

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

SANDER RUE,

Plaintiff,

No. CIV 01-1036 JP/LFG-ACE

v.

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

Defendants.

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendants, the City of Albuquerque, a municipal corporation, Francie D. Cordova, in her capacity as Clerk of the City of Albuquerque, and the City of Albuquerque Board of Ethics and Campaign Practices, a board of the City of Albuquerque, by and through their attorneys, hereby submit their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Defendants have also submitted separately two volumes of Defendants' Exhibits in Opposition to Plaintiff's Motion for Summary Judgment, containing 22 exhibits (referred to hereafter as "Def. Ex. ___").

**DEFENDANTS' STATEMENT OF MATERIAL FACTS
IN DISPUTE PURSUANT TO LOCAL RULE 56.1**

Plaintiff's statement of Undisputed Material Facts, served on June 18, 2002, is wholly inadequate to support summary judgment for plaintiff. It is bereft of any facts concerning the reasons Albuquerque has adopted and maintained limits on campaign spending in city elections, the impact that the limits have had on city elections during the 28-year period since they were adopted in 1974, or the purposes served by the limits.

Such facts are indispensable to any reasoned evaluation of plaintiff's claim that this critical feature of Albuquerque's election code should be judicially invalidated. After responding to plaintiff's numbered statements in Part A, defendants set forth in Part B a full statement of the material facts in dispute that must be examined in evaluating the constitutionality of Albuquerque's city council spending limit.

A. Response to Plaintiff's Statement of Material Facts

1. The Albuquerque City Charter does place a limit on candidates' campaign expenditures in City Council elections; however, plaintiff's description of the limit in paragraph 1 is not entirely accurate. Candidates for city council are prohibited from spending an amount in excess of twice the annual salary of the office. Art. XIII, Section 4(d)(1). (Plaintiff's paragraph 1 inaccurately states that candidates are prohibited from spending an amount equal to twice the annual salary of the office.)

2. Admitted.

3. Admitted.

4. Denied. The evidence demonstrates that Mr. Rue could have communicated effectively with his constituents while remaining within the spending limit, had he budgeted his spending from the outset of the campaign like other candidates. Mr. Rue's opponent, Michael Cadigan, did not exceed the spending limit, yet contacted more voters with mailings and other forms of contact than Mr. Rue. The facts and evidence supporting this denial are set forth in detail in ¶¶ 58-84, *infra*, and record materials cited therein, which are incorporated herein by reference.

5. Defendants have no means to determine the accuracy of Mr. Rue's prediction that he intends to run for city council again in the future, inasmuch as the next

election for Mr. Rue's district will not take place until 2005, and therefore deny this portion of paragraph 5 Plaintiff's Undisputed Material Facts. The evidence demonstrates that Mr. Rue is interested in securing election to the state legislature and ran in the Republican primary on June 4, 2002. Def. Ex. 20, Rue Dep., at 70. Although he was defeated in that election, Mr. Rue would have the opportunity to run again for the state legislature in 2004, before the next city council election from District 5. Thus, whether Mr. Rue will again seek election to the city council in 2005 is, on this record, speculative. However, if Mr. Rue does seek election to the city council in 2005, paragraph 5 of Plaintiff's Undisputed Material Facts does not assert that he would raise or spend an amount in excess of the spending limit, and the evidence shows that the spending limit would not impede his campaign or prevent him from communicating effectively with voters. The facts and evidence supporting this denial are set forth in detail in ¶¶ 58-84, *infra*, and record materials cited therein, which are incorporated herein by reference.

In addition, if Mr. Rue does seek election as a candidate in future city council elections, defendants deny that the limit on spending in city council elections would deprive Mr. Rue of communications he would desire to receive from city council candidates, as stated in paragraph 5 of Plaintiff's Undisputed Material Facts. Mr. Rue would be eligible to vote for city council candidates only in District 5, the same district in which he would be running as a candidate. The spending limit would not impede Mr. Rue's knowledge of his own campaign, and it is illogical to suggest that Mr. Rue would desire to receive a greater number of campaign communications from his opponents in the absence of a spending limit.

B. Defendants' Statement of Material Facts in Dispute Which Preclude Summary Judgment for Plaintiff.¹

6. 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%. Def. Ex. 9, Plaintiff's Responses and Objections to Defendants' First Set of Requests for Admissions ("Plaintiff's Admissions"), ¶ 1; Def. Ex. 5, p. 5-45 ("Election Code, Code of Ethics Win Approval," Albuquerque Journal, February 27, 1974, A1).

7. Since their inception in 1974, the 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 city council elections currently is set at an amount equal to twice the annual salary of the office. Article XIII, § 4(d)(1), Albuquerque City Charter. Prior to that amendment, candidates were limited to spending an amount equal to the salary of the office. Def. Ex. 9, Plaintiff's Admissions, ¶7.

8. Elections for city office in Albuquerque are nonpartisan and are held in odd-numbered years. Def. Ex. 9, Plaintiff's Admissions, ¶ 6.

9. Albuquerque's limits on campaign spending serve to prevent political corruption and its appearance, preserve the public's confidence in the integrity of the political process, allow candidates and elected officials to spend their time serving the public rather than engaging in fundraising, promote robust debate by fostering

¹ Defendants recognize that some of the facts set forth in the numbered paragraphs 6 through 84 may be admitted, rather than disputed, by plaintiff. However, since none of these facts were presented by plaintiff, defendants have included them in their statement of material facts in dispute out of an abundance of caution and to assure a complete record. To the extent the facts set forth herein are admitted, they support the constitutionality of Albuquerque's spending limit, and to the extent they are disputed by plaintiff, such factual dispute precludes a grant of summary judgment.

competitive elections, and promote voter interest in and connection to the electoral process. See ¶¶ 10-84, *infra*.

Facts Demonstrating That Albuquerque’s Spending Limits Are Necessary to Serve The City’s Compelling Interest In Deterring Corruption And The Appearance Of Corruption And Promoting Public Confidence In Government.

10. 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. Def. Ex. 5, pp. 5-1 through 5-47.

11. In 1973 and 1974, City residents actually voted twice in favor of limits on campaign spending and contributions. The first vote came on October 2, 1973, when 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. The proposed charter included an election code with spending and contribution limits. Def. Ex. 5, pp. 5-16 - 5-19 (“Final Draft of Proposed City-County Charter,” Albuquerque Journal, September 2, 1973). A majority of voters in the City of Albuquerque approved both the consolidation and the proposed charter, but consolidation did not go through because a majority of county residents voted against it. Def. Ex. 5, p. 5-23 (“Charter Beaten,” Albuquerque Journal, October 3, 1973).

12. A similar set of election regulations was then presented to Albuquerque voters again as part of a number of proposed amendments to the existing city charter. Def. Ex. 5, pp. 5-33, 5-34 (“Proposed Charter Amendments for City Elections,” Albuquerque Journal, January 20, 1974, E10). The new election code, with limits on spending and contributions, was approved by Albuquerque voters on February 26, 1974, winning over 90% support from city voters. Def. Ex. 1, Albuquerque Election Financing:

An Analysis by Anthony Gierzynski, Ph.D. (“Gierzynski Report”), at 7-8 (attached to Declaration of Anthony Gierzynski, Ph.D.); Def. Ex. 5, p. 5-45 (“Election Code, Code of Ethics Win Approval,” Albuquerque Journal, February 27, 1974, A1).

13. In explaining the charter proposals on government ethics and election regulations included in the proposed charter for the consolidated government, 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.

Def. Ex. 5, p. 5-20 (“Tough Election, Ethics Codes Are in Charter,” Albuquerque Journal, September 9, 1973, A1). She also noted that “Albuquerque and Bernalillo County have gotten big enough and I think it is a very imminent danger that big financial interests will have more and more influence.” *Id.* Similar statements appeared in numerous articles appearing during the debate on the proposed charter. *See, e.g.*, Def. Ex. 5, p. 5-10 - 5-11 (“Campaign Ethics Code Put Into Merger Plan,” Albuquerque Journal, July 14, 1973, A1) (Study Committee member states “The general political climate through too many administrations has been gradually deteriorating.”)

