CASE NO. 06-17001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN JOSE SILICON VALLEY CHAMBER OF COMMERCE POLITICAL ACTION COMMITTEE, an unincorporated association; et al.,

Plaintiffs-Appellees,

v.

THE CITY OF SAN JOSÉ; et al.,

Defendants-Appellants.

United States District Court
Northern District of California
San José Division

DC No. CV-06-4252-JW

On Appeal From The United States District Court
For The Northern District Of California
Hon. James Ware, Presiding

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The District Court should have abstained from deciding the merits of this case because the *Younger* doctrine applies; COMPAC's lawsuit interfered with the Elections Commission's enforcement action.

Section 12.06.310 is consistent with the First Amendment because it does not restrict speech and simply limits contributions. If contributions to independent committees cannot be regulated, contributors may circumvent contribution limitations to candidates by making large donations to independent committees. Moreover, the phrases "in aid of" and "in opposition to" in Section 12.06.310 are not unconstitutionally vague because the same or essentially the same terms have been held constitutional by the Supreme Court.

II. ARGUMENT

A. *YOUNGER* ABSTENTION SHOULD HAVE BEEN GRANTED.

1. COMPAC's Lawsuit Interfered with the Election Commission's Enforcement Action.

a. "Direct" Interference Is Not Necessary.

COMPAC disregards the holding in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (en banc) that direct interference with a state proceeding is unnecessary in this Circuit. While COMPAC's complaint did not expressly seek to enjoin or stay the administrative proceeding before the Commission, it had such practical effect. The District Court did not consider this effect and COMPAC

neglects to address it, too. In *Gilbertson*, this Court stated "we recede from our statements in *Green v. City of Tucson*, 255 F.3d 1086, 1102 (9th Cir. 2001) (en banc), that direct interference is a threshold requirement, or element, of *Younger* abstention . . . ." (*Gilbertson*, 381 F.3d at 968-69.) Thus, *Younger* abstention applies to federal actions having the "practical effect" of a declaration or injunction, even if there is no "direct" interference with the state court proceedings. (*Id.* at 978.)

COMPAC's Complaint sought not only "prospective" relief, but also interfered with the Commission's action:

> 51. As a result of the Commission's unconstitutional deprivation of COMPAC's rights under color of law, COMPAC has sustained and is continuing to sustain irreparable harm to its First Amendment rights of expression and discussion of public issues. COMPAC is entitled to a permanent injunction against Defendants preventing any enforcement action against Plaintiffs pursuant to the Commission Report and the language of SJMC section 12.06.310, and in connection with the COMPAC communications . . . .
>
> . . . .
>
> 53. COMPAC is also entitled to the declaratory judgment of this Court ordering Defendants to rescind the formal reprimand of COMPAC issued on June 21, 2006 for COMPAC's alleged violation of section 12.06.310.[1]

[1] Excerpt of Record ("ER"), ER0013-ER0014.

The Complaint clearly sought to stop the Commission from following the Report that concerned COMPAC's violations before the November 2006 Mayoral elections and rescind the Commission's reprimand letter.

COMPAC argues without merit that the District Court did not expunge the reprimand letter, and thus, did not grant "retroactive" relief.[2] First, when *Younger* elements are present, abstention is mandatory. (*Fresh Intern. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1356 (9th Cir. 1986)). The actual relief granted is not an element of the *Younger* test so whether or not the District Court rescinded the Commission's letter of reprimand is irrelevant.

Second, the federal lawsuit has interfered with the Commission's proceeding. *Gilbertson* cited with approval a finding of *Younger* abstention in *Samuels v. Mackell*, 401 U.S. 66 (1971), where the plaintiffs sought a declaration that the state statute under which they were being prosecuted was unconstitutional. (*Gilbertson*, 381 F. 3d at 971.) "The *Samuels* Court held that *Younger* applies to requests for declaratory relief because 'ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid.'" (*Id.* (quoting *Samuels*, 401 U.S. at 72.)) Like *Samuels*, COMPAC's Complaint sought

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[2] Appellees' Brief ("AB"), 15.

a declaration that the ordinance being enforced against it was unconstitutional.[3] Likewise, the order declaring Section 12.06.310 unconstitutional has disrupted and interfered with the proceeding before the Commission.

COMPAC's argument that the District Court's decision does not interfere with the Commission's proceeding is wrong. COMPAC refused to provide information to the Commission pertinent to imposing a fine.[4] That fact, as well as the Complaint's request for rescission of the Commission's formal reprimand and for injunctive relief from ongoing enforcement of the challenged provision, demonstrate that COMPAC filed the federal suit precisely to stop the proceeding, avoid paying the fine and overturn the Commission's decision.

The District Court not only erred in requiring "direct" interference with the Commission's proceedings but also in its conclusion that the Complaint did not seek to interfere with those proceedings.

b. *Younger* Would Not Apply If COMPAC Sued in Federal Court Before the Violations or Before the Commission's Action.

COMPAC improperly analogizes its Complaint to that in *Green*, claiming that it merely challenges Section 12.06.310.[5] In *Green*, both the state and federal

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[3] ER0014.

[4] ER0384.

[5] AB, 10.

complaints concerned the same constitutional challenge to a state statute. (*Green*, 255 F.3d at 1090-91.) *Green* noted that *Younger* abstention would not apply where the federal plaintiff was also a plaintiff in the state action, and likened the *Green* case to *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) [*NOPSI*], where the same party filed a state and federal action challenging the constitutionality of the same statute. (*Green*, 255 F.3d at 1096-1098.)[6]

Unlike this case, the state action in *Green* was not an enforcement proceeding and the federal plaintiffs were not parties there. (*Id.* at 1091-91.) COMPAC is not merely challenging an ordinance, but it is doing so (and more) in the context of a pending state action to enforce the ordinance against it.

