No. 06-17001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN JOSE SILICON VALLEY CHAMBER OF COMMERCE POLITIC ACTION COMMITTEE, et al.

Plaintiffs-Appellees,

v.

CITY OF SAN JOSE, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California,
Civil Action No. 06-04252

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

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I. STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation. The CLC has provided legal counsel to parties and *amici* in campaign finance cases at both the federal and state court level, including representing intervenors Senators John McCain and Russ Feingold in *McConnell v. FEC*, 540 U.S. 93 (2003). More recently the CLC has participated in *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), and *Wisconsin Right to Life v. FEC*, No. 04-1581, 546 U.S. 410 (2006), *remanded to* 2007 WL 124149 (D.D.C. scheduling order Jan. 19, 2007).

The present case concerns a challenge brought under the First and Fourteenth Amendments of the Constitution to San Jose Municipal Code ("SJMC") § 12.06.310, which limits contributions to committees making independent expenditures. The regulation of such committees is a key issue in campaign finance law and directly impacts the interests and activities of the *amicus curiae*.

This *amicus* brief will assist the Court's understanding of the law governing contribution limits as applied to political committees making independent

expenditures in federal, state and local elections. Specifically, the brief will analyze this issue according to the recent *McConnell* decision, an analysis which the Supreme Court has specifically directed the Fourth Circuit Court of Appeals to conduct in a similar case, *North Carolina Right To Life, Inc. (NCRL) v. Leake*, CA-99-798 (E.D.N.C. Oct. 24, 2001), *aff'd* 344 F.3d 418 (4th Cir. 2003), *vacated by* 541 U.S. 1007 (2004), *remanded to* 99-CV-798-BO(3) (E.D.N.C. argued Oct. 12, 2006).[1] The CLC is participating as *amicus curiae* in *NCRL*.

II. SUMMARY OF ARGUMENT

In 1993, the City of San Jose (the "City") enacted a comprehensive system of campaign finance regulation, including a limit on contributions to independent committees – defined to include committees making independent expenditures. *See* SJMC § 12.06.310. On September 20, 2006, the District Court struck down SJMC § 12.06.310 as violative of the First and Fourteenth Amendments. *See* Order Granting Plaintiffs' Motion for Summary Judgment (September 20, 2006) ("SJ Order"). *Amicus* respectfully submits that the District Court's decision was in error, and urges this Court to reverse the decision. Specifically, this brief will

[1] In *NCRL*, a federal district court declared unconstitutional several provisions of North Carolina's campaign finance law, including its contribution limits as applied to committees making only independent expenditures. The Fourth Circuit affirmed this decision. The Supreme Court, however, vacated this decision, and remanded the case back to the Fourth Circuit for "further consideration in light of *McConnell v. FEC*." *See* 541 U.S. 1007 (2004) (emphasis added).

focus on three holdings of the District Court that *amicus* believes are contrary to controlling Supreme Court precedent and undermine the structure of federal campaign finance jurisprudence.

First, upending the precedent established in *Buckley v. Valeo*, 424 U.S. 1 (1976), which clearly distinguishes between contribution restrictions and expenditure restrictions, the District Court held that SJMC § 12.06.310 is a "dual limit on contributions and expenditures," and subjected the provision to strict scrutiny. In so holding, the District Court misconstrued Supreme Court case law, which consistently finds that only laws that directly cap an entity's spending are "expenditure limits" subject to strict scrutiny. In contrast, SJMC § 12.06.310 restricts only the source and amount of contributions that a committee may use for expenditures in San Jose elections. This incidental effect on expenditures, common to all statutory contribution limits, does not transform SJMC § 12.06.310 into an expenditure limit, nor warrant strict scrutiny review.

Second, the District Court erred in holding that San Jose's interest in preventing actual or apparent corruption would justify only "contribution limits on candidates or committees who coordinate with candidates," not contribution limits on committees making independent expenditures. *See* SJ Order, slip op. at 9. This holding is directly contrary to the *McConnell* decision. There, the Supreme Court upheld the "soft money" provisions of the Bipartisan Campaign Reform Act of

2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which imposed federal limits on contributions to national and state parties, even if the party committees engaged only in independent, non-coordinated activities. 540 U.S. at 134-73. Further, the Court explicitly noted that its earlier decisions, such as *California Medical Assn. (CalMed) v. FEC*, 453 U.S. 182 (1981), had construed the state's "anti-corruption" interest broadly to justify limits on contributions to political committees that made only independent expenditures. 540 U.S. at 151-152, n.48. The *McConnell* decision thus dispelled any doubt regarding the constitutionality of limits on contributions to committees making independent expenditures.

