Preliminary Statement

Defendants-appellants, the City of Albuquerque, a municipal corporation, and Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque, appeal from the final judgment granting declaratory and injunctive relief entered herein on August 22, 2002 (as amended August 23, 2002). Defendants-Appellants' Appendix ("App."), at 182, 184.

STATEMENT OF JURISDICTION

This case raises a claim under federal law over which the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a). The District Court entered final judgment in favor of plaintiff on August 22, 2002, as amended on August 23, 2002. Defendants-Appellants' Appendix ("App.") 182, 184. The judgment granted a permanent injunction and declaratory relief on plaintiff's federal law claims.[1] The defendants-appellants filed a timely notice of appeal on September 6, 2002. App. 186; *see* App. 007. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 and/or 1292(a)(2).

---

[1] The complaint included claims under the New Mexico Constitution as well, *see* App. 040-041, but the plaintiff apparently is not pursuing them. Although the District Court's judgment did not mention the state law claims, this does not affect this Court's appellate jurisdiction, because the District Court granted injunctive relief on the federal claim, which may be appealed under 28 U.S.C. 1292(a)(2).

STATEMENT OF ISSUES FOR REVIEW

1. Does *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), require exacting scrutiny of limits on candidates' campaign expenditures, or does it instead establish a *per se* rule automatically invalidating any expenditure limit, regardless of the Defendants-Appellants' factual showing, and the District Court's finding, that the spending limit is narrowly tailored to serve compelling governmental interests?

2. Does the decision of a motions panel of this Court granting an injunction against enforcement of Albuquerque's spending limit pending appeal establish the law of the case requiring the merits panel to hold that the spending limit is unconstitutional?

3. Is Article XIII, § 4(d)(2) of the Albuquerque City Charter, which establishes a limit on campaign spending by candidates in Albuquerque mayoral elections, closely tailored to serve compelling governmental interests and therefore constitutional under the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Plaintiff Rick Homans, a candidate for mayor in the 2001 Albuquerque mayoral election, filed this action on August 10, 2001, alleging

that Albuquerque's limit on candidates' campaign expenditures in mayoral elections, Article XIII, § 4(d)(2) of the Albuquerque City Charter, violates Homans' rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. On August 13, 2001, he filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin enforcement of the spending limit for the upcoming October 2001 mayoral election.[2] In support of the motion for temporary restraining order and preliminary injunction, plaintiff relied upon his own affidavit, App. 297-300, and the affidavit of a consultant, Del Esparza, App. 301-304,

The District Court granted the motion for a temporary restraining order on August 20, 2001, *see* App. 003 (Docket Entry # 14), App. 008 (Memorandum and Opinion on motion for temporary restraining order), and scheduled an evidentiary hearing on plaintiff's motion for a preliminary injunction for August 30, 2001.

In opposition to the motion for preliminary injunction, defendants-appellants submitted evidence demonstrating the basis for Albuquerque's

---

[2] Before Homans filed his lawsuit, the spending limit had been enjoined on by a state court judge on May 21, 2001, in a lawsuit entitled *Duran v. Archuleta*, No. CV-2001-01420 (2d Judicial District, New Mexico). App. 305. That lawsuit was dismissed prior to the election because of the plaintiffs' lack of standing, and the injunction consequently was dissolved. Thus, at the time Homans filed his lawsuit, the limit had been suspended for part of the election campaign and then reinstated.

adoption of the expenditure limits and how the limits had affected the City's electoral process since 1974. This evidence included expert analysis of a database containing all available data from the campaign finance disclosures of candidates for Albuquerque municipal office from 1989 through 1997, prepared by Professor Anthony Gierzynski, a political scientist and nationally recognized scholar on campaign finance. App. 311-342. Professor Gierzynski's report also examined Albuquerque turnout rates, the competitiveness of Albuquerque elections, the proportion of candidate expenditures devoted to voter contact, and other factors, and compared Albuquerque's experience to that of other jurisdictions that allow unlimited candidate expenditures. *Id.*

Defendants also presented expert testimony or reports from four additional expert witnesses: Professor Donald Gross, a political scientist and campaign reform expert at the University of Kentucky, who prepared a report summarizing his research on how spending in congressional elections affects voter participation, information, and interest in elections, App. 485-510; Larry Makinson, Senior Researcher at the Center for Responsive Politics and one of the nation's leading experts on campaign finance, who presented testimony and exhibits at the preliminary injunction hearing concerning the impact of unlimited spending on elections, App. 200-240,

594-611; David Mermin, an expert in survey research who reported on the results of a professional survey of Albuquerque voters concerning public perceptions of campaign spending and spending limits, App. 343-389; and Martin Schram, author of *Speaking Freely: Former Members of Congress Talk About Money in Politics* (1995), in which former members of Congress discuss how the demands of fundraising draw time and attention of members of Congress away from their duties as legislators, App. 467-482.

Other evidence which the City presented in connection with the preliminary injunction hearing included the Declaration of Jim Baca, then-Mayor of Albuquerque, App. 511-513, financial disclosure forms of various mayoral candidates, App. 514-593, and archival newspaper articles demonstrating the background of the City's adoption of the limits and the public perception of campaign-related corruption, App. 393-466.

Following the evidentiary hearing the District Court denied Homans' motion for a preliminary injunction in a decision and order dated September 1, 2001. App. 017-033 (reported at 160 F. Supp. 2d 1266 (D. N.M. 2001)). The District Court found that Albuquerque's spending limits were narrowly tailored to serve compelling governmental interests. As the District Court summarized: "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." App. 030.