14. Former City Councilor Marion Cottrell, who attended the debates on the proposed 1974 charter revision and was active in city politics at the time, also confirmed that the campaign finance provisions were needed because of concerns about how political money was affecting how city government functioned – “[t]he feeling that you couldn’t get things done unless you had money, and that if you had money and spent it certain ways, that things would get done.” Def. Ex. 16, Deposition of Marion Cottrell (“Cottrell Dep.”) at 31. Similarly, another former Councilor who attended the charter

revision debates stated that the campaign finance limits reflected “a lot of concern about the influence of money in elections and on elected officials,” and the public’s desire “to have confidence in the City and the credibility of candidates and officeholders.” Def. Ex. 14, Declaration of Alan Reed in Opposition to Motion for Summary Judgment (“Reed Decl.”) ¶ 7.

15. 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:

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.

Def. Ex. 5, p. 5-22 (“Reason to Vote Yes Tuesday,” Albuquerque Journal, September 30, 1973, A4).

16. Soon after county voters defeated the proposed consolidation despite the support of city voters, Albuquerque’s City Commission approved proposed amendments to the city charter which would include a code of ethics and elections based on the proposals that had been made for the consolidated government. Def. Ex. 5, p. 5-31 (“Commission Approves Revisions in Charter,” Albuquerque Journal, January 12, 1974, A1-A2) (noting “The proposed changes follow the structure advocated for the consolidated city-county government.”)

17. The 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, Common Cause, the Democratic

Party and Unity Party, and other groups, who also endorsed the proposed Ethics Code and a change to a mayor-council form of government. Def. Ex. 5, p. 5-40 (Albuquerque Journal, February 18, 1974, A5); *see also* Def. Ex. 5, pp. 5-42-43 (“Charter Vote Tuesday,” Albuquerque Journal, February 24, 1974, A1, A12).

18. Editorial comment again noted that the new 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.” Def. Ex. 5, p. 5-39 (Editorial, “For Proposition No. 2,” Albuquerque Journal, February 18, 1974, A4).

19. 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 races. *See, e.g.*, Def. Ex. 5, p. 5-9 (“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”); Def. Ex. 5, p. 5-1 (“Campaign Time is Time for Payoffs,” Albuquerque Journal, October 13, 1972, A4); Def. Ex. 5-2 (Editorial, “Campaign Financing Disgrace,” Albuquerque Journal, October 28, 1972, A4); Def. Ex. 5, p. 5-3 (“Wealthy Continue to Aid Party War Chests,” Albuquerque Journal, October 29, 1972, A1); Def. Ex. 5, p. 5-5 (“Tidy Sum of Out-of-State Money Flows Into State U.S. Senate Race,” Albuquerque Journal, October 29, 1972, A1); Def. Ex. 5, p. 5-20 (“Tough Election, Ethics Codes Are in Charter,” Albuquerque Journal, September 9, 1973, A1) (referring to Watergate scandal).

20. Since the adoption of spending limits in 1974, the limits have served to deter the reality and appearance of corruption and to promote public confidence in the integrity of government, and limits on spending remain necessary to serve these compelling governmental interests today. Def. Ex. 11, Declaration of Michael Cadigan in Opposition to Motion for Summary Judgment (“Cadigan Decl.”) ¶ 5 (“Albuquerque’s spending limits have kept the influence of money in City Council under control and the lesser fund-raising obligations have attracted more community-minded people to run for office”); Def. Ex. 12, Declaration of Dede Feldman in Opposition to Motion for Summary Judgment (“Feldman Decl.”) ¶ 15 (“Having spending limits in place has constrained the really big contributors, like the developers and the big vested interests, from having undue influence on the City Council.”); Def. Ex. 13, Declaration of Abraham Gutmann in Opposition to Motion for Summary Judgment (“Gutmann Decl.”) ¶ 19 (“Because those groups cannot give large amounts of money when there are spending limits, candidates and ultimately public officials treat all of their constituents equally. . . . So I think the spending limits keep the politicians honest.”); Def. Ex. 14, Reed Decl. ¶ 20 (“I disliked the injunctions against the spending limits in 1997 and 2001 because . . . now the city voter wonders what the candidates are doing to get all that extra money and what promises are they making and that sort of thing.”); Def. Ex. 16, Cottrell Dep. at 27-28, 34 (“Money and big money seemed . . . [to] keep people elected or elect certain people. . . . I think the charter has been successful in making the people of Albuquerque feel that they have an honest government.”)

21. The continuing need for spending limits was documented by survey research conducted among Albuquerque voters in 1998, when the City Council was

considering whether to maintain or eliminate the limits. The survey demonstrates that 84% of Albuquerque voters believe that campaigns for national office in New Mexico, which are not subject to spending limits, are too influenced by special interest money, with two-thirds of respondents characterizing elections for national office as “dishonest.” Def. Ex. 3, Declaration of David Mermin, with attached survey findings (hereafter, “Survey Findings”), p. 3, questions (questions 14, 15). 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. 3, 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). Overall, 87% percent of voters expressed support for maintaining limits on spending in Albuquerque elections. *Id.*, p.6 (question 29).²

22. If Albuquerque’s 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).

23. The findings set forth in this survey were echoed by those of an Albuquerque Journal poll conducted August 14-16, 2001, which found that 74% of

² The survey asked voters whether they favor or oppose the law setting limits on mayoral and city council 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.*

respondents favored a cap on campaign expenditures. Def. Ex. 4, “Most Voters for Spending Caps,” Albuquerque Journal, August 20, 2001.

24. The evidence also indicates public awareness of how political money is currently deployed in elections for New Mexico state office and federal office to advance the legislative agenda of wealthy special interests. *See, e.g.*, Def. Ex. 5, p. 5-48-49 (“Campaign Donor Seeks N.M. Tax Breaks for Plant,” Albuquerque Journal, February 14, 1999, A1) (lobbyist for waste company explains company’s donations to both political parties and numerous House and Senate candidates by noting that company planned a project in New Mexico and “[w]e didn’t want to be strangers when we showed up with a request”); Def. Ex. 5, p. 5-55 (“Norwest Biggest Donor,” Albuquerque Journal, October 15, 1999, D5) (Norwest spokesperson explains donations to state legislators by saying “There’s always a political interest, of course. We wouldn’t be giving if there weren’t.”). The evidence also shows that the deployment of political money has been successful in advancing the agenda of well-funded special interests in the state legislature. Def. Ex. 12, Feldman Decl. ¶ 14 (“I think that unlimited spending in campaigns for state legislature has made a difference in decisions made in the state legislature. . . . You can see this influence with the alcohol and gambling industries.”) Such incidents underscore why Albuquerque voters have greater confidence in the integrity of their city elections, which are subject to meaningful restraints on campaign spending.

25. Voter turnout rates have remained higher in Albuquerque than in comparable cities without spending limits. According to a report prepared by Professor Anthony Gierzynski, a political scientist and nationally recognized scholar on campaign

finance, average turnout of registered voters in Albuquerque elections from 1974 to 2001 was 40.3%, compared to turnout rates for city elections across the country which are typically in the 25-35% range. Def. Ex. 1, Gierzynski Report, at 7-8 (attached to Declaration of Anthony Gierzynski, Ph.D.).

26. 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. For example, turnout of registered voters in Pasadena in May of 1987 was 20%, and in Sacramento turnout was 33% in September 1987. *Id.* at 8. By comparison, turnout ranged from 40.4% to 51.3% in Albuquerque elections held in 1985 and 1989. *Id.*, Figure 1. Further, Figure 2 of Professor Gierzynski's report compares Albuquerque turnout with that of other cities for which data could be found for the period 1988 through 2001, and demonstrates that Albuquerque's turnout compared favorably with that of other cities during that period. *Id.* at 7-8 & Figure 2.

27. In 1997 and 2001, spending limits were enjoined after the election campaigns were underway. The percent of registered voters turning out in those years, which coincided with mayoral elections, averaged 37.7%. During the years spending limits were in place, the average turnout in similar city elections coinciding with mayoral elections averaged 43.1%. Def. Ex. 1, Gierzynski Report, at 7-8. However, since the spending limits were in place for part of the campaign in those years and many candidates did not exceed the limits, Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, ¶ 4 & Figure 2, the 1997 and 2001 elections do not fully reflect the deleterious impact that is likely to result from permanently enjoining the spending limits.

