OPPOSITION TO EMERGENCY RELIEF REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICK HOMANS,	Docket No. _____
Plaintiff-Appellant,	(District Court Docket No. CIV-01-917 MV/RLP)
v.	
THE CITY OF ALBUQUERQUE, a municipal corporation and MARGIE BACA ARCHULETA, in her capacity as Clerk of the City of Albuquerque,	
Defendants-Appellees.	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL AND OTHER RELIEF

Defendants, the City of Albuquerque, a municipal corporation, and Margie Baca Archuleta, in her capacity as Clerk of the City of Albuquerque, by and through the City of Albuquerque's City Attorney's Office (Assistant City Attorneys Randy Autio and Daniel E. Ramczyk) and associated counsel from the National Voting Rights Institute (Brenda Wright and John C. Bonifaz) hereby respond in opposition to plaintiff Rick Homan's Motion for Injunction Pending Appeal and other relief. In further opposition to plaintiff's Motion, defendants have submitted Defendants' Appendix containing defendants' exhibits that were presented to and accepted by the

district court, but which plaintiff did not include in the appendices submitted to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

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 the voters of Albuquerque approved by a vote of over 90%. Exhibit 1, Albuquerque Election Financing: An Analysis by Anthony Gierzynski, Ph.D. ("Gierzynski Report"), at 4 (attached to Declaration of Anthony Gierzynski, Ph.D.).[1] As the district court found, the caps on campaign spending serve numerous critically important governmental interests, including deterring corruption and the appearance of corruption, promoting citizens' confidence in the integrity of government, promoting highly competitive elections which allow for robust debate of the issues, and freeing elected officials and candidates from the endless burden of fundraising so that they may devote their time to the business of government.

Elections for city office have been conducted subject to the contribution limits and spending limits in the city charter for the past 27

[1] Exhibit numbers refer to the original numbers of the exhibits filed in the district court, which are being sent to this Court by overnight delivery for filing on September 6, 2001.

years, save for the mayoral election in 1997 when the spending limits were temporarily enjoined. In 1999, the city amended the Election Code so as to permit mayoral and city council candidates to spend an amount equal to twice the annual salary of their respective offices, thus doubling the previous limits which had been set at an amount equal to the salary of the office. As a result, the spending caps applicable to the upcoming October 2, 2001 elections are $174,720 for the office of mayor and $17,056 for the office of city councilor. These limits are extremely generous, as witnessed by the fact that even in 1997, when the limits had been temporarily enjoined and candidates were free to spend as much as they wished, the winning candidate spent only $106,000, the second-place candidate spent less than $80,000, and even the highest-spending candidate spent only $175,600, only a few hundred dollars more than the current limits would allow. Def. Ex. 10 & 11 (1997 candidates' campaign disclosures).

As the district court found, during the past 27 years when spending limits have been in effect, Albuquerque has enjoyed higher voter turnout in municipal elections than in comparable cities without limits on campaign spending. Exhibit 1, Gierzynski Report, at 7. Albuquerque's elections have also been far more competitive than elections in most cities, with numerous

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Defendants-Appellees are filing these exhibits, nos. 1-21, as volumes 1 and 2 of their

challengers coming forward to seek city office. *Id.* at 6. Because incumbents do not build huge war chests to deter competition in Albuquerque, challengers have been far more successful in winning election against incumbents in Albuquerque than is true in other cities without spending limits. *Id.*

The spending limits have fostered citizens' confidence in the fairness and honesty of Albuquerque elections. Albuquerque voters overwhelmingly believe that state and national elections, which have no limits on spending, are far too influenced by special interest money and are lacking in integrity. By contrast, voters express far higher approval of the integrity of Albuquerque city elections, and they believe that, if Albuquerque's spending limits are removed, the potential for corruption will increase, ordinary citizens will be less able to run for office, and elected officials will spend more time listening to and raising money from special interests. Exhibit 2, Public Perceptions of Campaign Spending Limits: Findings from a Survey of 400 Registered Voters in the City of Albuquerque, New Mexico (hereafter, "Survey Findings") (attached to Declaration of David Mermin). Clearly, removing Albuquerque's spending limits threatens serious and irreparable harm to the public interest.