Finally, the District Court incorrectly concluded that the language "in aid of and/or opposition to" in SJMC § 12.06.310 was vague. In finding this language unconstitutional, the District Court appeared to demand that SJMC § 12.06.310 meet a standard akin to "express advocacy," where only "communications that expressly advocate the election or defeat of a candidate" would be subject to regulation. As the Supreme Court made clear in *Buckley*, however, the "express advocacy" standard does not govern with respect to "political committees" and other groups with a "major purpose" of influencing elections. *See Buckley*, 424 U.S. at 78-79. Because SJMC § 12.06.310 regulates only political committees, which by definition, engage in activities to influence candidate elections, it need

not meet the stringent standards of express advocacy. The language "in aid of and/or opposition to" provides sufficient notice.

For the above reasons, *amicus* respectfully asks this Court to reverse the District Court decision, and declare SJMC § 12.06.310 constitutional.

III. ARGUMENT

A. SJMC § 12.06.310 Is a Contribution Limit, and Is Not Subject to Strict Scrutiny Review.

The threshold issue in this case is whether SJMC § 12.06.310 serves as a limit on the expenditures of appellees COMPAC and the COMPAC Issues Fund (the "Chamber Committees"), or a limit on the contributions received by the committees. This provision imposes a $250 limit on contributions to "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." SJMC § 12.06.310(a). The provision also allows a donor to contribute over $250 to a committee if the committee segregates the portion in excess of $250 into a separate account which will not be used in City candidate elections. SJMC § 12.06.310(b). Although SJCM § 12.06.310 thus sets no limits on the spending of independent committees, the District Court considered it a "content based expenditure limit," and applied strict scrutiny. *See* SJ Order, slip op. at 8. *Amicus* submits that the District Court misconstrued the City's contribution limit as an

expenditure limit, and proceeded to misconstrue Supreme Court precedent on this issue by inappropriately applying strict scrutiny to the City's contribution limit.

Beginning with *Buckley*, the Supreme Court has subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. *See McConnell*, 540 U.S. at 134; *FEC v. Beaumont*, 539 U.S. 146, 147-48 (2003). The difference in treatment is based on the Supreme Court's conclusion that a cap on expenditures imposes a greater burden on First Amendment rights than does a limit on contributions. The Court found that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial … restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19-20. In contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because "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." *Id*. at 20, 21. It is essentially "speech by proxy." *CalMed*, 453 U.S. at 195. *See also Beaumont*, 539 U.S. at 147-48 (holding that contributions "lie closer to the edges than to the core of political expression"). Furthermore, in terms of practical effect, a contribution limit leaves donors free to "engage in independent political expression," to "associate actively through volunteering their services," and to "assist to a limited but nonetheless substantial extent in

supporting candidates and committees with financial resources." *Buckley*, 424 U.S. at 28. Because contribution limits thus impose a lesser burden on First Amendment rights than do expenditure limits, they are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, at 136, *quoting Beaumont*, 539 U.S. at 148 (internal quotations omitted).

The District Court's determination that that SJMC § 12.06.310 "serves as a dual limit on contributions and expenditures" and that strict scrutiny applied was inconsistent with Supreme Court precedent and plainly in error.

First, calling SJMC § 12.06.310 an expenditure "limit" is a misnomer. This section in no way caps or limits the total amount of money a political committee can spend for independent expenditures. Political committees are free to accept contributions from as many individuals as are willing to contribute – and to spend every penny supporting or opposing candidates for City office. Similarly, SJMC § 12.06.310 does not restrict contributors to political committees from making unlimited expenditures for their own "independent political expression." *Buckley*, 424 U.S. at 28. In designating SJMC § 12.06.310 an expenditure limit, the District Court misapprehends the nature of the laws that the have been deemed "expenditure limits" in Supreme Court precedent:

- *Buckley*, 424 U.S. 1 (1976), found unconstitutional Section 608(e)(1) of the Federal Election Campaign Act (FECA), which capped independent

expenditures "relative to a clearly identified candidate during a calendar year" at $1,000.

- *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), struck down a law making it a criminal offense for an independent political committee to spend more than $1,000 to further the campaign of a presidential candidate in the public financing system.

- *Colorado Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996), invalidated a section of FECA that capped the total independent expenditures a political party could make in general elections.