28. Another set of comparisons limited to southwestern cities comparable to Albuquerque in their form of government also shows that Albuquerque voter turnout was generally higher than that of the other cities during the same time period. These data consist of voter turnout for the period 1974 through 1989 for several southwestern cities, calculating voter turnout as a percentage of the voting-age population rather than as a percentage of registered voters. As demonstrated in Professor Gierzynski's Supplemental Declaration, Def. Ex. 2, these data show that Albuquerque had the highest turnout of any of the southwestern cities that were directly comparable in terms of the timing of their elections (that is, cities, like Albuquerque, holding their municipal elections nonconcurrently with higher-profile state or national elections). Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, ¶ 3 & Figure 1.

29. Empirical analysis of congressional elections indicates that simply increasing the amount of money in a campaign is as likely to reduce, as it is to increase, voter turnout. *See* Report of Dr. Donald A. Gross in the Case of *Rue v. City of Albuquerque* (hereafter, "Gross Report"), at 3 (attached to Declaration of Dr. Donald A. Gross, Def. Ex. 8).

30. The federal experience with limited contributions and unlimited spending in congressional elections unequivocally demonstrates that contribution limits alone have failed to deter corruption and the appearance of corruption in congressional elections. This is 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. Def. Ex. 7, Declaration of Larry Makinson. None of this evidence was available to the Supreme Court at the time of the *Buckley* decision.

31. Since the *Buckley* decision, campaign contributions to candidates have been limited to \$1,000 per election, but spending has been unlimited. As Mr. Makinson explained, the federal regime of unlimited spending has left 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 on a winning campaign. Def. Ex. 7 (Tr. 17 & Makinson Ex. B).³

32. The federal experience also confirms that, when spending is unlimited, 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 \$305,000. 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. 7 (Makinson Ex. D & Tr. 20-21). The more funds that candidates have to raise to remain competitive with their rivals, the more they have to depend on the continued good will of the people who put money into their campaigns. Def. Ex. 7 (Tr. 22-23).

³ Mr. Makinson’s expert report for this case consists of his Declaration and several attachments. The attachments constitute Mr. Makinson’s courtroom testimony in the preliminary injunction hearing in the case of *Homans v. City of Albuquerque*, No. CIV 01-917 MV/RLP (D. N.M.) (Transcript of Proceedings August 30, 2001), as well as certain exhibits entered into the record in connection with his *Homans* testimony. Accordingly, Mr. Makinson’s Declaration in this case is designated as Def. Ex. 7, with page references to the attached *Homans* transcript designated in parentheses as “Tr. ___” and references to exhibits attached to his report designated as “Makinson Ex. [A through I]”.

33. The problem of undue influence of large donors has not been solved by placing limits on the amount that any one individual can contribute. Techniques such as “bundling” allow special interests to funnel multiple contributions to candidates so that the candidate effectively receives thousands of dollars from one interest despite the limit on individual contributions. For example, a large number of executives and employees from the same corporation, often with their spouses and sometimes their children, each donate \$1,000 to a candidate. They may coordinate the timing of the donations, or the candidate may do a fund-raiser sponsored by the company at which donations are collected. Although each check is considered an individual \$1000 donation, the candidate understands quite well that one corporation or organization has effectively contributed thousands of dollars to his campaign. Def. Ex. 7 (Tr. 26-27). Bundling, however, encompasses a broader set of practices than merely presenting multiple checks in one envelope. These practices are detailed in Mr. Makinson’s testimony, Def. Ex. 7 (Tr. 27-33 & Makinson Exhs. G & F).

34. The problem of bundling, which makes contribution limits ineffective, is not caused by the so-called “soft-money” loophole. Recent federal legislation seeking to close that particular loophole, or any comparable future New Mexico legislation that might be passed, 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. Def. Ex. 7 (Tr. 34).

35. Mr. Makinson’s extensive research establishes 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. Def. Ex. 7 (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.” *Id.* 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.” Def. Ex. 7 (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.” Def. Ex. 7 (Tr. 39-40).

36. Even plaintiff, Mr. Rue, acknowledged that he would be uncomfortable if it were necessary to solicit contributions from people he does not know, because “I don’t like the complications of implied quid pro quo.” Def. Ex. 20, Deposition of Sander Rue (“Rue Dep.”) at 80. Mr. Rue’s unwillingness to solicit such funds did not cause him any disadvantage during the 2001 election because his opponents, Michael Cadigan and Jeff Armijo, decided to keep their spending within the limit. However, if the spending limits were permanently enjoined, and his opponents stepped up their fundraising, Mr. Rue could be significantly disadvantaged in future city council elections by his unwillingness to engage in aggressive fundraising.

37. In sum, while the record before the *Buckley* Court in 1976 may have suggested that contribution limits alone, without limits on spending, would be sufficient

to limit the improper influence of money and insure citizens' faith in the integrity of government, the record in this case establishes the opposite.

Facts Demonstrating that Albuquerque's Spending Limits Serve the Compelling Governmental Interest of Permitting Candidates And Officeholders to Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties.

38. 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. As Mr. Makinson explained, fundraising is a constant and dominant preoccupation of members of Congress. During the peak fundraising season, it is not unusual for a member of Congress to go to three or four fundraisers a night. Def. Ex. 7 (Tr. 22-23). The same problem exists at every level of government in the absence of spending limits. *Id.*; *see also, e.g.*, Def. Ex. 12, Feldman Decl. ¶¶ 11-12. The more funds that candidates have to raise to remain competitive with their rivals, the more they have to depend on the continued good will of the people who put money into their campaigns. Def. Ex. 7 (Tr. 22-23). *See also* Def. Ex. 6, Declaration of Martin Schram filed in *Homans v. City of Albuquerque*, with attached excerpts from his book *Speaking Freely: Former Members of Congress Talk About Money in Politics* 37-46 (1995) (detailing how demands of fundraising draw time and attention of members of Congress away from their duties as legislators).

39. Eliminating the city council spending limit therefore would impede the ability of city council members to carry out their duties and the ability of all city council candidates to spend time meeting with voters. Def. Ex. 11, Cadigan Decl., ¶ 21 (“Because unlimited spending creates an arms-race mentality, I would have to spend a significant portion of my time fund-raising, an activity that is already uncomfortable for

me, rather than meeting with a broad spectrum of voters, and I would feel uncomfortable with the possible appearance that I owe implicit obligations to people and interests that contributed large sums of money.”). State Senator Dede Feldman’s experiences running for both City Council and the State Senate are demonstrative:

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

Def. Ex. 12, Feldman Decl. ¶ 11.

40. Even while adhering to a spending limit of \$16,200 in the 1999 election, one of the city council candidates reported spending 10 to 15 hours per week on fundraising during his campaign. Def. Ex. 17, Deposition of Michael Guerrero (“Guerrero Dep.”) at 11-13. The prospect of candidates spending even more time on fundraising is clearly detrimental to the proper functioning of the City’s political process.

41. 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. 3, Survey Findings, at 8, Question 40.

Facts Demonstrating that Albuquerque’s Spending Limits Promote an Open and Robust Public Debate by Encouraging Electoral Competition.

42. As noted in the study of Professor Donald Gross:

In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability alive.

Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Def. Ex. 8, Gross Report, at 8; *see also* Def. Ex. 1, Gierzynski Report, at 11-12.

43. With spending limits in place since 1974, Albuquerque’s elections have been 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 more successful in winning election against incumbents in Albuquerque than is true in other cities without spending limits. *Id.* *See also* Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., Table 2.

44. 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 20 percentage points between winner and second-place candidate). Def. Ex. 1, Gierzynski Report, at 7. By comparison, in city council races from 1989 through 1999 in which spending limits were in place, 18 out of 22 elections were contested – that is, 81.8% of the elections had at least two serious competitors. Twelve of these city council elections, or 54.5%, would be considered competitive (with the second-place candidate

within 20 percentage points of the winner) and 8, or 36.3%, considered close (within ten percentage points). *Id.* at 7. In addition, 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.

