the rigors of purely private fund-raising. Another approach would be to raise limits on *contributions.* Candidates could then save time by seeking fewer, larger, donations. Not only would this free up candidates' time, but it would also lessen any pressure to evade low contribution limits. Albuquerque's contribution limits are currently set at five percent of the spending caps; while the record does not disclose the governmental rationale for this formula, there is no reason the City could not revisit these limits in response to the realities of modern campaigning. State and local governments are also free to limit the number of times an individual can run for the same office. Another simple solution would be to expand the number of seats in a given elective body, in this case the Albuquerque City Council. With fewer constituents to represent, and fewer potential voters to persuade, candidates would have to spend less time on all forms of campaigning, including fund-raising.

In short, Albuquerque's restrictions do not further the objective of reducing corruption. Nor are they "closely drawn" in light of the many alternatives that are not constitutionally suspect. They accordingly do not comport with the plain teaching of *Buckley.*

*Electoral Competition*

Albuquerque's final constitutional justification is that spending limits are necessary to promote electoral competition. Once again, I agree with the conclusion of the principal opinion – that Albuquerque has failed to show that this interest is served by its spending limits. I do not believe *Buckley,* however, allows us to entertain this interest as a proposed rationale for spending limits.

Albuquerque's argument is that "campaign spending poses a threat to [electoral] competition because large incumbent war chests tend to discourage serious challengers." *Supra* at 913-914. Thus, the City contends that spending caps are needed to equalize candidate resources, which in turn may improve electoral competition. This interest, like the others urged on us here, however, was considered and rejected by the *Buckley* Court. Addressing the argument that spending limits are necessary "to equalize the relative ability of individuals and groups to influence the outcome of elections," the Court stated,

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic 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, 96 S.Ct. 612 (quotations omitted). The Supreme Court couched its language broadly in response to the argument that spending caps are necessary to "encourage participation as candidates by many who in the past remained inactive on the ground that, inevitably, they could not compete against the established fund-raiser." *Buckley,* Br. of Attorney General & FEC at 36.[4] The *Buckley* Court, however, rejected this claim: "[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 56-57, 96 S.Ct. 612.

Thus, I believe *Buckley* does effectively "preclude[ ] this court from recognizing robust electoral competition as a state interest sufficiently compelling to justify the expenditure limits." *Cf. supra* at 913-914. Because the Supreme Court has rejected this proposed rationale, this court should make clear to trial courts and future potential litigants that time and money spent attempting to build a record justifying spending restrictions based on this argument would be wasted.

Even if encouraging competition were a compelling interest, many of the alternative proposals identified above would be less restrictive means of serving this interest. For example, increasing the number of seats, limiting the number of terms individuals can serve, raising contribution limits, and supplementing private

[4] This argument undermines Albuquerque's claim that campaign spending is not important for challengers hoping to inform or persuade voters because communication with likely voters is not expensive. *See* Rue Aplt. Br. at 16-17, 62-63.

donations with public funds all could help relatively unknown candidates amass the resources necessary to challenge a sitting officeholder without impinging on the First Amendment.

*Conclusion*

The principal opinion correctly notes that *Buckley* is the starting point for analysis in any campaign finance case. In this case, *Buckley* is also the endpoint because *Buckley* itself precludes our recognition of the reformulated interests urged on us by Albuquerque. Besides this imposing legal impediment, I see two possible consequences of the principal opinion's analysis: First, it would encourage additional attempts by governments to abridge citizens' rights to engage in (sometimes expensive) political speech through artful restatements of the governmental interests rejected in *Buckley*. Second, by couching its decision on the lack of a sufficient record, rather than on the protections of the First Amendment, the principal opinion tempts heavy reliance on surveys, statistical analysis, and other time-consuming and costly forms of record building when the inevitable litigation arises from those abridgments. The Supreme Court has given us little reason to expect that new criticism of the high cost of politics will undercut the central holding of Buckley that most spending limitations are constitutionally foreclosed by the First Amendment.

217 F.Supp.2d 1197

United States District Court,
D. New Mexico.

Rick HOMANS, Plaintiff,

v.

The CITY OF ALBUQUERQUE, a Municipal Corporation and Margie Baca Archuleta in her capacity as Clerk of the City of Albuquerque, Defendants.

**No. CIV. 01-917 MV/RLP.**

Aug. 22, 2002.

Rick L. Alvidrez, Keleher & McLeod, Albuquerque, NM, for plaintiff.

Randy M. Autio, Dan Ramczyk, Albuquerque City Attorney's Office, Albuquerque, NM, Brenda Wright, John C. Bonifaz, National Voting Rights Inst., Boston, MA, for defendants.

## *FINDINGS OF FACT AND CONCLUSIONS OF LAW*

VAZQUEZ, District Judge.

