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I. STATEMENT OF JURISDICTION

Appellees San Jose Silicon Valley Chamber of Commerce Political Action Committee and COMPAC Issues Fund (collectively, "COMPAC") agrees with the Statement of Jurisdiction of Appellants City of San Jose, San Jose Elections Commission, and Does 1 through 10 inclusive (collectively, the "City"), but adds that the District Court's September 20, 2006 judgment, its order denying the City's Motion for Judgment on the Pleadings, its order denying the City's Motion for Summary Judgment, as well as its order granting COMPAC' Motion for Summary Judgment, are final. Accordingly, the District Court's judgment and orders are subject to appeal under 28 U.S.C. section 1291.

II. STATEMENT OF ISSUES

1. Whether the District Court was correct not to abstain;

2. Whether the District Court was correct in finding that San Jose Municipal Code section 12.06.310 (all further statutory references are to the San Jose Municipal Code, unless otherwise indicated) violates the First Amendment; and

3. Whether the District Court was correct in finding that section 12.06.310 violates the Fourteenth Amendment.

III. STATEMENT OF THE CASE

COMPAC agrees with the City's Statement of the Case (Appellants' Replacement Opening Brief at 2-5), but adds that the District Court also found Younger abstention inappropriate because the Commission's proceeding had come to a completed end.

IV. STATEMENT OF FACTS

The parties stipulated to key facts, and the District Court, in turn, *only* relied on the following stipulated facts in reaching its decision (Excerpts of Record ("ER"), Vol. II at ER0381-82, 384-85 and ER389-90, 398):

> 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. 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. 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. 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." The mailers and telephone messages were paid for with contributions to COMPAC from individuals and organizations, some of whom contributed more than $250 each.
>
> A citizen complaint about COMPAC's messages was filed with the San Jose 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. 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.
>
> The Election Commission held a hearing on May 31, 2006. It adopted the Evaluator's conclusion that COMPAC had not violated the SJMC's 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 . . .
>
> The Elections Commission decided to impose a civil fine against COMPAC. 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.
>
> On June 21, 2006, the Elections Commission issued COMPAC a letter to public reprimand for its violation of SJMC Section 12.06.310.

(ER, Vol. II at ER00389-90, citations omitted.)

The facts needed to determine the merits are therefore not in dispute, including those most critical to COMPAC's constitutional claims – that the communications by COMPAC that triggered the City's enforcement were not in coordination with a candidate and did not constitute "independent expenditures."

V. INTRODUCTION AND SUMMARY OF ARGUMENT

A. The District Court Correctly Held That Abstention Was Inappropriate

In its effort to delay resolution of COMPAC's constitutional claims by seeking an alternate forum, the City asked the District Court to abstain. Relying

on an appropriate view of state and federal comity that underlies *Younger* abstention, the District Court refused.

Federal courts have virtually an unflagging obligation to exercise the jurisdiction given to them. Thus, *Younger* abstention is rarely granted, especially in First Amendment cases. Specifically, *Younger* abstention is inappropriate unless the federal court action interferes with a state proceeding that provided an adequate opportunity to hear federal constitutional claims, is judicial in nature, and is ongoing.

COMPAC never attempted to interfere with the Commission's proceeding, and in fact did not file its federal action until the Commission's proceeding was over. The Commission barred consideration of whether section 12.06.310 was constitutional. COMPAC only attacked section 12.06.310 – a legislative, not judicial act – not the underlying proceeding. For each of these reasons, COMPAC's federal court action does nothing to offend state and federal comity, and *Younger* abstention is accordingly unwarranted.

B. Section 12.06.310 Violates the First Amendment

This case is an attempted intrusion by the City into recognized protections for political speech. In an expansion of the outer limits of campaign finance jurisprudence, section 12.06.310 severely restricts speech by San Jose political

committees and violates the First Amendment under strict scrutiny. The vague statutory language of section 12.06.310, coupled with the City's arbitrary enforcement power, prevents COMPAC from engaging in any political speech. When contribution limit ordinances impose such drastic restrictions on political speech and associational freedoms, the Ninth Circuit has already recognized that they act as a "double edged sword," impinging on the rights of both the contributors and the recipients of such contributions.

Even under a more "relaxed" form of scrutiny traditionally used for *candidate* contribution limits, section 12.06.310 violates the First Amendment. The City has established no record or evidence of a valid anti-corruption interest to support its limits on independent committees. The facts of this case establish that the ordinance neither prevents corruption of municipal officials nor stops circumvention of its other candidate contribution limits. The glaring absence of evidence in the record, coupled with misplaced comparisons to the reasoning by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), dictate that the City has failed to carry its heavy First Amendment burden.

In addition, section 12.06.310 is not closely drawn to meet *any* valid governmental purpose. The ordinance applies to a virtually limitless category of political speech, including the discussion of public policy issues, which the

Supreme Court has recognized as inimical to the core principles of the First Amendment. Moreover, the draconian $250 limit under the law is so restrictive on expressive and associational freedoms that it violates the First Amendment, as the Supreme Court has recently explained in *Randall v. Sorrell*, 126 S.Ct. 2479 (2006).

C. Section 12.06.310 is Unconstitutionally Vague

The statutory $250 limit is triggered when an independent political committee spends funds "in aid of and/or opposition to" a municipal candidate. As the District Court correctly noted, this language is unconstitutionally vague because it is given meaning only by the subjective interpretation of others. The ordinance provides for no objective standard of conduct and provides a shocking level of discretion to the City to enforce the law in an arbitrary and discriminatory manner based on the perceived intent of the speaker.

The City's attempt to liken section 12.06.310 to the definition of "federal election activity" under federal law is also misguided, as the language in the two statutes is inherently different; the latter provides clear guidelines and thresholds regarding a standard of conduct, while the former does not. Accordingly, the ordinance violates the Fourteenth Amendment.

VI. ARGUMENT

A. The District Court Properly Denied the City's Motion for Judgment on the Pleadings

The City attempted to derail COMPAC's lawsuit by asking the District Court to abstain. The District Court refused, based on established case law and its appropriate view of state and federal comity. The City attempts to revive a few of its failed arguments here.

1. Abstention is Exceptional, Especially in First Amendment Cases

In its effort to delay resolution of COMPAC's constitutional claims by seeking an alternate forum, the City has turned the doctrine of abstention on its head by treating abstention as the rule, rather than the exception. In fact, the City advocates for a rule that would force a litigant to state court whenever there has been an administrative action. However helpful to its own case, the City's vision is at odds with federal authority and has no anchor in the principles of federalism that form the foundation of abstention doctrine. (*Green v. City of Tucson*, 255 F.3d 1086, 1099 (9th Cir. 2001) (*en banc*) [stating that abstention is "not intended to cut a broad swath through the fabric of federal jurisdiction, relegating parties to state court whenever state court litigation could resolve a federal question"].)

Federal courts are extremely reluctant to turn away a litigant attempting to

vindicate federal rights. (*Green*, 255 F.3d at 1089 [stating that "the federal courts' obligation to adjudicate claims within their jurisdiction is virtually unflagging"].) Consequently, most every federal case addressing abstention begins with the same warning – that abstention is the exception, not the rule. (*See, e.g.*, *Green*, 255 F.3d at 1089; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).) This admonition can be expressed another way: in most every case, abstention is not appropriate.

This bedrock principle is especially important in cases implicating First Amendment rights. "[F]ederal courts are particularly well-suited to hear" First Amendment challenges, making abstention "generally inappropriate when First Amendment rights are at stake." (*J-R Distributions, Incorporated v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984) [overruled on other grounds by *Brockett v. Spokane Arcades, Incorporated*, 472 U.S. 491 (1985)].) More importantly, forcing a plaintiff who has commenced a federal action "to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." (*Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *see also Porter v. Jones*, 319 F.3d 483, 492-493 (9th Cir. 2003).) As such, factors aiding in the determination of abstention are to be "tightly circumscribed." (*Green*, 255 F.3d at 1089.) The City, however, tries to achieve its sweeping

change in the law by twisting federal authority well beyond the breaking point.

2. Abstention is Not Warranted Under Factors Salient to This Case

To determine whether *Younger* abstention is appropriate, the Ninth Circuit has adopted the multi-factor analysis articulated in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). (*Green*, 255 F.3d at 1095.) Under the *Middlesex* factors, *Younger* abstention might be appropriate where a state proceeding is: (1) judicial; (2) ongoing; (3) implicates important state interests; and (4) provides an adequate opportunity to raise constitutional challenges. (*Middlesex*, 457 U.S. at 432.) A mechanical application of these factors, however, overlooks the most important features of the inquiry: a bonafide concern over mutual respect between state and federal functions. (*Green*. 255 F.3d at 1094 [warning that blind deference should not be given to considerations of comity].)

Moreover, the *Middlesex* factors are not comprehensive. (*Id.* at 1095.) In fact, this Court has previously identified a threshold factor that forms the foundation of the *Younger* inquiry, which is critical to the analysis here: a federal court action is not eligible for *Younger* abstention unless the federal action attempts to *interfere* with the state proceeding. (*Id.*; *Canatella v. State of California*, 304 F.3d 843, 850 (9th Cir. 2002) ("*Canatella I*").)

a. COMPAC Never Interfered With the Commission's Proceedings

In enforcing a law against a respondent, an agency typically operates under specific procedures for investigating, hearing, and rendering a determination, and the respondent might attempt to enjoin the proceeding by challenging one or more of these particular procedures. In these circumstances, *Younger* abstention may be appropriate. (*See, e.g.*, *Gilbertson v. Albright*, 381 F.3d 965, 968, 983 (9th Cir. 2004) (*en banc*) [litigant challenged authority of board to revoke his professional license and alleged that the hearing violated Due Process rights]; *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 621 (1986) [litigant challenged agency's jurisdiction]; *Middlesex*, 457 U.S. at 435 [litigant attempted to enjoin proceedings of state licensing board].)