45. Unlimited spending has deterred competition for office at the federal level. Def. Ex. 7, Makinson Report. “[I]t’s had a deleterious effect on the competitiveness of elections.” Def. Ex. 7 (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.” *Id.* Unlimited spending particularly benefits incumbents at the expense of challengers, in large part because sitting incumbents are already in a position to assist potential donors who may be interested in legislative policy. Def. Ex. 7 (Tr. 35-36, 38, 40-41; Makinson Ex. G); *see also* Def. Ex. 12, Feldman Decl. ¶¶ 10, 13.

46. Thus, in elections where spending is unlimited, incumbents typically enjoy a substantial funding advantage over challengers. In Albuquerque elections, however, this is not the case. In city council elections, the incumbent-challenger spending ratio was almost even: 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. Def. Ex. 1, Gierzynski

Report, at 12. Again, the relative parity between incumbents and challengers has fostered competitiveness in Albuquerque city elections.

47. Candidates who have run as challengers in city council elections confirm that the spending limits have permitted them to run competitive races against incumbents. *See, e.g.*, Def. Ex. 12, Feldman Decl. ¶¶ 5-6, 10. In 1999, for example, Brad Winter and Greg Payne defeated incumbents while spending substantially less than the limit, and Michael Guerrero came in a close second to a long-term incumbent while spending substantially less than the limit. Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., Table 2; *see* Def. Ex. 17, Guerrero Dep. at 10.⁴

48. Albuquerque's spending limit for city council races has encouraged electoral competition by allowing average citizens and candidates of lesser means to seek election to city council. As Alan Reed explains:

It encourages candidates of modest means who could not otherwise run and who can be credible and competitive candidates. Ruth Adams was a retiree when she was elected to the City Council. Steve Gallegos worked at the phone company. Vince Griego, who is now retired, managed the repair service of the county motor pool. There are numerous public school employees, like Pat Baca, Alan Armijo, and Angela Robbins, who have run and served on the City Council. Tim Kline was a police officer and then worked at a car dealership. Twenty-five years ago, when fifty bucks was the limit of what I could put into a campaign, I couldn't have run, even for \$3,000, if I would have to be running against a candidate that could spend unlimited amounts.

Def. Ex. 14, Reed Decl. ¶ 8. Likewise, Abraham Gutmann would not have been able to run a competitive campaign without spending limits. Def. Ex. 13, Gutmann Decl. ¶ 18 (“[The spending limits] have allowed people who do not have access to large donations to

⁴ The only city council election in which a non-incumbent has won while exceeding the spending limit is in District 7 in 2001, when Sally Mayer defeated Tim Kline and both candidates exceeded the limit. Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., Table 2. *See also* Declaration of Neil Weinberg, Def. Ex. 15 (indicating that Tim Kline, who was serving as a councilmember from District 5, had not previously represented most of the voters in the new District 7 in which he ran in 2001).

run competitive campaigns. At the time I ran for city council, I was a student but nevertheless felt I could run a competitive campaign under the spending limits.”).

Marion Cottrell testified that a number of people who did not have resources were elected to the first City Council; among the original councilors, he counted two “public school educator[s], a couple of university professors, [and] a pharmacist who had his own small business.” Def. Ex. 16, Cottrell Dep. at 40-41. In the absence of spending limits, such candidates will be deterred from running for City Council. Def. Ex. 13, Gutmann Decl. ¶ 22 (“I definitely would have been deterred from running in the City Council race had the spending and contribution caps not been in place.”); Def. Ex. 14, Reed Decl. ¶ 8 (“Twenty-five years ago, when fifty bucks was the limit of what I could put into a campaign, I couldn't have run, even for \$3,000, if I would have to be running against a candidate that could spend unlimited amounts.”).

49. In the 1997 and 2001 elections, the limit on spending in city council races remained in place for most of the election, and given the legal uncertainties, only 2 of the city council candidates in 1997 and 3 of the city council candidates in 2001 actually exceeded the limits in 2001 (two of those 3 candidates ran against each other in 2001). Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., ¶ 4 and Table 2. The candidate field in the 2001 Albuquerque election, and the results of the election, thus did not fully reflect the anti-competitive impact that unlimited campaign spending will have in the long run if the limit is permanently enjoined. However, the evidence set forth above demonstrates that removal of the spending limit will reduce robust debate of the issues in Albuquerque elections by decreasing the number of contested and competitive elections.

Facts Demonstrating that Spending Limits Serve The Compelling Governmental Interest In Increasing Voter Interest In And Connection To The Electoral Process

50. Research by Professor Donald Gross, a political scientist at the University of Kentucky specializing in the study of campaign finance and congressional elections, demonstrates that direct mobilization of voters in the form of being contacted by a candidate or party is far more effective than high campaign spending in stimulating voter participation. Def. Ex. 8, Gross Report, at 8.

51. By contrast with the effectiveness of direct mobilization in stimulating participation, high-spending campaigns do not stimulate voter participation. In fact, Professor Gross's study of survey data from the 1994 and 1996 congressional elections demonstrates that, "[i]n any given electoral setting, simply increasing the amount of money in the campaigns is as likely to reduce, as it is to increase, voter turnout." *Id.* at 3.

52. There are several reasons why campaign spending is less effective than direct mobilization in stimulating voter turnout. 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. Candidate resources, in addition, may often be spent in areas and on items that have little to do with actually communicating with voters. High-spending campaigns also tend to add to citizen perceptions of corruption and the view that elections are for sale. *Id.* at 3-5.

53. 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.* This is consistent with Professor Gierzynski’s findings, noted above, which show that Albuquerque’s voter turnout has remained higher than that of other cities that do not have spending limits. See ¶¶ 25-28 *supra*.

54. Campaign spending also does little to enhance voters’ engagement with the electoral process. Voter engagement is measured by such things as whether voters say that they are interested in the election, whether they care about the results of the election, whether they are familiar with the candidates’ names, and whether they know the positions or ideology of the candidates. Empirical analysis of congressional elections shows that increased campaign spending generally had no effect *or a negative effect* on voters’ interest in the election, concern about the outcome of the election, and attentiveness to news reports about the campaign. Higher spending campaigns did not make citizens any more certain in their ideological placement of candidates than lower spending campaigns, and in some races, spending may have blurred voters’ ability to determine such differences. Def. Ex. 8, Gross Report, at 6. The only positive effect of spending was to increase voters’ general familiarity with the candidate, but this did not translate into greater interest in or concern about the election. As Professor Gross notes:

As a result, exposure to high spending House elections does little to connect citizens to the electoral process. In other words, in high spending campaigns, citizens may be more familiar with candidates, but they may care less, they may be less interested, they may pay less attention, and they may be less certain or able to distinguish the ideological leaning of candidates.

Id. at 7.

55. Direct mobilization in the form of being contacted by a candidate or political party has substantial positive effect on voters' overall engagement with the political process. In the 1994 elections studied by Professor Gross, for example, direct contact by a political candidate or party significantly increased respondents' interest in the congressional race, respondents' certainty about their ability to accurately place the candidates on ideological scales, and respondents' concern about the outcome of the election. Therefore, as Professor Gross states, "the more spending limits encourage candidates and parties to rely upon direct contacts with citizens, the more likely we are to see an increase in voter information, citizen concern with the election, and citizens' connection to the electoral process." *Id.* at 8.

56. Candidates with experience in City Council elections stress that their direct contact with the voters has engaged the voters, and therefore connected them to the political process, by creating a dialogue that actively includes voter concerns in their campaigns. Def. Ex. 11, Cadigan Decl., ¶ 7 ("When you go and talk to people, you create a dialogue with the voters and they become engaged in the political process. When you rely primarily on direct mail and political advertisements, on the other hand, you target only a passive audience and you do not engage voters in the process."); Def. Ex. 12, Feldman Decl. ¶ 7 ("Direct voter contact, when you can talk and listen to voters and find out their concerns, is the most important part of campaigning."); Def. Ex. 13, Gutmann Decl. ¶ 6 ("I focused on going door-to-door and tried to meet all likely voters one-on-one because I think voters really appreciate it when a candidate is committed enough to come to their door and to meet them. I think it creates a real connection.").