"Federal courts can, and often will, determine the constitutionality of state statutes where the parties are not yet involved in proceedings in the state court. As long as no state court action to enforce the state law is pending, there is little concern regarding judicial interference with federal-state relations." (CAL. PRAC. GUIDE FED. CIVIL PROC. BEFORE TRIAL, Ch. 2E-7, sec. 2:2191.5 (2007) (citing *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), and *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1001-1002 (9th Cir. 1995)).) Thus, "[p]laintiffs can

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[6] The *NOPSI* Court decided that a federal court could determine whether the city council's rate increase was preempted by federal law, even though the matter was still under review by the state court. (*NOPSI*, 491 U.S. at 362.)

challenge the constitutionality of state laws by seeking declaratory relief in federal court before violating the law. Once the law has been violated and state prosecution commenced, *Younger* requires federal courts to abstain." (*Id.* at sec. 2:1291.5a.)

Had COMPAC filed its federal lawsuit before engaging in conduct that led to the Commission's action, or before the Commission's proceeding, COMPAC's arguments might have applied. However, as it is, *Younger* abstention should have been granted.

2. There Was an "Ongoing" State Proceeding When COMPAC Filed the Federal Lawsuit.

COMPAC improperly adds another requirement to the *Younger* test: that *Younger* does not apply unless the administrative body that enforces a regulation is "administered by or under the inherent jurisdiction" of the State Supreme Court.[7] However, COMPAC cites no opinion that sets out this requirement.[8]

The District Court improperly decided that the Commission's proceeding had ended before this suit was filed.[9] The hearing took place and a decision was

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[7] AB, 18-19.

[8] COMPAC also improperly asserts that the Commission's proceedings "lack characteristics essential to judicial proceedings", that they are "not coordinated or under the judicial stewardship of the judiciary, and are run by political appointees . . . ." (AB, 18). Those statements are unsupported by the record or legal authority.

[9] ER0384.

rendered, but to date, due to COMPAC's refusal to cooperate and because the District Court held Section 12.06.310 unconstitutional, there has been no conclusion of the proceeding, i.e. no finding of what penalty was appropriate. At the time COMPAC filed its federal Complaint, the state proceeding was ongoing because the amount of the penalty was still pending and COMPAC was entitled to seek state court review of the Commission's decision.

COMPAC improperly analogizes its case to *Steffel v. Thompson*, 415 U.S. 452 (1974), arguing that *Younger* does not apply because there was no pending state proceeding.[10] The *Steffel* Court phrased the issue before it, in part, as follows: "This case presents the important question reserved in *Samuels v. Mackell*, whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending . . . ." (*Id.* (citation omitted).) In *Steffel*, the federal plaintiff was only threatened with state prosecution, i.e. a state enforcement action had not yet been brought, while here, the enforcement action was already under way. (*Steffel*, 415 U.S. at 545) The procedural posture of *Steffel*, as well as *Green* discussed earlier, makes both cases inapplicable here.[11]

The Supreme Court developed the *Younger* doctrine, applying it to state administrative proceedings (see, e.g., *Middlesex County Ethics Committee v.*

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[10] AB, 19-20.

[11] AB, 17.

Garden State Bar Association, 457 U.S. 423, 437 (1982) and *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 625 (1986)), and holding that appellate processes must be exhausted before a party such as COMPAC can seek relief in federal court. (*Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975).) Further, in *Dayton*, the Supreme Court held that it is sufficient if constitutional claims can be raised in state judicial review of administrative proceedings. (*Id.* at 629.) These decisions lead to the conclusion that the *Younger* abstention doctrine applies in COMPAC's case. (See also *Alleghany Corp. v. McCartney,* 898 F.2d 1138, 1145 (8th Cir. 1990) (holding that *Younger* abstention was proper when the State Insurance Commissioner denied the federal plaintiff's application to acquire insurance companies and the federal plaintiff sued in federal court rather than challenge the Commissioner's decision in state court).

While the Supreme Court has "never squarely faced" the question whether these facts satisfy the *Middlesex* requirement that there be pending state proceedings, the *NOPSI* majority nevertheless stated that the Court's decision in *Dayton* "suggests, perhaps, that an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." ((*NOPSI*, 491 U.S. at 369 n. 4).) It should be also noted that two Justices stated in concurring opinions as follows. "Nothing in [*NOPSI*] curtails our prior application of *Younger* to certain administrative proceedings

which are 'judicial in nature;' nor does it alter our prior case law indicating that such proceedings should be regarded as 'ongoing' for the purposes of *Younger* abstention until state appellate review is completed." (*NOPSI*, 491 U.S. at 373 (Rehnquist, C.J., concurring) (citations omitted).) Justice Blackmun indicated his belief that prior decisions had decided the question. (*Id.* at 374 (Blackmun, J., concurring).)

Thus, the Supreme Court strongly indicates that under circumstances such as these, the administrative proceeding is considered pending for *Younger* purposes.

Even though the Fifth Circuit in *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), cited by COMPAC, takes the opposite position, that decision is not binding on this Circuit and must yield to the Supreme Court's express suggestions and to inferences resulting from the Supreme Court decisions in *Middlesex*, *Huffman*, and *Dayton*[12].