**THIS MATTER** is before the Court on the parties' Joint Motion for Stipulated Admission of Evidence, Briefing Schedule and Expedited Determination on the Merits **[Doc. No. 35]**. The Court, having considered the motion, the pleadings, testimony in connection with plaintiff's motion for a preliminary injunction, joint stipulation of certain evidence for expedited determination on the merits, exhibits, relevant law, and being otherwise fully informed, finds that the parties' joint motion is well-taken

and will be **GRANTED**, and that, under the Tenth Circuit's interpretation of *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), plaintiff is entitled to (1) a declaratory judgment that Article XIII, Section 4(d)(2) of the Albuquerque City Charter violates the First Amendment to the United States Constitution and (2) a permanent injunction enjoining the enforcement of the expenditure limitations under Article XIII, Section 4(d)(2) of the Albuquerque City Charter.

## I. BACKGROUND

Rick Homans was a duly qualified candidate for Mayor in the City of Albuquerque, New Mexico (the "City"), whose name appeared on the printed ballot for the mayoral election held October 2, 2001. Mr. Homans brought this action seeking a declaratory judgment that Article XIII, Section 4(d)(2) of the Albuquerque City Charter (the "City Charter") violates the First Amendment to the United States Constitution. That Section states:

> (d) No candidate shall allow contributions or make expenditures in excess of the following for any election:
>
> * * *
>
> (2) To a candidate for the office of Mayor contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

The annual salary of the Mayor in office at the time of the October 2, 2001 election was $87,360. Therefore, the expenditure limitation for the October 2, 2001 mayoral election was $174,720. Under the terms of the City Charter,

Article XIII, Section 4(d)(2), Mr. Homans was subject to a $500 fine for each violation of the expenditure limitations, and, if he had won the election, would have been subject to potential public reprimand and removal from office by the City Council for any such violation.

Prior to Mr. Homans's registration of his candidacy for Mayor, a state court issued a preliminary injunction which prevented enforcement of the expenditure limitations at issue herein. When Mr. Homans received informational materials from the City regarding his candidacy, he was verbally informed by a City employee that the expenditure limits would not be enforced. Three voters had brought the state court action. A candidate intervened in the action and argued that the voters lacked standing to bring suit. The state court agreed and gave the candidates twenty days to join the lawsuit before it would be dismissed for lack of standing. Neither Mr. Homans nor any other candidate joined, and the case was dismissed on August 15, 2001.

Plaintiff commenced the instant action, filing a complaint for declaratory judgment and injunctive relief **[Doc. No. 1],** on August 10, 2001. Thereafter, on August 13, 2001, plaintiff filed a motion for a preliminary injunction and a temporary restraining order **[Doc. No. 3],** seeking an order enjoining enforcement of the expenditure limitation provision of the City Charter. In support of his motions, Mr. Homans claimed that the City Charter was an unconstitutional infringement on his First Amendment rights. He contended that, in reliance on a City employee's assertion that the limits would not be enforced in this election, he had already exceeded the City Charter's expenditure limits. He further claimed that if the expenditure limits were not enjoined, he would have to stop

campaigning and close his campaign headquarters. The City maintained that the City Charter was a constitutional limitation on campaign spending and that enforcement of the limitation would not cause Mr. Homans irreparable injury.

This Court held a hearing on August 20, 2001, for the purpose of determining whether Mr. Homans was entitled to temporary injunctive relief. Based on the record before the Court at that time, the Court found that Mr. Homans had shown a likelihood of success on the merits of his claim that the City Charter violated the First Amendment, that he would suffer irreparable harm if enforcement of the City Charter were not enjoined, and that the balance of harms and the public interest weighed in his favor. Thus, the Court granted Mr. Homans's motion for temporary injunctive relief **[Doc. No. 17].**

The Court held another hearing on August 30, 2001, for the purpose of determining whether Mr. Homans was entitled to preliminary injunctive relief. By this time, the Court had had the opportunity to review the evidence submitted by the City in opposition to Mr. Homans's motion. At the hearing, the Court heard the testimony of Mr. Larry Makinson, an expert on election reform from the Center for Responsive Politics. The Court also heard argument from counsel for both parties on the issue of whether Mr. Homans was entitled to preliminary injunctive relief.

After the second hearing, the Court denied Mr. Homans's request for a preliminary injunction, finding that Mr. Homans had not shown a likelihood of prevailing on the merits ("Preliminary Injunction Memorandum Opinion") **[Doc. No. 21].** The Court determined that

*Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), did not present an absolute bar to expenditure limits, and that the relevant City Charter expenditure provision was narrowly tailored to meet the compelling governmental interests of preserving the public faith in democracy and reducing the appearance of corruption. The Court further found that Mr. Homans had made a sufficient showing of irreparable harm, that the balance of harms weighed in favor of Mr. Homans, and that the public interest favored the City.