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appendix.

In view of the compelling interests served by Albuquerque's spending limits, plaintiff has not established a likelihood of success on the merits of his First Amendment challenge, as the district court correctly found. As explained more fully below, *Buckley v. Valeo*, 424 U.S. 1 (1976), does not set forth a *per se* rule that automatically requires invalidation of all limits on campaign spending. Instead, *Buckley* leaves the door open to new factual proof, not presented to the *Buckley* Court, demonstrating why limits on campaign spending are necessary to serve the compelling governmental interest in deterring corruption and the appearance of corruption in the political process. In addition, nothing in *Buckley* forecloses the consideration of new, compelling interests, not specifically addressed in *Buckley*, which support the constitutionality of Albuquerque's limits on campaign spending. The record here fully supports the constitutionality of Albuquerque's spending limits, mandating the denial of plaintiff's motion for injunctive relief.

Finally, plaintiff Rick Homans is unable to establish the type of irreparable harm necessary for injunctive relief. The sequence of events below demonstrates that Homans was fully aware that the spending limits could be reinstated prior to the election following a scheduled trial on the merits on August 27, 2001. The undisputed evidence shows that Homans

announced that he would be a candidate for mayor well over a year ago. Exhibit 3, "In Brief: Around ABQ," Albuquerque Journal, June 6, 2001 (noting that Homans "announced [his candidacy] more than a year ago").

Homans also bypassed the opportunity for a full trial on the merits of the constitutionality of Albuquerque's spending limits, which was scheduled to go forward during the week of August 27, 2001 in the state court action of *Duran v. Archuleta*, No. CV 2001-01420 (Second Judicial District). By his own admission, Homans knew that Albuquerque's limits had only been preliminarily enjoined by the state court in the *Duran* case in May 2001, and Homans therefore was on notice that the pending state-court injunction against enforcement of the limits could be lifted once the trial on the merits had been completed. Indeed, Homans admits having received the May 21, 2001 letter ruling of the state court judge in the Duran case, Exhibit C to Homans' complaint, p. 2, which states that "The City will have an opportunity at trial on the merits to attempt to show that the spending limits in Albuquerque are narrowly tailored and based upon governmental interests more compelling than those rejected by the U.S. Supreme Court in *Buckley.*"

The state court trial in the *Duran* case was scheduled for August 27, 2001, and Homans' affidavit does not deny that he was aware of this.[2] Indeed, Homans was listed as a witness by the plaintiffs in the *Duran* case. Homans was entirely free to join the *Duran* action as a plaintiff and proceed to trial on the merits on August 27 (the sole reason for the dismissal of the state court action was that no candidate elected to join as a plaintiff, depriving the voter-plaintiffs of standing). Harm brought on by the moving party cannot serve as the basis for the drastic remedy of a preliminary injunction. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.") (citing 11A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure §* 2948.1 pp. 152-53 (1995).

Accordingly, and in view of the harm to the public interest that would result from eliminating Albuquerque's limits on campaign spending, the request for an injunction restraining all enforcement of Albuquerque's spending limits pending appeal should be denied.[3]

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[2] Homans was present in court, sitting at counsel table, throughout the entire preliminary injunction hearing held by the district court on August 30, 2001, but his counsel elected not to call him to testify.

[3] In the event this Court were to find, contrary to the City's arguments, that the existence of the state court injunction against the spending limits during part of the campaign creates a balance of hardships warranting any relief to Homans, the Court nevertheless should not grant the drastic remedy of enjoining all further enforcement of the limits for

LEGAL ARGUMENT

To obtain the unusual remedy of an injunction pending appeal, plaintiff must demonstrate each of the following: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not issued; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) that the public interest will not be harmed. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1019 (10th Cir. 1996).

I. BECAUSE ALBUQUERQUE'S LIMITS ON CAMPAIGN EXPENDITURES ARE PERMISSIBLE UNDER THE FIRST AMENDMENT, PLAINTIFF HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS.