In light of the above, *Younger* abstention is appropriate in this case.

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[12] See also *Nevada Entertainment Industries, Inc. v. City of Henderson*, 8 F.3d 1348 (9th Cir. 1993), opinion withdrawn on rehearsing by *Nevada Entertainment Industries, Inc. v. City of Henderson*, 21 F.3d 895 (9th Cir. 1994) (municipal code provided the federal plaintiff adequate opportunity to raise its federal claim during state court review of city council decision; *Younger* abstention doctrine allied unless plaintiff exhausted state court review.)

B. THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

1. The District Court Erred in Applying Strict Scrutiny.

a. Section 12.06.310 Does Not Restrict COMPAC's Speech or Associational Rights.

COMPAC argues that in *Lincoln Club of Orange County v. City of Irvine,* 292 F.3d 934 (9th Cir. 2002), "this Court faced substantially similar facts as those presented here ...."[13] COMPAC is wrong; Section 12.06.310 is very different from the ordinance at issue in *Lincoln Club.*

In *Lincoln Club*, Irvine's ordinance prohibited any committee that made independent expenditures in support of or in opposition to candidates for office in an Irvine municipal election from accepting contributions from any person that exceeded a total of $320. (*Lincoln Club,* 292 F.3d at 936.) Since the Lincoln Club and its political action committees were funded exclusively by annual membership dues of $2,000 per member, the ordinance effectively prohibited the Lincoln Club from making independent expenditures. (*Id.*)

In contrast, Section 12.06.310 only regulates contributions. It does not bar expenditures under any circumstances, and, thus, does not restrict the speech of independent committees. Independent committees in San Jose may accept contributions in excess of the contribution limit and may use $250 per contributor

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[13] AB, 23.

in aid of or opposition to a City candidate without limit on the amount of contributors.

COMPAC claims that it "faces restrictions on its expressive activity that are equally severe" as those in *Lincoln Club* and that it "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."[14] COMPAC cites to the Evaluator's Report to support its claim.

The Evaluator reasoned that Section 12.06.310 is intentionally broader than the restrictions on independent expenditures for two reasons.[15] First, San Jose's ordinance "uses two very different terms in the two sections: 'independent expenditures,' and 'expending funds. . . in aid of and/or opposition to.' Interpreting each to require 'express advocacy' essentially eliminates the possibility that the City had something different in mind when it used the phrase 'expending funds. . . in aid of and/or opposition to.'"[16] Second, "requiring the phrase 'expending funds. . . in aid of and/or opposition to' in section 12.06.310 to mean the same thing as 'independent expenditure' in section 12.06.320 ignores the difference between restrictions on campaign <u>expenditures</u> and limitations on

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[14] AB, 24.

[15] ER0031.

[16] ER0031.

campaign <u>contributions</u>."[17] The Evaluator did not conclude that Section 12.06.310 applied to an "undefined category of speech." The Evaluator concluded that "the phrase 'expending funds . . . in aid of and/or opposition to' does not necessarily include the requirement of 'express advocacy' found in the definition of 'independent expenditure,' but only requires an attempt to influence voters for or against a candidate."[18]

COMPAC argues it is unable to interpret the phrase "expending funds or making contributions in aid of and/or opposition to the nomination or election for a candidate for city council or mayor…." However, if COMPAC sends a mailer that praises a candidate, that "aids" the candidate; if COMPAC's communication vilifies a candidate, it "opposes" the candidate; if COMPAC televises a candidate forum, it neither aids nor opposes any candidate. And to answer the District Court's hypotheticals – (1) if an independent committee "merely plans to mention how elected representatives seeking reelection voted on particular issue"; or (2) if a "communication[] [does] not directly referenc[e] a candidate," neither of the communications aids or opposes any candidate.

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[17] ER0032.

[18] ER0033.

COMPAC argues that it must "undertake a massive re-organization of its fundraising activities and operations. . . ."[19] COMPAC submitted a declaration from Bob Hines, Vice-President for Policy and Communications, where he concludes that COMPAC has been unable to engage in activities related to its underlying mission to educate the local community "on issues important to the business community...as they relate to the decisions and policy positions of City officials who are running for City office."[20]

But Mr. Hines does not explain how Section 12.06.310 affects COMPAC's mission. He does not state that COMPAC has been prohibited from making any expenditure that is not in aid of or opposition to a City candidate. Even as to expenditures opposing or supporting a City candidate, as long as no more than $250 from any contributor is used, Section 12.06.310 does not limit the expenditure. Unlike the Lincoln Club, COMPAC can spend the contributions it receives. This difference is key; Section 12.06.310 does not limit expenditures and should not be subject to strict scrutiny.

Moreover, Section 12.06.310 does not "severely burden" COMPAC's associational rights.[21] Although COMPAC contends that "expenditures for

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[19] AB, 26.

[20] AB, 26.

[21] AB, 28.

newsletters warning of pending legislation, or for panel discussions about public policy issues are potentially subject to" Section 12.06.310, they are not.[22] Section 12.06.310 simply limits contributions in aid of or in opposition to the nomination or election of a candidate for city council or mayor.

b. Less Rigorous Scrutiny Applies to Section 12.06.310.

COMPAC argues that 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."[23] This is not true. While the City acknowledges that recipients have important First Amendment rights, it also understands that "the overall effect" of "contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . . rather than to reduce the total amount of money potentially available to promote political expression." (*Buckley v. Valeo,* 424 U.S. 1, 21-22 (1976).)