57. Another indicator of voter engagement is the extent to which small donors, as opposed to large donors, play a role in funding election campaigns. In Cincinnati, where spending is unlimited in city elections, 45% of all funds raised for city elections from 1991 to 1995 came from donors contributing at least \$1,000, while only 8% of funds came from donors contributing less than \$100.00. By contrast, in Albuquerque's elections from 1989-1997, only 27% of all funds came from donors contributing at least \$1,000, and 16% came from donors contributing less than \$100.00. Def. Ex. 7 (Makinson Ex. H; *see also* Tr. at 45). In terms of the relative number of contributions coming from small donors, only 6% of donors gave less than \$100.00 in Cincinnati's elections in 1995, while 53% of donors gave at least \$1,000. In Albuquerque's 1995 election, 13% of donors gave less than \$100.00, while only 27% gave \$1,000 or more. Clearly, in Albuquerque, small donors are able to play a larger role in the electoral process.

**Facts Demonstrating that the Spending Limits Permit
Effective Campaigns for City Council
and Effective Communication with Voters.**

58. The current spending limit for Albuquerque's city council elections is more than adequate for running an effective campaign for city council in Albuquerque. Def. Ex. 11, Cadigan Decl. ¶¶ 6, 22; Def. Ex. 12, Feldman Decl. ¶ 6; Def. Ex. 13, Gutmann Decl. ¶ 21; Def. Ex. 14, Reed Decl. ¶ 9; *see also* Def. Ex. 1, Gierzynski Report at 9-10.

59. Only two years ago, the limit was doubled from its previous level, after the first lawsuit challenging Albuquerque's spending limits was filed during the 1997 city elections. Def. Ex. 9, Plaintiff's Admissions, ¶¶ 4, 7.

60. Mr. Rue's campaign manager, Patrick Killen, admits that Bradley Winter, Hess Yntema, and Greg Payne all ran "very effective" campaigns for city council in 1999. Def. Ex. 18, Killen Dep. at 18. None of these candidates exceeded the spending limit of \$16,200 applicable to the 1999 campaign. Brad Winter defeated an incumbent while spending only \$6,419 on his campaign, less than half the amount permitted under the spending limit. Greg Payne also defeated an incumbent while spending only \$13,071. Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Table 2.

61. There are many low-cost ways to reach out to voters in Albuquerque. Door to door contact is easy and free. Other low-cost methods of voter contact used effectively by city council candidates include standing on corners with signs, passing out campaign literature at public locations or events, attending public forums and community meetings, putting up yard signs, placing an ad in a local community newspaper, doing "lit drops" with volunteer assistance, and calling in to local radio talk shows to discuss issues. Def. Ex. 11, Cadigan Decl. ¶¶ 7-9, 11, 13-16; Def. Ex. 12, Feldman Decl. ¶¶ 7-9 ; Def. Ex. 13, Gutmann Decl. ¶¶ 6, 7, 9-11; Def. Ex. 14, Reed Decl. at ¶¶ 10, 12-15, 17.

62. Candidates can obtain voter lists on disk from the county for a small charge, and the list identifies things like party registration and voting in past city council elections. The candidates can easily use these voter lists to identify voters they would like to target. Def. Ex. 18, Killen Dep. at 54.

63. By purchasing inexpensive software, a candidate can use a home computer to make automated phone calls to voters. Def. Ex. 14, Reed Decl. ¶ 17.

64. Candidates can achieve multiple contacts with voters in city council elections without exceeding the spending limit. *See* Def. Ex. 11, Cadigan Decl. ¶¶ 9-11,

13-19 (candidate sent four direct mailings and made numerous contacts in other ways); Def. Ex. 12, Feldman Decl. ¶¶ 7-9 (same); Def. Ex. 13, Gutmann Decl. ¶¶ 7-10, 13-14 (candidate was “pretty well known” as a result of campaign because he walked door-to-door to distribute three different fliers to each likely voter, made “get-out-the-vote” call to each likely voter, and put out eye-catching signs); Def. Ex. 14, Reed Decl. ¶¶ 10-12 (candidate sent between three and five direct mailings and made numerous contacts in other ways); Def. Ex. 17, Guerrero Dep. at 16 (candidate sent 5 or 6 direct mailings and made other contacts; by the end of the campaign, most people in the district knew who he was and what his message was).

65. Even if there were no limits on campaign spending, candidates would not normally use TV for city council elections because of the lack of congruence between media markets and council district boundaries. Def. Ex. 13, Gutmann Decl. ¶¶ 7, 17. Even candidates who chose to engage in unlimited spending in 2001, like Mr. Rue and Sally Mayer, did not choose to use TV, because it is not cost effective in a city council campaign. Def. Ex. 20, Rue Dep. at 22-23; Def. Ex. 19, Mayer Dep. at 77-78. Similarly, radio is not considered cost effective for council districts because of the broad market served by radio stations. Def. Ex. 13, Gutmann Decl. ¶¶ 7, 17.

66. Witnesses who have experience with City Council campaigns state that the most important thing in a council election is personal contact with voters. Def. Ex. 11, Cadigan Decl. ¶ 7; Def. Ex. 12, Feldman Decl. ¶ 7; Def. Ex. 13, Guttman Decl. ¶ 7; Def. Ex. 17, Guerrero Dep. at 33. *See also* Def. Ex. 19, Mayer Dep. at 17-18.

67. Three local newspapers provide coverage of city council elections and run candidate profiles. Def. Ex. 13, Gutmann Decl. ¶ 12 . There is also newspaper coverage of candidate forums. Def. Ex. 14, Reed Decl. ¶ 15.

68. In a typical campaign, candidates target their direct mailings by identifying likely voters and likely supporters, rather than mailing to every household in the district. This is true whether spending is capped or uncapped, because it is not considered efficient to make blanket mailings to the entire district. For example, Mr. Rue, who did not observe the spending limit in 2001, targeted his mailings to about 6,000 households. Def. Ex. 20, Rue Dep. at 42. *See* Def. Ex. 14, Reed Decl. ¶ 18 (“Any candidate with a good campaign plan will have a very select list of targeted voters that he or she is trying to reach, regardless of whether spending is limited or unlimited.”).

69. When asked if, in retrospect, he would have done anything differently in his 2001 city council campaign, Mr. Rue stated that he would have wanted to get out earlier in walking the district and making personal contact with voters, as Mr. Cadigan had done. Def. Ex. 20, Rue Dep. at 45-46, 48-49.

70. Survey evidence shows 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 very 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. 3, Survey Findings, at 2 (questions 4, 5, 7, 8 & 10).

71. 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. For city council elections, most of the competitive candidates from 1989 to 2001 spent less than the maximum allowed, including many of the victorious candidates. Def. Ex. 1, Gierzynski report at 9-10; *see also* Figures 3 and 4. In 1999, for example, three of the four winning city council candidates spent substantially less than the spending limit (more than \$2,500 below the spending limit). *Id.* In the years when spending limits were in effect, the winning candidate frequently was not the candidate who spent the most; this was the case in half the contested city council races. *Id.* at 10. In the years when the limits were enjoined, only two candidates exceeded the limit in 1997 (one of whom lost to a candidate who underspent the limit) and only three candidates exceeded the limit in 2001 (two of whom lost their elections). Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., ¶ 4.

72. The spending limit has allowed challengers a better opportunity of running competitive city council elections against incumbents than would be possible if spending were unlimited. Def. Ex. 12, Feldman Decl. ¶¶ 5-6, 10; Def. Ex. 1, Gierzynski Report at 6-7, 12.

73. The successful candidate in Mr. Rue's district, Michael Cadigan, kept his spending within the limit, yet he was more successful in communicating with voters than Mr. Rue. Def. Ex. 22, Albuquerque City Council District 5 Post-Election Survey,

October 4, 2001, at 5; Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, ¶ 3, Table 1 & Figure 2. This demonstrates that higher spending does not necessarily mean better communication with voters.

74. As Mr. Cadigan observed, “The spending limit was more than adequate to allow my campaign to reach virtually every registered voter in the district, and to make multiple contacts with thousands of voters.” Def. Ex. 11, Cadigan Decl., ¶ 22. Mr. Cadigan enlisted the help of numerous volunteers and engaged in extensive door-to-door campaigning. His campaign also sent four direct mailings, posted 750 yard signs, distributed literature at the home of almost every registered voter, and handed out fliers in public locations. He attended numerous public forums and neighborhood meetings to publicize his candidacy. *Id.*, ¶¶ 7-19.