As the evidence submitted below unequivocally demonstrates, and as the district court found, Albuquerque's limits on campaign spending further several critical governmental objectives, including preventing political corruption and its appearance, preserving the public's confidence in the integrity of the political process, allowing candidates and elected officials to spend their time serving the public rather than engaging in fundraising, and promoting a healthy and competitive electoral system. The evidence also clearly established that candidates can run vigorous and effective campaigns for city office while keeping their expenditures within these limits.

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the remainder of the campaign, since a lesser remedy would suffice to address any such

Accordingly, Albuquerque's spending limits satisfy First Amendment requirements, and Homans cannot establish the likelihood of success on appeal.

A. *Buckley v. Valeo* does not automatically invalidate all limits on campaign spending.

Plaintiff contends that this Court must overrule *Buckley v. Valeo*, 424 U.S. 1 (1976) in order to sustain the City's limits on campaign spending. That contention is incorrect. *Buckley* did not announce a *per se* ban on any and all limits on campaign spending. Instead, it held that the congressional spending limits established by FECA should be given "exacting scrutiny" because of their potential impact on First Amendment rights of political expression, 424 U.S. at 44-45, and that the FECA limits were not justified based on the record before the Court. The facts do matter, even when courts are applying the strictest standard of constitutional review.[4] Exacting scrutiny of limits on campaign spending is *not* the same as a *per se* ban on

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harm. *See infra* at Part II.

[4] While the *Buckley* Court referred to "exacting scrutiny," 424 U.S. at 44, it did not, at any time in the opinion, cite strict scrutiny as the standard of review, nor did it employ the commonly understood language for strict scrutiny, requiring that a measure be "narrowly tailored" to satisfy a compelling state interest. *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 903 (2000) (noting that *Buckley* "referred generally to 'the exacting scrutiny required by the First Amendment,'" while treating FECA's expenditure limits as a more direct restriction on expression than its contribution limits) (citing *Buckley*, 424 U.S. at 16). As explained above, however, even if strict scrutiny applies, expenditure limits are not unconstitutional *per se*.

such limits. In recent years, the Supreme Court has upheld a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (applying strict scrutiny to Michigan statute restricting independent expenditures by corporations in political campaigns, but upholding restriction); *Burson v. Freeman,* 504 U.S. 191 (1992) (applying strict scrutiny to state ban on electioneering activity near polling places, but upholding ban).[5] 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)). Accordingly, plaintiff's bare invocation of *Buckley* cannot establish the unconstitutionality of Albuquerque's spending limits. As the record demonstrated, Albuquerque's spending limits are closely drawn to serve compelling governmental interests, including interests whose sufficiency was not tested in *Buckley*.

[5] Even decisions that strike down particular campaign restrictions demonstrate that the constitutionality of a restriction is factually contingent, not based on *per se* rules. For example, *Colorado Republican*: "the lack of coordination between the candidate and the source of the expenditure . . . prevents us 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 in the electoral system." 518 U.S. at 617 (emphasis added).

In *Buckley v. Valeo*, the Supreme Court addressed the constitutionality of the Federal Election Campaign Act of 1974 ("FECA"). 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. *See Buckley*, 424 U.S. at 23-38. On that basis, *Buckley* upheld FECA's limits on the amount that donors can contribute to candidates. 424 U.S. at 20-38. The Court nevertheless struck down the limits on overall campaign spending, concluding, on the record before it, that the contribution limits of FECA alone would be sufficient to corruption and the appearance of corruption. As the Supreme Court stated: "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 55-56. Because the Court rejected the need for spending limits as a factual matter, rather than as a matter of law, it left the door open to upholding spending limits on a different factual record. As noted in the concurring opinion of Judge Avern Cohn in *Kruse v. City of Cincinnati*, 142 F.3d 907, 920 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998):

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be 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.

(concurring opinion of Cohn, D.J., sitting by designation).

