United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

San Jose Silicon Valley Chamber of Commerce Political Action Committee, et al.,

Plaintiffs,

v.

The City of San Jose, et al.,

Defendants.

NO. C 06-04252 JW

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs, San Jose Silicon Valley Chamber of Commerce Political Action Committee and COMPAC Issues Fund, sponsored by the Silicon Valley Chamber of Commerce (collectively, "COMPAC,") have filed this action against the City of San Jose, the San Jose Elections Commission, (collectively, "Defendants,") under 42 U.S.C. § 1983, claiming that San Jose Municipal Code Section 12.06.310 violates the First and Fourteenth Amendments both facially and as-applied. Presently before the Court are the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The Court conducted a hearing on September 18, 2006. Based upon the papers submitted to date and the oral arguments of counsel, the Court GRANTS COMPAC's Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment.

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II. BACKGROUND

The parties have jointly stipulated to the following facts:

Beginning on May 16, 2006, COMPAC distributed to San Jose residents six versions of mailers and one version of telephone messages relating to recent events in San Jose. (Stipulated Facts and Exhibits to Respective Summary Judgment Motions by All Parties ¶ 1, hereafter "Stipulated Facts," Docket Item No. 11.) Each mailer and telephone message referred to City Councilperson Cindy Chavez ("Chavez"), a mayoral candidate in the June 6, 2006 primary election and November 2006 general election. (Stipulated Facts ¶¶ 2-3.) Each mailer or telephone message attributed actions, decisions, or voting stances to Chavez regarding San Jose's $4 million payment related to the Grand Prix Auto Race, the Norcal garbage contract, certain city eminent domain actions, or Mayor-City Council relations. (Stipulated Facts, Exs. A-H.) Each mailer concluded, "There has to be a better way for San Jose," or "There just has to be a better way for San Jose." Id. The mailers and telephone messages were paid for with contributions to COMPAC from individuals and organizations, some of whom contributed more than $250 each. (Stipulated Facts ¶ 7.)

A citizen complaint about COMPAC's messages was filed with the San Jose Election Commission ("Election Commission") on May 17, 2006. (Stipulated Facts ¶ 4.) The Election Commission began an investigation, conducted by its Evaluator, to determine whether the mailers and telephone messages violated the San Jose Municipal Code's ("SJMC") requirements for independent expenditures or contribution limits on independent committees. Id. The Evaluator concluded that COMPAC's mailers and telephone calls were not "independent expenditures" under SJMC law, because they did not "expressly advocate" Chavez's election or defeat or otherwise refer to Chavez's mayoral campaign or candidacy. (Stipulated Facts at ¶ 6.)

The Election Commission held a hearing on May 31, 2006. (Stipulated Facts ¶ 8.) It adopted the Evaluator's conclusion that COMPAC had not violated the SJMC's independent expenditures restrictions or reporting requirements. Id. However, it found that COMPAC, by funding its communications with individual contributions exceeding $250, had violated SJMC Section 12.06.310, which provides:

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> **Contribution Limitations to Independent Committees.**
>
> A. No person shall make nor shall any person accept any contribution to or on behalf of an independent committee expending funds or making contributions in aid of and/or opposition to the nomination or election of a candidate for city council or mayor which will cause the total amount contributed by such person to such independent committee to exceed two hundred fifty dollars per election.
>
> B. Independent committees contributing to election campaigns in addition to City of San Jose council or mayoral campaigns shall segregate contributions received or expenditures made for the purpose of influencing such San Jose elections from all other contributions or expenditures. Where an independent committee has segregated such contributions and expenditures for such city elections, contributors to that committee may contribute more than two hundred fifty dollars so long as no portion of the contribution in excess of two hundred fifty dollars is used to influence San Jose council or mayoral elections.
>
> C. This section is not intended to prohibit or regulate contributions to independent committees to the extent such contributions are used on behalf of or in opposition to candidates for offices other than mayoral or council offices of the city of San Jose.

The Elections Commission decided to impose a civil fine against COMPAC. (Stipulated Facts ¶ 9.) The exact amount of the fine is pending receipt of information from COMPAC about the number of contributions exceeding $250 that it used to fund the communications. Id.

