UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WORKING CALIFORNIANS, Plaintiff, v. CITY OF LOS ANGELES; and LOS ANGELES CITY ETHICS COMMISSION, Defendants.	Case No. CV 09-08237 DDP (PJWx) **Order (1) Denying Plaintiff's Ex Parte Application for a Temporary Restraining Order (2) Denying Plaintiff's Application for an Order to Show Cause Why a Preliminary Injunction Should Not Issue** [Motion filed on November 10, 2009]

Presently before the Court is Plaintiff Working Californians' application for a temporary restraining order ("TRO") and an order to show cause why a preliminary injunction should not issue. Plaintiff seeks to enjoin the City of Los Angeles ("City") and the Los Angeles City Ethics Commission from enforcing the City's limitation on contributions to entities that make campaign-related independent expenditures, contending that enforcement of the contribution limits in an upcoming City Council runoff election would violate the Plaintiff's First Amendment speech and associational rights.

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After reviewing the parties' papers, and hearing oral argument, the Court concludes that Plaintiff has not established a likelihood of success on the merits of its First Amendment claim. Accordingly, the TRO application is denied.[1]

I. Background

The following facts are not in dispute.

On December 8, 2009, the City will conduct a special runoff election for City Council District 2. (Stipulation of Facts "SOF" ¶ 1.) The City Clerk certified Christine Essel and Paul Krekorian as the two candidates who will appear on the ballot. (SOF ¶ 2.)

Plaintiff Working Californians is registered with the California Secretary of State as a political committee under California Government Code Section 82013(a). (SOF ¶ 3.) According to public records, the entity was created in 2006. (Tristan Decl. Ex. M.) Plaintiff has two officers – Brian D'Arcy and Marvin Kropke. (Id.) D'Arcy is the business manager of International Brotherhood of Electrical Workers ("IBEW") Local 18, and Kropke is the business manager of IBEW Local 11.[2] (Tristan Decl. Ex. N.) Both D'Arcy and Kropke serve as treasurer for their local unions' respective political action committees ("PACs"). (Id.)

According to the Secretary of State's website, Plaintiff has received contributions from a total of six donors since 2007,

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[1] At the November 19, 2009 TRO hearing, the Court granted City Council candidate Paul Krekorian's ex parte application to intervene in this case. Krekorian then submitted a brief in opposition to Plaintiff's TRO application. The Court has reviewed the opposition brief, and considered the arguments raised therein.

[2] The IBEW represents many employees at the Los Angeles Department of Water and Power.

all of which are themselves political committees – IBEW Local 18 PAC; IBEW Local 11 PAC; Burbank Fire Fighters Local 778 PAC Fund; Burbank City Employees Association; United Teachers Los Angeles PACE; and CA State Council of Service Employees SCC PAC.

Plaintiff has stated that it intends to make independent expenditures in support of Essel in the upcoming runoff, and that it intends to raise contributions from individuals and organizations in amounts exceeding $500 per year per donor and/or combine its financial resources with other individuals and organizations for the express purpose of financing independent expenditures. (SOF ¶¶ 3-4.)

Los Angeles Charter Section 470(c)(5) provides, in relevant part, that:

> No person shall make to any committee (other than the candidate's controlled committee) which supports or opposes any candidate . . . , and no such committee shall accept from any such person, a contribution totaling more than five hundred dollars ($500) in any calendar year.

Los Angeles Municipal Code Section 49.7.24, implementing the Charter provision, states that "[a]ny person or committee who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess of the amounts set forth in Charter Section 470(c)(5)."

The parties have stipulated that "Los Angeles Charter Section 470(c)(5) and Los Angeles Municipal Code Section 49.7.24, limit contributions to Working Californians to $500 per donor per year when solicited by Working Californians or earmarked by its donors for the purpose of making independent expenditures in the Special Runoff Election on December 8, 2009." (SOF ¶ 8.) Independent

expenditures cannot be coordinated with any candidate, or with the candidate's campaign. (SOF ¶ 9.)

On November 9, 2009, Plaintiff filed a TRO application along with an application for an order to show cause why a preliminary injunction should not issue. (Dkt. No. 3.) Pursuant to the parties' stipulation, the Court provided the City with one week to prepare and file an opposition, and held a hearing on November 19, 2009. (Dkt. No. 25.) After the hearing, at the Court's request, the parties submitted short supplemental briefs. (Dkt Nos. 38, 39, 40.)