Abstention is inappropriate, however, when a litigant does not attempt to interfere with the agency's proceeding, but instead limits its federal court action to the constitutionality of the underlying statute at issue. (*Green*, 255 F.3d at 1098.) This is what COMPAC did when it limited its federal court action to the question of whether section 12.06.310 was constitutional (ER, Vol. II at ER0014, Complaint, ¶¶1-2), a question which the Commission explicitly excluded from its consideration. (ER 0264-65.)

By way of contrast, COMPAC has *not* challenged the Commission's authority to act, has *not* attacked the Commission's hearing procedures, and has *not* attempted to enjoin or otherwise interfere with the Commission's proceedings against COMPAC. Thus, COMPAC's federal court action, which was filed after the Commission proceeding ended, has neither sought to "enjoin, declare invalid, or otherwise involve the federal court[] in terminating or truncating" the Commission's proceedings (*Green*, 255 F.3d at 1098), nor has the action had "the same practical effect . . . . as a formal injunction." (*Gilbertson*, 381 F.3d at 977-78.) As such, the District Court's order makes no mention of the constitutionality of the Commission's proceeding.

That COMPAC's lawsuit never interfered with the Commission's ability to function is key to this analysis, as "interference with state proceedings is at the core of the comity concern that animates *Younger*." (*Gilbertson*, 381 F.3d at 976.) Because COMPAC's vindication of its constitutional rights in federal court did not impact the Commission's proceeding, its action does not disrespect federal and state comity. (*Id.* at 975.) To force COMPAC into state court, after the Commission has completed its investigation, held its hearings, and made its judgment, would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."

(*Green,* 255 F.3d at 1097, citing *New Orleans Public Service v. Council of New Orleans,* 491 U.S. 350, 368 (1989).)

The City refuses to recognize that interfering with the state proceeding is a prerequisite for abstention. It instead obfuscates the requirement, asserting that "the District Court's requirement that COMPAC's Complaint had to have sought to enjoin the City's proceeding before a *Younger* analysis could be undertaken was erroneous as it is contrary to *Gilbertson.*" (Appellants' Replacement Opening Brief at 29.)

The City misreads the District Court's order. The District Court never stated that COMPAC *was required* to enjoin the Commission's proceeding to trigger *Younger* abstention. The District Court only observed that the injunctive relief *requested by* COMPAC did not interfere with the Commission's proceeding. (ER 0384 ["COMPAC has not requested the Court to stay a state or municipal administrative proceeding due to its unconstitutionality"].)

The City also misreads *Gilbertson.* Contrary to what the City argues, *Gilbertson* does not represent a seismic shift from the Ninth Circuit's holding in *Green*, which made "interference" a focus of *Younger* analysis. Rather, *Gilbertson* reinforced *Green's* central premise by stating (as mentioned above) that "interference with state proceedings is at the core of the comity concern that

animates *Younger*." (*Gilbertson*, 381 F.3d at 976.)

Gilbertson then slightly expanded the circumstances in which interference is recognized. (*Id.* at 970 [stating that the interference standard in *Green* merely needed "clarification"].) *Green* held that interference had to be direct: the federal litigant needed to "enjoin, declare invalid, or otherwise involve the federal court[] in terminating or truncating" state proceedings. (*Green*, 255 F.3d at 1098.) *Gilbertson* clarified that interference aimed at a state proceeding could also occur when a federal action had "the same practical effect . . . . as a formal injunction." (*Gilbertson*, 381 F.3d at 977-78.)

In *Gilbertson*, the plaintiff sought "money damages from members of the Board" for violating his constitutional rights. (*Id.* at 968.) The *Gilbertson* court concluded that plaintiff's lawsuit for damages *against individual board members* had the same practical effect as an injunction and interfered with the agency proceeding. (*Id.*) Like the other cases where interference was found, the plaintiff in *Gilbertson* was attacking the agency's procedures and authority to act.

There is a great divide between COMPAC's actions and those of the *Gilbertson* plaintiff. COMPAC did not bring a monetary claim against individual Commissioners alleging that they brought the enforcement action for political reasons. COMPAC did not challenge the Commission's procedural defects (even

though it failed to respond to COMPAC's request for reconsideration and refused to hear COMPAC's constitutional objections). Thus, COMPAC did not attempt to enjoin, declare or otherwise interfere with the Commission's proceedings. Most telling of all, the City has not identified any such relief requested by COMPAC.

COMPAC has taken issue with the underlying ordinance, seeking prospective relief so that COMPAC may participate in public policy discussions without fear of government retribution. Put simply, this case is not about the Commission, it is about the law. COMPAC never attempted to interfere with the Commission's proceedings, and *Younger* abstention is accordingly not appropriate.

b. COMPAC's Action Attacks a Legislative Act, Not a Judicial One

As the City concedes (Appellants' Replacement Opening Brief at 24-25), and as the District Court confirmed (ER, Vol. II at ER0384), COMPAC only challenged the constitutionality of section 12.06.310. When a litigant such as COMPAC challenges the constitutionality of completed legislative activity, *Younger* abstention is never appropriate. *(Green*, 255 F.3d 1096-97 [stating "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding *reviewing legislative or executive action*"](emphasis in

original); *Gilbertson*, 381 F.3d at 974 [stating "*Younger* does not apply to a state judicial proceeding that is reviewing legislative or executive action . . ."] and at 977 [observing that, whereas "judicial proceedings or disciplinary proceedings which are judicial in nature are the type of proceeding that does implicate an important state interest," a state proceeding that involves the "interpretation of completed legislative or executive action is not of that character"]; *Jonathon Club v. City of Los Angeles*, 680 F. Supp. 1405, 1409 (C.D. Cal. 1988) [stating that a "request for an injunction against the City's enforcing the ordinance" is an inappropriate subject for *Younger* abstention].)

Where, as here, there has been no attempt to annul the results of a state trial and the relief sought is prospective in nature, *Younger* abstention is not permitted. (*Wooley v. Maynard*, 430 U.S. 705, 711 (1977).) Like the plaintiff in *Wooley*, COMPAC sought declaratory and injunctive relief against the enforcement of a statute so as to be free from future prosecution. (*Id.*) Notably, the District Court's judgment did not provide retroactive relief – it did not, for example, expunge the letter of reprimand issued against COMPAC – but instead looked prospectively, ruling "Defendants are permanently enjoined from enforcing San Jose Municipal Code Section 12.06.310 against Plaintiffs." (ER, Vol. II at ER0404.)

Put simply, the District Court's decision did not change the outcome of the

Commission's proceeding; it merely voided section 12.06.310. Because COMPAC attacked a completed legislative act, and not a judicial proceeding, abstention is inappropriate.

c. There is *No* Ongoing State Proceeding

Younger abstention may not be considered unless the federal action interferes with an *ongoing* state proceeding. (*Gilbertson*, 381 F.3d at 978.) But as the District Court found here, the Commission proceeding came to a completed end before COMPAC filed its lawsuit. (ER, Vol. II at ER0384, fn. 1.) This finding has not been challenged by the City. Instead, and without explaining how, the City argues that the Commission is somehow part of the state judiciary, and that the availability of a state judicial forum makes the City's proceeding constructively "ongoing."

The City relies heavily on *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). In *Huffman*, the plaintiff attempted to bypass *the state appellate court* by bringing a federal court challenge to a *state court's* decision. (*Huffman*, 420 U.S. at 584.) COMPAC, however, is not challenging a state court decision.

Huffman does nothing to support the City's sweeping contention that administrative proceedings are somehow unified with the state judiciary system, and the Supreme Court has yet to take on this issue. (See, e.g., *New Orleans*

Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 369 fn. 4 (1989) ("*NOPSI*").) This Court, however, casts a critical eye towards the City's position, stating, ". . . there is no doctrine that the availability or *even the pendency* of state judicial proceedings excludes the federal courts." (*Green*, 255 F.3d at 1097)(emphasis in original).

Directly on point is *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987).) In *Thomas*, after an administrative proceeding regarding license revocation was complete, the plaintiff filed a challenge in federal court. The Fifth Circuit held that the "mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings . . . ." (*Thomas*, 807 F.2d at 456.) COMPAC's case is even more compelling. In *Thomas*, the plaintiff initiated state court proceedings but then dismissed the case before filing his federal court action. In contrast, COMPAC never initiated state judicial proceedings. In addition, the plaintiff in *Thomas* challenged the agency's procedures.

The City's sweeping contention that administrative proceedings are unified with the state judiciary would, in any case, violate the fundamental principle that "comity does not require blind deference." (*Green*, 255 F.3d at 1094.) Although there may be administrative agencies that closely coordinate their activity with the

state judiciary, the Commission does not.

For example, the Commission is not administered by or under the inherent jurisdiction of the California Supreme Court, as is the State Bar Court. (*Hirsh v. Justices of the Supreme Court of the State of California*, 67 F.3d 708, 712 (9th Cir. 1995); *See also Middlesex,* 457 U.S. 423, 425-26 [attorney discipline process administered by Supreme Court of New Jersey].) Similarly, the Commission is not part of a cohesive administrative process, like that provided by the California Administrative Procedure Act, which requires Administrative Law Judges to abide by hearing procedures modeled after state judicial procedures. (*Delta Dental Plan of California*, 139 F.3d 1289, 1295 (9th Cir. 1998).) Instead, the Commission's proceedings are procedurally informal, lack characteristics essential to judicial proceedings, are not coordinated or under the direct stewardship of the judiciary, and are run by political appointees unsuited to consider federal constitutional concerns.

