UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

RICK HOMANS,

Plaintiff,

v.

No. CIV-01-917 MV/RLP

THE CITY OF ALBUQUERQUE,
a municipal corporation and
FRANCIE D. CORDOVA,
in her capacity as Clerk of the City of
Albuquerque,

Defendants.

DEFENDANTS' MEMORANDUM BRIEF ON THE MERITS

Defendants, the City of Albuquerque, a municipal corporation, and Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque, hereby submit their Memorandum Brief on the Merits in support of entry of judgment in favor of defendants. Defendants have also submitted separately their Proposed Findings of Fact and Conclusions of Law. In addition, Exhibits 1 through 21 offered by defendants, and admitted by stipulation of the parties, are assembled in two volumes submitted separately. Defendants have also included in Volume II of the Exhibits a copy of the Transcript of Proceedings at the preliminary injunction hearing held by this Court August 30, 2001, listed as Exhibit 22.[1]

INTRODUCTION

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

[1] The procedural history of this case to date is set forth in ¶¶ 8-9 of Defendants' Proposed Findings.

voters of Albuquerque approved by a vote of over 90%. Def. Ex. 5, p. 5-45, "Election Code, Code of Ethics Win Approval," Albuquerque Journal, February 27, 1974, A1. The limit for mayoral campaigns is currently set at twice the annual salary of the mayor, or $174,720 for the 2001 election. Article XIII, § 4(d)(2), Albuquerque City Charter.

The evidence presented to this Court demonstrates that 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, promoting voter interest in and connection to the electoral process, and promoting robust debate of the issues by fostering competitive elections. In addition, the evidence demonstrates that the spending limit of $174,720 for mayoral campaigns is fully adequate to permit vigorous and effective campaigns and is thus closely tailored to serve the City's compelling interests.

As explained more fully below, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), does not set forth a *per se* rule that automatically requires invalidation of any 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 spending limit. Because the record here firmly establishes that Albuquerque's limit on spending in mayoral

campaigns is closely tailored to serve compelling governmental interests, the Court should enter judgment in favor of defendants dismissing plaintiff's claims.[2]

ARGUMENT

I. ALBUQUERQUE'S LIMIT ON CAMPAIGN EXPENDITURES SERVES COMPELLING GOVERNMENTAL INTERESTS AND IS PERMISSIBLE UNDER THE FIRST AMENDMENT.

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

Plaintiff contends that this Court must overrule *Buckley v. Valeo* in order to sustain Albuquerque's limit 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. Exacting scrutiny of limits on campaign spending is *not* the same as a *per se* ban on such limits. The facts do matter, even when courts are applying the strictest standard of constitutional review. 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

[2] For the same reasons that Albuquerque's spending limit satisfies First Amendment requirements, it is also valid under the free speech clause of the New Mexico Constitution, Art. II, § 17. Defendants understand that plaintiff is not pursuing his claims under other provisions of the New Mexico Constitution.

activity near polling places, but upholding ban).[3] 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)).

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 deter corruption and the appearance of corruption.

Buckley's discussion of whether FECA's spending limits were necessary to deter corruption or the appearance of corruption demonstrates the factually contingent nature of the Court's ruling on this point. While the appellate court in *Buckley* had ruled that "the expenditure restrictions [of FECA] are necessary to reduce the incentive to circumvent direct contribution limits," the Supreme Court found: "There is no indication

[3] 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, in *Colorado Republican*, the Court said: "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 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." *Buckley*, 424 U.S. at 55-56. Thus, the assertion that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law.

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 to leaving open the possibility of a different factual record supporting the necessity of limits on spending as an anti-corruption measure, *Buckley* left the door open to identifying new and compelling governmental interests, not specifically rejected in *Buckley*, that could justify the 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 26 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.[4] 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. *See Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 405 (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 409 (Kennedy, J., dissenting) (noting difficulty of constitutional issues surrounding campaign regulation but stating, "For now, however, I would leave open the possibility

[4] Subsequent Supreme Court decisions 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.