Homans appealed, and a two-judge motions panel of this Court granted Homans' request for an injunction pending appeal on September 6, 2001. *Homans v. City of Albuquerque,* 264 F.3d 1240 (10th Cir. 2001). The motions panel stated that plaintiff had established a likelihood of success on the merits, noting that *Buckley* demands "exacting scrutiny" of spending limits, 264 F.3d at 1243 (quoting *Buckley v. Valeo*, 424 U.S. at 54-55), and that the Sixth Circuit and a Vermont District Court had found expenditure limits to be unconstitutional under *Buckley*, 264 F.3d at 1244. This Court thereafter issued an order abating Homans' interlocutory appeal of the denial of his motion for preliminary injunction, so as to permit final adjudication of the merits in the District Court. Order, November 2, 2001, No. 01-2271.

On February 13, 2002, the parties filed a Joint Motion for Stipulated Admission of Evidence, Briefing Schedule and Expedited Determination on the Merits in the District Court. Through this motion, the parties agreed that the District Court could decide the case on the merits based on the testimony and exhibits submitted in conjunction with the motion for preliminary injunction, along with additional exhibits and stipulations submitted by the

parties in their Joint Stipulation of Certain Evidence for Expedited Determination on the Merits, also filed February 13, 2002 (hereafter, "Stipulation"). App. 051-162. These additional exhibits included records of spending in the 2001 election, voter turnout figures, and Census data on Albuquerque's population and demographic characteristics. *Id.*

On August 22, 2002, the District Court entered Findings of Fact and Conclusions of Law, ruling in favor of Homans' First Amendment claims and granting permanent injunctive relief against further enforcement of the spending limit. App. 163-181. The District Court viewed the ruling of the motions panel granting injunctive relief to Homans as precluding any other determination, even though the District Court again found, based on the factual record, that the City's expenditure limits "are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and

promoting an open and robust public debate by encouraging electoral competition." App. 180.[3]

The defendants filed their notice of appeal on September 6, 2002. App. 186. Homans' interlocutory appeal in No. 01-2271 was dismissed as moot by order of this Court dated September 30, 2002.

STATEMENT OF FACTS

A. The Record Surrounding Adoption of the Limits.

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%. App. 438. The City's adoption of spending limits in 1974 came against a backdrop of widespread public reports of campaign finance abuses and the corrosive effect of money and its influence in politics.

[3] A separate lawsuit was filed challenging Albuquerque's spending limit for city council races, and was assigned to the Hon. James A. Parker, Chief Judge. *Rue v .City of Albuquerque, et al.*, No. 01cv1036 JP/LFG (D.N.M.). The cases proceeded separately below. On October 11, 2002, Chief Judge Parker granted summary judgment to the plaintiff, relying on Judge Vazquez' ruling in this case. Docket # 69, No. 01cv1036. The City has filed a notice of appeal. Docket # 78 (November 8, 2002).

In explaining the charter proposals on government ethics and election regulations that were eventually incorporated in Albuquerque's City Charter, a member of the Charter Study Committee stated:

> Over the last 30 years I have watched the influence of big money on elections. And it has had a bad effect in two ways. It makes elected officials beholden to big money interests and it makes it necessary for candidates to seek out big money.

App. 413.[4] *See also, e.g.,* App. 404.

Editorial comment on the proposed charter also noted "the rich odor of corruption and the din of mediocrity which taints governmental units nationwide," and praised the proposed ethics and election code, quoting from the declaration of policy:

---

[4] The amendments to the City Charter were an outgrowth of proposed amendments to merge city and county government in 1973. On October 2, 1973, voters in Albuquerque and Bernalillo County were presented with a proposal for merger of city and county government and a charter establishing the structure of the merged government, drafted by the Charter Study Committee mentioned above. The proposed charter included an election code with spending and contribution limits. App. 409, 410. A majority of voters in the City of Albuquerque approved both the consolidation and the proposed charter in the October 1973 vote, but consolidation did not go through because a majority of county residents voted against it. App. 416. Albuquerque's City Commission then approved proposed amendments to the city charter that included a code of ethics and elections based on the proposals originally developed for the consolidated government. App. 424 (noting "The proposed changes follow the structure advocated for the consolidated city-county government."); App. 426, 427 (listing charter amendments). Albuquerque voters approved these charter amendments on February 26, 1974. App. 438.

> “The proper administration of democratic government requires that public officials be independent, impartial and responsible to the people; that governmental decisions, and policy be made in the best interests of the people, the community and the government, and that the public have confidence in the integrity of its government.”

App. 415, “Reason to Vote Yes Tuesday,” Albuquerque Journal, September 30, 1973, A4. *See also* App. 432, Editorial, “For Proposition No. 2”, Albuquerque Journal, February 18, 1974, A4 (noting that proposed election code was needed to “deprive special interests of the means of ‘buying’ any candidate or any substantial claim to his loyalties,” and that the election code “offers the potential of clearing the air of mistrust and suspicion in municipal politics and restoring a measure of public faith and confidence in governmental processes”).

Other news articles and editorial comment appearing in Albuquerque newspapers during this time period also documented public concern over the corrosive impact of large campaign contributions and expenditures in national and state elections. *See, e.g.,* App. 402, “Loopholes Weaken Campaign Laws,” July 29, 1973, Albuquerque Journal, A4 (columnist noting that “much money is given by civic minded donors, but a great deal of it is an obvious attempt at influence buying”); App. 394, “Campaign Time is Time for Payoffs,” Albuquerque Journal, October 13, 1972, A4; App. 395, Editorial, “Campaign Financing Disgrace,” Albuquerque Journal, October

28, 1972, A4; App. 396, "Wealthy Continue to Aid Party War Chests," Albuquerque Journal, October 29, 1972, A1; App. 398, "Tidy Sum of Out-of-State Money Flows Into State U.S. Senate Race," Albuquerque Journal, October 29, 1972, A1; App. 413, "Tough Election, Ethics Codes Are In Charter," Albuquerque Journal, September 9, 1973, A1 (referring to Watergate scandal).