Recipients may have legitimate concerns about regulation of contributions. (*Id.* at 21.) COMPAC claims, however, that its "concern is not limited to its capacity to amass financial resources, but rather, that enforcement of the ordinance

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[22] AB, 28.

[23] AB, 29.

prohibits it from engaging in any speech at all."[24] But Section 12.06.310 regulates contributions, not speech.[25]

COMPAC argues that "the lesser form of scrutiny [in *McConnell*] was warranted by factors not present here" and cites to *McConnell*'s discussion of the provisions of the Bipartisan Campaign Reform Act that applied to the national parties and the state party committees.[26] (*McConnell v. Federal Election Commission,* 540 U.S. 93, 139 (2003).) COMPAC ignores, however, the fact that the *McConnell* Court explained that the same reasoning and policy interests in regulating contributions to candidates and party committees apply to independent committees. (*Id.* at 174.)

COMPAC also argues that *McConnell* applied lesser scrutiny because "the categories of communications . . . were clearly defined."[27] The *McConnell* Court

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[24] AB, 32.

[25] COMPAC claims that its challenge to Section 12.06.310 is also based on the amount – $250 – of the limitation on contributions. But "[a] contribution limit level will be accepted unless it is 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.'" (*Jacobus v. State of Alaska*, 338 F.3d 1095, 1117 (9th Cir. 2003).) Here, the District Court acknowledged that while "the $250 contribution limit per election is low," "it is not dispositive." (ER, Vol II at 0396.) Moreover, COMPAC failed to introduce any evidence to support this assertion.

[26] AB, 32.

[27] AB, 32.

reviewed a provision of the Bipartisan Campaign Reform Act that prevents donors from contributing funds to state and local party committees for "Federal election activity". (*Id.* at 161-162.) Federal election activity includes "any 'public communication' that 'refers to a clearly identified candidate for Federal office' and 'promotes,' 'supports,' 'attacks,' or 'opposes' a candidate for that office." (*Id.* at 162.)

Section 12.06.310 limits contributions to independent committees expending funds or making contributions in aid of or in opposition to the nomination or election of a candidate for city council or mayor. Although it does not limit contributions spent for "any public communication", it does require that the funds be used in aid of or in opposition to the nomination or election of a candidate for city council or mayor. As in *McConnell,* the contribution regulation here applies to categories of communications clearly defined and this Court should apply a less rigorous form of scrutiny.

COMPAC argues erroneously that the potential for corruption in contributions to independent committees does not exist.[28] In *Jacobus v. Alaska,* 338 F.3d 1095 (9th Cir. 2003), this Court reviewed Alaska's campaign finance statute that limited contributions to political parties and concluded that since "a modern election campaign simply cannot be conducted without significant sums of

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[28] AB, 32-33.

money, candidates become beholden to the sources of any contributions that aid their campaign, whether given directly or indirectly." (*Jacobus*, 338 F.3d at 1114.) Thus, even indirect contributions through independent committees may cause candidates to become beholden to large contributors.

Moreover, the *McConnell* Court cited a Senate Committee Investigation Report on the 1996 federal elections, which concluded that the loopholes of soft money and bogus issue advertising led to a meltdown of the system that had been intended to keep corporate, union and large individual contributions from unduly influencing the electoral process. (*McConnell,* 540 U.S. at 129-32.) The Court found that in light of the "realities of political fundraising", large contributions to independent committees – like contributions to candidates and political parties – are subject to corruption and the appearance of corruption and consequently may be regulated accordingly. (*Id.* at 152.)

c. Section 12.06.310 Is Not A Content-Based Ordinance.

COMPAC claims that 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" and cites to *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995) and *ACLU of Nevada v. Heller,* 378 F.3d 979

(9th Cir. 2004).[29] But Section 12.06.310 is not remotely similar to the ordinances reviewed in those cases.

In *McIntyre*, the statute prohibited distribution of anonymous campaign literature designed to influence the voters in any election. (*McIntyre,* 514 U.S. at 336 and 338, fn. 3.) Mrs. McIntyre had distributed leaflets in opposition to a proposed school tax. (*Id.* at 337.) The Supreme Court found the statute to be "a direct regulation of the content of speech." (*Id.* at 345.) An "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." (*Id.* at 342.) The *McIntyre* Court also noted that "the risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue" and that "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill...." (*Id.* at 353, fn. 15 (citations omitted) and 355.)

In *ACLU*, the Nevada legislature attempted to respond to the *McIntyre* decision by adding an exception to its statute "for a natural person who acts independently. . . ." (*ACLU,* 378 F.3d at 982.) But the *ACLU* Court found that the "reasons given by *McIntyre* for protecting anonymous speech apply regardless of whether an individual, a group of individuals, or an informal 'business or social

[29] AB, 33.

organization' is speaking" and, in fact, "a particular group's concern that its message may be prejudged based on its association with the group could be even more well-founded than an individual's similar concern." (*Id.* at 989-990.)

The *McIntyre* and *ACLU* cases are inapposite because contribution limits are analyzed differently from limits on expenditures. (*Buckley,* 424 U.S. at 21-22.) Furthermore, there is "a distinction between prohibiting the distribution of anonymous literature and the mandatory disclosure of campaign-related expenditures and contributions. Though contributing and expending money is a form of speech. . . this type of speech is less worthy of protection than McIntyre's personally crafted leaflet." (*California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1104 (9th Cir. 2003.)