On September 4, 2001, Mr. Homans filed an interlocutory appeal of this Court's denial of a preliminary injunction **[Doc. No. 25].** Mr. Homans also filed with the Tenth Circuit Court of Appeals an emergency motion for an injunction pending appeal, and an alternative motion for suspension of the appellate rules and expedited review of the district court's denial of his application for a preliminary injunction. In a *per curiam* order dated September 6, 2001, the Tenth Circuit granted Mr. Homans's emergency motion for an injunction pending appeal, and enjoined the City from further enforcing Article XIII, Section 4(d)(2) of the City Charter. The Tenth Circuit found that Mr. Homans had demonstrated a substantial likelihood of success on the merits on his First Amendment claim that campaign expenditure limitations are unconstitutional. Additionally, the Tenth Circuit agreed with this Court's findings that Mr. Homans had made a sufficient showing of irreparable harm and that the balance of harms weighed in favor of Mr. Homans.

Thereafter, based on the parties' agreement, the Tenth Circuit suspended the appeal pending entry of final judgment in this Court **[Doc. No. 29].** The parties then filed a joint motion for stipulated admission of evidence,

briefing schedule and expedited determination on the merits **[Doc. No. 35],** requesting, *inter alia,* that this matter be decided on the merits without a trial based upon the evidentiary record developed in connection with Mr. Homans's motion for temporary restraining order and motion for preliminary injunction. The parties further agreed to the admission of the evidence and factual stipulations set forth in the parties' joint stipulation for admission of certain evidence for expedited determination on the merits ("Stip.") **[Doc. No. 36],** which was filed simultaneously with the joint motion.

## II. FINDINGS OF FACT

1. Mr. Homans is a resident of the City. Stip. at ¶ 1.

2. The City is a municipal corporation organized under the laws of the State of New Mexico and is a "person" within the meaning of 42 U.S.C. § 1983. Stip. at ¶ 2.

3. Francie D. Cordova is the Clerk of the City (the "Clerk") and is charged with enforcement of certain ordinances relating to City elections and is a "person" within the meaning of 42 U.S.C. § 1983. Ms. Cordova succeeded defendant Margie Baca Archuleta as the Clerk on December 1, 2001. Stip. at ¶ 3.

4. The City's expenditure limits were enacted in 1974. Stip. at ¶ 12, Def.Ex. 1 at 4.

5. Limits on candidate spending remained in effect for each mayoral and city council election held from 1974 through 1995. Stip. at ¶ 13.

6. The spending limits were temporarily enjoined for the 1997 elections by a court order in *Murphy v. City of*

*Albuquerque,* No. CV-97-0007826 (2d Judicial Dist.). Stip. at ¶ 14.

7. Studies of the temporary removal of the limits show a correlation to a significant decrease in voter turnout. *See* Def.Ex. 1 at 8.

8. The spending limits were restored for the 1999 city council elections after the plaintiffs in *Murphy* withdrew their lawsuit through a stipulated dismissal. Stip. at ¶ 15.

9. The City Charter was amended in 1999 to permit candidates for Mayor and city council to spend up to twice the annual salary of the office in their election campaigns. Stip. at ¶ 16.

10. The City is one of the few remaining cities in the United States that limits the amount of money a candidate for political office may spend on his or her own campaign. *See* John C. Bonifaz, et al., *Challenging Buckley v. Valeo: A Legal Strategy,* 33 Akron L.Rev. 39, 56 (1999).

11. A system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advantage. *See* Tr. at 37-44.

12. Nationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. *See* Def.Ex. 1 at 6. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking reelection. *See id.*

13. Many successful candidates for the office of Mayor of the City have spent far less than the maximum expenditure allowed. *See* Def.Exs. 10 & 11.

14. The prior Mayor of the City, Jim Baca, ran a successful campaign for Mayor in 1997, winning the election after spending only $43,888.26 on television advertising. *See* Def.Ex 9, ¶ 3. During that campaign, Mayor Baca relied primarily on grassroots outreach rather than on television advertising. *See id.* at ¶¶ 2-3.

15. Between 1991 and 1995, in Cincinnati, where there are no expenditure limits, forty-five percent (45%) of all funds raised for elections came from donors contributing a minimum of $1,000.00. Between 1989 and 1997, in the City, which imposed expenditure limits, only twenty-seven percent (27%) of all funds raised came from donors contributing a minimum of $1,000.00. *See* Tr. at 45; Def.Ex. 20.

16. In Cincinnati's 1995 elections, fifty-three percent (53%) of all funds raised for elections came from donors contributing at least $1,000.00, whereas only six percent (6%) of the funds raised came from donors contributing less than $100.00. In the City's 1995 elections, by contrast, twenty-seven percent (27%) of all funds raised came from donors contributing a minimum of $1,000.00 and thirteen percent (13%) of all funds raised came from donors contributing less than $100.00. *See* Tr. at 46; Def.Ex. 21.