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."). *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).[5]

[5] Two justices have taken the opposite position, stating that limits on contributions, as well as limits on spending, violate the First Amendment. *Nixon,* 528 U.S. at 410-430 (Thomas, J., joined by Scalia, J., dissenting). The remaining justices, Chief Justice Rehnquist, Justice O'Connor, and Justice Souter, have refrained from taking any position on whether the First Amendment presents a *per se* bar to any legislation limiting spending in candidate campaigns.

A further point should be added to clarify the City's position. The City's contention that *Buckley* is not an absolute ban on spending limits does not depend on counting up the four concurrences and dissents in *Nixon* and *Colorado Republican* described above. The fact that *Buckley* leaves the door open to the constitutionality of spending limits, instead, is established by analysis of *Buckley* itself, and by the nature of exacting scrutiny as applied by a majority of the Supreme Court in cases such as *Austin v. Michigan Chamber of Commerce* and *Burson v. Freeman*.

Lower federal court judges have also questioned whether *Buckley* stands 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

> Spending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*: (1) "Freeing office holders so they can perform their duties," in the words of Judge Cohn, *Kruse[v. City of Cincinnati]*, 142 F.3d at 920, or as Justice Kennedy put it, "permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising," *Shrink*, 120 S.Ct. at 916; (2) "[P]reserving faith in our democracy," *Kruse*, 142 F.3d at 920; (3) "[P]rotecting access to the political arena" as stated by [Justice] Stevens, *Colorado Republican*, 518 U.S. at 649-650; and (4) "diminish[ing] the importance of repetitive 30-second commercials." *Id.*

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.[6]

[6] As noted above, defendants believe the compelling interests discussed in this Memorandum can, on the proper record, justify campaign expenditure limits without requiring *Buckley* to be overruled. If, however, recognition of any of these important interests were deemed to be barred outright by *Buckley,* defendants wish to preserve their argument that the time has come for *Buckley* to be overruled to the extent required to uphold Albuquerque's spending limits. In addition to the interests discussed in this Memorandum, defendants specifically wish to preserve, *inter alia*, the arguments that limitations on expenditures should be analyzed and reviewed as limitations on conduct rather than speech under *United States v. O'Brien*, 391 U.S. 367 (1968), or as reasonable

The order of the 10th Circuit motions panel granting plaintiff's emergency request for an injunction pending appeal stated that plaintiff had established a likelihood of success on the merits, noting that *Buckley* demands "exacting scrutiny" of spending limits. 246 F.3d at 1243 (quoting *Buckley v. Valeo*, 424 U.S. at 54-55). The decision of a motions panel on an emergency motion for an injunction pending appeal, however, does not constitute a binding decision that the plaintiff is entitled to permanent injunctive relief. *See American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1476-77 (3d Cir. 1996) (en banc) (district court erred in concluding that it was bound to enter permanent injunction in favor of plaintiffs based on emergency ruling of court of appeals granting plaintiffs' motion for preliminary injunction, even when record on request for permanent injunction was identical to record on request for preliminary injunction). As noted in *ACLU of New Jersey*, the court of appeals' emergency order "was based on an assessment of the *likelihood* that plaintiffs would succeed on the merits, and neither constitutes nor substitutes for an actual finding that plaintiffs have succeeded on the merits and are entitled to permanent relief." 84 F.3d at 1477 (emphasis in original).

Moreover, while the 10th Circuit's ruling noted that spending limits had been struck down in *Kruse v. City of Cincinnati* and in *Landell v. Sorrell*, the ruling does not state that *Buckley* created a *per se* rule which automatically requires invalidation of any and all limits on campaign spending, regardless of the facts. In addition, this Court is

---

time, place and manner regulations under cases such as *Kovacs v. Cooper*, 336 U.S. 77 (1949), as well as the argument that limits are justified as a means of ensuring that all citizens can participate equally in the political process. *Cf. Nixon*, 528 U.S. at 402 (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").

now able to undertake a more comprehensive examination of the factual record than was possible in light of the time constraints created by plaintiff's request for emergency pre-election relief at the time of the injunction motion. Accordingly, it remains open to this Court to determine that, based upon the factual record showing how spending limits have actually operated in Albuquerque since 1974, and/or based upon new and compelling governmental interests not identified in *Buckley*, Albuquerque's limit on campaign spending in mayoral elections survives First Amendment scrutiny.