The other cases cited in support of the City's theory that proceedings are "ongoing" – *NOPSI*; *Dayton*; *Fieger v. Thomas*, 74 F.3d 740 (6th Cir. 1996); and *Chamber of Commerce v. Ohio Elections Commission*, 135 F. Supp. 2d 857 (S.D. Ohio 2001) – are inapposite. The majority of these cases involve administrative proceedings that were, by law, unified with the state judiciary. (See, e.g.,

Middlesex, 457 U.S. 423, 425-26 [attorney disciplinary system integrated with judicial system]; *Hirsh*, 67 F.3d at 712 [same]; *Feiger*, 74 F.3d at 742-43 [same].) No such integrated system is at issue here. Rather, the City points to a generic state procedural rule making state court review of the Commission's proceeding *possible*. But this argument – that abstention is appropriate when state law permits a writ of mandate for *any* governmental action – would, when taken to its conclusion, make *any* local governmental action immune from federal court review. This argument would obliterate the concept that abstention is the exception, as well as the concept that abstention is limited to concerns of state and federal comity. The Commission's proceeding was entirely distinct from state judicial proceedings, as it is neither integrated with the state judiciary system nor part of a broader regulatory framework.

Moreover, in *NOPSI*, state court proceedings *were pending while* plaintiff sought relief in federal court. (*NOPSI*, 491 U.S. at 357-58.) In contrast, no state court proceedings have been initiated here, and no proceeding – judicial, administrative, or otherwise – is pending. (*Cf. Steffel v. Thompson*, 415 U.S. 452, 462 (1974) [holding that *Younger* abstention is inappropriate when no state court proceeding is "pending at the time the federal complaint is filed"].) In *Dayton, Feiger*, and *Chamber of Commerce*, administrative proceedings were still pending

when plaintiffs filed their federal court actions. (*Dayton*, 477 U.S. at 624; *Feiger*, 74 F.3d at 742; *Chamber of Commerce*, 135 F. Supp 2d at 866.) Obviously, administrative proceedings that are still pending are "ongoing."

d. The Commission's Proceeding Did Not Offer Any Opportunity to Address Constitutional Issues

Younger abstention is not appropriate when a litigant has had no opportunity to present federal claims in a state proceeding. (*Gilbertson*, 381 F.3d at 973, 978; *Meredith v. Oregon*, 321 F.3d 807, 818-19 (9th Cir. 2003).) The Commission explicitly barred COMPAC from making any challenge to the constitutionality of section 12.06.310. (ER, Vol. II at ER0264 [comment of Mr. Sato]; *Id.* at ER0265 [comment of Mr. Chell].)

Permitting COMPAC to bring its constitutional challenge in federal court does not offend principles of comity, as the failure to avail oneself of state court cannot "be interpreted as reflecting negatively upon [a] state court's ability to enforce constitutional principles." (*Steffel*, 415 U.S. at 462.)

Cases cited by the City – such as *Dayton* and *Canatella v. State of California*, 404 F.3d 1106 (9th Cir. 2005) ("*Canatella II*") – do not advance its argument. The City's hand-plucked quotes from *Dayton* ignore the case's context and restrictive language, that abstention is triggered when only "particular kinds of

state proceedings" have been commenced. (*Dayton*, 477 U.S. at 626.) In *Dayton*, pending administrative proceedings *were addressing constitutional issues*. (*Dayton*, 477 U.S. at 624, 629; *Green*, 255 F.3d at 1096 [observing that context of case is critical to engaging in a proper *Younger* analysis].) *Dayton's* concurring opinion observed that, where an administrative agency has failed to address constitutional concerns, a federal court plaintiff would not be forced into state court. (*Dayton*, 477 U.S. at 633, n.5 (Brennan, J., concurring in judgment [dicta]).)

The City's reliance on *Canatella II* is similarly unpersuasive. In *Canatella II*, the administrative agency was equipped to engage in constitutional review, and in any case, was fully integrated with the state judiciary. (*Canatella II*, 404 F.3d at 1109, 1111.) Not only is the Commission a unique creature of the municipal government with a very limited focus, it did not provide COMPAC with an adequate forum to raise its constitutional concerns about section 12.06.310. For this additional and independent reason, *Younger* abstention is not appropriate.

3. The District Court was Correct in Not Abstaining

Abstention is the exception and not the rule, especially in the context of First Amendment claims, where the consideration of factors permitting *Younger* abstention are tightly circumscribed; the City instead tries to expand their reach.

Where this Court has warned that comity does not require blind deference, the City champions a concept of comity that obliterates the role of the federal judiciary and does little to disguise the City's attempt to forum shop and delay proceedings.

COMPAC never attempted to interfere with the Commission proceeding, but instead simply attacked the underlying law. In the end, it defies logic that permitting COMPAC to argue constitutional claims in federal court, claims that the Commission has *declined to hear*, would somehow disrupt federal and state comity. For all of the reasons stated above, *Younger* abstention does not apply and the District Court properly heard the matter.

B. The District Court Correctly Held That Section 12.06.310 Violates the First Amendment

The District Court held that section 12.06.310 violates the First Amendment under strict scrutiny because the ordinance restricts COMPAC's expenditures for political speech. The ordinance does not serve a valid governmental purpose and regulates protected First Amendment activity by independent political committees. By pointing to cases analyzing entirely different statutes, regulating different types of political speech, the City now challenges the District Court findings.

1. Section 12.06.310 is Subject to Strict Scrutiny

a. The Restriction on COMPAC's Speech Triggers Strict Scrutiny Under *Lincoln Club*

In *Lincoln Club v. City of Irvine*, this Court faced substantially similar facts as those presented here and held that strict scrutiny applies. (*Lincoln Club of Orange Co. v. City of Irvine*, 292 F.3d 934, 939 (9th Cir. 2002).) In *Lincoln Club*, the Court analyzed the City of Irvine's ordinance limiting contributions to $320 per election cycle to any political committee that makes independent expenditures. (*Id.* at 936.) The plaintiff, a nonprofit organization, received contributions through member dues in excess of $320, thereby preventing it from spending any of its funds on independent expenditures unless it raised contributions from new sources. (*Id.* at 938-939.) The Court reasoned that if the plaintiff maintained "its present organizational structure it will continue to be precluded from making any political expenditures whatsoever in Irvine municipal elections," and also noted that compliance with the ordinance would require "dramatic changes" to its organizational structure to reduce its annual member dues and maintain its current resources. (*Id.*) These combined burdens, the Court concluded, placed 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)." (*Id.* at 939.)

COMPAC faces restrictions on its expressive activity that are equally severe. Under section 12.06.310, it is impossible to know whether a given expenditure may be subject to the $250 limitation. Unlike the Irvine ordinance, which applied only to communications for independent expenditures, section 12.06.310 applies to *any* expenditure deemed by the Elections Commission, *ex post*, to be "in aid of and/or opposition to" a City candidate. (ER, Vol. II at ER0315.) The City has always maintained that the "aid of and/or opposition to" language is "intentionally broader" than most restrictions on independent expenditures, which are limited to express advocacy. (ER, Vol. I at ER0031.) Indeed, this broad construction was evidenced by the City's stipulation that COMPAC's communications did not constitute independent expenditures. (*Id.* at ER0069.) As such, COMPAC has no way to know whether its speech will implicate the ordinance, because the City has stated that it applies to a wide, undefined category of speech.

The City concedes that this limitation cannot be constitutionally applied to all of COMPAC's contributions, for this would be "hopelessly overbroad." (Appellants' Replacement Opening Brief at 43.) Rather, the City maintains that COMPAC can raise funds in an unlimited amount provided that it segregates its

resources into two pools of funds: one limited to the first $250 of any contribution received, to be used for expenditures "aiding" or "opposing" a candidate, and the second containing funds received from any contributor over $250, to be used for "non-City election purposes." (Appellants' Replacement Opening Brief at 46; Section 12.06.310(B); ER, Vol. II at ER0315.)

This oversimplified approach ignores the problem arising after this categorization takes place. As discussed in depth below, the District Court held that the language in section 12.06.310 is unconstitutionally vague and does not provide adequate "*ex ante*" notice to political committees about whether the $250 limit should apply. (ER, Vol. II at ER0398.) Accordingly, segregating COMPAC's funds would not resolve this problem, because COMPAC could not know whether any given expenditure should be financed using the limited or unlimited pool of funds. As the District Court noted, the ordinance "affords troubling discretion to the Election Commission" to determine whether COMPAC has violated the law. (ER, Vol. II at ER0398.)

As a result, COMPAC faces a drastic choice: either discard the portion of any contribution over $250 to avoid a possible violation of the law, or seek pre-clearance from the City regarding whether any given expenditure "aids" or

"opposes" a City candidate.[1] The former choice results in a permanent disgorgement of most of COMPAC's financial resources, while the latter would be tantamount to official censorship and would preclude any spontaneous expressive activity. At the very minimum, either option compels COMPAC to undertake a massive re-organization of its fundraising activities and operations, resulting in a severe burden on its ability to conduct protected speech and associational freedoms. Absent these two dramatic alternatives, COMPAC is effectively shut down.

As Bob Hines, COMPAC's Vice-President for Policy and Communications, describes this "chilling" effect on COMPAC's spending:

> Since the San Jose Elections Commission's enforcement action against COMPAC, operations at COMPAC have come to a halt. Because doing so could be construed as aiding or opposing the candidate's campaign, COMPAC has been unable to engage in activities related to its underlying mission to educate citizens, community leaders, neighborhood groups and others on issues important to the business community and the future economic vitality of San Jose and Silicon Valley as they relate to the decisions and policy positions of City officials who are running for City office.

(ER, Vol. II at ER0319.)

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[1]The City has, in the past, suggested that such pre-clearance is an option for COMPAC to be certain whether its spending implicates the ordinance. (ER, Vol. II at ER0399-0400.)

The City wrongly suggests that *Lincoln Club* is distinguishable. (Appellants' Replacement Opening Brief at 44-46.) The City emphasizes that section 12.06.310 allows COMPAC to segregate its funds as described above, thereby preventing any "bar" on COMPAC's expenditures. However, this conclusion misreads the Court's analysis in *Lincoln Club* and ignores the realities facing COMPAC. (*Id.* at 45.)