The proposed election code, which appeared on the ballot as Proposition 2, was endorsed by a broad variety of groups, including the Greater Albuquerque Chamber of Commerce as well as the League of Women Voters and Common Cause. App. 433; *see also* App. 435-436. The 90% vote in favor of the new election code was a resounding statement of the public's desire to preserve the integrity of City government against the corrosive effect of money in politics.

Since their inception in 1974, the spending limits have been set at some multiple of the salary of the office to which the limit applies. Pursuant to a 1999 amendment to the City Election Code, the spending limit applicable to mayoral elections currently is set at an amount equal to twice the annual salary of the office. Article XIII, § 4(d)(2), Albuquerque City Charter. Prior to that, candidates were limited to spending an amount equal

to the salary of the office. *See* App. 053. The spending cap applicable to the October 2, 2001 elections was $174,720 for the office of mayor. App. 052.

B. Impact of Spending Limits on Albuquerque Elections

As the District Court found, Albuquerque's 28-year record of holding elections subject to spending limits decisively refutes the contention that spending limits will dampen political debate, hinder challengers in overcoming the advantages of incumbency, or otherwise threaten the First Amendment goal of promoting a robust and open debate of the issues. App. 168-169, 180. To the contrary, on every measure of the health of an electoral system – whether it be voter confidence in government, extent of voter turnout, competitiveness of elections, ability of challengers to take on incumbents, or participation of small donors – Albuquerque measures well.[5]

As the District Court noted, Albuquerque's spending limits have served to deter the appearance of corruption and to promote public confidence in the integrity of City government. App. 167, 171; *see* App. 343-389. Fifty-seven percent of surveyed City voters strongly believe that elections for federal office (in which spending is unlimited) are overly

[5] The evidence is summarized briefly herein, and is further detailed below where pertinent to the discussion of the compelling governmental interests served by Albuquerque's limit on campaign spending and the narrow tailoring of the limits.

influenced by special interest money, while only 23% said the same of City elections.[6] App. 171; *see* App. 348, 350 (questions 15, 23). By a margin of more than 2 to 1 (71%), City voters say that the spending limits improve the fairness of City elections. App. 171 (citing App. 351 (question 31)). 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. App. 353 (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. App. 353 (question 36).

Voter turnout in Albuquerque mayoral elections has been strong compared to turnout in comparable cities without spending limits. App. 318. Albuquerque's mayoral elections have been far more competitive than elections in jurisdictions that allow unlimited spending. App. 317. Because of spending limits, incumbents do not build huge war chests to deter electoral competition in Albuquerque, and challengers have been far more

---

[6] Specifically, 57% of voters said that the phrase "overly influenced by special interest money" describes elections for national office "very well," while only 23% said the same of City elections. App. 348, 350 (questions 15, 23).

successful in taking on incumbents than in other cities. *Id.* With limits on spending, elected officials can spend time talking to citizens and doing the job they were elected to do, rather than spending their time dialing for dollars to fund their campaigns. App. 511-513.

C. Harms Caused by Unlimited Spending

The evidence further demonstrated that unlimited campaign spending harms the political process and that these harms cannot be prevented by relying on contribution limits alone to deter corruption and its appearance. At the federal level, since 1976, contributions to congressional candidates have been limited while spending has remained unlimited. As found by the District Court, limits on contributions alone, without limits on candidates' overall spending, have been entirely ineffective in deterring the appearance and reality of corruption and undue influence in federal elections. App. 172.

The absence of spending limits in congressional elections has resulted in an "arms race" mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. App. 206, 214. A regime of unlimited spending leads to practices such as "bundling," which render contribution limits alone insufficient to deter the corrupting influence of special interest money. App. 172. 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. In this way, well-heeled interests, such as industry groups with a stake in particular legislative battles, continue to wield enormous influence regardless of contribution limits. App. 216-222.

The record further demonstrates that, when campaign spending is unlimited, fundraising becomes a full-time job for candidates and officeholders fearful of being outmatched by an opponent's spending. "As the cost of elections rise, candidates for office at every level of federal, state and city government are under a great deal of pressure to engage in fundraising activities and to depend on the good will of their donors." App. 170; *see also* App.473-482 (interviews with former members of Congress describing how demands of fundraising draw time and attention of members of Congress away from their duties as legislators); App. 212-213 (Makinson testimony noting that it is "not unusual" for members of Congress to attend three or four fundraising events a night during peak fundraising season).

Unfortunately, with the suspension of the City's spending limits during the 2001 election, the same preoccupation with fundraising immediately emerged in Albuquerque. As stated in the declaration of Jim Baca, who was running for re-election as Mayor in 2001, "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." App. 512; *see* App. 171 (noting the "detrimental impact on the local electoral process").

The evidence further showed that high-spending campaigns do little to stimulate voter information about, or participation in, elections. As documented in research concerning congressional elections conducted by Professor Donald Gross, direct contact between voters and candidates is much more effective in stimulating voter participation than high-spending campaigns. App. 488. Personal canvassing of voters has a more substantial positive impact on voter turnout than direct mail or even telephone calls. App. 489.

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. His study demonstrates that campaign spending in congressional elections 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. App. 492. 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. App. 492. 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 place the candidates accurately 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." App. 492-493.