75. Mr. Rue’s excess campaign expenditures were not needed for voter contact. Mr. Rue’s campaign budget called for him to spend only 62% of his funds on voter contact, with the rest going to “strategic political consulting and campaign management.” Def. Ex. 21, Projected Campaign Budget; Def. Ex. 18, Killen Dep. at 50.

76. Mr. Rue spent \$9,700 of his total campaign fund of \$25,724 to pay Patrick Killen to serve as his campaign manager. At the time of Mr. Rue’s campaign, Mr. Killen was 21 years old, and had lived in Albuquerque for only two years. His sole previous involvement in Albuquerque City Council campaigns was a limited amount of volunteer work at the end of Greg Payne’s 1999 campaign on the last couple of weekends before the election. Def. Ex. 18, Killen Dep. at 5-6. “Like I say, I haven’t had much experience with a lot of Albuquerque campaigns.” *Id.* at 50. Mr. Killen candidly indicated that he could not say whether Mr. Rue’s campaign would have done better or worse without the

expenditure on Mr. Killen's compensation. "I could have been totally out of the picture, and he could have tried to do all this himself, and I don't know if he would have fared better or worse. I honestly don't." *Id.* at 26.

77. The example of Mr. Cadigan's campaign demonstrates that Mr. Rue could have communicated effectively with voters in his district while spending less than the limit. While Mr. Rue claims he would have been prevented from sending three pieces of direct mail if the limit had been enforced, Mr. Cadigan sent four pieces of direct mail while remaining within the limit. Def. Ex. 11, Cadigan Declaration, ¶ 10. Other city council candidates also have sent three or more mailings while abiding by the spending limit. *See* Def. Ex. 12, Feldman Decl. ¶ 9; Def. Ex. 17, Guerrero Dep. at 13.

78. City Council candidates typically seek to organize volunteers to help the campaign with literature drops, door-to-door canvassing, telephoning, and other tasks. Def. Ex. 11, Cadigan Decl. ¶¶ 12-14, 17-20; Def. Ex. 12, Feldman Decl. ¶¶ 6-7; Def. Ex. 13, Gutmann Decl. ¶ 8; Def. Ex. 14, Reed Decl. ¶ 10; Def. Ex. 17, Guerrero Dep. at 16. Mr. Killen, however, acknowledged that he did not encourage Mr. Rue to recruit volunteers for his campaign. Def. Ex. 18, Killen Dep. at 32-33.

79. Mr. Rue has acknowledged that he did not do any planning at the outset of his campaign about how to budget his expenditures to stay within the legal spending cap. Def. Ex. 20, Rue Dep. at 40 ("I know I certainly didn't understand the ramifications of spending caps early on in the process. . . . I wasn't really sure of the dynamics of what spending caps really meant early on.") If Mr. Rue ignored the limit from the outset of the campaign, and found himself exceeding the limit in September, that does not mean that the limit was too low to permit adequate outreach.

80. Mr. Rue testified that he was planning to compete in the 2001 Republican primary election for District 23 of the New Mexico House of Representatives while spending only \$7,000 to \$8,000, even though there is no limit on spending for state legislative races in New Mexico. Def. Ex. 20, Rue Dep. at 71. This is less than half the amount candidates may spend in a city council election under the current limits – again undermining the claim that the city council spending limit is too low.

81. Mr. Rue does not plan to use a paid campaign manager in future elections. *Id.* at 72.

82. Albuquerque's spending limit will continue to rise to keep pace with increases in the salary of city council members. Albuquerque City Charter, Art. XIII, Section 4(d)(1). 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.

83. If Albuquerque's limits were too low to permit effective communication with voters, one would expect to find that Albuquerque turnout is lower than that in other comparable cities. In fact, the opposite is true. Def. Ex. 1, Gierzynski Report, at 7-8; Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, ¶ 3 & Figure 1.

84. One reason that higher spending does not necessarily enhance communication with voters is that not all spending in elections is used to purchase contact with voters. For example, candidates may spend money on more expensive office space or equipment, donate money to other candidates, or use funds to raise more funds. 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 14-15; *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.* at 15.

ARGUMENT

Introduction

A motion for summary judgment may be granted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). “When determining whether there exist issues of material fact and whether the movant is entitled to judgment as a matter of law, a court looks at the record and the reasonable inferences from the record in the light most favorable to the non-movant.” *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1283 (10th Cir. 2002); *Kaul v. Stephan*, 83 F.3d at 1212.

Each of the factual paragraphs set forth above is supported by detailed evidence submitted in the two volumes of Defendants’ Exhibits in Opposition to Plaintiff’s Motion for Summary Judgment, and must be accepted as true in determining this motion. To summarize, these critical facts about Albuquerque’s limit on campaign spending in city council races, include the following:

- The spending limit has served to deter corruption and the appearance of corruption (including the reality or appearance of improper influence on candidates and elected officials), and has promoted the confidence of ordinary citizens in the integrity of government and the electoral process; and if the spending limit is struck down, the great majority of Albuquerque citizens will have less confidence in city government and less faith in the integrity of their elected officials (§§ 10-29, *supra*);
- The spending limit has served to free candidates and elected officials from the endless burden of fundraising so that they may devote their time to the business of government and interaction with the voters rather than to fundraising (§§ 38-41, *supra*);
- The spending limit has promoted an open and robust political debate in city elections by fostering competitive elections (§§ 42-49, *supra*);
- The spending limit has served to increase voter interest in and connection to the electoral process (§§ 50-57, *supra*);
- The experience of the last 26 years with unlimited spending in federal elections demonstrates that limits on the amounts that donors may contribute to candidates, without limits on overall campaign spending, are ineffective in serving the governmental interests listed above (§§ 30-37, *supra*);
- The spending limit is set at a level high enough to permit effective campaigns for city council and effective communication with the voters (§§ 58-84, *supra*)

- Voter turnout has remained higher in Albuquerque than in comparable cities that lack limits on campaign spending (§§ 25-28, *supra*);
- City council elections in Albuquerque are more competitive than elections in other jurisdictions where spending is unlimited, and challengers have a greater likelihood of running successfully against incumbents in Albuquerque than in other jurisdictions (§§ 43-46, *supra*).

Plaintiff's motion incorrectly asserts that these facts all are irrelevant as a matter of law, and must be disregarded, in determining whether Albuquerque's limit on campaign spending may be upheld under the First Amendment. In making this argument, plaintiff misapprehends the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), as well as the ruling of the 10th Circuit motions panel that granted a motion for injunction pending appeal in *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001). 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. Further, the ruling of the 10th Circuit motions panel in the *Homans* case was an interlocutory ruling, rather than a decision on the merits, and is not controlling on the question of whether plaintiff is entitled to judgment on the merits in this case.

Because the evidence presented by defendants establishes, at the very least, triable issues of fact as to whether Albuquerque's limit on spending in city council campaigns is closely tailored to serve compelling governmental interests, the Court should deny plaintiff's motion for summary judgment.

I. BUCKLEY V. VALEO DOES NOT AUTOMATICALLY INVALIDATE ALL LIMITS ON CAMPAIGN SPENDING.

Plaintiff contends that this Court must ignore all facts concerning how Albuquerque’s spending limit has operated in practice, asserting that “there is no set of facts that could support a finding that the limit at issue here is constitutional.” Pl. Corrected Memorandum of Law at 5. Plaintiff 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 the Federal Election Campaign Act of 1974 (“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 are critical to the constitutional analysis, 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, 669 (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, 211 (1992) (applying strict scrutiny to state ban on electioneering activity near polling places, but upholding ban).⁵ As the Court has cautioned: “[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal

⁵ Even decisions that strike down particular campaign restrictions demonstrate that the constitutionality of a restriction is factually contingent, not based on *per se* rules. For example, 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’

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 limits on the amounts that donors could contribute to federal candidates *and* on the amount that candidates could spend on congressional 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 the FECA’s limits on the amount that donors can contribute to candidates. *Id.* 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.” *Buckley*, 424 U.S. at 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.

independent expenditures is necessary to combat a substantial danger of corruption in the electoral system.” 518 U.S. at 617 (emphasis added).