COMPAC claims that the ordinance at issue in *Citizens for Clean Government v. City of San Diego,* 474 F. 3d 647 (9th Cir. 2007) "provided for limits on contributions made directly to all San Diego candidates."[30] This is not so. "The City of San Diego bans contributions exceeding $250 to any committee supporting or opposing a candidate for City Council office." (*Citizens for Clean*

[30] AB, 34.

Government, 474 F.3d at 649.)[31] Thus, this Court's analysis of San Diego's ordinance applies to Section 12.06.310; because "it restricts only . . . indirect speech, a contribution limit 'does not in any way infringe the contributor's freedom to discuss candidates and issues.'" (*Id.* at 651-652, quoting *Buckley,* 424 U.S. at 21.)

Finally, COMPAC claims that since "the City can not [sic] establish any link between its ordinance and the valid governmental interests recognized in *Buckley* or *McConnell*", Section 12.06.310 "should not receive the benefit of a relaxed form of judicial scrutiny."[32] Even if the City were unable to establish an adequate governmental interest, this would not change the standard of review. Furthermore, COMPAC simply ignores the record.

In November 1990, San Jose voters passed a Charter amendment to require the Council to adopt and maintain a code of ethics for, among other things, limitations on contributions for elected City offices.[33] In 1992, the City Council received a Report on Campaign Practices and the Effectiveness of Existing Law

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[31] In the Replacement Opening Brief, the City stated that the San Diego ordinance at issue regulated independent committees. In fact, it regulates contributions to any committee supporting or opposing a candidate for City Council office as well as to candidates.

[32] AB, 35.

[33] ER0323-0324.

from the League of Women Voters of San Jose/Santa Clara and others with findings and recommendations.[34] The Report noted the importance of ensuring that limits on contributions to mayor and city council candidates be protected against evasion and raised the concern that independent committees should not be used by campaign consultants and campaign insiders to raise contributions exceeding the City's contribution limits.[35] After the Report was issued, a Campaign Reform Task Force was established to make recommendations about political campaign practices in San Jose.[36] In December 1993, the City enacted a comprehensive set of ethics and campaign laws, including the limit on contributions to independent committees now codified in Section 12.06.310.[37] Thus, Section 12.06.310 was enacted in response to the City's valid governmental interests. The District Court Erred In Concluding That Section 12.06.310 Violates the First Amendment.

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[34] ER0342-0344, ER0349.

[35] ER0342-0344, ER0349.

[36] ER0358-0359.

[37] ER0326.

2. Section 12.06.310 Serves An Important Government Interest.

COMPAC implies that the purpose of Section 12.06.310 is to "silenc[e] speech that influences an election."[38] This is not true. Section 12.06.310 does not regulate speech; it regulates contributions. Moreover, the purpose of the code of ethics for municipal campaigns is to prevent the perception by the public that campaign contributors exercise undue or improper influence over elected officials.[39]

a. Section 12.06.310 Serves To Prevent Corruption And The Appearance of Corruption.

COMPAC asserts that the City's "rationale for limiting contributions to independent committees" is flawed because "influencing elections" does not equate to "holding 'undue' influence over elected officials."[40] COMPAC claims that the City "relies on *McConnell* to suggest that 'influencing' elections is itself conducive to corruption." This is not the City's contention. All contributions are made for the purpose of influencing an election – but the City is permitted to regulate them.

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[38] AB, 36.

[39] ER0070, ER0317.

[40] AB, 38.

The *McConnell* Court observed that its "treatment of contribution restrictions reflects . . . the importance of the interests. . . in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" (*McConnell*, 540 U.S. at 136 (citations omitted).) These interests "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." (*Id.* at 136-37 (citations omitted).)

COMPAC misleadingly argues that "the City introduced documents into the record, including newspaper articles containing extensive innuendo, to support its conclusion that COMPAC intended to 'influence' the election."[41] The City does not rely on these documents. Rather, to support its contention that it has an important governmental interest in preventing corruption and the appearance of corruption, the City relies on (1) the Report on Campaign Practices and the

[41] AB, 39.

Effectiveness of Existing Law; and (2) the recommendations by a Campaign Reform Task Force that the Council established after the Report was issued.[42]

Moreover, San Jose was "not required to ignore historical evidence regarding a particular practice [of undue influence of candidates]." (*McConnell,* 540 U.S. at 153.) "[U]nlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation." (*Id.*) San Jose identified the possibility of corruption and potential for circumvention and enacted Section 12.06.310 to remove the temptation. COMPAC's conclusion that the "record is wholly insufficient to carry the City's heavy First Amendment burden. . . " is wrong.[43]

Finally, COMPAC offered no evidence to "cast doubt on the apparent implications of [the evidence San Jose relied on in enacting Section 12.06.310]." (*Nixon v. Shrink Missouri Government PAC,* 528 U.S. at 394-395.) Since "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system and no reason to question the existence of a

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[42] ER0342-0344, ER0349, ER0358-0359. Among other things, the Report noted the importance of ensuring that limits on contributions to mayor and city council candidates be protected against evasion and specifically raised the concern that independent committees should not be used as a way to raise contributions in excess of the City's contribution limits. ER0342-344, ER0349.

[43] AB, 40.

corresponding suspicion among voters", San Jose has articulated an important governmental interest. (*Id.*)

i. Large Contributions to Independent Committees Are Susceptible To A Corrupting Effect And The Appearance of Corruption.