On June 21, 2006, the Elections Commission issued COMPAC a letter of public reprimand for its violation of SJMC Section 12.06.310. (Stipulated Facts ¶ 10.)

On July 11, 2006, COMPAC filed this 42 U.S.C. § 1983 action, asserting that Section 12.06.310 violates the First and Fourteenth Amendments of the United States Constitution. Both parties have moved for summary judgment.

III. STANDARDS

Summary judgment is proper "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." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex v. Catrett, 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

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portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it bears the burden of proof at trial. Id. at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law...Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991) (citing Anderson, 477 U.S. at 255); Matsushita, 475 U.S. at 588; T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the non-moving party, coupled with disputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." T.W. Elec. Serv., 809 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could not return a verdict for the non-moving party." Anderson, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587.

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IV. DISCUSSION

Plaintiffs seek summary judgment on their claims that the City of San Jose and the Elections Commission violated their Fourteenth Amendment due process and First Amendment free speech rights by imposing or threatening to impose public censure and civil penalties pursuant to an allegedly unconstitutional municipal ordinance. Defendants seek summary judgment on the grounds that the contested campaign contribution ordinance is consistent with the First Amendment and is not vague or overbroad.

A. First Amendment

i. Standard of Review

COMPAC contends that the challenged ordinance is subject to strict scrutiny, because it imposes a content-based expenditure limit on an independent political committee. (Memorandum and Points of Authority in Support of Motion for Summary Judgment or Partial Summary Judgment by All Plaintiffs at 16, hereafter "Plaintiffs' Motion," Docket Item No. 10.) The Defendants contend that the ordinance is subject to a lower level of constitutional scrutiny because it is a contribution limit. (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment or in the Alternative, for Partial Summary Judgment at 16, hereafter, "Defendants' Motion," Docket Item No. 28.)

The Supreme Court first drew a distinction between government-imposed limits on expenditures and contributions in Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, numerous plaintiffs (including candidates, political parties, and contributors) brought suit against defendant government officials in their official capacity and as members of the Federal Election Commission. Id. at 7-8. The plaintiffs challenged the constitutionality of various provisions of the Federal Election Campaign Act of 1971 ("FECA"). Id. at 7. Certain of the challenged FECA provisions prohibited contributions exceeding $25,000 per year or $1,000 per single candidate for an election campaign, and from spending more than $1,000 per year "relative to a clearly identified candidate." Id. at 12-13. In this seminal case, the Supreme Court held that both FECA's contribution and expenditure limits implicated First Amendment interests, but "its expenditure ceilings impose[d]

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significantly more severe restrictions on protected freedoms of political expression and association than [did] its limitations on financial contributions." Id. at 23. The Supreme Court held that contribution limits will be upheld even if they represent a "significant interference with protected rights of political association," so long as they are closely drawn to match a sufficiently important governmental interest. Id. at 25. The Court explained:

> [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. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21. Expenditure limits present greater cause for constitutional concern because "[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." Id. at 19. More recent Supreme Court cases "have construed Buckley as requiring strict scrutiny of limitations on independent expenditures and lesser constitutional scrutiny of limitations on contributions." Lincoln Club v. City of Irvine, 292 F.3d 934 (9th Cir. 2001), citing (*inter alia*) Fed. Elec. Comm'n v. Colorado Republican Fed. Campaign Comm'n, 533 U.S. 431 (2001); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387 (2000).

The leading Ninth Circuit case bearing on the contribution/expenditure distinction is Lincoln Club, to which both COMPAC and Defendants cite heavily. In Lincoln Club, the City of Irvine enacted a campaign finance law that placed a ceiling of $320 on the contributions a person or committee could receive from a single source during a two-year election cycle. 292 F.3d at 936.