One reason why high-spending campaigns are not necessarily effective in promoting communication with voters is that not all spending in elections is directed to 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. App. 324; *see also* App. 489. As the District Court found, "candidates in elections where spending limits are imposed tend to spend more campaign money on actual voter contact." App. 171; *see* App. 325, 334. 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. App. 325, 334.

D. Adequacy of Limits for Running Effective Mayoral Campaigns. The current spending limit of $174,720 for Albuquerque mayoral elections is extremely generous, having been doubled from its previous level in 1999. App. 052, 053. The expenditure limit has permitted vigorous, effective campaigns for office in Albuquerque. App. 316-320, 325 (Gierzynski Report); App. 511 (Baca Decl.); *see also* App. 169.

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. App. 319. In Albuquerque mayoral races, however, the pattern is quite different: in three out of five contests, including runoffs, from 1989-1997, the winner was not the top spender, and many competitive candidates did not spend the maximum allowed. App. 320, 334, 335.

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 winning candidate, Jim Baca, spent only

$106,000, including $43,888.26 on television advertising. App. 511. The second-place candidate, Vickie Perea, made a strong showing while spending less than $80,000. App. 590. Even the highest-spending candidate in 1997 spent only $175,600, only $888 more than the current cap. App. 514-591 (1997 Mayoral Campaign Disclosure Statements).

In the 2001 elections, when the spending limit was again enjoined, mayoral candidate Bob Schwartz ran an effective campaign while spending only $154,684, finishing a close second to the winner, Martin Chavez, who spent $421,753. *See* App. 054, 055-057 (listing candidate vote totals and expenditures). Only three of the eight mayoral candidates spent in excess of the limit in 2001, and two of those three (including the plaintiff, Rick Homans, who spent over $500,000) finished far behind Mr. Schwartz. App. 054, 055-057. In addition, the spending limit is pegged to the mayor's salary, which is subject to periodic increases, further assuring that the limit will not become overly restrictive for future campaigns. App. 052; *see* Albuquerque City Charter, Article V, § 2, as amended by Resolution 245-1981.

SUMMARY OF ARGUMENT

For more than a quarter century, Albuquerque has conducted its mayoral elections subject to limits on candidates' campaign expenditures. The record below demonstrates, and the District Court found, that the spending limits have promoted a vibrant, competitive electoral system, healthy voter turnout, and strong public confidence in government, while avoiding many of the ills that plague elections for state and national office, where spending is unlimited. As the District Court concluded after reviewing all the evidence, the City's expenditure limits "are narrowly tailored to serve the compelling interests of deterring corruption and the appearance of corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition." App. 180.

The District Court nevertheless concluded, relying on the prior motions panel ruling in this case, that Albuquerque's spending limits are unconstitutional as a matter of law under the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). App. 180. Upholding this

ruling would mean, in effect, that no set of facts may ever be demonstrated that would permit a lower federal court to uphold limitations on candidates' campaign spending under *Buckley*.

Such a reading of *Buckley,* we submit, is in error. As demonstrated in Point I of this Brief, *Buckley* requires exacting scrutiny of campaign expenditure limits, but does not establish a *per se* rule automatically invalidating all expenditure limits. A fair reading of *Buckley* establishes that both factual and legal grounds remain available on which spending limits may be upheld consistent with that decision. *Buckley* left the door open to proof of new facts and circumstances that would demonstrate why spending limits are necessary to serve the compelling governmental interests of deterring corruption and the appearance of corruption. It also left the door open for a showing that new and compelling governmental interests not directly addressed in *Buckley* – such as the need to free candidates and officeholders from the burden of endless fundraising – would justify limits on campaign expenditures. The record in this case fully supports the constitutionality of Albuquerque's expenditure limits on both these grounds.

As demonstrated in Point II of the Brief, the September 6, 2001, decision of a motions panel of this Court, which granted plaintiff's emergency motion for an injunction pending appeal (264 F.3d 1240), does

not establish the law of the case for the panel hearing this appeal on the merits, and does not foreclose this Court from determining that Albuquerque's spending limits pass constitutional muster. *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th Cir. 1996). The order of the motions panel granting plaintiff's emergency request for an injunction pending appeal was issued without full briefing and without oral argument, under severe time constraints imposed by the upcoming election schedule. Because such a ruling by its nature is preliminary, decided on the basis of expedited briefing and consideration, the constitutionality of Albuquerque's spending limit is fully open to re-examination in this plenary appeal.

Point III of the Brief explains how the unique record of Albuquerque's 28-year experience with expenditure limits satisfies the exacting scrutiny required by *Buckley.* The evidence demonstrates that Albuquerque's spending limits further the compelling governmental interest in deterring corruption and the appearance of corruption in politics; promoting public confidence in government and citizen interest in the electoral process; ensuring that officials spend less time fundraising and more time carrying out their duties as representatives and interacting with citizens; and fostering public debate of the issues by promoting electoral competition. The evidence also shows that Albuquerque's expenditure limit

of $174,720 for mayoral campaigns is sufficiently generous to allow candidates to run effective, vigorous campaigns, and thus is closely drawn to serve these compelling interests.

The record as a whole powerfully demonstrates that invalidating Albuquerque's spending limit will not strike a blow for First Amendment freedoms, but will impoverish the political debate by turning officeholders into full-time fundraisers, undermine voter confidence and interest in the electoral process, and eliminate the necessary conditions for a full and robust debate of the issues by closing politics to meaningful participation by average citizens.

For all these reasons, the judgment of the District Court invalidating Albuquerque's expenditure limit should be reversed.