II. Legal Standard

In any case where a party seeks the extraordinary remedy of preliminary relief by way of a TRO or a preliminary injunction, the party must meet exacting criteria. The legal standard for obtaining a TRO is the same as for a preliminary injunction. See Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); cf. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977). The Supreme Court recently set forth the standard for assessing a motion for preliminary injunction in Winter v. Natural Resources Defense Council, Inc., --- U.S. ----, 129 S. Ct. 365, 376 (2008). "Under Winter, plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009).

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III. Discussion

The Court first takes up whether Plaintiff has established that it is likely to succeed on the merits of its First Amendment challenge. Because the Court ultimately concludes that Plaintiff has not established such a likelihood, this Order does not address the other Winter criteria.

A. The Contribution/Expenditure Distinction

The Court begins its analysis with the Supreme Court's foundational case in this domain, Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, the Court upheld the Federal Election Campaign Act's limitations on contributions to candidates, and struck down, on First Amendment grounds, the Act's limitations on independent expenditures. Since Buckley, the Court has consistently held that, "restrictions on contributions require less compelling justification than restrictions on independent spending." Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986). Thus, independent campaign expenditures, generally, are subject to strict scrutiny, while contributions are subject to "less exacting scrutiny." VanNatta v. Keisling, 151 F.3d 1215, 1220 (9th Cir. 1998).

The Ninth Circuit has summarized the Buckley Court's justification for the contribution/expenditure distinction as follows:

> In Buckley the Court reasoned that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Buckley, 424 U.S. at 19. The Court concluded that expenditure limitations place substantial restraints on both political speech and association.

> By contrast, the Buckley court found that contribution limitations do not place a substantial restraint on protected political speech and association. Rather, the Court found that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." Buckley, 424 U.S. at 20 (emphasis added). The Court justified its position that contribution limits impose only a marginal restriction on protected speech by reasoning that contributions are merely speech by proxy, and not full-fledged speech: "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." Buckley, 424 U.S. at 21.

Lincoln Club of Orange County v. City of Irvine, 292 F.3d 934, 937 (9th Cir. 2002). Accordingly, in order to determine the appropriate standard of First Amendment review in this case, the Court must first resolve whether the City's campaign finance laws, as they will be applied to Plaintiff, serve as a contribution restriction or as a more burdensome restriction on independent expenditures.

B. Appropriate Level of Scrutiny

Plaintiff contends that the City's $500 limit on contributions to non-candidate political committees that engage in candidate-related election speech is, in effect, a restriction on its ability to make independent (i.e., uncoordinated with any candidate) campaign expenditures. As such, it argues, the contribution restriction is subject to strict scrutiny under Buckley. For this proposition, Plaintiff relies heavily on the Ninth Circuit's holding in Lincoln Club. In that case, the court concluded that the City of Irvine's restriction on contributions to independent groups that engage in campaign speech, as applied to the Lincoln

Club of Orange County (a political club funded in large part by membership dues), was subject to strict scrutiny.

The Court is persuaded that the facts of Lincoln Club are distinguishable, and indeed, that certain language in the opinion undercuts Plaintiff's basic premise, i.e., that limits on contributions to independent political committees that engage in campaign speech always trigger strict scrutiny.

In determining the applicable First Amendment standard, the Lincoln Club court observed that restrictions on contributions to independent expenditure committees "burden[] speech and associational freedoms[]," but concluded that, "under Buckley and its progeny such [] restriction[s] do[] not place a severe burden on protected speech and associational freedoms." Id. at 938 (emphasis added); see also id. ("[T]he Ordinance's contribution limit, standing alone, does not warrant strict scrutiny.").

The court ultimately concluded that strict scrutiny was warranted, but the holding turned on the undisputed fact that, as-applied to the Lincoln Club, Irvine's contribution limits served as a total bar on independent campaign expenditures. As the court explained, "[i]n the November 1998 and 2000 Irvine municipal elections, the Lincoln Club was prohibited from making any independent expenditures in support of or in opposition to candidates because the Lincoln Club's annual dues exceeded the $320 limit imposed by the Ordinance." Lincoln Club, 292 F.3d at 936 (emphasis added). Because Buckley teaches that regulation of independent campaign expenditures – as opposed to contributions – are subject to strict scrutiny, the Ninth Circuit reversed the

judgment of the district court, and ordered it to apply strict scrutiny on remand.

In light of the above, the Court construes Lincoln Club as standing for two propositions: (1) a restriction on contributions to independent expenditure committees does not constitute a per se severe burden on speech and associational freedoms; and (2) such a restriction may amount to a severe burden (thereby triggering strict scrutiny) when applied in a manner that forecloses an independent committee's ability to make campaign expenditures.