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Plaintiff and its two affiliated political action committees were funded by annual dues of $2000 per member; because their dues payments exceeded the law's ceiling, the plaintiff was barred from making any expenditures whatsoever to support or oppose candidates. Id. Plaintiff sued the city under 42 U.S.C. § 1983, alleging that the law violated its First Amendment rights of free speech and association. Id. The Ninth Circuit noted that its own and Supreme Court precedent cases had dealt with contributions to candidates rather than to independent expenditure committees. Id. at 937. It characterized the ordinance before it as both an expenditure and contribution limitation. First, the ordinance restricted contributions to independent expenditure committees, which was not a constitutionally severe burden on speech and associational freedoms post-Buckley. Id. at 938. Second and more problematically, the campaign finance law restricted expenditures; it barred independent committees from making any political contributions if their source of money was membership dues exceeding the Ordinance's maximum. Id. To comply with the ordinance, the plaintiff's choices were (1) to rearrange its financial structure drastically or (2) to abstain from making any political expenditures in Irving municipal elections. Id. at 938-39. The Ninth Circuit concluded, "The Ordinance's expenditure limitation is a double-edged sword, placing a substantial burden on protected speech (i.e. barring expenditures) while simultaneously threatening to burden associational freedoms (i.e. by requiring a restructuring of the Lincoln Club.) We conclude that such substantial burdens on protected speech and associational freedoms necessitate the application of strict scrutiny to the Ordinance." Id. at 939. Since the Ninth Circuit's decision, no district court in this circuit has confronted this issue.

This case is factually distinguishable from Lincoln Club in multiple ways. However, the Court concludes – applying the rationale of Lincoln Club – that SJMC Section 12.06.310 serves as a dual limit on contributions and expenditures. On one hand, the ordinance limits contributions that the committee can use to support or oppose a candidate for municipal government to $250. Here, strict scrutiny is not triggered as per Buckley, particularly since there is no substantial interference with protected rights of political association. Would-be contributors may donate to COMPAC in whatever increments they choose, subject to the ordinance's requirements regarding segregating

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funds to be used for aiding or opposing a candidate. However, the restriction also serves as a content-based expenditure limit – independent committees may spend only $250 per donor, if they are spending to aid or oppose a candidate for San Jose municipal office.[1] The Defendants' conduct substantiates the conclusion that the ordinance does function as an expenditure limit. As COMPAC correctly contends:

> That the ordinance is essentially a limitation on expenditures is also exemplified by the Commission's enforcement action against COMPAC: the Commission did not issue a reprimand against COMPAC's contributors for violating the $250 limit – but rather against COMPAC for funding its mailers and telephone messages. More importantly, the Commission did not base its reprimand solely on COMPAC's receipt of contributions exceeding $250, but on the Commission's interpretation of COMPAC's expenditures – the Commission concluded that the mailers and telephone messages aided or opposed a mayoral candidate.

(Plaintiff's Motion at 15.) It is indisputable that there has been no showing of hardship to COMPAC comparable in magnitude to that suffered in Lincoln Club. Rather than facing a complete bar on expenditures, COMPAC faces restrictions on expenditures. Rather than an ordinance requiring a complete restructuring of its finances, COMPAC is confronted with a statute requiring it to set procedures in place to segregate funds exceeding $250 under particular circumstances. However, since Buckley, the Supreme Court has viewed expenditure limits with heightened concern because of their potential to alter the quantity and manner of a political speaker's speech. Buckley, 424 U.S. at 19. Even though the harm to the COMPAC here is not as pronounced as in Lincoln Club, the Court holds that the appropriate level of constitutional review is strict scrutiny: the restriction must be narrowly tailored to serve an overriding state interest. ACLU of Nevada v. Heller, 378 F.3d 979, 992-93 (9th Cir. 2004).

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[1] That the ordinance is a content-based expenditure limitation is made clear because it is susceptible to the following interpretation: contributions of any amount may be made to an independent committee, even for the committee's use in aid of or opposition to candidates. Applying the ordinance, a contributor could donate $1000 to COMPAC to be used in aid of or opposition to the nomination or election of four candidates for San Jose Mayor or City Council— but COMPAC could not use the entire sum in aid of or opposition to a single candidate.

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ii. Constitutionality of the Ordinance Under Strict Scrutiny

The Defendants contend that contribution limits serve two important government interests: to prevent "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." (Defendants' Motion at 16, quoting McConnell v. Federal Elections Commission, 540 U.S. 93, 136 (2003)). COMPAC first contends that the proffered government interest in campaign finance regulation – preventing corruption and the appearance of corruption – is not an overriding state interest when "grafted on" to laws regulating independent committees rather than candidates. (Plaintiffs' Motion at 16-17.) Second, COMPAC contends that the contested ordinance is not narrowly drawn to serve a compelling government interest due to vagueness, overbreadth, and a contribution limit so low as to create serious associational and expressive problems. (Plaintiffs' Motion at 17-18.)