In addition, *Buckley* left the door open to identify new and compelling governmental interests, not specifically discussed and rejected in *Buckley*, that could justify a state's enactment of campaign spending limits. The *Buckley* Court carefully listed the three specific governmental interests that had been offered as justifying the FECA's limits on congressional campaign spending limits: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. *See Buckley*, 424 U.S. at 55-56. While rejecting these interests as a basis for the particular limits contained in FECA, the Court did not hold that there could never be a new and compelling governmental interest that could justify campaign spending limits. Rather, the Court stated: "No governmental interest *that has been suggested* is sufficient to justify [the congressional spending limits]." 424 U.S. at 55 (emphasis added). This clearly leaves the

door open for courts to consider different compelling interests as a basis for upholding spending limits.

In the 25 years since *Buckley*, the Supreme Court has not again reviewed any statutory scheme establishing limits on the amount that candidates may spend on their election campaigns.[6] In the Court's most recent cases addressing other campaign finance issues, however, a total of four Justices have now gone on record suggesting (or stating outright) that neither *Buckley* nor the First Amendment should be read as an inflexible bar to campaign finance regulation, even with respect to spending limits.[7]

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[6] Subsequent Supreme Court decisions cited by Homans, such as *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) and *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996), address only the constitutionality of limits on *independent expenditures* by political action committees and political parties, not spending limits on expenditures by candidate campaigns.

[7] *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 913 (2000) (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 916 (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. FEC*, 518 U.S. 604, 649-50 (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 repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.").

Lower federal court judges have also recognized that *Buckley* does not stand as a *per se* bar to the constitutionality of spending limits. For example, although the U.S. Court of Appeals struck down spending limits enacted by the City of Cincinnati, a concurring opinion by Judge Cohn in that case recognized that, on the right factual record, limits on spending could be upheld consistent with *Buckley* and the First Amendment. *Kruse v. City of Cincinnati*, 142 F.3d at 919. More recently, U.S. District Judge William K. Sessions, III, noted that "[s]pending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*…" *Landell v. Sorrell*, 118 F. Supp. 2d 459, 482 (D. Vt. 2000) While Judge Sessions ultimately struck down Vermont's spending limits on the authority of *Buckley*, he took note of the more recent Supreme Court commentary in the *Nixon* and *Colorado Republican* decisions and observed that "[p]owerful, if not controlling, judicial commentary such as this reinforces the view that the constitutionality of expenditure limits bears review and reconsideration." *Landell v. Sorrell*, 118 F. Supp. 2d at 482.[8] The district court, therefore, correctly rejected the plaintiff's argument that *Buckley*

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[8] The *Landell* decision currently is on appeal to the United States Court of Appeals for the Second Circuit (No. 00-9159(L)).

establishes a *per se* rule automatically invalidating the City's spending limits.

B. Albuquerque's Spending Limits Are Constitutional Because They Are Necessary To Serve The Compelling Interest In Deterring Corruption And The Appearance Of Corruption.

As discussed above, *Buckley* and subsequent Supreme Court decisions recognize the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). While the record before the *Buckley* Court in 1976 may have suggested that contribution limits alone were sufficient to limit the improper influence of money and insure citizens' faith in the integrity of government, the record now available emphatically refutes any such conclusion.

1. Unlimited Spending and Public Confidence in Government. Although campaign contributions in federal elections have remained limited to $1,000 per election since *Buckley* was decided, candidates' pursuit of ever-larger campaign war chests has fueled greater and greater public cynicism about

the ability of elected officials to act in the public interest. According to survey research conducted among Albuquerque voters in 1998, an overwhelming majority of Albuquerque voters believe that campaigns for national office in New Mexico are too influenced by special interest money, with two-thirds of respondents characterizing national elections as "dishonest." Exhibit 2, Survey Findings, p. 3 (questions 14, 15). *See also, e.g.*, Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1129-30 (1994) (citing Gordon S. Black poll finding that 74% of voters believed that "Congress is largely owned by the special interest groups").[9]

By contrast, the majority of voters agree that local Albuquerque elections, which are conducted with limits on spending, are basically fair and honest. Exhibit 2, Survey Findings, p. 5 (questions 21, 22). Overwhelming majorities agree that local Albuquerque elections are less influenced by special interests than state and national elections. *Id.* (question 27). On the