B. Albuquerque's Spending Limit Serves The City's Compelling Interest In Deterring Corruption And The Appearance Of Corruption and Promoting Public Confidence in Government.

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, 84% 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." Def. Ex. 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) p. 3 (questions 14, 15).[7]

By contrast, the majority of voters agree that local Albuquerque elections, which are conducted with limits on spending, are basically fair and honest. Def. Ex. 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 other hand, if spending limits are removed, the great majority of voters 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). Fifty-nine percent 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,

[7] 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. *Nixon,* 528 U.S. at 394 ("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 determined that contribution limits are necessary to combat corruption and the appearance thereof.'") (citation omitted); *Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d 445, 457-58 (1st Cir. 2000).

87% percent of voters expressed support for maintaining limits on spending in Albuquerque elections. *Id.* (question 29).

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."

Nixon, 528 U.S. at 390 (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, "the willingness of voters to take part in democratic governance", as measured by voter turnout rates, has remained higher than in cities where spending has been unlimited. 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. Def. Ex. 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 record also permits a comparison of turnout figures for the years when limits were in place for Albuquerque mayoral elections with those for the two mayoral elections in which the limits were enjoined. Based on the City's official turnout figures, the

average turnout in mayoral general elections for which the spending limits were in place (1974, 1977, 1985, 1989, and 1993) was 43.1%, while the average turnout for the two years in which the limits were enjoined (1997 and 2001) was 37.7%. (Calculations based on Exhibit A to Joint Stipulation). Further, the lowest turnout in any mayoral election – 33% -- occurred in 1997, one of the years when the limits were enjoined. *Id.* at 8.

The report of Professor Donald Gross, a political scientist and campaign reform expert at the University of Kentucky, provides further support for this point. Based on his study of congressional elections, Dr. Gross concludes that spending limits thus can be expected to have a positive impact on voter participation because lower spending campaigns encourage candidates to place a greater reliance on direct forms of mobilization that are most effective in increasing voter turnout. *Id.* at 6. For this reason, Professor Gross concludes that "[i]t is the elimination of spending limits which is most likely to threaten the levels of voter participation seen in Albuquerque for the last twenty plus years." *Id.* at 6.

The fact that turnout was not precipitously low in the 2001 election (42.4%), when the limits were again enjoined, does not provide a reason to be sanguine about the long-term effect of eliminating Albuquerque's limits on campaign spending. The limits remained in place for part of the 2001 election, and given the legal uncertainties, only three of the eight mayoral candidates actually exceeded the limits. The candidate field in the 2001 Albuquerque election, and the results of the election, thus did not fully reflect the deleterious impact that unlimited campaign spending is likely to have in the long run. The evidence presented by defendants convincingly demonstrates that high-spending elections, over the long term, decrease voter interest and confidence in the electoral

process and deter electoral competition, directly contrary to the First Amendment goal of promoting an open and robust public debate. Albuquerque should not have to suffer this kind of damage to its political system, but should be permitted to maintain campaign finance regulations that have produced healthy, competitive elections with high voter turnout and strong public confidence in government.