COMPAC incorrectly argues that "speech by political committees that act independently of candidates does not create the appearance of corruption" and relies on *FEC v. National Conservative Political Action Committee (NCPAC),* 470 U.S. 480 (1985).[44] Section 12.06.310 does not regulate speech. It regulates the corrupting effect or the appearance of corruption by large contributions. In *NCPAC,* "the conduct proscribed [was] not contributions to the candidate, but independent expenditures in support of the candidate." (*NCPAC,* 470 U.S. at 497.) The *NCPAC* Court stated: "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." (*Id.*)

COMPAC also tries to argue that "it cannot be established whether a given expenditure 'aids' or 'opposes' a candidate – unless the message is made by, or coordinated with a candidate." It is not the speech that is being regulated but the amount of individual contributions to committees engaged in activity seeking to aid or oppose City candidates. If COMPAC sends a mailer that praises a

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[44] AB, 41.

candidate, it is engaged in activity seeking to "aid" the candidate; if COMPAC's communication vilifies a candidate, it is engaged in activity "opposing" the candidate.

ii. Limiting Contributions To Independent Committees Serves To Prevent Corruption And The Appearance Of Corruption.

COMPAC contends that the "Court should decline the City's invitation to expand the holdings of [*McConnell* and *Jacobus*] to independent committees."[45] However, for many years federal campaign finance laws have been intended to prevent contributions from and to political action committees from unduly influencing elections.

In *California Medical Association v. FEC,* 453 U.S. 182, 197 (1981) (*CalMed)*, the Supreme Court held that the provisions of the Federal Election Campaign Act limiting the amount individuals and non-profit associations could contribute to multicandidate political action committees were constitutional. Moreover, the contribution limit was upheld even though there was no requirement that it apply only to the portions used as contributions to candidates. Although Justice Blackmun's concurrence includes dicta that contributions to independent committees that make only independent expenditures "pose no . . . threat" of corruption or the appearance of corruption, this view was flatly rejected in *McConnell.*

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[45] AB, 44.

The *McConnell* Court observed that campaign finance laws and the electoral process had been distorted with the proliferation of (1) soft money directed to party committees and friendly tax-exempt organizations in an effort to circumvent federal campaign contribution limits, and (2) "issue" ads designed to influence federal elections and financed by party committees and tax-exempt organizations which circumvented contribution limits. (*McConnell*, 540 U.S. at 122-32.)

This Court agrees. In *Jacobus v. Alaska,* the Ninth Circuit concluded that since "a modern election campaign simply cannot be conducted without significant sums of money, candidates become beholden to the sources of any contributions that aid their campaign, whether given directly or indirectly." (*Jacobus,* 338 F.3d at 1114.)

COMPAC claims that the factual record is "empty" and that the "lynchpin to *McConnell's* justification for novel restrictions on political parties rests in the Supreme Court's recognition for a 'special relationship and unity of interest' between lawmakers and parties."[46] However, San Jose was "not required to ignore historical evidence regarding a particular practice. . . ." (*McConnell,* 540 U.S. at 153.) The City is entitled to rely on historical evidence about the undue influence of candidates. (*Id.* at 129-132 (commenting on a meltdown of the campaign finance system).)

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[46] AB, 44.

COMPAC argues that the "record before the Court does not show a single instance of 'access peddling' by independent committees."[47] COMPAC concedes, however, that although political committees "typically have a much narrower ideological focus" than political parties, they "often contribute to both political parties."[48] When an independent committee contributes to opposing candidates, there can be "no other conclusion but that these donors [are] seeking influence, or avoiding retaliation, rather than promoting any particular ideology." (*Id.* at 148.)

iii. Limiting Contributions To Independent Committees Serves To Prevent The Circumvention Of Provisions Intended To Combat Corruption.

COMPAC argues that the decision in *CalMed* is inapplicable to the City's analysis that Section 12.06.310 prevents contributors from circumventing the City's contribution limits for candidate campaigns. COMPAC misleadingly contends that "there is no aggregate yearly limit on candidate contributions to 'evade.'"[49] San Jose's ordinance does not set annual limits, it sets limits per election. (San Jose Municipal Code Sections 12.06.210 and 12.06.540.)[50] Thus,

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[47] AB, 45.

[48] AB, 45.

[49] AB, 47.

[50] Addendum to Appellees' Brief, A-3 and Addendum to Reply Brief of Appellants, A-1.

contributors could evade the limits imposed on contributions to candidates by making larger contributions to independent committees in any election.

COMPAC erroneously claims that Section 12.06.210 "imposes identical limits on the amount local candidates from either a political committee or an individual contributor" so that "'evasion' or 'circumvention' of the City's candidate contribution limits, as envisioned by *California Medical Association*, is not even possible."[51] Section 12.06.210 limits contributions a candidate's controlled committee may receive. Section 12.06.310 addresses limits on contributions to independent committees. Because the City regulates contributions to candidates and their controlled committees and independent committees separately, circumvention of the City's candidate contribution limits is possible.

COMPAC argues further that *CalMed* is inapposite because Section 12.06.310 "is triggered whenever a committee either makes contributions to San Jose candidates, or independent expenditures, or other activities 'aiding' or 'opposing' a candidate."[52] But *CalMed* upheld the challenged contribution limit despite the fact that the California Medical Association's political action committee spent its funds on activities beyond campaign contributions. (*CalMed*, 453 U.S. at 195.)

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[51] AB, 47-48.

[52] AB, 48.

COMPAC for the first time complains about the definition of "committee." It is true that 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."[53] This does not render the City's ordinance inconsistent with the Constitution.