Plaintiff has not provided any evidence that enforcement of the challenged contribution restrictions will effectively thwart its ability to make independent expenditures related to the upcoming city council runoff election. Working Californians is free to solicit contributions from as many donors as it likes, and assuming that no individual contribution exceeds the City's $500 threshold, it can spend as much as it likes. Plaintiff is not a membership organization, and compliance with the City's contribution limits will not force it to alter its basic structure in any way.

The Court's understanding of Lincoln Club is informed by the Supreme Court's decision in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), in which the Court upheld federal restrictions on contributions to state and national political parties. In McConnell, the Court emphasized that "[t]he overall effect of dollar limits on contributions is merely to require candidates and political committees to raise funds from a greater number of persons. Thus, a contribution limit involving even significant interference with associational rights is nevertheless

valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." 540 U.S. at 136 (internal quotation marks and citations omitted); see also Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 196 (1981) (plurality opinion) (explaining that contributions are "speech by proxy," which is "not the sort of political advocacy that this Court in Buckley found entitled to full First Amendment protection"). The Court further noted that "contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." McConnell, 540 U.S. at 137.

The City's contribution limits surely effect significant interference with Plaintiff's associational rights. However, Plaintiff retains the ability raise funds from an unlimited number of persons, and to use those funds on campaign-related speech in the upcoming runoff election. As such, the Ordinance, as applied to Plaintiff, amounts to a contribution restriction subject to a "less exacting" standard of review than strict scrutiny. See Cal. Med. Ass'n, 453 U.S. at 195-196 (applying less rigorous scrutiny to $5,000 limit on contributions to multicandidate political committees); Jacobus v. Alaska, 338 F.3d 1095, 1108 (9th Cir. 2003) ("Contribution limits do not significantly burden speech because the communicative content of the act of contributing is largely symbolic, and therefore is not diminished by limits on the amount of the contribution.").

C. "Closely Drawn" Standard Applied

Next, the Court must determine whether the challenged contribution restrictions are closely drawn to match a sufficiently

important interest.[3] The City contends that the restrictions "serve[] the recognized important and compelling governmental purpose of avoiding corruption or the appearance of corruption and restoring faith in the electoral process." (Opp'n at 14.) Further, the City argues, "one would have to completely ignore reality in order to assume that a candidate who directly benefits from a large donation channeled through a PAC will not be as beholden to the donor as the candidate would have been had the donation been made directly." (Opp'n at 17.)

The government's interest in regulating election-related spending extends beyond strict quid pro quo corruption, and reaches reasonable efforts to prevent large donors from undermining public confidence in the electoral process. See Citizens for Clean Gov't, 474 F.3d at 652 ("Corruption, as the Court has defined it . . ., can encompass more than straightforward quid pro quo transactions.") The Court has also recognized the government's important interest in preventing the circumvention of otherwise lawful contribution limits. Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption . . . ."). Indeed, "legislators are free to craft new arguments about corruption provided they acknowledge that '[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and

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[3] The City bears the burden of establishing a sufficiently important interest in regulating contributions, Citizens for Clean Government v. City of San Diego, 474 F.3d 647, 653 (9th Cir. 2007), and it must support its argument in support of such an interest with more than "mere conjecture," Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391 (2000).

plausibility of the justification raised.'" Citizens for Clean Gov't, 474 F.3d at 652 (quoting Shrink, 528 U.S. at 391).

The City's anticorruption rationale is neither novel nor implausible. As one district court aptly noted, "'[i]ndependence' does not prevent candidates, officeholders, and party apparatchiks from being made aware of the identities of large donors, and people who operate independent expenditure committees can have the kind of 'close ties' to federal parties and officeholders that render them 'uniquely positioned to serve as conduits for corruption,' . . . ." SpeechNow.Org v. Fed. Election Comm'n, 567 F. Supp. 2d 70, 79 (D.D.C. 2008) (quoting McConnell, 540 U.S. at 156 n.51).

Further, as the Court observed in McConnell: "[T]ake away [the government's] authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" McConnell, 540 U.S. at 144 (quoting Shrink, 528 U.S. at 390). Independent political committees, if allowed to accept unlimited, unrestricted contributions from wealthy donors, could provoke just such a crisis of public confidence, and accordingly, the City has an important interest in regulating them.

Concluding that the City has articulated a sufficiently important interest, the Court must next determine whether the challenged contribution restrictions are closely drawn to match that interest. In its opposition, the City states that it "only applies its contribution limit to committees active in City candidate elections, and to other general committees engaged in campaign activity in multiple jurisdictions only when those

contributions are earmarked for City races or received in response to a solicitation to be used in relation to City races." (Opp'n at 21-22.) Thus, the City's contribution limits do not prevent independent groups from raising and spending unrestricted donations in support of or against ballot measures, or in efforts to get a particular issue on the ballot. The contribution limits apply only to groups that make expenditures in support of or in opposition to a candidate in a particular election – a context that carries well-documented corruption risks.[4] See, e.g., California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, (June 2008) (Tristan Decl. Ex. A.)