3. The Federal Experience With Limited Contributions and Unlimited Spending. The federal experience with limited contributions and unlimited spending unequivocally demonstrates that contribution limits alone have failed to deter corruption and the appearance of corruption in congressional elections. This was detailed in the testimony and exhibits presented by Larry Makinson, Senior Researcher at the Center for Responsive Politics and 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. In 1974, the average cost of a winning U.S. House campaign was $100,000, while in the 2000 elections the average winning campaign cost $840,000. Even when adjusted for inflation, this reflects an increase of over 400% in expenditures for a winning campaign. Tr. 17; Def. Ex. 14. The federal experience also confirms that those who decline to participate whole-heartedly in raising huge amounts from special interests are seriously disadvantaged in competing for office. In the 2000 elections, the average winner outspent the average loser by close to three to one, with the average winner spending $840,000 and the average loser spending $300,000. 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. Overall, ninety-six percent of winning House candidates outspent their opponents. Def. Ex. 16; Tr. 20-21.

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. For example, a particular corporation can encourage its officers and employees (and their spouses or family members) 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. Candidates recognize the actual, unified source of such aggregated largesse, and they similarly recognize the severe disadvantage they will face in the electoral arms race if they do not accept this type of concentrated financial support. Under such a regime, well-heeled interests, such as industry groups with a stake in particular legislative battles, continue to wield enormous influence regardless of contribution limits. *See* Proposed Findings of Fact and Conclusion of Law, ¶¶ 33-45; *see also* 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.

The Center for Responsive Politics has extensively tracked and documented how this broad array of bundling practices affects federal elections. This research shows that "the people who do this tend not to be random companies or random people in the country, but people that have a specific legislative agenda." Tr. 30. For example, in the 2000 presidential election, MBNA America, the nation's largest credit card company, bundled over $240,000 in donations to the Bush campaign; the list of MBNA-affiliated individual contributors is six pages long. Def. Ex. 17; Tr. 28-29. At the time of the campaign, MBNA had a critical legislative goal: pushing through a bankruptcy bill that would make it more difficult for debtors to declare bankruptcy. Tr. 30. Mr. Makinson also cited the oil and gas industry's donations to the 2000 Bush campaign as an example of bundling that has aroused public suspicion that the government's energy policies may be based on "returning a favor" to donors. Tr. 30.

Bundling, of course, is a bipartisan phenomenon; in the 1996 presidential election, a large accounting firm was the largest single bundler of donations to both the Clinton and Dole campaigns. Tr. 31. Further, bundling is practiced not only by single corporations or individuals, but also by entire industries that collectively have an interest in a public policy issue. Tr. 32.

The problem of bundling, which makes contribution limits ineffective, is not caused by the so-called "soft-money" loophole. Pending legislation to close that particular loophole would have no effect on the practices described in Mr. Makinson's testimony. All of the contributions cited in Mr. Makinson's testimony are "hard money" contributions, and the undue influence caused by such contributions would continue even if unlimited soft-money contributions were banned. As Mr. Makinson explained, "If the Congress got rid of soft money tomorrow and the President signed it the day after, we'd still have bundling, because that's hard money." Tr. 34.

Based on his extensive research, Mr. Makinson testified that the federal system of relying on contribution limits alone to stem the influence of large donors, without imposing limits on overall spending, has not worked. Tr. 34-35. "[T]he reality is, if you really do look at what the patterns are on how elections are financed, they're financed by people that have a stake in the decisions that are made by the lawmakers." Tr. 34-35. This means that, in addition to their voting constituents – the citizens who live in their district – elected officials must develop "a second set of constituents. You may call them the cash constituents." Tr. 39. On many less-publicized issues that come before Congress, "the only people paying attention are the cash constituents, and they're very persuasive when you're a member of Congress and you've got to raise $800,000 for the next election . . . . The more it costs, the more any legislator has to think about – very deep[ly] about . . . -- how they're going to vote." Tr. 39-40.

4. <u>Other Evidence Demonstrating Public Concern About the Influence of Money in Politics</u>. The Supreme Court and lower courts have consistently relied upon newspaper accounts of the impact of money in politics as evidence demonstrating a

compelling state interest in addressing public concern about corruption and the integrity of government. *Nixon,* 528 U.S. at 393; *Daggett*, 205 F.3d at 457. Defendants' Exhibit 5 consists of news articles that either (1) illustrate the public concerns that led to the adoption of Albuquerque's spending limits in 1974; or (2) illustrate the perception of corruption stemming from the influence of money in politics in federal and state elections that continues to support the maintenance of campaign finance limits for city elections. *See* Proposed Findings, ¶¶ 11-20.