The case law makes clear that those only laws that function as absolute caps on an entity's political expenditures are deemed "expenditure limits" subject to strict scrutiny.

Here, SJMC § 12.06.310 has at most an indirect effect on a political committee's expenditures. Every contribution limit in state and federal campaign finance law, however, has the indirect effect of reducing the funds available to the recipient candidate, party or committee to make expenditures. This does not transform a contribution limit into an expenditure limit. The case law confirms this conclusion. In *McConnell*, the Supreme Court considered a challenge to several provisions of BCRA that sought to check the stream of large "soft money" contributions into national, state and local party committees. One soft money provision – which resembled SJMC § 12.06.310 – imposed federal contribution limits on all funds raised and spent by national party committees, regardless whether the funds were ultimately used for candidate contributions or wholly

independent expenditures. *See* 2 U.S.C.A. § 441i(a). The *McConnell* court rejected plaintiffs' argument that, because BCRA's soft money provisions restricted not only a party's contributions to candidates but also its "spending of funds," the provision should be reviewed under strict scrutiny. 540 U.S. at 138. Instead, the Court found that the soft money provisions did not "in any way limit[] the total amount of money parties can spend," and only restricted the "source and individual amount" of donations. *Id*. at 139. The overall effect of such a contribution limit was "merely to require candidates and political committees to raise funds from a greater number of persons." *Id*. at 136, *citing Buckley*, 424 U.S. at 21-22. Similarly, here SJMC § 12.06.310 only restricts the "source and individual amount" of donations to political committees. If the Chamber Committees wish to increase their independent expenditures in City elections they can do so through the simple expedient of increasing their donor base. According to the reasoning in *McConnell*, SJMC § 12.06.310 thus functions purely as a contribution limit, and should be reviewed as such.

This Court should also note that the conflation of contributions and expenditures has implications that extend beyond the instant case. A decision to apply strict scrutiny to San Jose's contribution limits here would undermine the structure of campaign finance jurisprudence, which since *Buckley*, has relied upon the distinction between contribution limits and expenditures limits in determining

the appropriate standard of review. It is no answer to say that the Chamber Committees' expenditures are independent, and that the application of strict scrutiny is warranted on that basis.[2] There are many federal contribution limits that potentially reduce the money available to parties and political committees for independent expenditures – but that have been upheld by the Supreme Court as constitutionally permissible. *See, e.g., CalMed*, 453 U.S. 182 (1981) (upholding $5,000 limit on contributions to a multicandidate political committees). Indeed, the *McConnell* decision depends upon the constitutionality of limiting contributions to political parties even if the limits affect the parties' independent spending. *Cf. Colorado Republican Fed. Campaign Comm. v. FEC (Colorado I)*, 518 U.S. 604 (1996) (striking down party independent expenditure limit, but not touching limits on contributions to party committees used for this purpose). Were

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[2] Nor does this case present the extraordinary facts that characterized *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002). In *Lincoln Club*, the Ninth Circuit considered an Irvine statute that that prohibited any entity that accepted contributions over $320 from making independent expenditures in Irvine elections. Because the *Lincoln Club* plaintiff recieved membership dues that exceeded the contribution limit, the statute had the extreme effect of barring the plaintiff from making any expenditures in Irvine elections.

Insofar as *Lincoln Club* has not been overruled by *McConnell*, it is clearly distinguishable from the instant case. The Chamber Committees have not shown that they are prevented from making expenditures in City elections. Further, because SJMC § 12.06.310 allows committees to segregate funds accepted in excess of the contribution limits in a separate account, all committees – even those that are funded by "over-the-limit" membership dues – can participate fully in San Jose elections. Indeed, the District Court virtually conceded as much, stating that this case is "factually distinguishable from *Lincoln Club* in multiple ways." SJ Order, slip op. at 7-8.

this Court to apply strict scrutiny to SJMC § 12.06.310 because of its indirect effect on independent expenditures, the logic of this decision would conflict with longstanding Supreme Court precedent and dictate application of strict scrutiny to many existing contribution limits, which hitherto have been subject to a less rigorous standard of review.

B. The Supreme Court Affirmed in *McConnell* that the Regulation of Contributions to Independent Committees is Constitutional and Supported by Important Government Interests.