Finally, COMPAC selectively reviews the evidence submitted by the City. As discussed above, the City followed the directive of San Jose voters, a Report on Campaign Practices and the Effectiveness of Existing Law and the recommendations from the Campaign Reform Task Force when it enacted the ethics ordinance that includes Section 12.06.310.[54]

b. Section 12.06.310 Is Closely Drawn.

COMPAC claims that Section 12.06.310 is overbroad because it "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 if the activity does not even mention, a candidate for municipal office."[55] COMPAC asserts further that Section 12.06.310 "could be triggered . . .by an advertisement urging the passage of a

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[53] AB, 49.

[54] ER0323-0324, ER0342-0344, ER0349, ER0358-0359, ER0326.

[55] AB, 52.

ballot measure, or an expenditure made to encourage citizens to register to vote. . . ."[56] And COMPAC endorses the District Court's conclusion that Section 12.06.310 "could encompass conduct as mundane as 'mentioning the vote of a city official on a piece of legislation in a newsletter sent to. . . members.'"[57]

These "examples" are incorrect interpretations of Section 12.06.310. If an independent committee mailing does not mention a candidate for municipal office then the funds spent on the mailing are not subject to the contribution limit. Furthermore, Section 12.06.310 applies only to elections for city council and mayor – not ballot measures. And it is difficult to understand how a "get-out-the-vote" effort could be construed as aiding or opposing a City candidate.[58] Finally, assuming that the conduct is simply a report of a vote of a city official, Section 12.06.310 should not apply. But the hypothetical is incomplete – is the city official a candidate in a current campaign? Was there any comment associated with the report of the vote?

COMPAC argues that only coordinated expenditures are subject to candidate corruption. But Section 12.06.310 regulates contributions that independent

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[56] AB, 53.

[57] AB, 53.

[58] A get-out-the-vote campaign would be considered "Federal election activity" under the Bipartisan Campaign Reform Act. (*McConnell,* 540 U.S. at 162.)

committees receive and make. Although "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive" this analysis does not apply to contributions. (*NCPAC*, 470 U.S. at 497.)

Finally, COMPAC argues that "these tailoring concerns regarding section 12.06.310 are not resolved by the Supreme Court's analysis in *McConnell*" but goes on to cite *McConnell* and state that "the Supreme Court noted that Congress may indirectly regulate noncoordinated expenditures by certain independent committees in order to effectuate a valid anti-corruption remedy."[59] The City agrees; *McConnell* found that in light of the "realities of political fundraising", independent committees are subject to corruption and the appearance of corruption and consequently may be regulated accordingly. (*McConnell,* 540 U.S. at 152.)

c. The $250 Limit In Section 12.06.310 Is Not Restrictive.

"A contribution limit level will be accepted unless it is 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.'" (*Jacobus*, 338 F.3d at 1117.) COMPAC misleadingly states that "the District Court . . .recognized that the ordinance's $250 limit . . . is restrictively low. . ."[60] In fact, the District Court

[59] AB, 54.

[60] AB, 56.

acknowledged that while "the $250 contribution limit per election is low" "it is not dispositive."[61] Moreover, COMPAC introduced no evidence to support its assertion about the $250 limit.

3. The District Court Erred in Concluding That Section 12.06.310 Is Unconstitutionally Vague Under the Fourteenth Amendment.

COMPAC argues that "the phrase, 'in aid of and/or opposition to' a municipal candidate is so ambiguous that it escapes precise definition."[62] However, the United States Supreme Court in *McConnell* found the same or essentially the same language to be constitutional. (*McConnell,* 540 U.S. at 170.)

COMPAC argues that "the analogy the City attempts to draw between [Section 12.06.310 and "federal election activity"] is unjustified.[63] Federal election activity includes "any 'public communication' that 'refers to a clearly identified candidate for Federal office' and 'promotes,' 'supports,' 'attacks,' or 'opposes' a candidate for that office." (*Id.* at 162.) Although Section 12.06.310 is not limited to contributions spent for "any public communication", it does require that the funds be used in aid of or in opposition to the nomination or election of a

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[61] ER0396.

[62] AB, 59.

[63] AB, 63.

candidate for city council or mayor. As in *McConnell,* the categories of communications regulated by Section 12.06.310 are clearly defined.[64]

Furthermore, the *Buckley* Court reviewed a provision of the Act that limited contributions "made for the purpose of influencing [certain elections] for any federal office." (*Buckley*, 424 U.S. at 23.) Although the Act did not define the phrase "for the purpose of influencing", the court found that it was not unconstitutionally vague for contribution limit purposes. (*Id.* at 24.)

COMPAC relies on the opinion in *Chamber of Commerce v. Ohio Elections Commission,* 135 F. Supp. 2d 857 (S.D. Ohio 2001), to support its contention that the phrase "in aid of or opposition to" is vague. But the *Chamber of Commerce* Court did not so decide. Instead, the Court decided to abstain and stay the action pending further action by the Elections Commission. (*Chamber of Commerce,* 135 F. Supp. 2d at 868 and 870.)

Finally, COMPAC argues that Section 12.0.310 is vague because "it grants the City the opportunity for arbitrary and discriminatory enforcement" and that it is uncertain whether its expenditures will trigger the $250 limit.[65] But COMPAC's

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[64] COMPAC cites to *Center for Individual Freedom v. Carmouche,* 449 F.3d 655 (5th Cir. 2006). However, the phrase "otherwise influencing the nomination or election of a person to public office" is much broader than Section 12.06.310. The City's ordinance limits funds used in aid of or in opposition to the nomination or election of a candidate for city council or mayor.