Based on the evidence presented in this case, which was not available to the Supreme Court in *Buckley*, it is clear that Albuquerque's spending limit is necessary to serve the City's compelling interest in deterring corruption and promoting public confidence in government. *See also* Defendants' Proposed Findings, ¶¶ 21-45.[8]

C. Albuquerque's Spending Limit Is Constitutional Because It Permits Candidates And Officeholders to Spend Less Time Fundraising And More Time Performing Their Duties as Representatives and Interacting With Voters.

Certain governmental interests that might prompt a jurisdiction to adopt spending limits simply were not addressed by the *Buckley* Court, and thus are not foreclosed as a

[8] The 10th Circuit's order granting plaintiff's motion for an injunction pending appeal states that the interests in "preserving faith in democracy and deterring the appearance of corruption are really no different than the interests deemed insufficient to justify expenditure limits in *Buckley*." 246 F.3d at 1244. But the panel did not address the passage in *Buckley,* cited above at pp. 4-5, indicating that the need for spending limits as an anti-corruption measure was rejected not as a matter of law, but as insufficiently supported by the factual record then before the *Buckley* Court. 424 U.S. at 55-56 ("*There is no indication* 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.") (emphasis added). Further, the panel did not address the substantial evidence in this record, not available to the *Buckley* Court, demonstrating that contribution limits alone in fact have proved utterly inadequate to deter the reality and appearance of corruption.

potential basis for upholding such limits. 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):

> 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.

Id. at 920. *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). The compelling nature of this interest as a basis for upholding campaign spending limits is persuasively set forth in 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). *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1769-70 (2001) (noting that expenditure limitations may serve the important goal of reducing the burdens and distractions of fundraising).

Notably, the 10th Circuit's order granting plaintiff's motion for an injunction pending appeal did not mention this interest as a potential basis for limits on campaign spending, because it viewed this Court's decision as identifying only two compelling

interests supporting spending limits, namely, "preserving faith in democracy and deterring the appearance of corruption." 246 F.3d at 1244. Clearly, the interest in preserving the time of officeholders so that they may fulfill their duties as representatives provides a strong, independent basis for spending limits that was not addressed in *Buckley*.

The evidence demonstrates 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 declaration of Jim Baca, the former Mayor of Albuquerque, states "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." Def. Ex. 9, Baca Declaration, ¶¶ 7-9. In addition, in the survey conducted among Albuquerque residents in 1998, voters expressed concern about this very issue. Seventy-eight percent of voters said that, if 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." Def. Ex. 2, at 8, Question 40. *See also* Def. Ex. 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); Testimony of Larry Makinson, Tr. at 22-23 (same).

Turning candidates for city office into full-time fundraisers will not strike a blow for First Amendment freedoms, but instead will make them more captive to the demands of fundraising, and less able to fulfill their duties as representatives. Albuquerque's

strong interest in avoiding such damage to its political process justifies the reasonable spending limits it has enacted.

D. Albuquerque's Spending Limit Serves The City's Compelling Interest In Increasing Voter Interest In And Connection To The Electoral System.

The record also establishes that limiting candidate expenditures is likely to promote voter interest in and connection to the electoral process because it may encourage candidates to rely more upon forms of direct contact with voters. This evidence is set forth in the report submitted by Professor Donald Gross, and is described in ¶¶ 51-60 of Defendants' Proposed Findings. Professor Gross's research demonstrates that, as compared to high spending in campaigns, mobilization of voters through direct contact by a candidate or political party not only is more effective in stimulating voter turnout, but also increases the likelihood that voters will be interested in the race, aware of the candidates' positions, and concerned about the outcome of the race. *Id.*

This may be because high spending campaigns tend to be media focused, leading citizens to view politics as a spectator sport. High-spending advertising in campaigns is sometimes used to alienate voters and dampen turnout rather than to encourage participation. High-spending campaigns also dampen participation by reinforcing the public's cynicism about the impact of money on the political process. *Id.* at 3-5.