17. In the last federal Congressional election, in more than half the Congressional districts in the country, the winning candidate outspent the losing candidate by a factor of ten to one or more. *See* Tr. at 20-21.

18. As the cost of elections rise, candidates for office at every level of federal, state, and city government are under a great deal of pressure to engage in fundraising activities and to depend on the goodwill of their donors. *See id.* at 22-23.

19. Voter turnout for all of the City's elections between 1974 and 1999 was approximately forty percent (40%). *See* Def.Ex. 1 at 7. Voter turnout for cities without expenditure limits is generally between twenty-five percent (25%) to thirty-five percent (35%). *Id.* Voter turnout in the City is generally higher than most major cities. *See id.* at 7-8.

20. Campaigns where there are no spending limits in place tend to reduce the number of lower-income to lower-middle-income citizens who can run for office with some expectation of winning. *See id.* at 10.

21. A spending gap between incumbents and challengers generally results in diminished competitiveness in elections. *See id.* at 11.

22. Candidates in elections where spending limits are imposed tend to spend more campaign money on actual voter contact. *See id.* at 14.

23. A survey of the City's voters shows that most voters consider newspaper coverage, public debates and forums, seeing the candidate in person, and radio and television news coverage more important than radio and television advertisements. *See* Def.Ex. 2 at 2.

24. Fifty-seven percent (57%) of surveyed City voters think that federal elections are overly influenced by special interest money. In contrast, only twenty-three percent (23%) think that the City elections are overly influenced by special interest money. *See* Def.Ex. 2 at 3. Forty-nine percent (49%) think that only candidates with access to large sums of money are able to run for federal office and win. *See id.* Only five percent (5%) think that

ordinary citizens are able to run for federal office and win. *See id.*

25. Fifty-seven percent (57%) of surveyed City voters strongly favor the current spending limits. *See id.* at 6. Another twenty-five percent (25%) not-so-strongly favor the current spending limits. *See id.* Seventy-one percent (71%) believe that spending limits improve the fairness of elections by ensuring that ordinary citizens, not just the very wealthy, can run for office in the City without having to raise so much money from special interest groups. *See id.*

26. Unlimited spending on mayoral races has a detrimental impact on the local electoral process. *See* Def.Ex. 9 at ¶¶ 4-6.

27. In the last twenty-five years, the cost of running for a seat In the United States House of Representatives[1] has risen by approximately 400 percent. *See* Tr. at 17. This rise does not reflect simply a rise in the cost of living. *See id.* at 18.

28. Federal contribution limits have not effectively changed the negative public perception of the undue influence of large donors on federal elected officials. *See id.* at 22, 34.

29. It is not difficult for large donors to get around federal and state contribution limits through practices such as "bundling." *See id.* at 26-27.

[1] There are no limits on campaign spending by candidates for federal offices.

30. Article XIII, Section 4(d)(2) of the City Charter restricts total contributions and expenditures by mayoral candidates as follows:

> (d) No candidate shall allow contributions or make expenditures in excess of the following for any election:
>
> * * *
>
> (2) To a candidate for the office of Mayor contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

Stip. at ¶ 8.

31. The City Charter and the Rules and Regulations of the Board of Ethics and Campaign Practices give the Board the power to fine a candidate up to $500 for each violation of Article XIII, Section 4(d)(2), to issue a public reprimand to the candidate and to recommend to the City Council that a candidate duly elected by the voters be removed from office. Stip. at ¶ 10.

32. The City was scheduled to have a municipal election, including an election for the office of Mayor, on October 2, 2001. Stip. at ¶ 4.

33. Mr. Homans was a candidate for the office of Mayor of the City, having filed with the City both a Declaration of Candidacy on August 7, 2001, and petitions with in excess of 5,100 valid signatures of registered City voters during the period between July 12 and July 21, 2001. Stip. at ¶ 5.

34. Mr. Homans was a duly qualified candidate for the office of Mayor of the City with sufficient signatures to

be listed as a candidate on the printed ballot for the mayoral election held on October 2, 2001. Stip. at ¶ 6.

35. The salary of the City Mayor at the time of the filing of the declaration of candidacy was $87,360 per year, resulting in a campaign contribution and expenditure limit for a City mayoral campaign of $174,720 under Article XIII, Section 4(d)(2). Stip. at ¶ 9.

36. In furtherance of his candidacy for Mayor, Mr. Homans conducted various fundraising and campaign activities during the several months prior to the October 2, 2001 election. Stip. at ¶ 7.

37. As a result of his campaign activities, Mr. Homans received campaign contributions and pledges in excess of the spending limitations specified under Article XIII, Section 4(d)(2) of the City Charter. App. at 3; Ex. A at ¶ 8.

38. Defendants contend that Article XIII, Section 4(d)(2) of the City Charter is constitutional and announced that they would enforce the contribution and expenditure limitations against candidates for the office of Mayor, including Mr. Homans, in the October 2, 2001 municipal election. Defendants further maintain that they will enforce the contribution and expenditure limitations in future municipal elections. Stip. at ¶ 11.