The instant case turns on whether the state can limit contributions to committees that make only independent expenditures, and whether such contribution limits are justified by a "sufficiently important state interest." Until the 2003 Supreme Court decision in *McConnell*, this issue was an open question in campaign finance law. In *McConnell*, however, the Supreme Court upheld BCRA's provisions limiting contributions to party committees, even those used for independent spending, and made clear that contribution limits on political committees making independent expenditures were justified by the state's anti-corruption interest.[3]

[3] The Supreme Court recognized the importance of the *McConnell* case to this question in the ongoing case *North Carolina Right to Life*. *See supra* n.1.

1. The McConnell Decision Made Clear that Limiting Contributions to Independent Committees Was Constitutionally Permissible.

The Supreme Court has long held that contributions to political action committees can be limited without running afoul of the First Amendment. In *CalMed*, the Supreme Court upheld FECA's $5,000 limit on contributions to multicandidate political committees. *See id*. at 185, *citing* 2 U.S.C. §§ 441a(a)(1)(C). A multicandidate political committee is a political committee that receives contributions from more than 50 individuals and makes contributions to at least five candidates, as well as potentially making independent expenditures. 2 U.S.C. § 441a(a)(4). Although the plaintiffs argued that the contribution limit was "akin to an unconstitutional expenditure limit," *id*. at 195, the Court applied a less rigorous standard of review, and found that the contribution limit served the state's interest in preventing actual or apparent corruption, and preventing circumvention of FECA's other contribution restrictions.[4]

[4] According to COMPAC's campaign finance reporting to California state, the committee made both independent expenditures and direct contributions to candidates in the 2006 City elections, bringing it directly in the ambit of the *CalMed* holding. (It reported over $2,000 in contributions to San Jose mayoral and City Council candidates in 2006). *See* Exhibit C, attached hereto; *see also* Section C, *infra*. Because COMPAC is thus comparable to the political committee considered by *CalMed*, the *CalMed* precedent controls, and would obviously support the constitutionality of SJMC § 12.06.310 as applied to COMPAC.

Although *CalMed* did not directly address the constitutionality of limits on contributions to committees making only independent expenditures,[5] the *McConnell* decision made clear that the Court's *CalMed* decision had necessarily upheld limits on contributions to such committees:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate

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[5] In *CalMed*, the plurality opinion appeared to avoid considering "the hypothetical application" of FECA to political committees that make only independent expenditures. *Id*. at 197, n.17. Further, in a separate opinion, Justice Blackmun, whose fifth vote was necessary for the decision, suggested that FECA's $5,000 limit could not apply to such committees. *Id*. at 203 (Blackmun, J., concurring in judgment) ("[a] different result would follow if [the $ 5,000 limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates"). However, because CALPAC, the committee at issue in *CalMed*, made direct contributions to candidates, the idea of a committee making only independent expenditures was merely a hypothetical. Blackmun's suggestion was therefore dictum.

Justice Blackmun's vote in *CalMed* also undercut his dictum. The plaintiff had argued that even if Congress could limit contributions that the committee would ultimately use for candidate contributions, Congress could not limit those contributions used for administrative expenses and other independent expenditures. Brief of Appellants at 34-35, *CalMed*, 453 U.S. 182 (1981). CALPAC's independent expenditures did not appear to trouble the plurality – or Justice Blackmun. The Court upheld the limit without regard to how the committee would ultimately use its contributions. That the Court (with Justice Blackmun's vote) did not strike down the limit on this ground – or narrowly construe the statute's reach – necessarily challenges Blackmun's own stated misgivings about regulating committees making only independent expenditures.

> contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.

540 U.S. at 151-152 n. 48 (emphasis added). As the last sentence makes clear, in the view of the *McConnell* court, *CalMed* held that Congress could limit contributions to entities that would use them for independent expenditures.

The *McConnell* court continued by noting that *CalMed* could not have upheld FECA's broad limit on contributions to multicandidate political committees without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell* itself, the Court wrote in the very next sentence after the passage quoted above:

> If indeed the First Amendment prohibited Congress from regulating contributions to fund [express advocacy and numerous other independent expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id. at 152, n.48. In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called "pass-through" corruption and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have

addressed such pass-through corruption concerns. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if contributions to committees making only independent expenditures were sacrosanct. *McConnell* thus clarifies that *CalMed* necessarily stands for the proposition that the state may limit contributions to political committees making independent expenditures.