The Court finds that preventing corruption and the appearance of corruption is an important government interest when applied to contribution limits on candidates or committees who coordinate with candidates. McConnell, 540 U.S. at 136. However, SJMC Section 12.06.310 is not narrowly tailored to serve that interest, because it also serves as an expenditure limit on independent committees. Far from narrow tailoring, the ordinance sweeps broadly to regulate a significant amount of protected speech. For instance, COMPAC correctly contends that the contested ordinance, as presently written and interpreted by the Election Commission, could encompass conduct as mundane as "mentioning the vote of a city official on a piece of legislation in a newsletter sent to...members." (Plaintiffs' Motion at 17.) The Defendants contend that COMPAC's conduct is distinguishable from this example: "it is hard to believe that COMPAC is genuinely so confused as to not know the difference between its mass mail and telephone campaign targeting a mayoral candidate launched three weeks before the mayoral election and simply inviting an official to speak on a panel or mentioning a City Council vote in a newsletter." (Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 12, hereafter, "Defendants' Opposition," Docket Item No. 35.) Moreover, although it is not dispositive, the $250 contribution limit per election is low, particularly in its failure to adjust for inflation. In invalidating $200-400 limits on individual

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contributions to state races, the Supreme Court considered, *inter alia*, the limits placed on challengers seeking to run competitive campaigns, the absence of automatic adjustment for inflation, and the absence in the record of "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" described. Randall v. Sorrell, 126 S.Ct. 2479, 2495-99 (2006).

Although the Defendants are correct that COMPAC's conduct is factually distinguishable, the Court holds that SJMC Section 12.06.310 regulates more speech than is necessary to advance the government interest of preventing corruption and the appearance thereof.[2] As such, it cannot survive a strict scrutiny challenge.

B. Fourteenth Amendment

i. Vagueness

COMPAC challenges the constitutionality of SJMC Section 12.06.310, contending that the words "in aid of or opposition to" violate due process because their meaning is "entirely dependent on the subjective interpretation of the Commission," they invite an "arbitrary and discriminatory application" of the law, and as applied, they have had a chilling effect on COMPAC's exercise of its free speech rights. (Plaintiffs' Motion at 5-9.) Defendants contend that the ordinance's language is not vague or overbroad because the Supreme Court has found similar language constitutional, the language is properly tailored, and COMPAC could have obtained an advisory opinion about the legality of its planned mailer and telephone campaign. (Defendants' Motion at 19-21.)

A high ("stringent") degree of clarity is constitutionally required of laws that "threaten to inhibit the exercise of constitutionally protected rights," including laws affecting freedom of speech. Hoffman Estates v. Flipside, 455 U.S. 489, 499 (1982). SJMC Section 12.06.310 cannot pass constitutional muster because it does not provide fair or adequate warning to speakers in the political process as to what conduct is prohibited. Nowhere in the Defendants' papers is a satisfactory explanation to the scenarios that COMPAC raises:

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[2] Defendants also argue that due deference to the legislative determination is appropriate. (Defendants' Motion at 18.) This argument is predicated on an incorrect level of scrutiny.

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> What does in aid of or in opposition to a candidate mean? If a COMPAC mailer praises a candidate's stance on an unpopular issue, does that aid or oppose the candidate? What if a communication vilifies a candidate's support of a popular issue? Does televising a candidate forum sponsored by a business group aid or oppose a candidate who has taken positions unpopular with the business community?

(Plaintiffs' Motion at 6.)