39. The City held a municipal election on October 2, 2001 for certain city offices, including the office of Mayor. Stip. at ¶ 18.

40. A total of eight candidates sought the office of Mayor in the October 2, 2001 mayoral election. Stip. at ¶ 19.

41. The official and certified results of the October 2, 2001 mayoral election are as follows:

| | | |
|---|---|---|
| a. | Jim R. Baca | 10,999 votes |
| b. | Martin J. Chavez | 30,292 votes |
| c. | James B. Lewis | 6,747 votes |
| d. | Alan B. Armijo | 2,570 votes |
| e. | Richard W. Homans | 9,737 votes |
| f. | Bob Schwartz | 27,490 votes |
| g. | Mike McEntee | 11,176 votes |
| h. | Kermit D. Vincent | 108 votes |

Stip. at ¶ 20.

42. Martin J. Chavez was elected Mayor in the October 2, 2001 mayoral election for the City with 30.56% of the vote. Stip. at ¶ 21.

43. Out of 235,152 registered voters, a total of 99,119 voters voted in the October 2, 2001 City mayoral election. Stip. at ¶ 24.

44. Article XIII, Section 4(c) requires candidates in municipal elections to publicly disclose campaign contributions and expenditures by filing four statements, signed under oath, with the following information:

a. The total of all contributions;

b. The name and residential street address of each contributor, the contributor's principal business occupation, the name and address of the contributor's employer, and the nature of the contributor's or contributor's employer's business, together with the total cumulative cash value contributed by the contributor, when that amount equals or exceeds $25 for the office of Councilor or to a Measure Finance Committee, and $100 for the office of Mayor.

c. All expenditures made on behalf of the campaign, including any reimbursements and the

nature thereof, and the name and address of the person or business to whom payment was made.

Stip. at ¶ 28.

45. According to the Disclosure Statements filed by the candidates for Mayor in the October 2, 2001 election, the candidates received and expended the following amounts:

a. Jim R. Baca
   Contributions: $ 333,937.00
   Expenditures: $ 341,035.08

b. Martin J. Chavez
   Contributions: $ 421,753.25
   Expenditures: $ 421,753.25

c. James B. Lewis
   Contributions: $ 61,541.17
   Expenditures: $ 61,541.18

d. Alan B. Armijo
   Contributions: $ 51,514.09
   Expenditures: $ 51,603.39

e. Richard W. Homans
   Contributions: $ 579,043.17
   Expenditures: $ 595,349.46

f. Bob Schwartz
   Contributions: $ 156,003.97
   Expenditures: $ 154,683.59

g. Mike McEntee
   Contributions: $ 173,699.65
   Expenditures: $ 159,580.85

h. Kermit D. Vincent
   Contributions: $ 1,448.00
   Expenditures: $ 1,088.00

Stip. at ¶ 29.

## III. CONCLUSIONS OF LAW

The Court has jurisdiction to entertain this matter pursuant to 42 U.S.C. § 1983. Venue is proper in the United States District Court for the District of New Mexico. Although the mayoral election in question has taken place, the constitutional issues in this case are capable of repetition yet may evade review unless the Court makes a determination on the constitutionality of Article XIII, Section 4(d)(2) of the City Charter.

Plaintiff challenges the City Charter's limit on campaign expenditures as unconstitutional under the First Amendment. *Buckley v. Valeo* is the "seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations." *Landell v. Vermont Pub. Interest Research Group,* 300 F.3d 129, 141-42 (2d Cir.2002) (citing 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659). In *Buckley,* the Supreme Court held that expenditure limitations "impose direct and substantial restraints on the quantity of political speech" and "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" 424 U.S. 1, 39, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (citations omitted). Accordingly, the Court held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45, 96 S.Ct. 612. The limitation thus "must be narrowly tailored to serve a sufficiently strong government interest. Expenditure limitations, being more severe [than contribution limitations], require 'closer scrutiny,' and, relatively speaking, the government interest must meet a more demanding test." *Landell,* 300 F.3d 129, 141-42 (citing

*Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 472, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001)). Applying this standard, the Supreme Court in *Buckley* held that while the governmental interests in preventing corruption and the appearance of corruption were compelling enough to justify restrictions on campaign contributions, such interests were inadequate to justify restrictions on individual expenditures. *See Buckley,* 424 U.S. at 45-48, 96 S.Ct. 612.