[65] AB, 61.

argument is contrary to *McConnell* and *Buckley* and hinges on an unnatural reading of the terms "aid" and "opposition" and, consequently, is without merit. (*McConnell*, 540 U.S. at 160.)

III. CONCLUSION

The City respectfully requests that this Court reverse the District Court's Order and remand the case with instructions to grant the motion for judgment on the pleadings and dismiss the Complaint. Alternatively, if this Court declines to reverse and remand this case on the ground of *Younger* abstention, the City respectfully requests that this Court reverse the District Court's Order granting COMPAC's motion for summary judgment and denying the City's motion for summary judgment because Section 12.06.310 is not unconstitutional.

DATED: March 28, 2007

RICHARD DOYLE, City Attorney

By:
LISA HERRICK
Sr. Deputy City Attorney

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

(Federal Rule of Appellate Procedure 32(a)(7)(C)(i))

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I certify that this Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 6998 words.

DATED: March 28, 2007

RICHARD DOYLE, City Attorney

By:

LISA HERRICK
Sr. Deputy City Attorney

Attorneys for Appellants

CASE NO 06-17001

ADDENDUM TO REPLY BRIEF OF APPELLANTS

INDEX

San Jose Municipal Code § 12.06.540

D. The city council shall review the amount of the expenditure limits set forth in subsection A. above, nine months in advance of each election, to determine if any change is warranted.

(Ords. 25445, 25942, 26440.)

12.06.540 Campaign contribution limits.

Candidates who participate in the voluntary campaign expenditure limits program shall be entitled to collect contributions in the following amounts:

A. The total contributions per election made by any person to any council candidate participating in the voluntary campaign expenditure limits program or to the controlled committee of that candidate shall not exceed a total of more than two hundred fifty dollars in the aggregate.

B. The total contributions per election made by any person to any mayoral candidate participating in the voluntary campaign expenditure limits program or to the controlled committee of that candidate shall not exceed a total of more than five hundred dollars in the aggregate.

(Ords. 25445, 26440.)

12.06.550 Notification to voters.

The ballot, ballot pamphlet and sample ballot shall prominently designate those candidates who participate in the program.

(Ords. 25445, 26440.)

12.06.560 Expenditure limits tripled.

Notwithstanding Section 12.06.530.

A. If a candidate who is not participating in the voluntary campaign expenditure limits program receives contributions, has cash on hand, or makes qualified expenditures equal to seventy-five percent or more of the expenditure limits set forth in the expenditure limits resolution adopted pursuant to this part, the expenditure limit shall be tripled.

B. If an independent expenditure committee(s) spend in the aggregate, in support or opposition to a candidate, more than fifty percent of the expenditure limits set forth in the expenditure limits resolution adopted pursuant to this part, the expenditure limit shall be tripled.

(Ords. 25445, 26440.)

Part 6

SPECIAL MUNICIPAL ELECTIONS

Sections:

12.06.600 Special municipal elections.
12.06.610 Campaign contribution collection period - Campaign disclosure.
12.06.620 Voluntary campaign expenditure limits program - Special election.

12.06.600 Special municipal elections.

A. Except as otherwise provided by this Part 6, the provisions of Chapter 12.06 shall apply to special municipal elections. Part 6 of Chapter 12.06 shall only apply to special municipal elections which do not exceed a six-month period from the call of the special municipal election to the date of a special municipal run-off election if any.

B. The prohibition on transfers of any city campaign funds to any other person's city campaign or officeholder fund in Section 12.06.410 shall apply to any special municipal election.

C. The prohibition on transfers of any city campaign funds to any other candidate's noncity campaign fund in Section 12.06.410 shall apply to any special municipal election.

D. The disclosure requirements for transfers of city campaign funds to a candidate's own city and noncity campaign in Section 12.06.420 shall apply to any special municipal election.

(Ords. 26239, 26440.)

12.06.610 Campaign contribution collection period - Campaign disclosure.

A. The campaign contribution collection periods for the special municipal election and a special municipal run-off election shall:
   1. Begin on the date that the special municipal election is set by the city council and begin the day after the special municipal election for any run-off election.
   2. End at 5:00 p.m. on the seventh day prior to the election and the seventh day prior to any run-off election.

B. Each candidate and each committee shall file, as a public record with the city clerk, cumulative itemized campaign statements completed on

PROOF OF SERVICE

CASE NAME: San Jose Silicon Valley Chamber of Commerce Political Action Committee, et al. v. City, et al.

COURT OF APPEALS CASE NO.: 06-17001
(United States District Court No.: C-06-04252 JW)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905.

On March 28, 2007, I caused to be served the within:

REPLY BRIEF OF APPELLANTS

by PERSONAL DELIVERY, with a copy of this declaration, by causing to be personally delivered a true copy thereof to the person at the address set forth below.

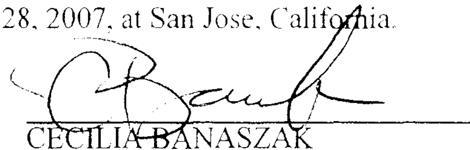
Addressed as follows:

Mr. James R. Sutton
The Sutton Law Firm
150 Post Street, Suite 405
San Francisco, CA 94108
Tel: (415) 732-7700
Fax: (415) 732-7701

Attorney for Appellee,
San Jose Silicon Valley Chamber of
Commerce Political Action Committee
and the COMPAC Issues Fund,
Sponsored by the San Jose Silicon
valley Chamber of Commerce.

Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 28, 2007, at San Jose, California.



CECILIA BANASZAK