Professor Gross's analysis of congressional campaign spending also shows that voter participation is much more likely to be stimulated by direct contact between voters and candidates or parties than by high-spending campaigns. *Id.* at 3-4. Personal canvassing has a much more substantial impact on voter turnout than direct mail or even telephone calls. *Id.* at 4. Spending limits thus can be expected to have a positive impact on voter participation by encouraging more emphasis on direct forms of mobilization in

election campaigns. Conversely, removing Albuquerque's spending limits will, if anything, work to reduce voter turnout. *Id.* at 5.

Professor Gross' research also contradicts the contention that unlimited campaign spending is necessary as a means for citizens to make a more informed voter choice. He found that campaign spending had either no effect or a negative effect on voters' political interest, concern about the outcome of the election, or attentiveness to news reports about the campaign. *Id.* at 7. While voters might be better able to identify candidates' names in high-spending campaigns, they were not better able to discern the ideological placement of the candidates. *Id.* at 7.

Again, in contrast to the ineffectiveness of high campaign expenditures, direct contact by a candidate or political party with a voter significantly increased voters' interest in the election, their concern about the outcome, and their ability to accurately place the candidates on ideological scales. "Just as direct personal contact with citizens seems to be the key to stimulating voter participation, it also seems to be the key to enhancing voter information and citizens' connection to the electoral process." *Id.* at 7-8.

Thus, spending limits, by encouraging this type of direct mobilization of voters, serve the compelling goal of promoting voter interest and engagement in the electoral process.

E. Albuquerque's Spending Limits Promote an Open and Robust Public Debate by Encouraging Electoral Competition.

Electoral competition is the indispensable condition for a full and robust debate of the issues and for assuring that elected official remain accountable to the voters. *See* Def. Ex. 8, Gross Report, at 8; Def. Ex. 1, Gierzynski Report, at 12. High-spending campaigns that deter challengers from entering a race thus effectively censor political

speech by eliminating the conditions for a meaningful debate of the issues in a competitive election. *See also* 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.") The evidence in this case strongly supports the conclusion that limits on campaign spending, by encouraging electoral competition, further the compelling governmental interest in promoting a robust debate of the issues and greater accountability of elected officials to their constituents.

With spending limits in place since 1974, Albuquerque's elections have been far more competitive than elections in most cities, with numerous challengers coming forward to seek city office. Def. Ex. 1, Gierzynski Report, at 6. Because of spending limits, incumbents do not build huge war chests to deter electoral competition in Albuquerque, and challengers have been far more successful in winning election against incumbents in Albuquerque than is true in other cities without spending limits. *Id.*

In cities across the country, mayors seeking reelection typically enjoy a success rate of over 80%. Def. Ex. 1, Gierzynski Report at 6. In Albuquerque, the success rate of incumbents seeking election is exactly 0% -- no incumbent mayor has ever been re-elected since 1974. *Id.* In city council races, the average incumbent success rate in elections nationwide from 1988 through 1996 was 86%; in Albuquerque, the success rate of city council incumbents between 1989 and 1999 was 71%. *Id.* Clearly, under a regime of limited spending, incumbents in Albuquerque races have been more vulnerable to challenge than are the typical incumbents in mayoral or city council races.

A comparison with New Mexico state legislative races, which have no spending limits, is also instructive. Between 1968 and 1995, only 60% of legislative races were contested at all, and only 30 percent were considered competitive (having a margin of victory of 20% or less). *Id*. at 7. By comparison, from 1974 to 1997, 100% of Albuquerque mayoral races were contested, with an average margin of victory of only 5.4% (7.4% for run-off elections). *Id.* at 6. In city council races from 1989 to 1999, 85.2% of contests had at least two serious competitors, with 63% of the races being competitive. *Id*.