First, to suggest that COMPAC is not restricted in making expenditures for political speech simply because it can raise additional contributions ignores the facts of *Lincoln Club*. It could be similarly argued that the *Lincoln Club* could have raised new contributions from its members or other sources under the statutory $320 limit. Yet, the Court nonetheless held that the Irvine ordinance acted as a limit on expenditures. (*Lincoln Club*, 292 F.3d at 938.) Similarly, the District Court correctly held that section 12.06.310 "does function as an expenditure limit." (ER, Vol. II at ER 0395.)[2]

Additionally, *Lincoln Club* also held that the Irvine ordinance severely burdened the Lincoln Club's associational rights because compliance with the law

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[2]To the extent that the District Court found that COMPAC did not face a complete bar on its expenditures, and that it faced "harm" that is "not as pronounced as in *Lincoln Club*," COMPAC respectfully disagrees, as noted in the Declaration of Bob Hines. (*See* ER, Vol. II at ER0318-0319, ER0395.)

required a complete overhaul of the Club's operations, threatening the continued viability of the organization. (*Lincoln Club*, 292 F.3d at 939.) For different reasons, section 12.06.310's associational harms likewise threaten the continued viability of COMPAC. An essential part of COMPAC's purpose is to educate members on business issues impacting the San Jose economy. COMPAC's expenditures for newsletters warning of pending legislation, or for panel discussions regarding public policy issues, are potentially subject to the ordinance's limits. As such, COMPAC is simply unable to conduct activities consistent with its organizational purpose on behalf of its membership for fear of violating City law.

Recognizing the vital First Amendment interests at stake, the District Court properly held that strict scrutiny applies.

b. The City Overlooks COMPAC's First Amendment Rights in Calling for a Relaxed Form of Scrutiny

Lincoln Club confirmed that the *act* of making a contribution does not alone determine the proper level of scrutiny of a law that places severe burdens on the First Amendment activities of *recipients*. The City erroneously argues that all statutes imposing limits on political contributions are subject to a "reduced" level of judicial scrutiny because political contributions are "not fully protected

speech." (Appellants' Replacement Opening Brief at 38, 41.)

The City mistakenly believes that any First Amendment review of a statute limiting political contributions should only consider the rights of would-be contributors, and that it should ignore resulting burdens imposed on the recipient's associational and expressive rights. However, as the District Court and this Court have already recognized, contribution limits acting as "double-edged swords" are unconstitutional, as they limit the amount a supporter can give to a political committee while simultaneously imposing serious expressive and associational restrictions on the recipient's ability to spend its funds. (*Lincoln Club of Orange Co. v. City of Irvine*, 292 F.3d at 939.) In such cases, strict scrutiny applies.

In *Buckley v. Valeo*, the Supreme Court observed a distinction between limits on political contributions and limits on expenditures for political expression. (*Buckley v. Valeo*, 424 U.S. 1, 19-23 (1976).) The Court noted that a restriction on expenditures for political expression "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.) In contrast, the Court held that limits on contributions to a candidate or political committee "entail only a marginal restriction upon the contributor's ability to engage in free communication." (*Id.* at 20.) *Buckley* therefore invalidated limits on expenditures

for political speech and upheld limits on contributions to candidates. (*See Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1090 (9th Cir. 2003).) Accordingly, restrictions on expenditures have been generally subject to higher scrutiny than limits on campaign contributions. (*McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 259-60 (1986).)

This dichotomy between contribution and expenditure limits has proven useful in analyzing the expressive and associational rights of *those who contribute* to candidates and political committees. As *Buckley* observed, the contributor's speech "rests solely on the undifferentiated symbolic act of contributing," and the law "does not infringe the contributor's freedom to discuss candidates and issues" because "the transformation of contributions into political debate involves speech by someone other than the contributor." (*Buckley*, 424 U.S. at 21.) Thus, the Supreme Court has referred to the act of contributing to a political committee as "speech by proxy." (*California Medical Association v. FEC*, 453 U.S. 182, 196 (1981).) Similarly, the Supreme Court has stated that contribution limits leave would-be contributors free to associate with political groups by joining as members or volunteering. (*Id.* at 22.)

However, contribution limits also impose burdens on the *recipients* of contributions. The Supreme Court has acknowledged that "speech by someone

other than the contributor" is also protected by the First Amendment (*Id.* at 21), and has warned that contribution limits may hamper the ability to raise funds for political speech:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from *amassing* the resources necessary for effective advocacy.

(*Id.* at 21, *emphasis added.*)

Yet, the Supreme Court explained that unless the contribution limit is severe, the sole burden on the recipient is to require solicitation from a broader fundraising base:

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

(*Id.* at 21-22.)[3]

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[3]We note that COMPAC's challenge to section 12.06.310 is based, in part, on the Supreme Court's recent holding in *Randall v. Sorrell*, holding that restrictively low contribution limits, like the $250 amount at issue here, are so low as to "reduce the total amount of money potentially available to promote political expression." (*Randall v. Sorrell* ---- U.S. ----, ----, 126 S.Ct. 2479, 2492-2493 (2006); *Buckley*, 424 U.S. at 21-22.) As the Ninth Circuit has suggested, such low limits indicate that a "donee's speech rights" are no longer "adequately

However, COMPAC's concern is not limited to its capacity to *amass* financial resources, but rather, that enforcement of the ordinance prohibits it from engaging in any speech at all. These restrictions on COMPAC's expenditures transcend the fundraising burdens discussed in *Buckley*. Because the relevant inquiry is not concerned with the "symbolic speech" of COMPAC's contributors, but instead with the law's restrictions on COMPAC's political speech, the Court should apply strict scrutiny.

Lastly, *Lincoln Club*'s key holding that severe restrictions on expressive and associational freedoms trigger strict scrutiny was not overruled by *McConnell*. Though *McConnell* used a relaxed form of scrutiny to uphold various "soft money" spending prohibitions imposed on political parties under the federal Bipartisan Campaign Reform Act ("BCRA"), the lesser form of scrutiny was warranted by factors not present here. (*McConnell*, 540 U.S. at 139.) Because the categories of communications subject to the federal provisions were clearly defined, compliance with those requirements did not create the chilling effect described above. (See *Id.* at 162, n.64.) Moreover, the Court noted that a more relaxed level of scrutiny was warranted by the opportunities for corruption arising

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protected" under *Buckley*. (*Jacobus v. Alaska*, 338 F.3d 1095, 1110 (9th Cir. 2003).) Thus, strict scrutiny may be warranted under *Buckley* alone.

through the special relationship between political parties and candidates, considerations also not present here. (*Id.* at 136.) These considerations are not warranted in this case. Accordingly, under *Lincoln Club*, the Court should apply strict scrutiny.

c. Strict Scrutiny Review is Consistent With Existing Campaign Finance Jurisprudence

The District Court's decision to apply strict scrutiny is consistent with prior cases holding that "content-based" regulations must receive the most exacting form of judicial scrutiny. (ER, Vol. II at ER0395.) The Supreme Court has held that strict scrutiny applied to a state statute requiring disclosure of the speaker's identity on certain types of campaign literature "defined by their content." (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-346 (1995).) Similarly, this Court has applied strict scrutiny to a Nevada statute requiring similar disclosures on communications "relating to" an election. (*ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004).) As the Court explained, "proscribing the content of an election communication is a form of regulation of campaign activity subject to traditional strict scrutiny." (*Id.* at 987.) Section 12.06.310 is similarly only triggered by certain types of speech. The law's $250 limit only applies when certain content in a committee's communications prompts regulation by the City.

Such content-based expenditure restrictions implicate the most significant type of First Amendment protections.

In an attempt to restrain this Court's consideration of First Amendment issues, the City relies on this Court's recent decision in *Citizens for Clean Government* to support its call for a lesser standard of review.[4] (Appellants' Replacement Opening Brief at 40, 42; *Citizens for Clean Gov't v. City of San Diego* 474 F.3d. 647, 649 (9th Cir. 2007).) However, the ordinances analyzed in the two cases are fundamentally different. The ordinance at issue in *Citizens for Clean Gov't* provided for limits on contributions made directly to all San Diego *candidates*, while section 12.06.310 is an arbitrary limit on certain contributions to independent committees. Thus, the San Diego ordinance operated in an identical manner to other candidate contribution limits reviewed in *Buckley* and subsequent cases under a lesser level of scrutiny. *Citizens for Clean Gov't* simply asked this Court to consider whether San Diego's limits on candidate contributions could be applied to committees supporting the recall of an elected official. Following *Buckley*'s analysis of *candidate* contribution limits, the Court observed that the

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[4]The City erroneously claims that *Citizens for Clean Government* analyzed limits on contributions to independent expenditure committees (Appellants' Replacement Opening Brief at 40), whereas it only analyzed candidate recall committees.

only "political activity" at issue is the symbolic speech of the contributor. (*Id.* at 651.) Unlike section 12.06.310, the San Diego ordinance in *Citizens* did not burden the candidates receiving contributions in any way other than requiring them "to raise funds from a greater number of persons." (*Buckley*, 424 U.S. at 22.) Accordingly, the Court concluded that "the act of contribution rather than the context in which contribution occurs, determines the standard of review" (*Citizens for Clean Gov't*, 474 F.3d at 651):

> We find no precedent holding that *contributions* to ballot measure campaigns *convey a different type or degree of speech* from contributions to candidates or parties.

(*See id.* at 652, emphasis added.)