[9] Opinion polls and other barometers of public sentiment, such as votes on campaign finance referenda, are relevant sources of evidence for courts assessing the validity of campaign finance laws such. *Nixon*, 120 S.Ct. at 908; *Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d 445, 457-58 (1st Cir. 2000). Albuquerque's spending limits were adopted as part of a city charter amendment presented as a ballot question in 1974, passing with over 90% of the vote. Exhibit 1, Gierzynski Report at 4. *Cf. Nixon*, 120 S. Ct. at 908 ("Although majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: '[A]n overwhelming 74 percent of the voters of Missouri

other hand, if spending limits are removed, voters firmly believe that the potential for corruption will increase, ordinary citizens will be less able to run for office, and elected officials will spend more time listening to and raising money from special interests. *Id.*, p. 8 (questions 35, 37, 39, 40). Nearly 60% of Albuquerque voters say that they will have "less faith in the integrity of the election process in Albuquerque" if spending limits are removed. *Id.*, (question 36). Overall, 87% percent of voters expressed support for maintaining limits on spending in Albuquerque elections. *Id.* (question 29).[10]

2. Unlimited Spending and Voter Turnout. As the Supreme Court has recognized, the public's perception of political corruption can become destabilizing unless countered:

> 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."

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determined that contribution limits are necessary to combat corruption and the appearance thereof.'") (citation omitted).

[10] These findings are echoed by those of a recent Albuquerque Journal poll conducted August 14-16, 2001, which found that 74% of respondents favored a cap on campaign expenditures. Exhibit 4, *Most Voters for Spending Caps*, Albuquerque Journal, August 20, 2001.

Nixon, 120 S.Ct. at 906 (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)). In Albuquerque, where campaigns have been conducted under reasonable spending limits for over 27 years, "the willingness of voters to take part in democratic governance", as measured by voter turnout rates, has remained higher than in cities where unlimited spending prevails. According to a report prepared by Professor Anthony Gierzynski, a political scientist and nationally recognized scholar on campaign finance, average turnout in Albuquerque elections from 1974 to 1999 was 40.2%, compared to turnout rates for city elections across the country, which are typically in the 25-35% range. Exhibit 1, Gierzynski Report at 7. Compared to cities most similar to Albuquerque in terms of the timing of their municipal elections (odd-numbered years), Albuquerque generally has enjoyed an even greater turnout advantage. *Id.*, Figure 2. The lowest turnout in any mayoral election – 33% -- occurred in 1997, the year when spending was the highest because the spending limits had been enjoined. *Id.* at 8. Clearly, removing Albuquerque's spending limits, which would greatly reduce voters' confidence in the integrity of city government, threatens to undermine the crucial goal of encouraging voter turnout and participation in city elections.

3. <u>Unlimited Spending and "Bundling" of Contributions</u>. Other evidence presented below compellingly demonstrates how contribution limits alone have failed to deter corruption, and the appearance of corruption, in federal elections. As explained in the testimony of Larry Makinson, one of the nation's leading experts on campaign finance, contribution limits alone, without spending limits, leave candidates locked in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. The federal regime of unlimited spending has led to congressional elections in which the winners for U.S. House seats outspent the losers, on average, by more than two to one in November 2000. *See* Ex. 16, 2000 Election Overview – Stats at a Glance.

The need for unlimited funds leads to practices such as "bundling," which render contribution limits alone insufficient to deter the corrupting influence of special interest money. Through this practice, which can take a variety of forms, donors affiliated with a particular interest can magnify their influence, despite the existence of contribution limits, by coordinating their contributions. Mr. Makinson fully explained at the hearing how such practices undermine the ability of contribution limits alone to limit the influence of large donors. *See* Transcript of August 30, 2001 hearing. *See*

also Exhs. 17 (bundling by MBNA in 2000 presidential election); Ex. 18 (bundling by industries regulated by congressional financial services committee). *See generally* Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42 (1994).