Mr. Makinson's testimony also substantiated the impact of unlimited spending in deterring competition for office at the federal level. "[I]t's had a deleterious effect on the competitiveness of elections." Tr. 36. "When half of those people [elected to the House] got there by spending ten times more than their opponent, the real election wasn't on election day. The real election was when people decided who they were going to put their money behind and one guy got all the money and the other guy didn't." Tr. 36.

In elections where spending is unlimited, incumbents typically enjoy a substantial funding advantage over challengers. In Albuquerque elections, however, the typical mayoral incumbent has spent only $3,738 more than the typical challenger, for a spending ratio of 1.1 to 1. In city council elections, the incumbent-challenger spending ratio was the same: 1.1 to 1. By comparison, in medium-sized California cities (which do not have spending limits), the ratio of incumbent spending to challenger spending was 4.5 to 1. In Chicago aldermanic races, the comparable ratios were 5.7 to 1 in 1991 and 4.3 to 1 in 1995. In Seattle city council elections in 1997 and 1999, the ratio of median incumbent spending to median challenger spending was 14.5 to 1. *Id.* at 12. Again, the

relative parity between incumbents and challengers has fostered competitiveness in Albuquerque city elections. *See* Defendants' Proposed Findings, ¶¶ 61-69.

II. ALBUQUERQUE'S SPENDING LIMIT IS CLOSELY TAILORED TO SERVE THE CITY'S COMPELLING INTERESTS.

A. Albuquerque's Spending Limit Permits Effective Campaigns.

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 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). Before these limits were increased in 1999, candidates were limited to spending an amount equal to the salary for the office in question.

These generous limits are clearly more than adequate for running an effective campaign for mayor of Albuquerque. Indeed, during the 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. Def. Ex. 10, 11 (1997 Mayoral Campaign Disclosure Statements). The winning candidate, Jim Baca, spent only $106,000, and the second-place candidate, Vickie Perea, spent less than $80,000. *Id.* This presents irrefutable evidence that higher spending simply is not necessary for running an effective campaign, and strongly supports the conclusion that the new limit of twice the mayor's annual salary is closely tailored to permit robust campaigns.

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 ever ran an effective campaign (since none had 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 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 in Support of Preliminary Injunction 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.

If Albuquerque's spending limits were overly restrictive, one would expect to find almost all candidates spending the maximum allowable, and one would not expect to find winning candidates spending less than the limits. In Albuquerque mayoral races from 1989 to 1997, however, the pattern is quite different: in three out of five contests, including runoffs, the winner was not the top spender, and many competitive candidates did not spend the maximum allowed. *Id*. at 9; *see also* Figures 5 and 6. For city council elections, most competitive candidates from 1989 to 1999 spent less than the maximum allowed, including many of the victorious candidates. *Id.* at 9; *see also* Figures 3 and 4. In 1999, for example, three of the four winning candidates spent substantially less than the spending limit. *Id.*

Further, in the 2001 elections, Bob Schwartz ran an effective campaign and finished a close second to the winner, Martin Chavez, while spending only $154,683.59, well under the spending cap. *See* Stipulation ¶¶ 20, 29. Only three of the eight candidates spent in excess of the limit, and two of those three finished far behind Mr. Schwartz. *Id.* *See also* Defendants' Proposed Findings, ¶¶ 70-77.

The fact that Albuquerque's spending limit will continue to rise to keep pace with increases in the mayor's salary also confirms the narrow tailoring of the city's limit. Because salary increases are typically provided to keep pace with inflation, this feature helps assure that the spending limit will also increase over time, and has essentially the same effect as adjusting the limits for inflation.