2. The *McConnell* Court Found that the Regulation of Contributions to Political Parties – Even Those Used for Independent Expenditures – Was Supported by Important Government Interests

The Supreme Court's decision in *McConnell* to uphold BCRA's soft money provisions reinforces *CalMed*'s proposition that the regulation of contributions to committees making independent expenditures is constitutionally permissible. If contributions that were eventually used as independent expenditures in federal elections had no corruptive potential – if they were always and necessarily sacrosanct – then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*. Instead, the Court found that the soft money provisions were justified by the state's interest in preventing actual and apparent corruption, broadly defined as "undue influence on an officeholder's judgment, and the appearance of such influence." *Id*. at 150, *quoting FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado II*).

The "core" soft money provision considered in *McConnell*, BCRA Section 323(a), codified at 2 U.S.C.A. § 441i(a), subjects all funds solicited, received, directed, or spent by the national parties to federal contribution limits regardless of their ultimate use. Section 323(b) extends this requirement to state and local party entities, imposing federal limits on contributions to such entities which are used to finance "federal election activity," including voter registration, voter identification, and public communications that promote or oppose a clearly identified federal candidate. *See* 2 U.S.C.A. § 441i(b). Significantly, none of the "federal election activities" set forth in Section 323(b) necessarily involves contributions to candidates, and most often such activities are undertaken independently of candidates.

Even though BCRA limited contribution that were ultimately used for independent spending, *McConnell* held that Sections 323(a) and (b) were constitutional, and closely drawn to match the important state interest of preventing corruption and the circumvention of the campaign finance laws. The *McConnell* majority construed the state's anti-corruption interest broadly. It expressly rejected the reasoning of Justice Kennedy's dissenting opinion, which asserted that only contributions "made directly to" or used "in coordination with" a federal office holder or candidate were potentially corrupting. *Id*. at 152 (emphasis added); *see also id*. at 286-341 (Kennedy, J., concurring in judgment in part, and

dissenting in part). The majority instead determined that large contributions, even those made to political parties and used for independent expenditures, threatened the integrity of the political system, because they allowed contributors to gain access and influence over federal candidates. *See id.* at 146-148 (influence), 149-151 (access and influence). As the Court noted, "large soft-money contributions … are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id*. at 156.

This broad understanding of the state's anti-corruption interest was based on the *McConnell* court's understanding of the "realities of political fundraising," where information about fundraising flowed freely between party committees and candidates. *Id*. at 152. The record in *McConnell* indicated that party committees made candidates "well aware" of contributors to the party, and donors themselves "would report their generosity to officeholders." *Id*. at 147. Indeed, candidates were active participants in the circumvention of campaign finance laws and "commonly asked donors to make soft-money donations to the national and state committees" in order to assist their campaign. *Id*. at 146. Given the exchange of information between the party committees and federal candidates, "[i]t is not only plausible, but likely, that candidates would feel grateful for [soft money donations to parties] and that donors would seek to exploit that gratitude." *Id*. at 145.

In addition, the Court recognized that Sections 323(a) and (b) served Congress's interest in preventing circumvention of campaign finance laws. Regarding the constitutionality of Section 323(b), for instance, the *McConnell* Court affirmed that Congress could limits all contributions to state party committees used "for the purpose of influencing federal elections." *Id*. at 167. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees:

> Congress knew that soft-money donors would react to §323(a) by scrambling to find another way to purchase influence. It was neither novel nor implausible for Congress to conclude that political parties would react to §323(a) by directing soft-money contributions to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. … Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Id. at 165 (internal citations and quotations omitted). The Court thus affirmed that circumvention was a valid state concern, even if the funds raised outside the federal limits were used only for independent party spending.

In upholding BCRA's soft money provisions, then, *McConnell* necessarily found that contributions to party political committees can corrupt, regardless whether such contributions are used for coordinated or independent expenditures. The Court's key observation was that a contribution's ultimate use is not the basis

for identifying its corruptive potential. Rather, the potential for corruption stems from the ability of donors to gain undue access to and influence over candidates as a result of their contributions to a political party.

3. The State's Broad Anti-Corruption Interest Articulated in *McConnell* Also Supports San Jose Municipal Code § 12.06.310.

The state interest that justified the contribution limits on party committees in *McConnell* also supports San Jose's limits on contributions to non-party committees making independent expenditures. The San Jose campaign finance statute, including SJMC § 12.06.310, was enacted to "prevent[] the perception by the public" that big contributors "exercise undue or improper influence over elected officials." SJMC § 12.06.200. Thus, in enacting SJMC § 12.06.310, the City recognized that contributions to political committees are potentially corruptive – regardless of whether the contributions are ultimately used for direct candidate contributions or independent expenditures.