Lastly, as *McConnell* observed, when courts undertake a less rigorous review of contribution limits, a more relaxed form of scrutiny is warranted by the governmental interests that "underlie" the contribution limits, namely, interests in preventing actual corruption and its appearance. (*McConnell*, 540 U.S. at 136, *quoting Nat'l Right to Work Cmte*, 459 U.S. 197, 208 (1982).) As discussed below, section 12.06.310 can not be justified on this basis and should not receive the benefit of a relaxed form of judicial scrutiny. Because the City can not establish any link between its ordinance and the valid governmental interests recognized in *Buckley* or *McConnell*, section 12.06.310 should be evaluated under

the highest form of judicial scrutiny.

d. Even Under a Less Rigorous Standard of Review, Section 12.06.310 is Unconstitutional

COMPAC submits that strict scrutiny is the appropriate level of review. Nevertheless, even under the slightly more relaxed form of scrutiny advocated by the City – i.e., the limits must be "'closely drawn' to match a 'sufficiently important interest,'" the City's ordinance is unconstitutional. (*Randall*, 126 S.Ct. at 2491, *quoting Buckley*, 424 U.S. at 25.) The court's review must still be rigorous and "exacting." (*Nixon v. Shrink Missouri Govt. PAC*, 528 US. 377, 386 (2000), *quoting Buckley*, 424 U.S. at 16.)

2. Section 12.06.310 Does Not Serve a Sufficiently Important Governmental Interest

a. The City May Not Regulate Contributions to Political Committees Unless it Serves an Anti-Corruption Purpose

The regulation of political speech is only constitutional for the purpose of eliminating corruption or its appearance, not for the purpose of silencing speech that "influences" an election. "The paradigmatic sufficient state interest under *Buckley* is the prevention of corruption, or the appearance of corruption, in the political process." (*Citizens for Clean Gov't*, 474 F.3d at 652; *Jacobus*, 338 F.3d at 1110.) This is a limited exception to the broad First Amendment protections for

political speech:

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate.

(*Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-297 (1981).)

Courts have thus upheld limits on contributions made directly to candidates to guard against corruption and its appearance, which manifests itself when "large contributions are given to secure a political quid pro quo from current and potential officeholders," and when elected officials "decide issues not on the merits or desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." (*McConnell* 540 U.S. at 153; *Buckley*, 424 U.S. at 25; *Nixon*, 528 U.S. at 395.)

In *Buckley*, the Supreme Court also rejected the notion that political speech can be regulated to create a "level playing field" to ensure that a particular group does not excessively "influence the outcomes of elections." (*Buckley*, 424 U.S. at 48-49.)

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the

people."

(*Id.* at 48-49, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1966) & *Roth v. U.S.*, 354 U.S. 476, 484 (1957).)

b. The City Employs a Flawed Theory of Corruption to Justify Its Ordinance

The City's apparent anti-corruption rationale for limiting contributions to independent committees is rather novel. First, it argues that expenditures by independent committees, including noncoordinated expenditures that do not expressly advocate the election or defeat of candidates, nonetheless "unduly influence" elections. (Appellants' Replacement Opening Brief at 49-52.) The City suggests that candidates are beholden to the large contributors who fund these expenditures. (*Id.* at 51.) Under this syllogism, section 12.06.310 prevents the "circumvention" of its limits on contributions to candidates:

> If contributions to independent committees cannot be regulated, contributors will circumvent contribution limitations intended to prevent corruption or the appearance of corruption by making large donations to independent political committees.

(*Id.* at 22.)

The core flaw in the City's theory rests in the assumption that "influencing" elections, however this is defined, can be equated with holding "undue" influence over elected officials. This theory is easily refuted by prior decisions in campaign

finance jurisprudence and is invalidated by the absence of any evidence in the record to support it.

i. The City Has Not Established That Contributions to Independent Committees Corrupt Candidates or Create the Appearance of Corruption

The City erroneously relies on *McConnell* to suggest that "influencing" elections is itself conducive to corruption. (Appellants' Replacement Opening Brief at 50-52.) As *Buckley* emphasized, this view is antithetical to the First Amendment. (*Buckley*, 424 U.S. at 49.) The Supreme Court has explicitly stated that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." (*First Nat'l Bank v. Belotti*, 435 U.S. 765, 790 (1978); *Citizens for Clean Gov't*, 474 F.3d at 652.) Nonetheless, the City introduced documents into the record, including newspaper articles containing extensive innuendo, to support its conclusion that COMPAC intended to "influence" the election. (ER, Vol. I at ER0113-0162; Vol. II at ER 0332-0334.) The City's reliance on this assertion is ultimately misplaced, as the Supreme Court rejected this as a valid basis for campaign finance regulation over 30 years ago.

More importantly, nothing the City has introduced provides any evidence of an actual link between such activity by independent committees and candidate corruption. As the Supreme Court has instructed, "[t]he quantum of empirical

evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." (*Nixon*, 528 U.S. at 390.) The City strains to characterize COMPAC's attempt to "influence" the electorate as sinister, but utterly fails to show how this has resulted in the quid pro quo or "sale of access" arrangements that underlie the corruption concerns in *Buckley* and *McConnell*. (See *Buckley*, 424 U.S. at 25; *McConnell*, 540 U.S. at 150-152.)

As this Court recently explained, "despite the flexibility implied" by the Supreme Court's "sliding scale approach" to the need for empirical evidence to support novel theories of corruption, the City may not rely on "mere conjecture as adequate to carry a First Amendment burden." (*Citizens for Clean Gov't*, 474 F.3d at 653, *quoting Nixon*, 528 U.S. at 392.) The declarations and newspaper articles introduced by the City are clearly designed to establish that COMPAC and other independent committees may "influence" the outcome of San Jose elections. However, they do not address any reported instance of improper activity by San Jose officeholders to substantiate the claim that such political speech is corruptive. The record is wholly insufficient to carry the City's heavy First Amendment burden, regardless of whether strict scrutiny is used. (*See Montana Right to Life Ass'n*, at 1093.) Though it is couched in anti-corruption rhetoric, the City's

justification for section 12.06.310 is essentially just a modified version of the egalitarian approach to political speech already rejected by the Supreme Court.

In addition, the City has ignored controlling Supreme Court decisions holding that speech by political committees that act independently of candidates does not create the appearance of corruption . In *FEC v. National Conservative Political Action Committee*, the Supreme Court rejected the notion that independent expenditures can themselves corrupt candidates:

> It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the 'corruption' may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

(*FEC v. Nat'l Conservative Political Action Cmte, (NCPAC)*, 470 U.S. 480, 497-498 (1985).) The Supreme Court went further to discredit the City's suggestion that candidates and officeholders value communications by independent committees, which they by definition do not control, by definition:

> It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures, by giving official favors to the latter in exchange for supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate and thereby

> alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

(*Id.* at 498).)

The Supreme Court's analysis in *NCPAC* has obvious logic, for it can never be established that an uncoordinated communication is actually *valued* by a candidate – just as it cannot be established whether a given expenditure "aids" or "opposes" a candidate – unless the message is made by, or coordinated with, a candidate. Absent such coordination, a political message may well be counterproductive to the candidate's preferred message, or its timing may be inconsistent with his or her campaign strategy. (*Buckley*, 424 U.S. at 47.) For evidence of this, the Court need look no further than the newspaper accounts detailing the maelstrom of controversy triggered by COMPAC's communications, which the City so urgently brings to this Court's attention. (ER, Vol. II at ER0332-0334.)

Contrary to the City's conception of campaign finance jurisprudence, this reasoning was recognized, not overruled, by *McConnell*. *McConnell* acknowledged that the regulation of expenditures "made totally independently of the candidate and his campaign" fails to "serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral

process." (*McConnell*, 540 U.S. at 221, *quoting Buckley*, 424 U.S. at 47-48.) *McConnell* also recognized that "[i]ndependent expenditures 'are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view.'" (*Id.*, *quoting FEC v. Colorado Republican Federal Campaign Cmte (Colorado II)*, 533 U.S. 431, 446 (2000).)

Following the Supreme Court's long-standing guidance, the District Court correctly held that candidate coordination is necessary to support the government interests alleged by the City in relation to independent committees. (ER, Vol. II at ER0396.) The Court should affirm this holding, as the City has offered no proof that noncoordinated expenditures by political committees can corrupt candidates. (*See NCPAC*, 470 U.S. at 498.) "On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." (*Id.*)

ii. The City's Reliance on McConnell *to Support its Theory of Corruption is Misplaced*

The City relies heavily on the analysis of political party restrictions in *McConnell* and *Jacobus,* to buttress its contention that section 12.06.310 is necessary to preserve "the integrity of the electoral process." (Appellants' Replacement Opening Brief at 53.) The City cites these cases to suggest that San

Jose candidates are similarly "beholden" to the supporters of independent committees, thereby creating the "appearance or perception" of corruption. (*Id.* at 48.) Though the City acknowledges that these cases actually involved restrictions on political parties, it nonetheless applies their analysis to independent committees. (See *Id.* at 51.)

These cases do not hold that large political contributions to any organization, regardless of its activities, create the appearance of corruption. Though *McConnell* and *Jacobus* indeed upheld various restrictions on the solicitation and spending of soft money by political parties, the corruptive influence of party activities was tethered to the parties' unique characteristics and role in the electoral process. In light of the empty factual record, the Court should decline the City's invitation to expand the holdings of these cases to independent committees.

The lynchpin to *McConnell*'s justification for novel restrictions on political parties rests in the Supreme Court's recognition of a "special relationship and unity of interest" between lawmakers and parties. (*McConnell*, 540 U.S. at 145.) Due to the historical role the parties have played in nominating and electing candidates for office, parties enjoy a "unique position, 'whether they like it or not,' to serve as agents for spending on behalf of those who seek to produce obligated

officeholders.'" (*Id.*, *quoting Colorado II*, 533 U.S. at 452.) Fundraising by political parties therefore creates "a sense of obligation" from candidates, as evidenced by a well-established record before the Supreme Court, including numerous instances of "access peddling" by political parties. (*Id.*, at 150-152.) Even prior to *McConnell*, this Court had noted evidence of "parties' unique ability to reward major benefactors with access to lawmakers and candidates." (*Jacobus*, 338 F.3d at 1113 *citing Colorado II*, 533 U.S. at 461.) *McConnell* also cited extensive proof of a corresponding willingness by candidates to participate in such exchanges. (*McConnell*, 540 U.S. at 149.)