ARGUMENT

Standard of Review

The District Court's legal conclusions are subject to this Court's *de novo* review. *Wells v. City & County of Denver*, 257 F.3d 1132, 1146-47 (10th Cir.), *cert. denied,* 122 S. Ct. 469 (2001). Factual findings of the district court are generally reviewed only for clear error. Fed. R. Civ. P. 52(a). When First Amendment issues are in question, the Court makes an

independent examination of the record. *Wells*, 257 F.3d at 1146-47. The Supreme Court has explained that the appropriate standard of review for First Amendment cases "must be faithful to both Rule 52(a) and the rule of independent review." *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984) (citations omitted). In this Brief, issues I and II present purely legal issues subject to de novo review, while issue III includes factual issues whose review is governed jointly by the requirements of Fed. R. Civ. P. 52(a) and the requirement of independent review of the record in First Amendment cases, as set forth in *Bose.*[7]

I. LIMITS ON CAMPAIGN SPENDING MAY BE UPHELD UNDER THE "EXACTING SCRUTINY" STANDARD SET FORTH IN *BUCKLEY V. VALEO.*

Buckley v. Valeo, while establishing a standard of exacting scrutiny for expenditure limits, does not render such limits unconstitutional *per se.* A fair reading of *Buckley* establishes that both factual and legal grounds remain available on which spending limits may be upheld consistent with that decision.

[7] Pursuant to Rule 28.2(C)(2) of the Tenth Circuit Rules, defendants-appellants note that each of the issues raised herein was raised in Defendants' Brief on the Merits in the court below, Docket # 39 (*see* App. 006), and each was addressed in the District Court's Findings of Fact and Conclusions of Law, App. 163-181.

In *Buckley*, the Supreme Court addressed the constitutionality of the Federal Election Campaign Act of 1974 ("FECA"), 2 U.S.C. §§ 431 *et seq*. Among other provisions, FECA placed limits on the amounts that donors could contribute to candidates *and* on the amount that candidates could spend on their campaigns. The *Buckley* Court acknowledged that government has a compelling interest in deterring corruption and the appearance of corruption of elected officials. *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 [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.

Thus, the proposition that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. For what if the record in *Buckley* had established that contribution limits, and the criminal and political consequences of violating them, had proved insufficient to serve the government's compelling interest in deterring corruption and the appearance of corruption? Clearly, *Buckley* leaves the door open for a determination that expenditure limits might be justified upon a factual record different from that presented in *Buckley*.

Nor should *Buckley* be read as foreclosing the possibility of identifying new and compelling 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. 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); *see also Federal Election Comm'n v. National Conservative Political Action Committee ("NCPAC")*, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finances") (emphasis added).

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.[8] 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 Gov't PAC,* 528 U.S. 377, 405 (2000) (concurring

[8] Subsequent decisions such as *NCPAC* and *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996), on which plaintiff has relied to argue that spending limits are *per se* unconstitutional, address the constitutionality of limits on *independent expenditures* by political action committees and political parties, not spending limits on expenditures by candidate campaigns.

opinion of Breyer, J., joined by Ginsburg, J.) (calling for approach that balances competing constitutional interests and stating "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy, making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns"); *id.* at 409 (Kennedy, J., dissenting) (noting difficulty of constitutional issues surrounding campaign regulation but stating, "For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. at 649-50 (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, 533 U.S. 431, 443 n.8 (2001) (noting that, while the FEC had not asked the Court in that case to revisit *Buckley*'s general approach to expenditure limits, "some have argued that such limits could be justified in light of post-Buckley developments in campaign finance") (citations omitted).[9]

Two justices have taken the opposite position, stating that limits on contributions, as well as limits on spending, violate the First Amendment. *See Shrink,* 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 not spoken on whether the First Amendment presents a *per se* bar to any and all legislation limiting spending in candidate campaigns.

In recent years, two other circuits have had occasion to consider the constitutionality of a locally enacted spending limits law. In *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998), the Sixth Circuit struck down spending limits enacted by the City of Cincinnati

[9] 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 *Shrink* 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, which,

for its city council elections. *See also Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (following *Kruse* and striking down limits on expenditures in state judicial races). Two members of the *Kruse* panel concluded – contrary to the analysis presented above – that *Buckley* should be read as a complete ban on campaign spending limits, regardless of the facts and circumstances that may be presented to support such limits. The third member of the panel, while concurring in the ruling striking down Cincinnati's limits, disagreed with the majority's interpretation of *Buckley*, concluding that *Buckley* does not render spending limits unconstitutional as a matter of law:

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.

Id. at 920 (concurring opinion of Cohn, D.J., sitting by designation).

The Second Circuit also has reviewed the constitutionality of spending limits. The Vermont legislature, after extensive public hearings and debate, enacted mandatory limits on campaign spending in 1997, which

---

as explained herein, is not a rule automatically invalidating challenged enactments.

have been challenged in *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000), *aff'd in part, vacated in part sub nom. Landell v. Vermont Public Interest Research Group,* 2002 WL 1846000 (2d Cir. August 7, 2002), *opinion withdrawn pending further proceedings before and amendment by the panel*, 2002 WL 31268493 (2d Cir. October 3, 2002). Like the District Court below, the District Court in *Landell* found that, as a factual matter, Vermont's spending limits were supported by compelling governmental interests:

> 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 at 482. While the District Court in *Landell* ultimately struck down Vermont's spending limits on the authority of *Buckley*, as the District Court did here, it took note of the more recent Supreme Court commentary in the *Shrink* 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.