The District Court rejected San Jose's articulated interest in the contribution limit, citing *McConnell* for the proposition that that the state's anti-corruption interest would only justify "contribution limits on candidates or committees who coordinate with candidates." SJ Order, slip op. at 9. In so ruling, the District Court got the holding of *McConnell* backwards. As discussed above, *McConnell* upheld contribution limits on national and state parties, even when party entities engaged only in independent, non-coordinated federal election activities. The

McConnell court expressly rejected the position of the District Court – *i.e.* that only "contributions made directly to … and expenditures made in coordination with a federal officeholder" were corruptive – and found that "this crabbed view of corruption" was contrary to "precedent" and "common sense." *Id.* at 152.

In addition to misconstruing *McConnell*, the District Court also failed to recognize that in reality contributions to independent committees, like contributions to political parties, lead to actual and apparent corruption in the electoral system. Political parties and independent committees share three essential features that make both entities ideal conduits for contributors who seek to gain influence over candidates and officeholders.

First, both parties and independent political committees are founded primarily to advocate for the nomination or election of candidates. The Chamber Committees here are registered political committees, formed for the "purpose of influencing or attempting to influence the action of the voters in a municipal election for or against the nomination or election of one or more candidates." SJMC § 12.06.040; *see also* Section C, *infra*. Because of this exclusive focus, political committees, like parties, have the "capacity to concentrate power to elect candidates." *Colorado II*, 533 U.S. at 455. By pooling individual resources and monitoring, rewarding, and punishing more effectively than can any individual the behavior of candidates and officeholders, political committees "marshal the same

power and sophistication for the same electoral objectives as the political parties themselves." *Id*. This focus and "capacity to concentrate power" distinguishes both parties and political committees from other independent political players, such as private individuals, which have fewer resources, broader commitments and less inclination to concentrate exclusively on influencing candidate elections.

Second, the informational exchange that takes place between political parties and candidates also occurs between political committees and candidates they support. As *McConnell* noted, candidates notice the large contributions received by party committees, and "feel grateful" for such contributions, even if the party uses such contributions for independent party expenditures. *See McConnell*, 540 U.S. at 145. It is likely that candidates are equally aware of contributions that go to non-party committees, and equally appreciative of committee expenditures – albeit independent – that support their campaigns. Particularly in the microcosm of a City election, it is improbable that a local candidate would not note the identities of the individual contributors who made large contributions to political committees that independently spent money on the candidate's behalf.

Lastly, and closely related to the first two similarities, is the potential for circumvention posed by parties and political committees. *See*, *Colorado II*, 533 U.S. at 454-55. Because of their narrow focus, electoral power and publicly-recognized fundraising abilities, independent committees, like parties, are

"effective conduits for donors desiring to corrupt … candidates and officerholders." *McConnell*, 540 U.S. at 156, n.51. Indeed, the *McConnell* court acknowledged that independent tax-exempt organizations, such as political organizations registered under Section 527 of the Internal Revenue Code, represented the new front for large-scale circumvention of FECA. *Id.* at 176-80. The Court recognized that political parties themselves used independent tax-exempt organizations to circumvent the law, noting that the record demonstrated "a robust practice" of parties "rais[ing] large sums of money to launder through tax-exempt organizations engaging in federal election activities." *Id*. at 179; 2 U.S.C. 441i(d). Similarly, the Chamber Committees here present an attractive opportunity for both private donors and political parties to "launder" large donations through an independent entity that supports their preferred candidates. Finally, even if donors to independent committees are not actually seeking to "corrupt" candidates, this situation certainly gives rise to the appearance that donors are attempting to circumvent San Jose's campaign finance statutes to acquire political influence over candidates and officeholders.

Due to these characteristics shared by both political parties and independent committees, the same state anti-corruption interest that supports federal limits on contributions to party committees supports San Jose's imposition of reasonable contribution limits on committees making independent expenditures.

Because the District Court ruled as a matter of law that the City's anti-corruption interest would only support contribution limits relating to "candidates or committees who coordinate with candidates," it did not reach the narrower question of whether the City had submitted sufficient evidence to justify its enactment of SJMC § 12.06.310. Although the District Court's decision to grant plaintiffs' summary judgment motion cut short the creation of a full record at the district court level, the City has nevertheless submitted sufficient evidence to justify its contribution limit.