In the Preliminary Injunction Memorandum Opinion denying Mr. Homans a preliminary injunction, this Court stated that "[s]ince the announcement of *Buckley* twenty-five years ago, the Supreme Court has been divided as to *Buckley's* scope. Particularly, there is substantial disagreement amongst the Justices as to whether the ruling in *Buckley* provides a *per se* ban on all expenditure caps." *Homans v. City of Albuquerque,* 160 F.Supp.2d 1266, 1270-71 (D.N.M.2001). As a result of the "abundance of judicial commentary on compelling governmental interests which fall outside the ambit of *Buckley,*" this Court was convinced to read *Buckley's* holding narrowly, and was "persuaded that the holding of *Buckley v. Valeo* does not render Albuquerque's expenditure limits *per se* unconstitutional." *Id.* at 1272. The Court went on to find that the City had demonstrated evidence of two compelling governmental interests, namely preserving the public faith in democracy and reducing the appearance of corruption, and that the City Charter's expenditure limits were narrowly tailored to meet these compelling governmental interests. *Id.* at 1272-73.

Citing the same case law regarding the scope of *Buckley's* holding in light of the post-*Buckley* experience as this Court did in the Preliminary Injunction Memorandum

Opinion, the Second Circuit Court of Appeals in *Landell* similarly rejected the contention that *Buckley* established an absolute ban on expenditure limitations. The Second Circuit stated,

> Critically, the Court [in *Buckley*] never concluded that the Constitution would always prohibit expenditure limits, regardless of the reasons and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits. After *Buckley,* there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

*Landell,* 300 F.3d 129, 142-43 (citations omitted). Further, the Second Circuit noted that "an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional . . . would require us to ignore not only *Buckley's* own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Id.* at 144-45.

As this Court did in the Preliminary Injunction Memorandum Opinion, the Second Circuit next addressed the question of whether the expenditure limitations at issue were narrowly tailored to a sufficiently important governmental interest. The Second Circuit found as follows:

> Fundamentally, Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money. Vermont's interest in ending this state of affairs is compelling: the basic democratic requirements of

> accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.

*Id.*[2] The Second Circuit then upheld the district court's determination that the limits set by Vermont permitted fully effective campaigns and were narrowly tailored. *See Id.* at 155. After thus reviewing Vermont's expenditure limitations "with the level of exacting scrutiny required by *Buckley* and its progeny for expenditure limits," the Second Circuit held these provisions to be constitutional. *Id.*

Unlike the Second Circuit, however, the Tenth Circuit has expressed its disagreement with this Court's interpretation of *Buckley.* In its decision granting Mr. Homans a preliminary injunction, the Tenth Circuit cited *Buckley* as providing a "clear statement" that campaign expenditure limitations "do not survive *even under* the rationale of (1) deterring corruption and preventing evasion of contribution limits, (2) equalizing the financial resources of the candidates, and (3) restraining the cost of election campaigns for its own sake." *Homans v. City of Albuquerque,* 264 F.3d 1240, 1243-44 (10th Cir.2001) (emphasis added). Upon its own "independent examination of the record," the

[2] In the context of its discussion regarding Vermont's compelling interest in expenditure limitations, the Second Circuit addressed the problem of bundling – a "distortion of the democratic process" which is caused when contributors "are members of organized, wealthy interest groups that 'bundle gifts.' " *Landell,* at 150-51. The Second Circuit cited to the finding regarding the bundling phenomenon in this Court's Preliminary Injunction Memorandum Opinion, and concluded that this phenomenon was "not anticipated by the Supreme Court in *Buckley.*" *Id.*

Tenth Circuit held that, even if the "facts do matter, . . . the compelling governmental interests identified by the district court, under the broad headings of preserving faith in democracy and deterring the appearance of corruption, are really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley*." *Id.* at 1244. The Tenth Circuit explicitly rejected this Court's reading of post-*Buckley* case law as evidencing a division within the Supreme Court over *Buckley's* scope. The Tenth Circuit stated that the cases this Court relied upon "all involve limitations on contributions, and even then, the statements are not those of a majority even if joined by other members of the Court," and that "the Supreme Court has not suggested that the distinction between campaign expenditures and campaign contributions is about to change." *Id.* Finally, the Tenth Circuit noted that its decision to grant Mr. Homans a preliminary injunction was "following binding Supreme Court precedent and protecting the core First Amendment right of political expression." *Id.*

This Court is mindful that the decision of an appellate court on an emergency motion for an injunction pending appeal does not constitute a binding decision that plaintiff is entitled to permanent injunctive relief. *See American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.,* 84 F.3d 1471, 1476-77 (3d Cir.1996) (en banc). Nonetheless, as a district court within the Tenth Circuit, this Court is bound to follow the Tenth Circuit's interpretation of the law, and its application of the law to the facts. As discussed above, the Tenth Circuit made its own independent examination of the record, which is now again before this Court, and found that the interests the City's expenditure limitations were enacted to protect are

insufficient to survive a First Amendment challenge. Thus, under the Tenth Circuit's interpretation of *Buckley* and its application of *Buckley* to the instant facts, this Court is constrained to find that the expenditure limitations in the City Charter constitute an unconstitutional infringement of the First Amendment. Until the Supreme Court revisits the issue of campaign finance reform, thereby resolving the clear conflict that now exists between the Tenth Circuit and the Second Circuit, this Court can reach no other holding. This Court is persuaded that, under the interpretation of *Buckley* applied in the Preliminary Injunction Memorandum Opinion and in the Second Circuit's *Landell* decision, the expenditure limitations in the City Charter would survive a constitutional challenge, as the City has demonstrated that these expenditure limitations are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition.

