

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

5 **I. Background**

6 The following facts are not in dispute.

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

11 Plaintiff Working Californians is registered with the
12 California Secretary of State as a political committee under
13 California Government Code Section 82013(a). (SOF ¶ 3.) According
14 to public records, the entity was created in 2006. (Tristan Decl.
15 Ex. M.) Plaintiff has two officers - Brian D'Arcy and Marvin
16 Kropke. (Id.) D'Arcy is the business manager of International
17 Brotherhood of Electrical Workers ("IBEW") Local 18, and Kropke is
18 the business manager of IBEW Local 11.² (Tristan Decl. Ex. N.)
19 Both D'Arcy and Kropke serve as treasurer for their local unions'
20 respective political action committees ("PACs"). (Id.)

21 According to the Secretary of State's website, Plaintiff has
22 received contributions from a total of six donors since 2007,
23

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

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

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

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

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

14 No person shall make to any committee (other than the
15 candidate's controlled committee) which supports or opposes
16 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.

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

22 The parties have stipulated that "Los Angeles Charter Section
23 470(c)(5) and Los Angeles Municipal Code Section 49.7.24, limit
24 contributions to Working Californians to \$500 per donor per year
25 when solicited by Working Californians or earmarked by its donors
26 for the purpose of making independent expenditures in the Special
27 Runoff Election on December 8, 2009." (SOF ¶ 8.) Independent

28

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

3 On November 9, 2009, Plaintiff filed a TRO application along
4 with an application for an order to show cause why a preliminary
5 injunction should not issue. (Dkt. No. 3.) Pursuant to the
6 parties' stipulation, the Court provided the City with one week to
7 prepare and file an opposition, and held a hearing on November 19,
8 2009. (Dkt. No. 25.) After the hearing, at the Court's request,
9 the parties submitted short supplemental briefs. (Dkt Nos. 38, 39,
10 40.)

11 **II. Legal Standard**

12 In any case where a party seeks the extraordinary remedy of
13 preliminary relief by way of a TRO or a preliminary injunction, the
14 party must meet exacting criteria. The legal standard for
15 obtaining a TRO is the same as for a preliminary injunction. See
16 Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp.
17 1320, 1323 (N.D. Cal. 1995); cf. New Motor Vehicle Bd. of Cal. v.
18 Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977). The Supreme
19 Court recently set forth the standard for assessing a motion for
20 preliminary injunction in Winter v. Natural Resources Defense
21 Council, Inc., --- U.S. ----, 129 S. Ct. 365, 376 (2008). "Under
22 Winter, plaintiffs seeking a preliminary injunction must establish
23 that (1) they are likely to succeed on the merits; (2) they are
24 likely to suffer irreparable harm in the absence of preliminary
25 relief; (3) the balance of equities tips in their favor; and (4) a
26 preliminary injunction is in the public interest." Sierra Forest
27 Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009).

28 ///

1 **III. Discussion**

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

7 A. The Contribution/Expenditure Distinction

8 The Court begins its analysis with the Supreme Court's
9 foundational case in this domain, Buckley v. Valeo, 424 U.S. 1
10 (1976). In Buckley, the Court upheld the Federal Election Campaign
11 Act's limitations on contributions to candidates, and struck down,
12 on First Amendment grounds, the Act's limitations on independent
13 expenditures. Since Buckley, the Court has consistently held that,
14 "restrictions on contributions require less compelling
15 justification than restrictions on independent spending."
16 Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S.
17 238, 259-60 (1986). Thus, independent campaign expenditures,
18 generally, are subject to strict scrutiny, while contributions are
19 subject to "less exacting scrutiny." VanNatta v. Keisling, 151
20 F.3d 1215, 1220 (9th Cir. 1998).

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

24 In Buckley the Court reasoned that "[a] restriction on
25 the amount of money a person or group can spend on political
26 communication during a campaign necessarily reduces the
27 quantity of expression by restricting the number of issues
28 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.

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

10 Lincoln Club of Orange County v. City of Irvine, 292 F.3d 934, 937
11 (9th Cir. 2002). Accordingly, in order to determine the
12 appropriate standard of First Amendment review in this case, the
13 Court must first resolve whether the City's campaign finance laws,
14 as they will be applied to Plaintiff, serve as a contribution
15 restriction or as a more burdensome restriction on independent
16 expenditures.

17 B. Appropriate Level of Scrutiny

18 Plaintiff contends that the City's \$500 limit on contributions
19 to non-candidate political committees that engage in candidate-
20 related election speech is, in effect, a restriction on its ability
21 to make independent (i.e., uncoordinated with any candidate)
22 campaign expenditures. As such, it argues, the contribution
23 restriction is subject to strict scrutiny under Buckley. For this
24 proposition, Plaintiff relies heavily on the Ninth Circuit's
25 holding in Lincoln Club. In that case, the court concluded that
26 the City of Irvine's restriction on contributions to independent
27 groups that engage in campaign speech, as applied to the Lincoln
28

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

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

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

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

28

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

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

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

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

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

12 The City's contribution limits surely effect significant
13 interference with Plaintiff's associational rights. However,
14 Plaintiff retains the ability raise funds from an unlimited number
15 of persons, and to use those funds on campaign-related speech in
16 the upcoming runoff election. As such, the Ordinance, as applied
17 to Plaintiff, amounts to a contribution restriction subject to a
18 "less exacting" standard of review than strict scrutiny. See Cal.
19 Med. Ass'n, 453 U.S. at 195-196 (applying less rigorous scrutiny to
20 \$5,000 limit on contributions to multicandidate political
21 committees); Jacobus v. Alaska, 338 F.3d 1095, 1108 (9th Cir. 2003)
22 ("Contribution limits do not significantly burden speech because
23 the communicative content of the act of contributing is largely
24 symbolic, and therefore is not diminished by limits on the amount
25 of the contribution.").