Bundling, however, is just one manifestation of a more general problem with relying on contribution limits alone to deter corruption. Limits on the contributions that may be made by a particular individual or corporation do not fully address the concentrated financial power that well-heeled interests can exert when candidates face an unlimited need for funds. Fundraising events, for example, present wealthy special interest donors with an opportunity to make their financial clout clear to elected officials despite limits on contributions. When one industry group with deep pockets can generate multiple contributions that are collectively quite large, and when a candidate needs every possible dollar to avoid being bested in the financial arms race, limits on contributions alone simply cannot solve the problem of improper influence by wealthy interests. *See* Transcript of August 30, 2001 hearing (Makinson Testimony).

Based on this record, which was not available to the Supreme Court in *Buckley*, the district court correctly found that Albuquerque's spending

limits can be upheld consistent with the First Amendment. *Cf. Kruse v. City of Cincinnati*, 142 F.3d at 919 (Cohn, D.J., concurring) ("it does not necessarily follow from the Supreme Court's rejection of the interest in limiting the high costs of campaigns that the interest in preserving faith in democracy is per se insufficient to justify the expenditure limits.")

C. Albuquerque's Spending Limits Are Constitutional Because They Permit Candidates And Officeholders to Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties.

Certain state interests that might prompt a state to adopt spending limits simply were not addressed by the *Buckley* Court, and thus are not foreclosed as a potential basis for regulation in this area. For example, the *Buckley* Court did not consider whether the governmental interest in preserving the time of officeholders from the demands of fundraising, so as better to perform their duties as representatives, would provide a compelling interest in limiting campaign spending. *See Kruse*, 142 F.3d at 920 (Cohn, D.J., concurring). *See also Nixon*, 120 S.Ct. at 916 ("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") (Kennedy, J., dissenting); 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).[11]

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. *See* Exhibit 6, Declaration of Martin Schram, attaching excerpts from *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995) (discussing how demands of fundraising draw time and attention of members of Congress away from their duties as legislators). Indeed, the declaration of Albuquerque Mayor Jim Baca details how, because the city's limits were enjoined by the state court in May 2001, he is now spending three hours per day on fundraising. Ex. 9, Baca Declaration. Mayor Baca further explained the harmful effect on public confidence resulting from such campaign solicitations by elected officials, which create a possible misperception among those doing business with the city that they are being "shaken down" for campaign contributions. Turning candidates for city office into full-time fundraisers will not strike a blow for First Amendment

[11] *See also Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, 531 U.S. 923, 121 S. Ct. 2351, 2359 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 light of post-Buckley developments in campaign finance") (citations omitted).

freedoms, but instead will make them more captive to the demands of the industries and special interests able to supply the largest sums. The district court correctly concluded that Albuquerque's strong interest in avoiding such damage to its political process justifies the reasonable spending limits it has enacted.[12]

D. Albuquerque's Spending Limits Are Narrowly Tailored to Allow Effective Campaigns and a Vibrant Public Debate.

The current spending limits for Albuquerque's mayoral and city council elections are extremely generous. Indeed, only two years ago, they were doubled from their previous levels. Under the newly enacted limits, candidates for mayor, city council president, and city council member may spend an amount equal to twice the amount of the annual salary for those offices. Accordingly, candidates for mayor may now spend up to $174,720 (twice the annual salary of $87,360), and candidates for city councilor may spend $17,056 (twice the annual salary of $8,528). Before these limits were increased in 1999, candidates were limited to spending an amount equal to the salary for the office in question.

[12] The City also believes that its spending limits are justified by the compelling governmental interest in promoting electoral competition and assuring that all citizens can participate equally in the political process. *Cf. Nixon*, 120 S. Ct. at 912 (Breyer, J., joined by Ginsburg, J., concurring) (noting that *Buckley*'s apparent rejection of this interest as a basis for campaign spending limits "cannot be taken literally").

These generous limits are clearly more than adequate for running an effective campaign for mayor of Albuquerque. Indeed, during the last mayoral election in 1997, candidates were free to spend an unlimited amount because the spending limits had been temporarily enjoined; yet the highest-spending candidate spent only $175,600, only $888 more than the current cap. The remaining candidates, including the winning candidate, spent much less. This presents irrefutable evidence that higher spending simply is not necessary for running an effective campaign.