SJMC Section 12.06.310 is subject to "arbitrary and discriminatory application." (Plaintiffs' Motion at 7.) This finding is exemplified by the Election Commission's adoption of the Evaluator's Report, which said of COMPAC's conduct, "Slogans like 'there has to be a better way for San Jose' and 'is this any way to run a city,' may not rise to the level of 'express advocacy,' but the intent to affect the election seems clear to us." (Stipulated Facts, Exh. at 18.) The Court finds that it is clear that San Jose's framework for independent committees to follow is constitutionally untenable. Put simply, a committee knows that it may not finance communications "in aid of or in opposition to" a candidate with contributions exceeding $250. If the committee is unclear on whether its proposed communication would violate the ordinance – for instance, because it merely plans to mention how elected representatives seeking reelection voted on a particular issue – it may seek an advisory opinion from the Election Commission. The Election Commission, in issuing its advisory opinion, may consider what the intention of the would-be communicator appears to be. This statutory setup is plainly vague, as it does not afford a would-be speaker a reasonable means of discerning ex ante whether its conduct is lawful. Further, it affords troubling discretion to the Election Commission to base its determination of whether a speaker's communication is lawful on that speaker's perceived intent.

Defendants' principal argument is that the Supreme Court found in McConnell that the words "oppose," "attack," and "support" were not unconstitutionally vague. (Defendants' Motion at 20.) In McConnell, the Supreme Court considered the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 540 U.S. at 115. The BCRA was enacted to close a gap in campaign finance law that allowed political parties and candidates to circumvent the Federal Election Campaign Act of 1971 ("FECA"). Id. at 132. FECA imposed "hard money" contribution limitations, imposing a ceiling on contributions for the purpose of advocating a candidate's election

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or defeat. Political parties and candidates were circumventing FECA's limitations through soft-money contributions. Id. at 124. BCRA was enacted to eliminate FECA's soft money loophole. Under BCRA, one of the new categories of "federal election activity" subject to restrictions was "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for state or local office is also mentioned or identified) and that promotes or supports a candidate for that office; or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate.)" 2 U.S.C. § 431(20)(A)(iii).

Defendants appear to contend as an absolute proposition that the Supreme Court held that the words "oppose," "attack," and "support" were not unconstitutionally vague in McConnell. (Defendants' Opposition at 14-15.) The correct reading of McConnell is not so broad. The Supreme Court's finding that those words satisfied due process must be interpreted in the context of BCRA, which was an "electioneering communication" ordinance. It applied pointedly and specifically only to (1) broadcast, satellite, and cable communications (2) clearly identifying a candidate for federal office (3) airing within sixty days of a general election or thirty days of a primary, and (4) targeted to the relevant electorate, i.e. those in the relevant jurisdiction, if for an election other than President or Vice-President. 540 U.S. at 189-191; see also 2 U.S.C. § 434(f)(3)(A)(i). In contrast, the SJMC ordinance applies (1) to expenditures on all manner of communications; (2) that can be construed in aid of or opposition to a candidate, which could potentially include ads that do not directly mention the candidate,[3] and (3) without regard to the timing relative to the election. Thus, three of the four constraints that lent meaning to the words in BCRA are not applicable here.

Defendants contend that COMPAC could have obtained an advisory opinion from the Elections Commission or the San Jose City Attorney. (Defendants' Motion at 21.) However, it is axiomatic that Defendants cannot salvage an unconstitutionally vague law by offering would-be

[3] Of course this is not one such case. However, if the Election Commission is willing to consider the Evaluator's determination of intent, then it is conceivable that the ordinance could apply to communications not directly referencing a candidate if the speaker's perceived intent is to aid or oppose a candidate.

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speakers an opportunity to have their speech green-lighted in advance, and the case that Defendants cite in support of this proposition does not so hold.[4] In McConnell, the Supreme Court was satisfied that the challenged statutory language was not unconstitutionally vague, independently of the possibility of the plaintiffs obtaining an advisory opinion. The Supreme Court's vagueness discussion upholding the BCRA's use of the words "promote," "oppose," "attack," and "support" did so in the context of speech by *political parties*. McConnell, 540 U.S. at 170. The Supreme Court held that the four challenged words "clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provisions." Id. (emphasis added.) In holding that the four words "provide explicit standards for those that apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," the Supreme Court wrote:

> This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns. See Buckley, 424 U.S. at 79 (noting that a general requirement that political committees disclose their expenditures raised no problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" and thus a political committee's expenditures "are, by definition, campaign-related.")