While "mere conjecture" is not an adequate basis for a campaign finance statute bearing upon First Amendment rights, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny … will vary up or down with the novelty and plausibility of the justification raised." *See McConnell*, 540 U.S. at 144, *quoting Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). The corruptive potential of direct contributions to candidates and their campaigns is not in dispute. *See Buckley*, 424 U.S. at 26-28. Further, the Supreme Court's decisions in *McConnell* and *CalMed* have established the government's interest in preventing contributors from circumventing limits on direct contributions to candidates by funneling money into political committees for "independent" spending. *McConnell*, 540 U.S. at 165-66; *CalMed*, 453 U.S. at 198. San Jose's interest in SJMC § 12.06.310 is thus hardly "novel" or

"implausible." Furthermore, the City has also introduced significant evidence to support its contribution limit. *See* Opening Brief of Appellants (Feb. 5, 2007), at 52-54. The City also highlighted that SJMC § 12.06.310, as part of San Jose's campaign finance statute, was enacted in response to a ballot measure passed by City voters, demonstrating that political corruption was a concern to the public. *See Shrink Missouri*, 528 U.S. at 394 ("[A]lthough majority votes do not … defeat First Amendment protections, the statewide vote on [a ballot measure] certainly attested to the perception [that] … voters determined that contribution limits are necessary to combat corruption and the appearance thereof") (internal quotations omitted). Given this quantum of evidence, the City has amply fulfilled its burden to substantiate its interest in the contribution limit. If there are any doubts as to the sufficiency of the record, however, *amicus* respectfully requests that the Court refrain from ruling on this issue, and instead remand the matter back to the district court for further fact-finding. *See, e.g., Citizens for Clean Gov't v. City of San Diego,* 2007 WL 121146 (9th Cir. 2007) (remanding case to allow further evidentiary development regarding the state's interest in regulating contributions to recall committees).

C. SJMC § 12.06.310 Satisfies the Due Process Clause of the Fourteenth Amendment.

The District Court also struck down SJMC § 12.06.310 on Fourteenth Amendment grounds, holding that the language of SJMC § 12.06.310 was

unconstitutionally vague, and would have a "chilling effect on COMPAC's exercise of its free speech rights." SJ Order, slip op. at 10. In so holding, the District Court did not properly apply the "vagueness" doctrine, which voids a statute not when a statute is merely "imprecise," but only when "no standard of conduct is specified at all." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982). Further, the District Court ignored the *Buckley* decision which makes clear that vagueness claims of the sort asserted by the Chamber Committees do not render a statute such as SJMC § 12.06.310 unconstitutional – because the Chamber Committees exist for the purpose of influencing candidate elections and their expenditures are, by definition, for that purpose.

SJMC § 12.06.310 restricts contributions "to or on behalf of an <u>independent committee</u> expending funds or making contributions in aid of and/or opposition to the nomination or election of a [City] candidate." The application of this section is thus limited to "committees," which are in turn defined in the Municipal Code as any person who "receives contributions or makes expenditures or contributions for the purpose of <u>influencing or attempting to influence the action of the voters in a municipal election for or against the nomination or election of one or more candidates</u>." SJMC § 12.06.040 (emphasis added). The definition of "committee" also sets minimum thresholds of activity, only covering those entities that receive

at least $1000 in contributions per year, or make independent expenditures of at least $1000, or make contributions "to or at the behest of candidates and committees" equaling at least $10,000 per year. *Id.*

Because SJMC § 12.06.310 applies only to political committees, the language "in aid of and/or opposition to" in this provision is inherently self-limiting. Read in conjunction with the definition of "committee," SJMC § 12.06.310 only reaches entities which are committed to "influencing the action of the voters in a municipal election for or against the nomination or election of one or more candidates." It is thus unclear how SJMC § 12.06.310 will sweep so broadly as to reach groups engaged only in issue discussion, as feared by the District Court. A group engaging in pure issue discussion would have no reason to register as a political committee in the first place, and thus would not be subject to SJMC § 12.06.310. The District Court's conclusion that SJMC § 12.06.310 is vague because it potentially infringes upon constitutionally protected speech is thus unfounded.

Federal campaign finance jurisprudence bears out this analysis. In finding SJMC 12.06.310 vague, the District Court appears to demand that the ordinance meet a standard akin to "express advocacy." The Supreme Court has made clear, however, that campaign finance laws regulating organizations with a "major

purpose" of influencing elections, such as the Chamber Committees here, need not be drawn so narrowly so as to cover only express advocacy.