On appeal, the Second Circuit issued an opinion on August 7, 2002, in which it disagreed with the District Court's view that *Buckley* requires courts automatically to invalidate any expenditure limit, regardless of the factual record supporting the limit, and found, after independent review of the record, that Vermont's spending limits were narrowly tailored to support compelling interests. 2002 WL 1846000 (2d Cir. August 7, 2002), *opinion withdrawn pending further proceedings before and amendment by the panel*, 2002 WL 31268493 (2d Cir. October 3, 2002) (opinion attached as Addendum to this Brief). The Second Circuit stated:

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

2002 WL 1846000, at 9 (citations omitted). The Second Circuit's August 7, 2002 opinion therefore concluded that Vermont's spending limits were constitutionally permissible. One judge dissented. *See* 2002 WL 1846000, at 28.

The City recognizes, of course, that the Second Circuit panel has now withdrawn its August 7, 2002, opinion "pending further proceedings before and amendment by the panel," 2002 WL 31268493, thus leaving in place for the time being the District Court's judgment invalidating Vermont's spending limits. The City nevertheless believes that, because of the dearth of appellate consideration of the constitutionality of spending limits since *Buckley*, the analysis in the Second Circuit's August 7, 2002 opinion is worthy of consideration by this Court.

The ruling of the motions panel granting plaintiff's motion for an injunction pending appeal in this case, 264 F.3d 1240, followed the *Kruse* majority opinion, concluding that *Buckley* required invalidation of Albuquerque's spending limit. Defendants-appellants respectfully submit, however, that Judge Cohn's concurring opinion in *Kruse*, and the August 7, 2002 opinion of the panel majority in *Landell* (which was not available to the motions panel), are correct in concluding that *Buckley* does not foreclose the issue. Even when precedent commands "exacting scrutiny" of a law, *scrutiny* is still required. Race-based redistricting plans, for example, can be justified only if they survive strict scrutiny, *see Miller v. Johnson*, 515 U.S. 900 (1995), but that does not mean that a race-based plan is automatically unconstitutional, nor that *Miller* must be overruled in order to sustain the

constitutionality of such a plan. *See King v. State Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (three-judge court), *aff'd mem.,* 522 U.S. 1087 (1998) (finding that race-based redistricting plan survived strict scrutiny review because it was narrowly tailored to further compelling state interests). 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)).

The same is true in the First Amendment context. 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).[10] By the

---

[10] 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

same token, although *Buckley* requires exacting scrutiny of a limit on campaign expenditures, that does not mean that *Buckley* must be overruled in order to sustain the limits enacted by Albuquerque.

The record in this case highlights the perverse results of treating *Buckley* as a *per se* bar to any spending limit. In *Buckley,* the FECA's spending limits were challenged before any congressional elections had actually been conducted under the limits. The *Buckley* Court was thus required to analyze the constitutionality of the FECA's spending limits on only a limited factual record, particularly because the FECA amendments included a special provision for expedited judicial review of any constitutional challenge to the reform legislation. 2 U.S.C. § 437h . *See generally* Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Reform*, 21 Okla. City U. L. Rev. 97 (1996). Now, however, Albuquerque has compiled a record showing how spending limits have actually operated in practice for over a quarter-century – a record completely unavailable to the *Buckley* Court. To interpret *Buckley* as requiring utter disregard of this body of real-world experience

---

system." 518 U.S. at 617 (emphasis added). *See also Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1224 (10th Cir. 2000) (noting that parties "compiled an extensive record" in facial challenge to party coordinated expenditure provision), *rev'd on other grounds*, 533 U.S. 431 (2001).

with spending limits would distort the concept of strict scrutiny beyond recognition.

Accordingly, this Court should apply exacting scrutiny, not a *per se* rule of invalidation, in reviewing the constitutionality of Albuquerque's spending limit, allowing the limit to be upheld upon a showing that it is closely drawn to serve a compelling governmental interest.

II. THE MOTIONS PANEL RULING DOES NOT ESTABLISH THE LAW OF THE CASE ON APPEAL OF THE MERITS.

In this case, the District Court found that Albuquerque had demonstrated compelling governmental interests supporting its expenditure limits and that the limit was narrowly tailored and would not impede effective political campaigns. App. 180. The District Court struck down the limit solely because it believed that the motions panel ruling, which granted emergency injunctive relief to Homans in September 2001, precluded any other result. App. 180.

The motions panel ruling, however, clearly does not establish the law of the case for purposes of this Court's review of the merits. *Law v. National Collegiate Athletic Association*, 134 F.3d 1025, 1028 n. 3 (10th Cir. 1998) ("a decision of a motions panel, however, is not binding on the merits panel"); *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th

Cir. 1996) (adopting rule that appeals court reviews prior motions panel decision "uninhibited by the law of the case doctrine"); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) (motions panel decisions are tentative and subject to reexamination by merits panel).

The order of the motions panel granting plaintiff's emergency request for an injunction pending appeal was issued without full briefing and without oral argument, under severe time constraints imposed by the upcoming election schedule. Plaintiff Homans served his motion on September 4, 2001; the City was required to prepare its response and file it the next day, September 5th; and the panel issued its order on September 6th.[11] The ruling by its terms established only that plaintiff had established a likelihood of success on the merits. 264 F.3d at 1243-44. Because such a ruling by its nature is preliminary, decided on the basis of expedited briefing and consideration, the constitutionality of Albuquerque's spending limit is fully open to re-examination in this plenary appeal. *Stifel,* 81 F.3d at 1544 ("'With the benefit of full briefing and . . . oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered.'") (quoting *E.E.O.C.*

[11] These dates are based on Defendants-Appellants' records. The docket sheet in No. 01-2271 actually indicates the motion was filed September 5th, but this may reflect a delay between delivery and filing.

v. Neches Butane Prods. Co., 704 F.2d 144, 147 (5th Cir. 1983); *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) (court remained free to reject plaintiff's claims on merits despite 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).