The City has offered no evidence that independent committees, which do not nominate candidates for office, are engaged in any of the activities of political parties that create the appearance of corruption. The record before the Court does not show a single instance of "access peddling" by independent committees or rewards given by candidates in exchange for contributions to COMPAC or any other independent committee. In fact, there is no evidence in the record of any interaction at all between these committees and officeholders in San Jose.

As the Supreme Court recognized in *Colorado II*, political committees do not share the same objectives as political parties because they typically have a much narrower ideological focus, and often contribute to both political parties.

(*Colorado II*, 533 U.S. 451.) Similarly, independent committees often contribute to more than one candidate in a particular election, or take positions on ballot measures that are inconsistent with the views of the candidates the committee supports. Thus, it is completely wrong for the City to presume that independent committees share the "special relationship and unity of interests" giving rise to the opportunities for candidate corruption confronted in *McConnell* and *Jacobus*. In short, the City's justification for section 12.06.310 is "mere conjecture" and "illusory." (*Montana Right to Life Ass'n*, 343 F.3d at 1092.)

iii. Section 12.06.310 is not Jusified as a Means to Prevent "Circumvention" of San Jose's Limits on Contributions to Candidates

In another attempt to force section 12.06.310 into the holding of a distinguishable campaign finance decision, the City argues that the ordinance prevents corruption and its appearance because it precludes contributors from "circumventing" the City's contribution limits for candidate campaigns. (Appellants' Replacement Opening Brief at 22.) In support of this theory, the City cites to *California Medical Association*, which upheld limits on contributions to federal multi-candidate committees.

California Medical Association analyzed a provision under the Federal Election Campaign Act ("FECA") imposing a $5,000 limit on contributions to

multicandidate committees; i.e., federal political committees that receive contributions from a wide group of supporters and make *contributions* to five or more candidates. (*Cal. Med. Ass'n*, 453 U.S. at 185 n1.) The Supreme Court noted that *Buckley* upheld a $1,000 direct limit on the amount candidates could receive from individuals, as well as a $25,000 limit on the amount individuals could contribute to all federal candidates in a calendar year; it thereby felt compelled to uphold the $5,000 limit to prevent evasion of these $1,000/$25,000 limits by "channeling funds through a multicandidate committee." (*Id.* at 198.) Because multicandidate committees could give up to $5,000 per year to candidates (as opposed to the $1,000 maximum for individuals), and because multicandidate committees were not subject to the $25,000 aggregate yearly limit, the Supreme Court agreed with Congress' conclusion that the candidate contribution limits could be "easily evaded."

California Medical Association's reasoning is entirely inapposite here. First, there is no aggregate yearly limit on candidate contributions to "evade." Also, unlike the federal statute reviewed by the Supreme Court, the Municipal Code already imposes *identical* limits on the amount local candidates can receive from either a political committee *or* an individual contributor. (Section 12.06.210; copy attached in addendum.) Thus, a contributor cannot "channel funds" through

a committee in order to make larger contributions to a City candidate; in other words, "evasion" or "circumvention" of the City's candidate contribution limits, as envisioned by *Calfornia Medical Association*, is not even possible.

California Medical Association is also unhelpful in analyzing section 12.06.310 because FECA's rules for multicandidate committees only applied to committees that make contributions to multiple candidates. In contrast, the City's ordinance is triggered whenever a committee *either* makes contributions to San Jose candidates, *or* independent expenditures, *or* other activities "aiding" or "opposing" a candidate. (Section 12.06.320(A) [providing that expenditures "aiding" or "opposing" a candidate are either a contribution or an independent expenditure]; copy attached in addendum].) In other words, the ordinance applies to political committees even if they make no contributions to local candidates at all, instead choosing only to make independent expenditures or other forms of political speech. Section 12.06.310 thus exceeds *California Medical Association*'s inquiry, which was to determine the constitutionality of FECA's circumvention remedy.

California Medical Association actually supports COMPAC's position. In response to a concern raised by the American Civil Liberties Union that FECA's limits might be construed to prohibit individuals from jointly pooling their

resources for independent expenditures, the majority opinion noted that, because the statute only applied to statutorily defined multicandidate committees, expenditures "made jointly by groups of individuals" would not be affected. (*California Medical Ass'n*, 453 U.S. at n17.) Similarly, Justice Blackmun noted in a separate concurring opinion that the circumvention rationale does not extend to "political committees established for the purpose of making independent expenditures, rather than contributions to candidates." (*Id.* at 203.)

Section 12.06.310 broadly regulates any of these forms of speech. If a group of individuals choose to pool their financial resources in order to "express common political views," they will be subject to a $250 cap on the amount each individual could contribute to finance the joint communication. (*Id.* at n.17; Section 12.06.040 [definition of "committee"]; copy attached in addendum; ER, Vol. II at 0315 [Section 12.06.310].) Section 12.06.310 is simply not rendered constitutional by *California Medical Association.*

The City also cites a report prepared by the League of Women Voters of San Jose and other organizations in 1992 about reforming San Jose's campaign finance law in support of its "circumvention" theory, arguing that "the Report reflected the concern discussed in *McConnell* that contribution limits on contributions to mayor and city council candidates could be evaded." (Appellants' Replacement Opening

Brief at 53; ER, Vol. II at ER0339-0363.) While the City is correct that the report discussed a concern regarding evasion of the limits imposed on San Jose candidates, the report never suggested that the evasion arose through non-candidate coordinated speech by political committees. Rather, the report concluded that evasion was made possible when independent committees and candidates share the same political consultants (ER, Vol. II at ER0350), and thereby recommended that the City adopt tighter restrictions on campaign consultants who work for local candidates (*Id.* at ER0356.) That the City would cite this report as support for section 12.06.310 is shocking, given that the issues and recommendations addressed by it are completely different. The report provides absolutely no support for the City's attempt to impose limits on contributions to political committees.

Because well-settled jurisprudence has established that independent political speech does not corrupt candidates, and because the City has provided no empirical evidence of such corruption or its appearance involving independent committees, section 12.06.310 does not serve any significant governmental interest and violates the First Amendment. Accordingly, no deference should be granted to the City's attempt to control political debate in San Jose through the imposition of limits on contributions to these committees. (Appellants'

Replacement Opening Brief at 55.) As this Court has stated, "[w]e cannot hold that hypotheticals, accompanied by vague allusions to practical experience, demonstrate a sufficiently important state interest." (*Citizens for Clean Gov't*, 474 F.3d at 654.)

3. Section 12.06.310 is not Closely Drawn to Serve Any Valid Governmental Purpose

The First Amendment also requires that any law designed to serve a sufficiently important governmental interest be "closely drawn" to prevent the unnecessary regulation of protect speech. However, section 12.06.310 regulates a virtually limitless category of activity and gives the City boundless discretion to enforce the law.

a. Section 12.06.310 is Overbroad and Restricts Protected Speech

As well as not serving any valid governmental interest, the ordinance is not "closely drawn" to avoid the unnecessary regulation of protected speech. As the Supreme Court has instructed, contribution limits are not closely drawn if they "work more harm to protected First Amendment interests than their anti-corruption objectives could justify." (*Randall*, 126 S.Ct., at 2482.) Section 12.06.310 violates this test because it grants the City the ability to regulate a virtually

limitless category of political speech.

The ordinance imposes a severe contribution limit on any political committee deemed to have spent funds "in aid of and/or opposition to" a candidate for municipal office, even if the expenditure is not coordinated with, and even the activity does not even mention, a candidate for municipal office. This standard encompasses a much broader scope of activities by independent committees than courts have ever analyzed.

Here it is important to recall that *Buckley, NCPAC* and *McConnell* all noted that *independent expenditures* – i.e., communications that expressly advocate the election or defeat of a candidate but which are made without consulting with the candidate – do not corrupt candidates. (*Buckley*, 424 U.S. at 47; *NCPAC*, 470 U.S. at 498; *McConnell*, 540 U.S. at 221.) Similarly, in *Lincoln Club*, the Irvine ordinance imposing contribution limits on political committees only applied to *independent expenditures* by those committees. (*Lincoln Club*, 292 F.3d at 936.) The City, however, stipulated that COMPAC's mailers and telephone calls were not independent expenditures. (ER, Vol. I at ER0069.) The City brazenly attempts to regulate activity even further removed from any concerns regarding candidate corruption.

The District Court correctly noted the breadth of the ordinance:

> 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.

(ER, Vol. II at ER0396.)

By regulating virtually any protected speech, including the discussion of public policy issues, the City thus impinges on the core First Amendment principles regarding political speech recognized in *Buckley*:

> The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

(*Buckley*, 424 U.S. at 14 (citations omitted).)

The overbroad scope of section 12.06.310 could be triggered, for instance, by an advertisement urging the passage of a ballot measure, or an expenditure made to encourage citizens to register to vote, since either of these activities could be deemed to "aid or oppose" a City candidate, even if they do not expressly advocate his or her election. Such intrusion into recognized forms of protected speech necessarily violates the First Amendment. (*See Citizens Against Rent*

Control, 454 U.S. at 298-299 [invalidating limits on political committees that contribute to ballot measures].) As the Supreme Court has instructed:

> Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.

(*FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986).)

