No. 06-17001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

CITY OF SAN JOSE, et al.,

Defendants-Appellants,

On Appeal from the United States District Court
For the Northern District of California
Case No. CV-06-04252-JW

The Honorable James Ware

BRIEF OF *AMICUS CURIAE* SAN JOSE POLICE OFFICERS' ASSOCIATION SUPPORTING APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedural 26.1, amicus curiae San Jose Police Officers' Association ("SJPOA") certifies that it is a non-profit organization organized under section 501(c)(3) of the Internal Revenue Code. SJPOA does not have any parent corporation and no publicly held corporation owns any stock in the SJPOA.

Dated: March 23, 2007

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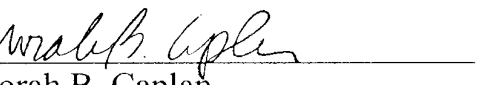
By: 
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INTERESTS OF *AMICUS CURIAE*

This appeal raises significant constitutional questions concerning the extent to which the government may restrict the speech and associational activities of persons who wish to make expenditures that are wholly independent of any candidate for public office.

Amicus Curiae San Jose Police Officers Association ("SJPOA") is a nonprofit association comprised of approximately 1,395 regularly salaried police officers, police recruits, airport police officers and other similar positions in the San Jose Police Department. It represents its members in matters concerning grievances, labor disputes, wages, work conditions, and all other terms and conditions of employment.

SJPOA is also active in communicating its members' views on San Jose municipal elections. Toward that end, SJPOA has formed a political action committee ("PAC") to support and further the goals and policies of the association. These goals include supporting candidates endorsed by SJPOA, promoting improvements in peace officer protection and safety, educating the public, and supporting policies that will improve the benefits, compensation and working conditions of its membership. SJPOA finances its political activities with a portion of its members' dues – currently less than $7.00 per month per member. SJPOA regularly interacts with other peace officer organizations and

other non-peace officer labor organizations to further various shared goals. Although the amount spent by individual members on political activity is relatively small, SJPOA and other organizations wish to associate with one another in the future to engage in joint political activities and enhance their collective voice as permitted by law.

SJPOA seeks leave to file this *amicus* brief in support of the San Jose Chamber of Commerce – PAC ("COMPAC"), plaintiff below. SJPOA respectfully submits that this brief will assist the court in understanding how the challenged ordinance, San Jose Municipal Code ("SJMC") section 12.06.310, operates as a content-based expenditure limit on independent committees. Particularly, SJPOA wishes to draw this Court's attention to how the ordinance operates to prohibit independent persons and committees in San Jose from pooling resources to engage in joint communications reflecting their shared political views. SJPOA respectfully submits that the district court's decision to review and ultimately enjoin the ordinance was consistent with both United States Supreme Court and Ninth Circuit precedent and should be affirmed on appeal.

INTRODUCTION

As all parties agree, both contribution limits and expenditure limits "operate in the area of most fundamental First Amendment activities." (*Buckley v. Valeo*, 424 U.S. 1, 14, 23 (1976) (*Buckley*).) Such restrictions burden both expressive and associational interests, since dissemination and advocacy of political viewpoints are "undeniably enhanced by group association." (*Id.* at 15 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).) The protection afforded to political speech is therefore critical to the vitality of our democratic system because it ensures robust discussion of public issues and debate on the qualifications of candidates. (*McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957).) Accordingly, restrictions on "the freedom to associate with others for the common advancement of political belief and ideas" have been subject to the "closest" judicial scrutiny. (*Buckley,* 424 U.S. at 25, citing *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973).)

Commencing with *Buckley*, the Supreme Court has held that the First Amendment tolerates limitations on campaign contributions to candidates that are "closely drawn" to serve "a sufficiently important" state interest. (*Buckley*, 424 U.S. at 25.) *Buckley* characterized contribution limits as having only an incidental effect on core associative and expressive rights; in particular, the

Court concluded that the act of making a political contribution primarily involves indirect, or symbolic, speech. (*Id.* at 20; *see also Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003) (contribution limits do not significantly burden protected speech because they only restrict indirect speech).) This is what has become known as the "speech by proxy" aspect of campaign contributions. (*Buckley*, 424 U.S. at 21.)

Against this "incidental" effect on speech and association, *Buckley* weighed the potential for undue influence that large financial contributions might have on candidates and concluded that the need to prevent corruption – or even the appearance of corruption – could justify reasonable limits on contributions to candidates. (*Buckley*, 424 U.S. at 25.) The symbolic nature of political contributions and the potential for undue influence by large contributors has led the Court to consistently apply "rigorous," but not "strict," scrutiny. (*See Randall v. Sorrell*, --- U.S. ---, 126 S.Ct. 2479 (2006); *McConnell v. Federal Elections Comm'n*, 540 U.S. 93, 134 (2003) (*McConnell*); *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm*, 533 U.S. 431, 441 (2001) (*Colorado II*); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000).)

By contrast, the Court has consistently held that expenditure limitations are subject to strict scrutiny, concluding that expenditure limitations burden

fully protected freedoms of political speech and association. (*Buckley*, 424 U.S. at 23.) Expenditure limits, by definition, restrict the amount of resources that a person or group can spend on *direct* political speech, and therefore "necessarily" reduce both the quantity and breadth of fully protected *direct* political speech concerning issues or candidates. (*Id.* at 19.) *Buckley* specifically rejected the argument that the government could seek to limit over-all campaign spending, making clear that "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise." (*Id.* at 57.)