Indeed, the motions panel based its assessment of the likelihood of plaintiff's success in part on the fact that spending limits had been struck down by the Sixth Circuit in *Kruse,* 142 F.2d 907, and by a federal district court in *Landell v. Sorrell,* 118 F. Supp. 2d 459. Now, however, the Second Circuit's August 7, 2002 opinion in *Landell* has called into serious question the correctness of the district court ruling in *Landell.* This significant development on a legal issue of great national importance further supports the need for plenary examination of the constitutionality of Albuquerque's spending limit by this Court.

Accordingly, this Court should make its own assessment of whether, 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.

III. ALBUQUERQUE'S LIMIT ON CAMPAIGN EXPENDITURES IS CLOSELY DRAWN TO SERVE COMPELLING GOVERNMENTAL INTERESTS AND SHOULD BE UPHELD BY THIS COURT.

As explained above, *Buckley* requires that spending limits be subjected to "exacting" scrutiny. Notwithstanding the judgment for Plaintiff, the District Court determined that the limits at issue satisfy the strict scrutiny standard, because they "are narrowly tailored to serve the compelling interests of deterring corruption, promoting public confidence in government, permitting candidates and officeholders to spend less time fundraising and more time performing their duties as representatives and interacting with voters, increasing voter interest in and connection to the electoral system, and promoting an open and robust public debate by encouraging electoral competition." App. 180. Mindful of this Court's obligation to make its own independent examination of the record in First Amendment cases, *see Wells*, 257 F.3d at 1146-47, the City explains below why the District Court was correct in finding that the spending limits are narrowly tailored to serve compelling state interests and therefore satisfy exacting scrutiny.

A. 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. <u>Unlimited Spending and Public Confidence in Government.</u>

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.

As noted above, *see* Statement of Facts *supra* pp. 12-13, survey research documents that Albuquerque's spending limit has promoted far greater voter confidence in the integrity of Albuquerque elections than in elections for state or federal office in New Mexico, which are not subject to spending limits.[12] 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. App. 353 (questions 35, 37, 39, 40). Overall, 87% percent of voters expressed

[12] 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. *Shrink,* 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); *Montana Right to Life v. Eddleman*, 306 F.3d 874, 882 (9th Cir. 2002) (accepting survey evidence as establishing perception of corruption); *Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d 445, 457-58 (1st Cir. 2000) (same). The courts also accept newspaper articles discussing campaign-related corruption to document the public's perception of corruption. *Shrink*, 528 U.S. at 393 (newspaper articles documented appearance of corruption); *Daggett,* 205 F.3d at 462-463 (same).

support for maintaining limits on spending in Albuquerque elections. App. 351 (question 29).[13]

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."

Shrink, 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 generally higher than in cities where spending has been unlimited. App. 318, 331 (Gierzynski Report).

[13] The survey asked voters whether they favor or oppose the law setting limits on spending in municipal races. 87% of respondents stated that they favor the law. As a follow-up question, respondents were asked to say whether they "strongly favor" or "not so strongly" favor; this breakdown of favorable responses was 62% "strongly favor" and 25% "not so strongly favor." Only 9% of respondents said they were opposed to the law, with 6% strongly opposed. *Id.*

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%.[14] (Calculations based on App. 061).

The report of Professor Donald Gross, a political scientist and campaign reform expert, further supports the connection between spending limits and voter turnout. Based on his study of congressional elections, Dr. Gross concludes that spending limits 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. App. 491. For this reason, Professor Gross concludes that "[i]t is the elimination of spending limits

[14] Albuquerque's spending limit for mayoral races was temporarily enjoined in September 1997 by a court order in *Murphy v. City of Albuquerque*, No. CV-97-0007826 (2d Judicial District, New Mexico). The spending limit was restored for the 1999 city council elections after the plaintiffs in *Murphy* withdrew their lawsuit through a stipulated dismissal. App. 053.

which is most likely to threaten the levels of voter participation seen in Albuquerque for the last twenty plus years." App. 491.

The fact that turnout was not precipitously low in the 2001 election (42.4%), when the limits were 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 record 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. As the District Court found, "[f]ederal contribution limits have not effectively changed the negative public perception of the undue influence of large donors on federal elected officials." App. 172.

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. App. 207, 597.

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 congressional elections, the average winner outspent the average loser by close to three to one. 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. App. 210-211, 599; *see* App. 170.

As detailed above, 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. *See* Statement of Facts *supra* pp. 14-15. 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. In this way, well-heeled special interests, such as industry groups with a stake in particular legislative battles, continue to wield enormous influence regardless of contribution limits. App. 216-226. *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-funded 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." App. 220 (testimony of Larry Makinson). 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. App. 218-219, 600-607. 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. App. 220. 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. App. 220.

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. App. 221. 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. App. 222.

The problem of bundling, which makes contribution limits ineffective, is not caused by the so-called "soft-money" loophole. The recently enacted McCain-Feingold legislation, which curbs "soft money," will have no effect on the bundling practices documented in this record. The contributions in question are "hard money" contributions, and the undue influence caused by such contributions would continue even if unlimited soft-money contributions are successfully 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." App. 224.

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. App. 224-225. "[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." App. 224-25. 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." App. 229. On many less-publicized issues that come before Congress, "the only people paying attention are the cash constituents. . . . The more it costs [to win election], the more any legislator has to think about – very deep[ly] about . . . -- how they're going to vote." App. 229-230.