"In enacting the provision at issue in this case," the City "has chosen too blunt an instrument for such a delicate task." (*Id.*)

Contrary to the City's assertion, these tailoring concerns regarding section 12.06.310 are not resolved by the Supreme Court's analysis in *McConnell*. In upholding soft money restrictions on political parties, the Supreme Court noted that Congress may indirectly regulate noncoordinated expenditures by certain independent committees in order to effectuate a valid anti-corruption remedy. (*McConnell*, 540 U.S. at 152 n.48.) More specifically, the Supreme Court cited the example of *California Medical Association*, where the valid circumvention remedy necessarily:

> restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.

(*Id.*)

The Court thus held that the regulation of noncoordinated expenditures does not invalidate a statute as overbroad in these cases. (*Id.*)

Footnote 48 in *McConnell* cannot be read as an abrogation of *Buckley* and *NCPAC*'s key holding noncoordinated expenditures do not corrupt candidates. Nor should this footnote be read to hold that expenditures made independently of candidates are unprotected by the First Amendment. Rather, it should be properly understood as the Supreme Court's acknowledgment that the First Amendment's protections for noncoordinated expenditures are *outweighed* in certain contexts by the government's interests in preventing corruption, provided that those interests have been validly established.

The only two instances where the Supreme Court has recognized the ability to regulate noncoordinated expenditures arose in *California Medical Association*, when candidate contribution limits could actually be circumvented, and in *McConnell*, where "[t]he close relationship of federal officeholders and candidates" to political parties allowed them to serve as "conduits" for corruption. (*California Medical Ass'n.* 453 U.S. at 197-199; *McConnell*, 540 U.S. at 156 n.51.) The City can point to no authority supporting the regulation of noncoordinated expenditures outside these two contexts. The record does not establish that section 12.06.310 prevents circumvention of any candidate

contribution limits, or that San Jose committees serve as "conduits" for corruption. Thus, the First Amendment protections for noncoordinated expenditures are *not outweighed* by any competing anti-corruption interest. Rather, such speech by COMPAC and other independent committees is like that of "political talk show hosts or newspaper editors" that cannot be regulated "*on the sole basis that their activities conferred a benefit on the candidate.*" (*McConnell*, 540 U.S. at 156 n.51, emphasis added.) As such, section 12.06.310 is not "closely drawn" under the First Amendment.

b. The $250 Limit Under Section 12.06.310 is So Restrictive That it Violates the First Amendment

In its order granting summary judgment to COMPAC, the District Court also recognized that the ordinance's $250 limit on contributions is restrictively low, "particularly in its failure to adjust for inflation." (ER, Vol. II at ER0396.) However, the Supreme Court has recently recognized that certain dollar limits on political contributions are so restrictive that they prevent "candidates and political committees from amassing the resources necessary for effective advocacy." (*Randall*, 126 S.Ct at 2491, *quoting Buckley*, 424 U.S. at 21.) Such low limits are not "closely drawn." (*Id.*)

Randall struck down Vermont's $200 to $400 per election limits on

contributions to candidates, concluding that the limits constituted the same obstacle to "effective advocacy" recognized in *Buckley*. Given the potential harm to expressive and associational freedoms, the Supreme Court observed, "we must recognize the existence of some lower bound [for contribution limits]." (*Id.* at 2492.) Faced with the disparity between the $1,000 limit upheld in *Buckley* and the challenged limits in Vermont, and the absence of any adjustment for inflation, the Court concluded that "[a]gain, the very low limits at issue transform differences in degree into difference of kind" and held that Vermont's "contribution limits are not narrowly tailored." (*Id.* at 2499.)

Section 12.06.310 imposes similarly low limits on contributions to independent committees operating in San Jose, far below what the Supreme Court has previously approved. The ordinance's $250 limit is nearly identical to Vermont's $200 to $400 limits invalidated in *Randall*, and like the Vermont statute, it is not adjusted for inflation. (ER, Vol. II at ER0315.) Following *Randall*, section 12.06.310 violates the First Amendment because the $250 limit is "too restrictive" and therefore not closely drawn under the First Amendment. (*Randall*, 126 S.Ct. at 2495.)

C. The District Court Correctly Held That Section 12.06.310 Is Unconstitutionally Vague and Violates the Fourteenth Amendment

The language of section 12.06.310 is unconstitutionally vague. In granting summary judgment on COMPAC's Fourteenth Amendment claim, the District Court observed that the ordinance "does not provide adequate warning to speakers in the political process as to what conduct is prohibited." (ER, Vol. II at ER0397.) In particular, the District Court emphasized that the City has not been able to adequately define the ordinance's virtually limitless scope and that its potential application to any expenditures by San Jose political committees resulted in "troubling discretion" afforded to the City to enforce the law.

1. Section 12.06.310 Provides Inadequate Warning Regarding its Scope and Invites Arbitrary and Discriminatory Enforcement

The Supreme Court has confirmed that a "stringent" test for vagueness should apply when a law interferes with First Amendment freedoms. (*Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982).) As *Buckley* explained, "The test is whether the language . . . affords the '(p)recision of regulation (that) must be a touchstone in an area so closely touching our most precious freedoms.'" (*Buckley*, 424 U.S. at 41, *quoting NAACP v. Button*, 371 U.S. 415, 438 (1963).) The effects of a vague law are pernicious: they "trap the innocent by not providing

fair warning," induce "citizens to steer far wider of the unlawful zone," and permit the "arbitrary and discriminatory application" of law. (*Buckley*. 424 U.S. at 41 n. 48, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).) All three virulent harms – the lack of fair warning about the boundaries of the law, the chilling of protected speech, and arbitrary and discriminatory enforcement – are caused by the language of section 12.06.310.

As the District Court's order concluded, the phrase, "in aid of and/or opposition to" a municipal candidate is so ambiguous that it escapes precise definition. (ER, Vol. II at ER0397-0398.) The ambiguity is an inherent result of the high degree of subjectivity required in determining whether a given activity or expenditure can be construed to "aid or oppose" a candidate. The District Court acknowledged that the City could not provide an answer to the following scenarios presented by COMPAC:

> 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?

(ER, Vol. II at ER0398.)

Similarly, a mailer or advertisement supporting a local ballot measure, or expenses

associated with voter registration efforts – which are consistent with the activities of local political committees – could be deemed to "aid or oppose" a particular candidate, even though such a conclusion would be based on indirect effects or remote references to a candidate's assumed interests. The statutory language at issue here is utterly incapable of establishing an objective standard of conduct for a person of average intelligence to follow, as the Fourteenth Amendment requires. (See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).)

The unconstitutional vagueness of similar campaign finance statutes has been noted by other federal courts. Though section 12.06.310(a) provides for a $250 contribution limit whenever a committee spends funds aiding or opposing a candidate, section 12.06.310(b) requires committees to segregate the portion of a contribution under $250 for the "purpose of influencing elections." (ER, Vol. II at ER0315.) Since *Buckley*, courts have consistently held that statutes cannot define the category of expenditures subject to regulation according to whether they "influence voters" or "influence elections." In *Buckley*, the Supreme Court noted that a definition of "expenditure" based on whether the spending influences elections triggers "line-drawing problems" resulting in "potential for encompassing both issue discussion and advocacy of a political result." (*Buckley*, 424 U.S. at 79.; *see also Center for Individual Freedom v. Carmouche*, 449 F.3d

655, 663-664 (5th Cir. 2006) [holding that Louisiana's definition of a campaign "expenditure" as any payment "supporting, opposing, or otherwise influencing the nomination or election of a person to public office" is vague].)

An Ohio District Court decision also held that a statute restricting corporate expenditures "in aid of or opposition to" a candidate was similar to the phrase "relative to a clearly identified candidate," which was also invalidated as vague in *Buckley*. (*Chamber of Commerce v. Ohio Elections Commission*, 135 F. Supp. 2d 857, 867-869 (S.D. Ohio 2001).) Accordingly, the operative language used in section 12.06.310 has already been invalidated by other federal courts.

Furthermore, the District Court correctly noted that the ordinance is vague because it grants the City the opportunity for arbitrary and discriminatory enforcement. (ER, Vol. II at ER0398.) As noted in the record, the City has already utilized this "troubling" discretion to base an enforcement action on its perception of a speaker's intent to "influence" elections. (*Id.*) Such an inquiry itself offends due process. (*Perry v. Bartlett*, 231 F.3d 155, 161 (4th Cir. 2000) [governmental inquiry into the intent of the speaker violates due process rights of speaker]; *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003)[rejecting "unpredictability of audience interpretation" in the regulation of political speech].) In other words, the ordinance improperly grants

the City the means and opportunity to silence any political speech it disfavors. As evident in the record, the ordinance's vagueness has thereby resulted in a chilling effect on COMPAC's political speech. (ER, Vol. II at ER0319.)

In defense of section 12.06.310, the City argues that "when a person gives money to a political action committee . . . that person necessarily understands that his or her contribution is for the purpose of influencing an election." (Appellants' Replacement Opening Brief at 60; *Buckley*, 424 U.S. at 24.) However, this misunderstands the issue, for the vagueness stems not from a *contributor's* understanding of what constitutes a "contribution" – which is the point addressed in *Buckley* – but rather, from the *committee's* lack of certainty whether its *expenditures* will trigger the $250 limit.

2. The Ordinance's Vagueness Is Not Salvaged By *McConnell*

Lastly, the City attempts to defend section 12.06.310 by analogy to the definition of "federal election activity" passed by Congress in BCRA. The City's reasoning is that the phrase "in aid of and/or opposition to" a candidate is "essentially the same language" as the federal definition, which includes the terms "promote," "oppose," "attack," and "support." (Appellants' Replacement Opening Brief at 57.)

Again, the City's reliance on *McConnell* is misplaced. In an effort to effectuate BCRA's new soft money restrictions involving political parties and candidates, Congress passed a statutory definition for "federal election activity" in order to circumscribe the range of permissible activities political parties and officeholders can undertake. (*McConnell*, 540 U.S. at 133-134.) In *McConnell*, the Supreme Court upheld this definition against a vagueness challenge, noting that it provided adequate notice regarding a cognizable standard of conduct. (Id. at n.64.)