Further, the Court concludes that the $500 contribution limit is sufficiently tailored to address the City's interest in preventing corruption, the appearance of corruption, and the circumvention of direct candidate contribution limits. "In the context of contribution limits, the requirement of 'close tailoring' does not require 'the least restrictive alternative.'"

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[4] The fact that the City's contribution restrictions only apply in the context of candidate-related election expenditures also distinguishes this case from Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) ("CARC"), on which Plaintiff relies. In CARC, the Court struck down a municipal ordinance limiting contributions to ballot measure campaign committees to $250. 454 U.S. at 298. The Court reasoned that, in the ballot measure context, the government's interest in preventing the appearance of corruption is attenuated – there is no identifiable candidate to corrupt. See id. ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978))); accord SpeechNow.Org, 567 F. Supp. 2d at 77 (holding that CARC does not bar contribution limits applied to groups that make candidate-related election expenditures). The municipal laws at issue in this case target only independent expenditures that attempt to influence candidate elections – expenditures that implicate well-documented corruption, appearance of corruption, and direct contribution limit circumvention risks.

Jacobus, 338 F.3d at 1115 (citing Cal. Med. Ass'n, 453 U.S. at 199 n.20). The $500 limit matches the City's limit on direct candidate contributions (the limit is $1,000 in elections for a citywide office), and Plaintiff has not provided evidence suggesting the limit effectively forecloses independent campaign spending.

Finally, the Court takes up Plaintiff's reliance on two recent out-of-circuit court of appeals decisions. See Emily's List v. Fed. Election Comm'n, 581 F.3d 1 (D.C. Cir. 2009) (holding that independent nonprofit groups may spend unlimited amounts out of their soft-money accounts for election-related activities); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008) ("NCRL") (holding that a North Carolina campaign finance statute's dollar limit on campaign contributions violated the First Amendment as-applied to a political committee that made only independent expenditures, because the state had not proffered concrete and systematic evidence of corruption associated with such committees). The majority opinions in both cases conclude that the First Amendment prohibits government entities from restricting contributions to independent expenditure committees. The majority opinion in McConnell, however, suggests otherwise. See 540 U.S. at 152 n.48 (rejecting Justice Kennedy's contention, raised in his dissent, that Buckley limits Congress to regulating contributions to candidates); see also Richard Briffault, *The 527 Problem . . . and the* Buckley *Problem*, 73 GEO. WASH. L. REV. 949, 985 (2005) ("[A]ccording to [McConnell's footnote 48], Buckley implicitly but definitively upheld the constitutionality of the [Federal Election Campaign Act's] limits on contributions to political committees, even if such a contribution limit is not fully supported by the

anticorruption rationale."). The partial concurring opinion in Emily's List picks up on this dissonance. See 581 F.3d 1, 34-35 (Brown, J., concurring in part) (explaining that McConnell "broadly recognized and deferred to governmental interests in preventing corruption, the appearance of corruption, and circumvention of election regulations" and concluding that "[a]rguably, this expansive corruption/circumvention/conduit rationale is broad enough to encompass some limits on independent expenditure committees, particularly for those political committees with a self-proclaimed electoral mission"). So does the vigorous dissent in NCRL. See 525 F.3d 274, 333 (Michael, J., dissenting) ("McConnell thus recognizes the plausibility of legislative concerns that contributions to fund independent expenditures can lead to the appearance of corruption in the electoral process.").

The lack of panel unanimity in Emily's List and NCRL is reflective of the unresolved issues that independent expenditure committees pose for First Amendment law. These are challenging questions – the Supreme Court's opinion in McConnell spanned more 150 pages. How the Supreme Court will handle them is far from clear. Nevertheless, the most natural reading of Buckley and McConnell suggests that (1) contributions to independent political committees are proxy-speech, and thus restrictions on such contributions are subject to rigorous scrutiny, but not strict scrutiny; and (2) government entities have an important interest in preventing large-scale donors from using independent committees to funnel unrestricted money into candidate election campaigns. Accordingly, for the purposes of this TRO application, the Court is

persuaded that Plaintiff has not established a probability of success on the merits of its First Amendment challenge.

IV. Conclusion

For the reasons set forth above, the Court (1) DENIES Plaintiff's TRO application; and (2) DENIES Plaintiff's application for an order to show cause why a preliminary injunction should not issue.

IT IS SO ORDERED.

Dated: November 24, 2009

DEAN D. PREGERSON
United States District Judge