The motions panel's order granting plaintiff's motion for an injunction pending appeal states that the governmental 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.*" 264 F.3d at 1244. But the panel did not address the passage in *Buckley, see* Argument *supra* pp. 25-26, 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. App. 172, 206-207, 212-213, 216-226, 229-230, 597, 599. 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.

B. Albuquerque's Spending Limit Serves the City's Compelling Interest in Allowing 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 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 possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.

Id. at 920. *See also Shrink*, 528 U.S. at 409 ("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 motions panel 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 the District Court's decision as identifying only two compelling interests supporting spending limits, namely, "preserving faith in democracy and deterring the appearance of corruption." 264 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." App. 512. 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." App. 353 (Question 40). *See also* App. 467-482, 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); App. 212-213, Testimony of Larry Makinson, (same).

Turning candidates for city office into full-time fundraisers will not enhance First Amendment freedoms, but instead will make candidates 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.

C. Albuquerque's Spending Limit Serves the City's Compelling Interest in Promoting 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 officials remain accountable to the voters. *See* App. 323, 493. 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. App. 317 (Gierzynski Report). In cities across the country, mayors seeking reelection typically enjoy a success rate of over 80%. *Id.* In Albuquerque, the success rate of incumbents seeking election is exactly 0% -each time a challenger has taken on an incumbent mayor since 1974, the challenger has been successful. Clearly, under a regime of limited spending, incumbents in Albuquerque races have been more vulnerable to challenge than are the typical incumbents in mayoral 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). App. 318. 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). App. 317.

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." App. 226. "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." App. 226.

As the District Court found, "[a] spending gap between incumbents and challengers generally results in diminished competitiveness in elections." App. 171; *see also* App. 322. 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. 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. App. 323. Again, the relative parity between incumbents and challengers has fostered competitiveness in Albuquerque city elections, a necessary condition for robust debate of the issues.[15]

D. Albuquerque's Spending Limit Is Closely Tailored.

1. Albuquerque's Spending Limit Permits Effective Campaigns.

When courts review the constitutionality of limits on contributions to candidates, they examine the impact of the limits on candidates' ability to run effective political campaigns. *See Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. at 379 (examining whether limitation on contributions "prevented candidates from amassing the resources necessary for effective advocacy");

---

[15] As noted above, the City believes the compelling interests discussed in this Brief 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,* The City wishes to preserve its 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, the City specifically wishes 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 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. Shrink*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J.,

Montana Right to Life v. Eddleman, 306 F.3d at 883-84 (noting that limit on contributions did not prevent candidates from amassing sufficient resources for effective campaign where state senate candidates, in districts averaging approximately 16,000 in population, raised average of $6,900 under new contribution limits). While these cases address contribution limits rather than expenditure limits, clearly an expenditure limit must also allow candidates to amass sufficient resources for effective advocacy in order to qualify as narrowly tailored.

As previously summarized in the Statement of Facts, Albuquerque's expenditure limit of $174,720 will not impede effective and vigorous mayoral campaigns. This is demonstrated by the evidence of spending patterns in past mayoral campaigns, which shows that successful and/or competitive candidates frequently spent less than the current limit – even in elections when the limit was temporarily enjoined. *See* Statement of Facts *supra* pp. 18-19.[16]

---

concurring) (noting that *Buckley*'s apparent rejection of this interest as a basis for campaign spending limits "cannot be taken literally").

[16] The fact that Homans spent over $500,000 on his mayoral campaign does not demonstrate that the spending limit is not narrowly tailored to permit effective campaigns – particularly in view of the fact that Homans garnered less than 10% of the vote through his high-spending campaign. (App. 054-056, 174-175.) Indeed, in asserting that an effective campaign for mayor requires an expenditure of $500,000 or more, plaintiff Homans apparently contends that no candidate for mayor of Albuquerque ever ran an effective

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.

The evidence of narrow tailoring goes further. The record shows that Albuquerque's spending limit has not prevented challengers from taking on incumbents; indeed, Albuquerque has been uniquely successful in avoiding the incumbent entrenchment typical of jurisdictions without spending limits. The record also shows that the spending limit has not prevented healthy voter turnout in Albuquerque elections, another sign that the limit does not impede effective communication with voters – the core First Amendment interest implicated in campaign spending. Indeed, the evidence available on this record demonstrates that high-spending campaigns are not necessary, and in fact are often detrimental, to the goal of an informed, politically active citizenry. *See* Statement of Facts *supra* pp. 13-14, 16-18.

---

campaign prior to 2001 (since none had ever spent an amount anywhere close to that). This assertion cannot be credited.

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 the District Court observed in connection with the preliminary injunction motion, "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." App. 030.

2. 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* Statement of Facts *supra* pp. 14-15; Argument *supra* 45-50. 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* Argument *supra* pp. 45-49. 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* Statement of Facts *supra* pp. 16-18. 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. The judgment below should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

The Defendants-Appellants request oral argument in this case. This case is of great importance to the City of Albuquerque and its citizens. The

judgment below invalidates a campaign regulation enacted in 1974 which, as the District Court found, serves a host of compelling governmental interests. Defendants-Appellants respectfully submit that the importance of the constitutional issues warrants oral argument of this appeal.

Respectfully submitted,

CITY OF ALBUQUERQUE

Robert M. White
City Attorney

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

____
Brenda Wright
Lisa J. Danetz
National Voting Rights Institute
One Bromfield Street, Third Floor
Boston, MA 02108
617 368-9100

Counsel for Defendants-Appellants