B. Albuquerque's Spending Limit Does 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, Part I.B.2, *supra*, Professor Gierzynski's report demonstrates that voter turnout in Albuquerque elections has been higher than turnout in comparable cities without spending limits. Professor Gross's study provides further support for this point. As discussed in Part I.D., *supra*, Professor Gross's research demonstrates that mobilization of voters through direct contact by a candidate or political party not only is more effective in stimulating voter turnout, but also increases the likelihood that voters will be interested in the race, aware of the candidates' positions, and concerned about the outcome of the race. Because this evidence has already been discussed above, it will not be repeated here.

The report of Professor Anthony Gierzynski contains, in addition, further analysis demonstrating why Albuquerque's spending limits do not impede effective communication with voters. As Professor Gierzynski points out, not all spending in elections is spent on voter contact. Candidates also spend money on overhead (such as office space, equipment, and staff), contribute money to other candidates, and spend money trying to raise more money. Def. Ex. 1, Gierzynski Report at 13. *See also* Def. Ex. 8, Gross Report at 4 (pointing out that, in congressional elections, "a great deal of candidate resources are spent in areas and on items that have little to do with actually communicating with voters").

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. Def. Ex. 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. See also* Briffault, *The Beginning of the End of the Buckley Era?,* 85 Minn. L. Rev. at 1739 (noting that much campaign money is not spent on communication with voters).

The evidence also showed that voters in Albuquerque place more importance on low-cost sources of campaign information than on expensive advertisements. When asked to identify sources of information they deemed "very important" in obtaining information about local Albuquerque elections, 62% of voters said that public debates and forums were very important, 48% said newspaper coverage was very important, 38%

percent said that radio and television coverage were important, and 31% said that seeing the candidate in person was very important. By contrast, only 18% said that radio and television advertisements were very important, only 14% said that of newspaper advertisements, and only 13% said that of materials that come by mail. Def. Ex. 2, p. 2.

Accordingly, Albuquerque's spending limits do not interfere with the core First Amendment interest implicated in campaign spending – namely, permitting effective communication with the electorate. *See* Defendants' Proposed Findings, ¶¶ 78-81.

In sum, 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 is different. As this Court has observed, "Albuquerque remains unique amongst municipalities in its high voter participation, and in the vibrancy of its highly competitive mayoral elections. The record clearly establishes twenty-five years of expenditure limits that have preserved the integrity of Albuquerque's electoral process and the public's faith in its elections." 160 F.Supp.2d at 1273.

C. Albuquerque's Spending Limit is Closely Tailored Because Other Measures Are Inadequate to Serve the City's Compelling Interests.

Defendants' evidence persuasively demonstrates that contribution limits alone, unaccompanied by overall limits on campaign spending, have proven entirely ineffective to deter the reality and appearance of corruption and assure public confidence in government. *See* Defendants' Proposed Findings, ¶¶ 21-45. Further, contribution limits

alone cannot serve the city's compelling interest in limiting the time that candidates and elected officials spend on fundraising. To overcome the "arms race" approach in which each candidate feels compelled to raise unlimited sums to prove his or her viability compared to other candidates, limits on campaign spending as well as contributions are indispensable. *See* Defendants' Proposed Findings, ¶¶ 46-50. In addition, without limits on spending, electoral competition and voter interest in elections are reduced, thus undermining the necessary conditions for a robust and meaningful debate of the issues. *See* Defendants' Proposed Findings, ¶¶ 51-69. Because this evidence demonstrates that the compelling interests identified above cannot be served if campaign spending is unlimited, it strongly supports the conclusion that Albuquerque's limit is closely tailored.

CONCLUSION

For the reasons set forth above, and on the basis of the foregoing authorities, Albuquerque's limits on campaign spending are fully constitutional under the First Amendment and New Mexico Constitution. Judgment should be entered in favor of defendants.

Respectfully submitted,

CITY OF ALBUQUERQUE

Robert M. White
City Attorney

_____

Randy M. Autio
Assistant City Attorney
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

Brenda Wright
John C. Bonifaz
National Voting Rights Institute
One Bromfield Street, Third Floor
Boston, MA 02108
(617) 368-9100

Counsel for Defendants