## IV. RELIEF

**IT IS THEREFORE ORDERED** that the parties' Joint Motion for Stipulated Admission of Evidence, Briefing Schedule and Expedited Determination on the Merits **[Doc. No. 35]** is **GRANTED.**

**IT IS THEREFORE FURTHER ORDERED** that Mr. Homans is entitled to (1) a declaratory judgment that

Article XIII, Section 4(d)(2) of the City Charter violates the First Amendment to the United States Constitution; and (2) a permanent injunction enjoining the City and the City Clerk from enforcement of the expenditure limitations under Article XIII, Section 4(d)(2) of the City Charter.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

SANDER RUE,

Plaintiff,

v. Civ. No. 01-1036 JP/LFG

CITY OF ALBUQUERQUE,
a Municipal Corporation,
MARGIE BACA ARCHULETA,
in her capacity as Clerk of the
City of Albuquerque, and
THE CITY OF ALBUQUERQUE
BOARD OF ETHICS AND
CAMPAIGN PRACTICES,
a board of the City of Albuquerque,

Defendants.

**MEMORANDUM OPINION AND ORDER**

(Filed October 11, 2002)

On September 10, 2002, in its final supplemental briefing on Plaintiff's Motion for Summary Judgment (Doc. No. 40), the City of Albuquerque (City) responded to the Court's request to explain how this case "is factually distinguishable in a manner that would permit a result different from that reached by Judge Vázquez" in *Homans v. City of Albuquerque*, *et al*., Civ. No. 01-917 MV/RLP. In its response the City did not attempt to factually distinguish this case from *Homans*, which held that the City's campaign expenditure limit for a mayoral candidate was unconstitutional. Civ. No. 01-917 MV/RLP, Doc. No. 48. Instead, the City argued that neither Judge Vázquez's judgment nor the Tenth Circuit's order in *Homans* is binding here.

According to the City, Judge Vázquez incorrectly assumed "that the Tenth Circuit's injunction order requires entry of judgment for Plaintiff." September 10, 2002, Letter Brief from Randy M. Autio, Deputy City Attorney at 3 (Letter Brief). The City is certainly correct that in an ordinary case a district court is not bound by an appellate court's decision on preliminary relief since an appellate "decision on a preliminary injunction is, in effect, only a prediction about the merits of the case" *U.S. v. Local 560 (I.B.T.)*, 974 F.2d 315, 330 (3d Cir. 1992). In *Homans*, however, the Tenth Circuit's "prediction" about the outcome of the case was not based at all on the facts, but rather on what that Court declared was a "legal error concerning the First Amendment." *Homans v. City of Albuquerque, et al.*, 264 F.3d 1240, 1243 (10th Cir. 2001). The Tenth Circuit brushed aside the City's argument that "the facts do matter," and held that the "compelling governmental interest identified by the district court, under the broad headings of preserving faith in democracy and deterring the appearance of corruption, are really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley v. Valeo*, 424 U.S. 1 (1976)," 264 F.3d at 1244 (full citation inserted). The Tenth Circuit's order in *Homans* repudiated the governmental interest asserted in that case, which are the same interests the City has asserted here.

Nonetheless, the City has argued that its compelling governmental interests "in freeing officeholders from the pressures of endless fundraising so as to preserve their time for performing their duties as representatives" was not addressed in *Buckley* or the Tenth Circuit's order in *Homans*. Letter Brief at 3. In its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the City

argued that the Tenth Circuit's order in *Homans* identified "only two compelling interests supporting spending limits, namely, 'preserving faith in democracy and deterring the appearance of corruption.'" Doc. No.49 at 47. However, the appellate order in *Homans* went much farther than the City admits.

As Judge Vázquez observed in her Findings of Fact and Conclusions of Law, "the Tenth Circuit made its own independent examination of the record . . . and found that the interest the City's expenditure limitations were enacted to protect are insufficient to survive a First Amendment challenge." Civ. No. 01-917 MV/RLP, Doc. No. 46 at 17. The Tenth Circuit's examination of the record in *Homans* necessarily revealed that the City enacted campaign expenditure limitations in part to permit candidates and officeholders to spend less time fundraising and more time interacting with voters and performing official duties. This interest was characterized in both the City's briefing, Civ. No. 01-917 MV/RLP, Doc. No. 13 at 9 & 15, and in Judge Vázquez' Memorandum Opinion and Order, Civ. No. 01-917 MV/RLP, Doc. No. 21 at 8, 10 & 12, as a governmental interest that was present in *Homans*, which *Buckley* did not address. Judge Vázquez' Memorandum Opinion and Order specifically stated that preserving the public's faith in democracy and reducing the appearance of corruption were enhanced by campaign expenditure limits because without spending limits "candidates are [ ] forced to spend innumerable hours eliciting contributions rather than performing public duties and ascertaining the interests of those citizens unable to make large financial contributions to their campaigns." Civ. No. 01-917 MV/RLP, Doc. No. 21 at 12. Hence, the City's interest in freeing officeholders from the pressures of endless fundraising was