Indeed, by contending that an effective campaign for mayor requires an expenditure of $500,000 or more, plaintiff Homans necessarily contends that *no previous candidate for mayor of Albuquerque has ever run an effective campaign* (since none has ever spent an amount anywhere close to that figure). Such an assertion simply cannot be credited. Indeed, it is undercut even by Homans' own evidence. For example, his evidence in the court below shows that billboard space on each of Albuquerque's two major interstate highways – which provides continual exposure to thousands of citizens every day – can be purchased for as little as $2,500 per month. *See* Plaintiff's Memorandum Brief at 5. Further, Homans' campaign consultant has stated publicly that 30-second commercials on cable television can be purchased for less than $10 per airing, and that the upper-end cost for

Homans' commercials has been around $400. Exhibit 7, "Mayoral Ad Campaign Blitz Starts Early," Albuquerque Journal, July 10, 2001, p. 2. There are clearly many low-cost ways to reach out to voters in Albuquerque, including attendance at the many public forums that are traditionally important in Albuquerque elections.

Even under previous, stricter spending limits that were in effect until 1999, Albuquerque has enjoyed vigorous electoral competition in mayoral races, with numerous candidates coming forward to seek office. The report of Professor Anthony Gierzynski, who has analyzed spending patterns in Albuquerque elections from 1989 through 1999, documents precisely how Albuquerque's spending limits have fostered competitive elections and effective communication with voters. *See* Exhibit 1, Gierzynski Report.

In sum, there is every reason to believe that invalidating Albuquerque's spending limits will lead to less electoral competition, contrary to the First Amendment values of a full and robust debate. When candidates are able to amass huge campaign war chests, it has the effect of scaring off potential challengers who are unable to raise similar sums. Exhibit 8, Report of Dr. Donald A. Gross (hereafter, "Gross Report"), at 8 (attached to Declaration of Dr. Donald A. Gross); *see also* Janet Box-Steffensmeier, "A Dynamic Analysis of the Role of War Chests in

Campaign Strategies," *American Journal of Political Science*, 40: 352-371 (1996). Unlimited spending thus narrows the candidate field, discouraging talented people from running for office, either because they cannot raise the funds needed to be competitive, or because they do not wish to become beholden to the special interests capable of supporting such high-spending campaigns. Contrary to plaintiff's contentions, the likely effect of removing spending limits will be to reduce electoral competition in Albuquerque, thus removing the necessary conditions for meaningful debate of the issues, directly contrary to the goals of the First Amendment.

E. Albuquerque's Spending Limits Do Not Impede Effective Communication with Voters.

The evidence demonstrates that high-spending campaigns are not necessary to stimulate voter information about, or participation in, elections. As already noted above, Professor Gierzynski's report demonstrates that voter turnout in Albuquerque elections has been higher than turnout in comparable cities without spending limits. A study by political science professor Donald A. Gross provides further support for this point. Professor Gross' empirical analysis of congressional elections indicates that simply increasing the amount of money in the campaign is as likely to reduce, as it is to increase, voter turnout. *See* Exhibit 8, Gross Report.

Further, Professor Gierzynski found that, in cities without spending limits, candidates generally spend a lower percentage of their overall funds on voter contact than is true of candidates in Albuquerque elections. Exhibit 1, Gierzynski Report at 14; *see also* Figure 5. Overall, about three-quarters of money spent by Albuquerque candidates from 1989 through 1999 was spent on voter contact, compared to about 50% of spending by candidates in medium-sized California cities and in Seattle, and about 68% of spending by candidates in local New Jersey elections. *Id.*

Thus, the evidence available on this record demonstrates that high-spending campaigns are not necessary, and indeed are often detrimental, to the goal of an informed, politically active citizenry. Although *Buckley* stated that a restriction on spending "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," 424 U.S. at 19, the record before the Court in *Buckley* did not demonstrate otherwise. The record before this Court, 25 years, later is different.