The factually contingent nature of the *Buckley* ruling is reflected in other passages as well, including the Court’s discussion of evidence showing how FECA’s limits would have affected the scope of previous election campaigns. *Id.* at 20 n. 21. For example, the *Buckley* Court noted that “[t]he statistical findings of fact agreed to by the parties in the District Court indicate that 17 of 65 major-party senatorial candidates in 1974 spent more” than the FECA’s spending limits would allow. *Id.* By contrast, the City’s evidence in this case shows that Albuquerque candidates have run highly competitive elections while spending less than the maximum amount allowed. Def. Ex. 1, Gierzynski Report at 9-10; *see also* Figures 3 and 4. For example, in 1999, after the city council spending limit was doubled, three of the four city council seats were won by candidates who spent substantially less than the limit (more than \$2,500 below the limit). *Id.*; *see also* Def. Ex. 2, Supplemental Declaration of Anthony Gierzynski, Ph.D., Table 2. The record here is replete with evidence that Albuquerque’s spending limit is more than adequate to permit vigorous, effective campaigns, and indeed that Albuquerque elections have been more competitive with higher voter participation than in comparable cities without spending limits. *See* ¶¶ 58-84, 25-28, *supra*. While a particular spending limit might be too low to pass constitutional scrutiny, the evidence refutes any such claim concerning Albuquerque’s spending limit.

Thus, the door remains open to uphold the constitutionality of Albuquerque’s spending limit based on the factual record of Albuquerque’s experience in holding elections under spending limits for the last 28 years – a factual record far different from that before the Supreme Court in *Buckley*. As noted in a concurring opinion 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 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. (concurring opinion of Cohn, D.J., sitting by designation).⁶

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 confined itself to listing and discussing the three governmental interests that had been specifically 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). 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

⁶ While Judge Cohn joined in the majority's judgment striking down Cincinnati's spending limit in *Kruse*, he did so because he felt the specific factual record in *Kruse* was inadequate to support Cincinnati's spending limit, not because he viewed *Buckley* as a *per se* bar to the constitutionality of spending limits. *Kruse*, 142 F.3d at 919-920.

election campaigns.⁷ 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”); *see also 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. 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

⁷ Subsequent Supreme Court decisions on which plaintiff relies at pp. 3-4 of his brief, 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, 614 (1996), address only the constitutionality of limits on independent expenditures by political action committees and political parties, not limits on expenditures by candidates’ campaigns. In addition, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), did not involve spending limits, but instead a total bans on all campaign spending by certain types of entities. Notably, *Austin v. Michigan Chamber of Commerce* upheld a total ban on independent expenditures by business corporations. 494 U.S. 652.

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) (citations omitted) (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”).⁸

In sum, this case should be no exception to the rule that “[i]n general, ‘constitutional litigation demands fact analysis of the most particularized kind.’” *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986) (quoting Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75); *see also* 1 J. Weinstein, *Weinstein’s Evidence*, ¶200[04] (“[W]hatever a judge’s persuasion, he can decide a particular constitutional issue only by appraising the factual

⁸ 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*. 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 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”).

basis for governmental action.”). *Cf. Wells v. City and County of Denver*, 257 F.3d 1132, 1150-51 (10th Cir.) (considering facts and evidence in record in rejecting facial First Amendment challenge), *cert. denied*, 122 S. Ct. 469 (2001). The facts presented here are indispensable to this Court’s evaluation of the constitutionality of Albuquerque’s spending limit, and those facts demonstrate that plaintiff’s motion must be denied.

II. THE HOMANS ORDER DOES NOT ESTABLISH PLAINTIFF’S ENTITLEMENT TO JUDGMENT ON THE MERITS.

Plaintiff also errs in arguing that the order of the 10th Circuit motions panel granting Rick Homans’ emergency request for an injunction pending appeal is a binding ruling on the merits of his claim that Albuquerque’s spending limits are unconstitutional. *Homans*, 264 F.3d at 1240. To the contrary, the motion panels’ ruling was interlocutory in nature, issued on dramatically expedited briefing and without benefit of oral argument, and hence does not establish plaintiff’s entitlement to final judgment on his claims. *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.” *Id.* at 1477 (emphasis in original); *see also United States v. Local 560 (I.B.T.)*, 974 F.3d 315,

330 (3d Cir. 1992) (stating “a trial court, in deciding whether to grant permanent relief, is not bound by its decision or the appellate court's decision about preliminary relief”).

Moreover, the 10th Circuit’s ruling, while indicating that spending limits are subject to “exacting scrutiny,” *Homans*, 246 F.3d at 1243 (quoting *Buckley v. Valeo*, 424 U.S. at 54-55), does not state that *Buckley* created a *per se* rule that automatically requires invalidation of any and all limits on campaign spending, regardless of the facts. This Court is now able to undertake a more comprehensive examination of the factual record than was possible for the 10th Circuit motions panel, which acted under drastic time constraints created by Rick Homan’s request for emergency pre-election relief. Further, the parties to this case have now engaged in discovery, and this record contains substantial evidence not available to the 10th Circuit motions panel in *Homans*. To cite just one example, the *Homans* record did not include the results of the poll commissioned for plaintiff Rue which shows that Mr. Rue, despite spending an amount in excess of the limit, was actually less successful in communicating his message to voters than his opponent, Michael Cadigan, who kept his spending within the limit. See ¶ 73, *supra*. Other facts not available to the motions panel include those set forth in ¶¶ 20, 28, 36, 39-40, 47-49, 56, 58-69, 71-83, *supra*.

As this Court observed in connection with the preliminary injunction order issued in this case,

It is clear that findings of fact and conclusions of law entered into the record by the Court at the preliminary injunction stage have no binding effect on future litigation between the parties. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1985); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69-70 (3d Cir. 1999); 11A Charles Alan Wright, et al. *Federal Practice and Procedure*, § 2941, at 33 (2d ed. 1995). Because the purpose of a “preliminary injunction is merely to preserve the relative position of the parties until a trial on the merits can

be held,” the ruling on the preliminary injunction does not prejudice the losing party at a trial on the merits. *Camenisch*, 451 U.S. at 395.

Rue v. City of Albuquerque, No. 01-1036 (D.N.M. Sept. 20, 2001) (order granting preliminary injunction).

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 city council elections survives First Amendment scrutiny.

III. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THIS RECORD PRESENTS DISPUTED ISSUES OF FACT CONCERNING WHETHER ALBUQUERQUE’S SPENDING LIMIT SERVES COMPELLING GOVERNMENTAL INTERESTS.

A. The Limits Are Necessary to Deter Corruption and its Appearance and Promote 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)). The record in this case demonstrates that Albuquerque’s spending limit was adopted in response to widespread public concern

about the corrupting influence of money in elections. See ¶¶ 10-19, *supra*.⁹ 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 conclusions.

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. 3, Survey Findings, at 3 (questions 14, 15).¹⁰ 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. 3, Survey Findings, at 5 (questions 21, 22).

⁹ This evidence includes affidavit or deposition testimony of witnesses familiar with city elections as well as newspaper accounts of the impact of money in politics. The Supreme Court and lower federal courts have consistently relied upon such evidence as demonstrating a compelling state interest in addressing public concern about corruption and the integrity of government. See, e.g., *Nixon*, 528 U.S. at 393; *Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d 445, 456-58 (1st Cir. 2000); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 465 (D. Vt. 2000), *appeal pending*, No. 00-9159 (L) (2d Cir. argued May 7, 2001).

¹⁰ 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 at 457-58.

On the other hand, if spending limits are removed, the great majority of voters believe that the potential for corruption in Albuquerque 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.*, at 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, 87% percent of voters expressed support for maintaining limits on spending in Albuquerque elections. *Id.* at 6 (question 29). *See also* Def. Ex. 4 (results of August 2001 Albuquerque Journal poll); ¶¶ 20-29, *supra*.

2. The Federal Experience With Limited Contributions and Unlimited Spending. The federal experience with limited contributions and unlimited spending demonstrates that contribution limits alone have failed to deter corruption and the appearance of corruption in congressional elections. This is 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, Def. Ex. 7. *See* ¶¶ 30-37, *supra*.