addressed by the Tenth Circuit in *Homans* as one of the "compelling governmental interests identified by the district court[ ] under the broad headings of preserving the faith in democracy and deterring the appearance of corruption." 264 F.3d at 1244.[1]

Here, Plaintiff has challenged the campaign expenditure limit for a City Councillor candidate, which is based on the same formula as a candidate for mayor.[2] After full review of the relevant facts and law Judge Vázquez held that the City's campaign expenditure limit for a mayoral candidate violated the First Amendment to the United States Constitution. Judge Vázquez observed that "under the Tenth Circuit's interpretation of *Buckley* and its application of *Buckley* to the instant facts, this Court is constrained to find that the expenditure limitations in the City Charter constitute an unconstitutional infringement of the First Amendment." Civ. No. 01-917 MV/RLP, Doc. No. 21 at 17. The City has not factually distinguished this case from *Homans* or offered a persuasive legal rationale for deviating from Judge Vázquez' judgment. Accordingly, under the Tenth Circuit's interpretation of the law in *Homans*, the governmental interests asserted here by the

[1] Another aspect of the appellate order in *Homans* counsels against the City's view that this interest went unaddressed. The Tenth Circuit's order summarily rejected the concurring analysis of Judge Cohn in *Kruse v. City of Cincinnati*, 142 F.3d 907, 919-920 (6th Cir. 1998). Judge Cohn had opined that the "independent interest in freeing officeholders from the pressures of fundraising so they can perform their duties" survived *Buckley*.

[2] A candidate for either the office of mayor or city councillor is prohibited by Article XIII, Section 4(d) of Albuquerque's City Charter from making campaign expenditures greater than "twice the amount of the annual salary paid by the City of Albuquerque" for the office "as of the date of filing of the Declaration of Candidacy."

City of Albuquerque in support of its campaign expenditure limitation for a City Councillor candidate do not overcome *Buckley*'s holding that campaign expenditure limitations violate the First Amendment to the United States Constitution.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (Doc. No. 40) is GRANTED, and Plaintiff is entitled to the following relief:

(1) a declaratory judgment that Article XIII, Section 4(d)(1) of the Albuquerque City Charter violates the First Amendment of the United States Constitution; and

(2) a permanent injunction enjoining the City of Albuquerque from enforcing the expenditure limitation under Article XIII, Section 4(d)(1) of the Albuquerque City Charter.

/s/ James A. Parker
CHIEF UNITED
STATES DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| | |
|---|---|
| RICK HOMANS,<br>Plaintiff-Appellee,<br>v.<br>THE CITY OF ALBUQUERQUE, a municipal corporation; FRANCIE D. CORDOVA, in her capacity as Clerk of the City of Albuquerque,<br>Defendants-Appellants. | No. 02-2244<br>(D.C. No.<br>CIV-01-917 MV/RLP) |
| SANDER RUE,<br>Plaintiff-Appellee,<br>v.<br>THE CITY OF ALBUQUERQUE, a municipal corporation; FRANCIE D. CORDOVA, in her capacity as Clerk of the City of Albuquerque; THE CITY OF ALBUQUERQUE BOARD OF ETHICS AND CAMPAIGN PRACTICES, a board of the City of Albuquerque,<br>Defendants-Appellants. | No. 02-2316<br>(D.C. No.<br>CIV-01-1036 JP/LFG) |

ORDER

Filed May 25, 2004

Before **LUCERO, O'BRIEN**, and **TYMKOVICH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk
of Court

by: /s/ J. Leal
Deputy Clerk

CHARTER OF THE
CITY OF ALBUQUERQUE

ARTICLE XIII. ELECTION CODE

Section 4. CAMPAIGN FINANCING.

* * *

(d) Limits to Campaign Financing. No candidate shall allow or accept contributions or make expenditures in excess of the following for any election:

1. To a candidate for the office of Councillor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to Councillors as of the date of filing of the Declaration of Candidacy.

2. To a candidate for the office of Mayor, contributions or expenditures equal to twice the amount of the annual salary paid by the City of Albuquerque to the Mayor as of the date of filing of the Declaration of Candidacy.

(e) Limits to Contributions. No candidate shall, for any one election, allow total contributions from any one person with the exception of contributions from the candidate himself or herself of more than 5% of the annual salary for such office at the time of filing the Declaration of Candidacy.