Id. The Supreme Court's focus, then, was on political parties and their speakers. Due to the presumption that political parties act in connection with political campaigns, it was reasonable that their members of "ordinary intelligence" could ascertain whether party speech promoted, opposed, attacked, or supported a candidate. Only after that finding did the Supreme Court write in dicta, "Furthermore, should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification and thereby 'remove any doubt there may be as to the meaning of the law.'" Id. Here, the conduct of an independent committee—not a political candidate or committee "the major purpose of which is the nomination or election of a candidate"— has been implicated by SJMC Section 12.06.310. As such, Defendants cannot rely on the Supreme Court's dicta on advisory opinions in McConnell to salvage an unconstitutionally vague law.

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[4] Defendants cite to Buckley v. Valeo, 424 U.S. at 24. (Defendants' Motion at 21.) However, their quotation is taken from McConnell, 540 U.S. at 170 n.64.

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The Court concludes that SJMC Section 12.06.310 violates the Due Process Clause of the Fourteenth Amendment, because it is impermissibly vague and susceptible to arbitrary or discriminatory interpretation.

ii. Overbreadth

Because SJMC Section 12.06.310 is unconstitutionally vague, the Court deems it unnecessary to address the question of whether the ordinance is overbroad.

iii. Narrowing Construction

COMPAC contends that the Court should give the challenged ordinance a limiting construction, applying it only to express advocacy. (Plaintiffs' Motion at 10-11.) The Ninth Circuit has held that "McConnell left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant government interest." Heller, 378 F.3d 985 (quoting Anderson v. Spear, 356 F.3d 651, 664-65 (6th Cir. 2004)).

Federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." Stenberg v. Carhart, 530 U.S. 914, 944 (2000) (quoting Boos v. Barry, 485 U.S. 312, 330 (1988)). Here, COMPAC contends that the Ninth Circuit has held that statutes that turn on whether conduct "influences" an election are subject to a narrowing construction. (Plaintiffs' Motion at 12, citing Heller, 378 F.3d at 986 n.5.) The Ninth Circuit in Heller referenced two other circuit decisions that held statutes susceptible to constitutional narrowing: (1) a Seventh Circuit case regarding the phrase "to influence the election of a candidate...or the outcome of a public question" and (2) a Fourth Circuit case regarding the phrase "for the purpose of influencing the outcome of an election for public office." Id., citing Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 510 (7th Cir. 1998); Va. Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268, 269 (4th Cir. 1998). One question posed by Caldwell, Heller, and Baldwin is whether this case's phrase, "in aid of or opposition to," is closer to "influencing," which the Fourth and Seventh Circuits held were susceptible to narrowing constructions, or "related

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to," which the Ninth Circuit held was not. However, the Court need not decide this question, because, as the Fourth Circuit held in Caldwell:

> A federal district court "lacks jurisdiction authoritatively to construe state legislation." United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971). As the Seventh Circuit has explained: "An important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined."

152 F.3d at 270 (some citations omitted). For this reason, the Court's supplying a narrowing construction would not supply COMPAC with the relief that it seeks. The plaintiff in Caldwell faced exactly this issue:

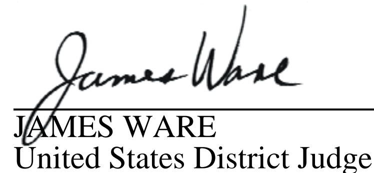
> The district court's holding, that the Virginia statutes at issue did not apply to [plaintiff], could not prevent a private party from suing to enjoin [plaintiff's] distribution of campaign literature based on the statutes, nor could it prevent the state from prosecuting [plaintiff] for failing to comply with the statutes. Because the scope of the statutes' applicability had not authoritatively been narrowed and by their plain terms they applied to [plaintiff], [plaintiff's] speech was still chilled by the statutes.

Id. The proper remedy, then, for the violation of due process at issue here is for the Court to invalidate the statute and enjoin its enforcement.

V. CONCLUSION

The Court GRANTS COMPAC's Motion for Summary Judgment and DENIES Defendants' Motion for Summary Judgment. Plaintiffs are entitled to reasonable attorney's fees.

Dated: September 20, 2006



JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: September 20, 2006 **Richard W. Wieking, Clerk**

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

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