Contribution limits alone, without spending limits, leave candidates locked in an “arms race” mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. The 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. 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 City's evidence extensively documents this problem. See ¶¶ 30-37, *supra*; see also Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42 (1994).¹¹

¹¹ The problem of bundling, which makes contribution limits ineffective, is not caused by the so-called "soft-money" loophole; it is instead a "hard-money" problem. Legislation to close the soft-money loophole would have no effect on the bundling practices that make contribution limits ineffective in deterring corruption and its appearance. See ¶ 34, *supra*. The *Kruse* majority was simply mistaken in asserting otherwise. See *Kruse v. City of Cincinnati*, 142 F.3d at 916.

3. 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 been higher than in cities where spending has been unlimited. As noted by one of the expert witnesses, “[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.” Def. Ex. 8, Gross Report, at 6. *See also* ¶¶ 25-28, 50-53, *supra*.

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. The Spending Limit Is Necessary To Permit 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 919-920 (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 Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting) (“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”) This record demonstrates that spending limits are necessary to serve the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government.

As Professor Vincent Blasi has written, “Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives.” 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, 1283 (1994) (explaining how governmental interest in preserving candidates’ time from burden of fundraising constitutes compelling justification for spending limits). *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 Rick Homans' motion for an injunction pending appeal did not mention this interest as a potential basis for limits on campaign spending, because it viewed Judge Vazquez' decision in *Homans* 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. See ¶ 38, *supra*.¹² Witnesses with experience in Albuquerque elections also express strong concerns about the detrimental impact of going to a regime of unlimited spending because of the increased time candidates will inevitably devote to fundraising. See ¶¶ 39-40, *supra*. Even Mr. Rue has testified that he has a strong reluctance to engage in aggressive fundraising from contributors that he does not know personally. See ¶ 36, *supra*. 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

¹² It is well-established that the City is entitled to rely on the experience of other jurisdictions in demonstrating the need for campaign finance regulations. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. at 394 n. 6 (2000).

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. 3, at 8, Question 40.

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.

C. Albuquerque’s Spending Limit Is Necessary to Serve 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* Def. Ex. 8, Gross Report, at 8; Def. Ex. 1, Gierzynski Report, at 11-12. 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 Albuquerque’s limit on campaign spending has encouraged electoral competition, furthering the compelling governmental interest in promoting a robust debate of the issues and greater accountability of elected officials to their constituents. *See* ¶¶, 42-49, *supra*. With

spending limits in place since 1974, Albuquerque's elections have been 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 more successful in winning election against incumbents in Albuquerque than is true in other cities without spending limits or in New Mexico legislative elections (where spending also is unlimited). *Id.*; see also ¶¶ 42-49, *supra*.

D. Albuquerque's Spending Limit Is Necessary to Serve The City's Compelling Interest In Increasing Voter Interest In And Connection To The Electoral System.

The record also establishes that limiting candidate expenditures promotes voter interest in and connection to the electoral process. See ¶¶ 50-57, *supra*. For example, Professor Gross's research demonstrates that voter participation is much more likely to be stimulated by direct contact between voters and candidates or parties than by high-spending campaigns. See Def. Ex. 8, Gross Report, at 3-4. Personal canvassing has a much more substantial impact on voter turnout than direct mail or even telephone calls. See *id.* at 4. Mobilization of voters through direct contact by a candidate or political party also is more effective than high campaign spending in increasing the likelihood that voters will be interested in the race, aware of the candidates' positions, and concerned about the outcome of the race. See ¶¶ 50-57, *supra*. This is borne out by the experience of witnesses who have run for city council in Albuquerque as well as by the expert testimony in the record. See ¶ 56, *supra*.

There are several reasons why campaign spending is less effective than direct mobilization in stimulating voter turnout. 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. Candidate resources, in addition, may often be spent in areas and on items that have little to do with actually communicating with voters. High-spending campaigns also tend to add to citizen perceptions of corruption and the view that elections are for sale. Def. Ex. 8, Gross Report, at 3-5.

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. *See 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.*

Again, in contrast to the ineffectiveness of high campaign expenditures, direct contact by a candidate or political party with a voter significantly increases 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." *See id.* at 7-8.

Thus, Albuquerque's spending limit, by encouraging candidates to rely on personal contact and direct mobilization of voters, serves the compelling goal of promoting voter interest and engagement in the electoral process.

IV. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THIS RECORD PRESENTS DISPUTED FACTS CONCERNING WHETHER ALBUQUERQUE’S SPENDING LIMIT IS CLOSELY TAILORED TO SERVE THE CITY’S COMPELLING INTERESTS.

A. Albuquerque’s Spending Limit Is High Enough to Permit Effective Campaigns and Does Not Impede Communication With Voters.

The factual record demonstrates that Albuquerque’s spending limits do not interfere with the core First Amendment interest implicated in campaign spending – namely, permitting effective communication with the electorate. 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. *See* ¶¶ 10-84, *supra*. Although the *Buckley* Court concluded 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,” *Buckley*, 424 U.S. at 19, the factual record before this Court is dramatically different than the *Buckley* record and strongly supports the conclusion that Albuquerque’s spending limit passes constitutional muster.

If Albuquerque’s spending limit 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 limit. In Albuquerque city council races, however, the pattern is quite different. Most competitive candidates from 1989 to 1999 spent less than the maximum allowed, including many of the victorious candidates. In 1999, for example, three of the four winning candidates spent substantially less than the spending limit (more than \$2,500 less than the limit). *See* ¶ 71, *supra*. Other evidence

from past city council candidates as well as expert analysis demonstrates that the current spending limit is closely tailored to permit effective political campaigns and a vibrant public debate.¹³ See ¶¶ 58-84, *supra*.

The record further demonstrates that higher spending does not result in better communication with the electorate. As noted above, voter turnout in Albuquerque elections has been higher than turnout in comparable cities without spending limits. 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 8. *See also* Briffault, *The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. at 1739 & n.38 (noting that much campaign money is not spent on communication with voters). The evidence also demonstrates that mobilization of voters through direct contact by a candidate or political party not only is more effective than high-spending campaigns 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. *See* ¶¶ 50-84, *supra*.

The evidence concerning Mr. Rue's campaign illustrates that higher spending does not lead to better communication with voters and that he could have run a highly effective campaign while observing the spending limit. The poll results produced by Mr. Rue demonstrate that his opponent, Mr. Cadigan, was more successful in communicating

¹³ Testimony or affidavits of witnesses who have personally participated in electoral campaigns, describing their experiences and observations concerning the campaign process and the impact of campaign finance regulations, is routinely admitted in cases challenging campaign finance regulations. *See Daggett v. Comm'n on Governmental Ethics and Elections*, 205 F.3d at 456; *Landell v. Sorrell*, 118 F. Supp. 2d at 471; *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 622-23 (Alaska 1999), *cert. denied.*, 528 U.S. 1153 (2000).

with voters although Mr. Cadigan did not exceed the spending limit. *See* ¶¶ 73, 58-84, *supra*.

The evidence undermines the contention that Mr. Rue would even be affected by the city council limit if he runs again in the future. Mr. Rue has testified that in a future race he would not plan to hire a paid campaign manager, which accounted for a huge portion of his campaign spending in the 2001 election. In addition, in his recent primary race for the state legislature, Mr. Rue budgeted only \$7,000 to \$8,000 in spending, even though there are no spending limits in state legislative races. *See* ¶¶ 75-81, *supra*.

The fact that Albuquerque's spending limit will continue to rise to keep pace with increases in the salary of city council members 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. Indeed, only two years ago, following the first legal challenge to Albuquerque's spending limit, the limit was doubled from its previous level, providing further assurance that the limit is adequate for effective communication with voters. *See* ¶¶ 7, 82.

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

Defendants' evidence also demonstrates that contribution limits alone, unaccompanied by overall limits on campaign spending, have proven entirely ineffective to address the compelling governmental interests identified above. They have not been sufficient to deter the reality and appearance of corruption and assure public confidence in government. *See* ¶¶ 30-37, *supra*. 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 to campaigning 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* ¶¶ 38-41, *supra*. 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* ¶¶ 42-58, *supra*. 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, plaintiff’s motion for summary judgment should be denied.

Respectfully submitted,

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