The full text of the definition of "federal election activity" describes, in exacting detail, the four types of activities that are regulated: (1) voter registration activities conducted 120 days before a federal election; (2) voter identification or "get-out-the-vote" activities in connection with a federal election; (3) public communications referencing a "clearly identified" federal candidate that "promote," "oppose," "attack," and "support" a candidate for that office; and (4) volunteer activities by political party employees that exceed 25 percent of their compensated time. (2 U.S.C. section 431(20)(A); copy attached in addendum.)

As even a cursory comparison of the two statutes reveals, the analogy the City attempts to draw between the City and the federal definition is unjustified. Whereas the federal definition clearly delineates certain types of conduct, within

specified time frames and thresholds, the City's ordinance is open-ended. Even the prong within the federal statute identifying "public communications" referencing "clearly identified candidates" that "promote," "oppose," "attack," and "support" a candidate is substantively different. Most notably, section 12.06.310 is not limited to public communications that identify candidates; in fact, it applies to *any* expenditure which may aid or oppose a candidate. BCRA's definition, taken as a whole, provides clear and specific standards of conduct. Section 12.06.310 contains no specificity at all, leaving interpretation of the ordinance subject to the sole discretion of the City.

The City is thus left to argue that the use of several isolated terms cures any vagueness problems. As the District Court correctly noted, the City "appear[s] to contend as an absolute proposition that the Supreme Court held that the words 'oppose,' 'attack,' and 'support' were not unconstitutionally vague in *McConnell*." (ER, Vol. 11, at ER0399.) However, "[t]he correct reading of *McConnell* is not so broad." (*Id.*) Instead, the Court should look to the Louisiana statutory language invalidated last year by the Fifth Circuit. (*Ctr. for Individual Freedom v. Carmouche*, 449 F.3d at 663.) The phrase "supporting, opposing, or otherwise influencing the nomination or election of a person to public office" at issue in that case is effectively identical to the City's suggested interpretation of section

12.06.310, and was deemed unconstitutionally vague. (*Id.*)

Lastly, the City erroneously suggests that any vagueness problem is cured because "actions taken by political action committees – such as COMPAC – are presumed to be in connection with elections." (Appellants Replacement Opening Brief, at 58.) The City's suggestion that COMPAC's status as a registered committee automatically subjects *every* contribution it receives to the $250 limit is misleading, because the statutory language explicitly does the opposite: only contributions used to "aid" or "oppose" a candidate are subject to a $250 limit. (ER, Vol. II at ER0315 [Section 12.06.310(b)].) Therefore, COMPAC or any other organization's status as a political committee does not address the vagueness problem stemming from the ordinance's selective application.

The City refers to dicta in *Buckley* regarding a "major purpose test" which could be used to prevent issue advocacy organizations from qualifying as political committees – and being subject to FECA's disclosure requirements for *all* expenditures. (*Buckley*, 424 U.S. at 79.) The Supreme Court reasoned that only organizations under the control of candidate, or whose "major purpose" was to support a candidate, could qualify as a committee, thereby excluding issue advocacy groups from having to disclose all of their spending. Groups that have already qualified as committees, the Supreme Court observed, could be required to

disclose *all* their expenditures because they "can be assumed to fall within the core area sought to be addressed by Congress." (*Id.*) In other words, the *Buckley* "major purpose test" offered clarification about what groups could qualify as a committee, not what types of expenditures could be subject to regulation.[5] The latter issue creates the vagueness problem inherent in section 12.06.310 and it is not cured by the City's misplaced references to *Buckley*.

The Court should therefore uphold the District Court's order granting summary judgment on COMPAC's Fourteenth Amendment claim.

VII. CONCLUSION

The District Court properly held that *Younger* abstention is not an appropriate response to COMPAC's challenge to section 12.06.310. The ordinance severely burdens speech by political committees in San Jose, and should be reviewed under strict scrutiny. However, even under "exacting" scrutiny requested by the City, section 12.06.310 violates the First Amendment. Moreover, the language of the ordinance is unconstitutionally vague. Accordingly, the Court

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[5]Under state law, independent political committees are expressly allowed to undertake a wide range of activities "reasonably related to a political, legislative, or governmental purpose." (Cal. Govt. Code section 89512.5(a); copy attached in addendum.) As such, status as a state or local political committee does not automatically characterize all of the organization's expenditures as attempts to "influence" elections, contrary to the City's suggestion.

should affirm the District Court's orders denying the City's Motion for Judgment on the Pleadings and its Motion for Summary Judgment, and granting COMPAC's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED:

JAMES R. SUTTON
ION B. MEYN
GABE CAMARILLO

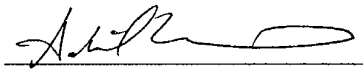
By: _____
GABE CAMARILLO
The Sutton Law Firm
Attorneys for Appellees

Dated: March 14, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(I), I certify that Appellees' Brief is proportionally spaced, has a typeface of 14 points, and contains 13,900 words.

Dated: March 14, 2007



GABE CAMARILLO
The Sutton Law Firm
Attorneys for Appellees

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that there are no related cases.

Dated: March 14, 2007

GABE CAMARILLO
The Sutton Law Firm
Attorneys for Appellees

CASE NO 06-17001

ADDENDUM TO APPELLEES' BRIEF

INDEX

SJMC section 12.06.040

Committee.

"Committee" shall mean any person who, directly or indirectly, receives contributions or makes expenditures or contributions 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 if:

A. Contributions received total one thousand dollars or more in any calendar year; or

B. Independent expenditures total one thousand dollars or more in a calendar year; or

C. Contributions made to or at the behest of candidates and committees total ten thousand dollars or more in a calendar year.

(Ords. 24499, 24577, 25257, 25447, 26440.)

SJMC section 12.06.160

Person.

"Person," for purposes of this chapter, shall include an individual, business entity, foundation, organization, committee or association, nonprofit corporation, and any other organization or group of people acting in concert.

(Ords. 24499, 24577, 25257, 26440.)

SJMC section 12.06.210

Campaign contribution limitations.

A. The total campaign contribution made by any person to any councilmember, council candidate and any controlled committee of that candidate may not exceed:

1. One hundred dollars for the primary election;

2. One hundred dollars for the general election, if any;

3. One hundred dollars for any special election.

B. The total campaign contribution made by any person to any mayor, mayoral candidate and any controlled committee of the candidate may not exceed:

1. Two hundred fifty dollars for the primary election;

2. Two hundred fifty dollars for the general election, if any;

3. Two hundred fifty dollars for any special election.

C. If the candidate voluntarily elects to participate in the voluntary campaign expenditure limitation program, the alternative campaign contribution limitations set forth in Part 5 shall apply in lieu of subsection A. and B.

(Ords. 24499, 24577, 24845, 25257, 25445, 26440.)

SJMC section 12.06.320

Contributions and expenditures by independent committees.

A. Independent committees are "persons" for purposes of the contribution limitations to city council and mayoral candidates. Any expenditure by an independent committee in aid of or in opposition to a council or mayoral candidate which is not an "independent expenditure" is deemed to be a contribution to that candidate, subject to the limitations of this chapter.

B. Each independent committee making contributions or independent expenditures in a council or mayoral election which does not participate in elections other than for city offices shall file the reporting statements required by Section 12.06.910. For each expenditure or contribution, the committee shall report what amount or portion was of benefit to a particular candidate.

(Ords. 24499, 24577, 25257, 26440.)

2 U.S.C. section 431(20)(A)

Federal election activity.

(A) In general. - The term "Federal election activity" means -
(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
(iii) 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); or
(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity. - The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for -
(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);
(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a

Federal election activity described in subparagraph (A);
(iii) the costs of a State, district, or local political convention; and
(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

Cal. Govt. Code section 89512.5

(a) Subject to the provisions of subdivision (b), any expenditure by a committee not subject to the trust imposed by subdivision (b) of Section 89510 shall be reasonably related to a political, legislative, or governmental purpose of the committee.

(b) Any expenditure by a committee that confers a substantial personal benefit on any individual or individuals with authority to approve the expenditure of campaign funds held by the committee, shall be directly related to a political, legislative, or governmental purpose of the committee.

CASE NO. 06-17001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN JOSE SILICON VALLEY CHAMBER OF COMMERCE POLITICAL ACTION COMMITTEE, an unincorporated association; COMPAC ISSUES FUND, SPONSORED BY THE SAN JOSE SILICON VALLEY CHAMBER OF COMMERCE, an unincorporated association,

Plaintiffs-Appellees,

v.

THE CITY OF SAN JOSE; SAN JOSE ELECTIONS COMMISSION,

Defendants-Appellants.

On appeal From the United State District Court For The Northern District Of California Hon. James Ware, Case No. 06-4252 JW

PROOF OF SERVICE

I, Gabe Camarillo, declare:

I am over 18 years of age and not a party to the above referenced lawsuit. I am an attorney at the Sutton Law Firm, PC and have personal knowledge of the facts recited herein and could testify competently thereto as to the service of the

following pleading, including all its attachments:

APPELLEES' BRIEF

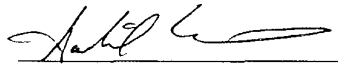
On Wednesday, March 14, 2007, I caused two (2) copies of this pleading to be served by overnight commercial delivery to:

George Rios
Assistant City Attorney of Office of the City Jose City Attorney
Counsel for Defendants
San Jose City Hall
200 E. Santa Clara St.
San Jose, California 95113

On Wednesday, March 14, 2007, I also caused the original and fifteen (15) copies of this pleading to be served by personal delivery to:

Clerk at the United States Court of Appeals
95 Seventh Street
San Francisco, California 94103

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California this 14th day of March, 2007.

By: 
Gabe Camarillo