In *Buckley*, the Court considered a "vagueness" challenge to FECA's definition of "expenditure" as it related to certain disclosure provisions of the Act. 424 U.S. at 79-80. FECA defined "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office…." 2 U.S.C. § 431(9)(A) (emphasis added). The Court was concerned that the language "for the purpose of influencing any election," could potentially subject not only candidate advocacy, but also "issue discussion" to federal regulation. It found, however, that as applied to "political committees," which it construed as "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," the definition did not raise vagueness concerns. *Id*. at 79. The Court reasoned that if a group's major purpose is influencing candidate elections, its expenditures "can be assumed to fall within the core area sought to be addressed by Congress," and are "by definition, campaign related." *Id*. at 79. In contrast, the Court found that the statutory language "for the purpose of influencing," as applied to individuals and "non-major purpose" groups, was unconstitutionally vague. Consequently, as applied to these groups, it narrowed the definition of "expenditure" to cover only express

advocacy, or "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80.

The Supreme Court thus made clear in *Buckley* that the adequacy of the definition of "expenditure" would depend on the identity of the parties it sought to regulate. Specifically, *Buckley* found that an "express advocacy" standard is not necessary in connection to a political committee whose major purpose is to influence candidate elections.

The District Court here erred in not likewise recognizing that SJMC § 12.06.310 should be evaluated in light of the parties it regulates. By its terms, SJMC § 12.06.310 only applies to "committees." Further, the Municipal Code makes clear that only those entities which work to "influenc[e] … the actions of the voters … for or against the nomination or election of one or more candidates" are committees. SJMC § 12.06.040. Because SJMC § 12.06.310 thus only applies to committees whose purpose relates to "the nomination or election" of candidates, the language of this provision need not conform to the "express advocacy" language articulated in *Buckley*. In this context, the language "in aid of or in opposition" in SJMC § 12.06.310 is more than sufficient to satisfy the Fourteenth

Amendment.[6] It certainly is no vaguer than FECA's definition of "expenditure," which *Buckley* upheld as applied to "major purpose" groups.

The facts of the case support this conclusion. COMPAC and the COMPAC Issues Fund are political committees, and their major purpose relates to candidate elections in San Jose. First, both Chamber Committees registered as committees with the Secretary of the State of California in the 2006 election. *See* Exhibit A, attached hereto;[7] Cal. Gov't Code § 82013, 84101. They did not contest their status as "committees" under San Jose law in the litigation below. Nor are they contesting the constitutionality of the definition of "committee" on vagueness or overbreadth grounds. Second, the activities of the Chamber committees indicate that their "major purpose" relates to influencing candidate elections. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (noting that a group's independent spending activities can indicate that "the organization's major purpose may be regarded as campaign activity"). According to the Chamber Committees' reporting to the state, both committees supported candidates in the 2006 San Jose

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[6] The statute might present a closer case if it regulated individuals or "non-major purpose" groups, since their expenditures would not necessarily be election-related. However, SJMC § 12.06.310 by its terms applies only to committees, and the Chamber Committees do not dispute their status as committees.

[7] Exhibits A through C are reports which the Chamber Committtes filed with the California Secretary of State, publicly available at http://www.cal-access.ss.ca.gov/Campaign/Committees/. The Court may take judicial notice of these public documents pursuant to Fed. R. Evid. 201.

election. For instance, the COMPAC Issues Fund reported making almost $190,000 in independent expenditures for mailings "to support Chuck Reed for Mayor" or "to oppose Cindy Chavez for Mayor." Exhibit B. COMPAC reported making approximately $1,000 in direct contributions to mayoral candidates and approximately $1,250 in direct contributions to City Council candidates in the 2006 San Jose elections. Exhibit C.[8]

As these facts show, the Chamber Committees are political committees whose major purpose is to influence candidate elections. Under the precedent set by *Buckley* and *McConnell*, they are therefore not entitled to a bright-line "express advocacy" test. Because the committees' expenditures are presumed to be "campaign related," SJMC § 12.06.310 provides them with more than sufficient notice of the activities it covers.

[8] COMPAC is also organized under Section 527 of the Internal Revenue Code, 26 U.S.C. § 527, which provides tax-exemption for "political organizations," defined to mean entities "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for … influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office …." 26 U.S.C. § 527(e)(1)-(2). *See also* Exhibit D, attached hereto. Thus, COMPAC's decision to register under Section 527 confirms that its "primary purpose" is influencing candidate elections.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be **REVERSED**.

RESPECTFULLY SUBMITTED this 12th day of February, 2007.

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