For all these reasons, plaintiff has not established a likelihood of success on his First Amendment challenge to Albuquerque's spending limits.[13]

II. ANY INJURY SUFFERED BY HOMANS IS THE RESULT OF HIS OWN DELAY AND LITIGATION STRATEGY, AND IS NOT COGNIZABLE.

As established above, the mere fact that Homans would like to spend more than the applicable limit does not by itself establish irreparable harm, given the overwhelming evidence from past elections that the spending cap is sufficiently generous to permit competitive campaigns by challengers and effective communication with voters. Homans nevertheless claims irreparable harm because he has already exceeded the city's spending limits and would allegedly have to cease spending additional money if the injunction is not maintained. The proper course, knowing that he intended to exceed the limits, was for Homans to assert his constitutional claims in a timely fashion so as to obtain a trial on the merits *before* exceeding the limits. Had he presented his legal claims in a timely fashion, there would be no need for a preliminary injunction. Homans' own delay cannot serve as the basis for a claim of irreparable harm justifying preliminary injunctive

[13] Plaintiff Homans' Memorandum Brief in Support of Plaintiff's Motion for Preliminary Injunction relies solely upon his First Amendment claim; accordingly, we do not address his claims under the New Mexico Constitution.

relief. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.") (citing 11A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice & Procedure §* 2948.1 pp. 152-53 (1995).

The issuance of an injunction against the spending limits in May 2001 in the state court action *Duran v. Archuleta*, CV 2001-01420 (Second Judicial District), does not alter Homans' responsibility for seeking relief in a timely manner. Precisely because that action was filed in a more timely manner, it was ready for trial on the merits the week of August 27, 2001. Homans was entirely free to join that action as a plaintiff and participate in the trial.

While the district court found that Homans had established irreparable injury, this conclusion appeared to rest primarily on the notion that an alleged harm to First Amendment interests is generally considered irreparable. This, however, ignores the fact that Homans has not established a likelihood of success on his First Amendment claim. Moreover, this Court can determine that denial of injunctive relief was appropriate based on Homans lack of cognizable harm, even if that was not the ground relied upon by the district court to deny relief. *See United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court free to affirm district

court on any grounds supported by the record). Here, the record firmly supports the conclusion that any alleged harm suffered by Homans is self-inflicted and therefore not cognizable.

Even if the unique facts concerning the pendency of a state court injunction during part of the campaign season were deemed to establish a balance of equities favoring Homans, the drastic relief he requests of totally eliminating the spending caps would not be appropriate. Even if Homans had properly relied upon the state court injunction to overspend the limits prior to September 1, the City retains an important interest in maintaining some upper cap on the amount that candidates may spend in the upcoming mayoral race. Homans, while declining to state in his affidavit how much he has actually spent on the campaign, announced in a news interview that he had spent approximately $200,000. See "Judge Upholds Albuquerque's Limit on Campaign Spending," The New York Times, September 3, 2001, A13. Accordingly, if the Court were to conclude that some additional spending must be permitted during the next month because of Homans' alleged reliance on the state court injunction for his previous spending, the Court could enter a limited injunction providing that candidates may spend some multiple of the current limit – for example, 150% of the limit – rather than simply declaring that no cap whatsoever may be enforced for this

election. (It should be noted that the successful candidate in the last mayoral race, Jim Baca, spent only $43,000 on television ads during his entire campaign; *see* Ex. 9, Baca Declaration). Such a limited remedy would respond to Homans' claim of harm, while also recognizing that Homans has not demonstrated a likelihood of success on the merits.

III. THE HARM TO THE CITY AND TO THE PUBLIC INTEREST OUTWEIGHS ANY COGNIZABLE HARM TO PLAINTIFF.

The previous discussion of the compelling governmental interests served by Albuquerque's spending limits, Part I., *supra*, also establishes the serious harm to the defendants and to the public interest that would be caused by removing the city's spending limits. Further, in Part II, the City has also demonstrated that any harm claimed by Homans is not cognizable. For the reasons explained in Part I, this harm clearly outweighs any cognizable harm to plaintiff stemming from the denial of his request for injunctive relief.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

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