26 C. "Closely Drawn" Standard Applied

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

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

10 The government's interest in regulating election-related
11 spending extends beyond strict quid pro quo corruption, and reaches
12 reasonable efforts to prevent large donors from undermining public
13 confidence in the electoral process. See Citizens for Clean Gov't,
14 474 F.3d at 652 ("Corruption, as the Court has defined it . . . ,
15 can encompass more than straightforward quid pro quo
16 transactions.") The Court has also recognized the government's
17 important interest in preventing the circumvention of otherwise
18 lawful contribution limits. Fed. Election Comm'n v. Colo.
19 Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001) ("[A]ll
20 Members of the Court agree that circumvention is a valid theory of
21 corruption"). Indeed, "legislators are free to craft new
22 arguments about corruption provided they acknowledge that '[t]he
23 quantum of empirical evidence needed to satisfy heightened judicial
24 scrutiny . . . will vary up or down with the novelty and

25
26 ³ The City bears the burden of establishing a sufficiently
27 important interest in regulating contributions, Citizens for Clean
28 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).

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

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

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

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

1 contributions are earmarked for City races or received in response
2 to a solicitation to be used in relation to City races." (Opp'n at
3 21-22.) Thus, the City's contribution limits do not prevent
4 independent groups from raising and spending unrestricted donations
5 in support of or against ballot measures, or in efforts to get a
6 particular issue on the ballot. The contribution limits apply only
7 to groups that make expenditures in support of or in opposition to
8 a candidate in a particular election - a context that carries well-
9 documented corruption risks.⁴ See, e.g., California Fair Political
10 Practices Commission, *Independent Expenditures: The Giant Gorilla*
11 *in Campaign Finance*, (June 2008) (Tristan Decl. Ex. A.)

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

18 _____
19 ⁴ The fact that the City's contribution restrictions only
20 apply in the context of candidate-related election expenditures
21 also distinguishes this case from Citizens Against Rent Control v.
22 Berkeley, 454 U.S. 290 (1981) ("CARC"), on which Plaintiff relies.
23 In CARC, the Court struck down a municipal ordinance limiting
24 contributions to ballot measure campaign committees to \$250. 454
25 U.S. at 298. The Court reasoned that, in the ballot measure
26 context, the government's interest in preventing the appearance of
27 corruption is attenuated - there is no identifiable candidate to
28 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.

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

6 Finally, the Court takes up Plaintiff's reliance on two recent
7 out-of-circuit court of appeals decisions. See Emily's List v.
8 Fed. Election Comm'n, 581 F.3d 1 (D.C. Cir. 2009) (holding that
9 independent nonprofit groups may spend unlimited amounts out of
10 their soft-money accounts for election-related activities); N.C.
11 Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008) ("NCRL")
12 (holding that a North Carolina campaign finance statute's dollar
13 limit on campaign contributions violated the First Amendment as-
14 applied to a political committee that made only independent
15 expenditures, because the state had not proffered concrete and
16 systematic evidence of corruption associated with such committees).
17 The majority opinions in both cases conclude that the First
18 Amendment prohibits government entities from restricting
19 contributions to independent expenditure committees. The majority
20 opinion in McConnell, however, suggests otherwise. See 540 U.S. at
21 152 n.48 (rejecting Justice Kennedy's contention, raised in his
22 dissent, that Buckley limits Congress to regulating contributions
23 to candidates); see also Richard Briffault, *The 527 Problem . . .*
24 *and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 985 (2005)
25 ("[A]ccording to [McConnell's footnote 48], Buckley implicitly but
26 definitively upheld the constitutionality of the [Federal Election
27 Campaign Act's] limits on contributions to political committees,
28 even if such a contribution limit is not fully supported by the

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

15 The lack of panel unanimity in Emily's List and NCRL is
16 reflective of the unresolved issues that independent expenditure
17 committees pose for First Amendment law. These are challenging
18 questions - the Supreme Court's opinion in McConnell spanned more
19 150 pages. How the Supreme Court will handle them is far from
20 clear. Nevertheless, the most natural reading of Buckley and
21 McConnell suggests that (1) contributions to independent political
22 committees are proxy-speech, and thus restrictions on such
23 contributions are subject to rigorous scrutiny, but not strict
24 scrutiny; and (2) government entities have an important interest in
25 preventing large-scale donors from using independent committees to
26 funnel unrestricted money into candidate election campaigns.
27 Accordingly, for the purposes of this TRO application, the Court is

28

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

3 **IV. Conclusion**

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

8
9 IT IS SO ORDERED.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 24, 2009


DEAN D. PREGERSON
United States District Judge