Buckley also specifically rejected a $1,000 limit on independent expenditures "relative to a clearly identified candidate." (*Id.* at 40.) After first concluding that the phrase was unconstitutionally vague (a defect shared by the San Jose ordinance), the Court concluded that the provision violated the First Amendment even if narrowed because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." (*Id.* at 46.) The Court also rejected the arguments that expenditures should be limited to avoid circumvention of the contribution limits or to try to "equalize the relative ability of individuals and groups to influence the outcomes of elections." (*Id.* at 48.) The conclusion that independent expenditures do not

have the same potential for corruption was acknowledged as recently as the *McConnell* case, in which the Court stated that

> . . . expenditures made totally independently of the candidate and his campaign [ ] impose greater restraints on the freedom of speech and association than limits on contributions and coordinated expenditures while failing to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.

(*McConnell*, 540 U.S. at 221 (internal citations and punctuation omitted).)

In this case, section 12.06.310 limits contributions to independent committees, including committees conducting only independent expenditures. The City and *amici* therefore argue that it is simply a "contribution" limit. This superficial conclusion ignores the fact that the different treatment of contributions and expenditures has been grounded in the Court's consideration of the relative *effect* of such restrictions on expressive and associative rights; the greater the effect on direct political speech, the more exacting the level of constitutional scrutiny. For reasons, discussed below, section 12.06.310 does not merely limit "symbolic" speech; rather, it acts as a limit – in some cases, a total prohibition – on the ability of organizations to pool resources for their own direct and independent speech.

The City's position also ignores the fact that the San Jose ordinance shares many of the same attributes that led the Court in *Buckley* to strike down

the various expenditure limits – it cannot be justified under any corruption or circumvention rationale, it impermissibly attempts to equalize the influence of various actors in the political setting, and it is motivated by the (constitutionally infirm) desire to limit over-all campaign spending. For First Amendment purposes, the San Jose restriction is functionally indistinguishable from the limits on independent spending previously struck down by the courts.

The district court concluded that the restriction here should be evaluated in accordance with the strict scrutiny, and that the City failed to demonstrate either a compelling interest or that the language of the ordinance was adequately tailored to meet any articulated interest. That conclusion was correct. However, the absence of any legally acceptable interest and the vague language renders the provision unconstitutional even if a less rigorous standard of review is applied.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE SAN JOSE RESTRICTION ON INDEPENDENT SPENDING IS UNCONSTITUTIONALLY VAGUE

A. The San Jose Ordinance Does Not Merely Limit "Contributions"

The portion of the San Jose Municipal Code enjoined by the District

Court, section 12.06.310,[1] is part of a broader campaign finance regime, which divides political actors in San Jose elections into two categories: candidates (and their "controlled" committees) and "independent committees" – those committees whose activities are not controlled by any particular candidate or their campaign. (§ 12.06.120.) Because "independent committees" are defined as *all* committees other than candidate-controlled committees (§ 12.06.120), this category broadly encompasses both committees that support candidates through direct contributions (or other coordinated expenditures, see § 12.06.050[2]), and those whose activities are limited to "independent expenditures," defined as expenditures that are *not* coordinated with any candidate or campaign but which "expressly advocate[] the election or defeat of a clearly identified candidate...or taken as a whole or in context, unambiguously urge[] a particular result in an election." (§ 12.06.130.) In addition, in light of the Ethics Commission's interpretation of section 12.06.310 as including communications broader than express advocacy, the term "independent committee" apparently includes any committee making

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[1] Unless otherwise noted, all references are to the San Jose Municipal Code.

[2] Section 12.06.050 defines the term "contribution" to include expenditures that are made at the behest of the candidate, often termed "coordinated" expenditures.

expenditures that "aid" or "oppose" City candidates, but which do not constitute express advocacy. (§ 12.06.310.)

Under the San Jose ordinance, candidates for city council may not accept more than $100 per election, and candidates for mayor may not accept more than $250 per election. (§ 12.06.210.) Pursuant to section 12.6.310, independent committees that "expend funds or make contributions "in aid of and/or opposition to the nomination or election of a candidate for city council or mayor" are prohibited from accepting contributions in excess of $250 per election. (§ 12.06.310 (A).) Notwithstanding this restriction, independent committees may accept contributions of more than $250 "so long as no portion of the contribution in excess of two hundred and fifty dollars is used to influence San Jose council or mayoral elections." (*Id.* at (B).) Thus, unlike other "contribution" regimes, any amount may be *received* by these committees; the funds received simply may not be *spent* on San Jose elections – either directly in the form of contributions to candidates (or expenditures coordinated with them), or indirectly in the form of the committee's independent activities that are considered to "aid" or "oppose" a candidate.

The San Jose ordinance does not explicitly limit the amount that a person may spend on an "independent expenditure." Nor could it constitutionally do so, for reasons first articulated in *Buckley* and recently acknowledged in

McConnell – such limitations fail to serve any "substantial governmental interest in stemming the reality or appearance of corruption."

It is clear, however, that one purpose of the San Jose ordinance is to limit the amount of money that may be spent on independent expenditures, and on elections generally. This can be seen from the "Intent and Purpose" set out at section 12.06.200: "It is the intent of the city council . . . in enacting this chapter to place realistic and enforceable limits *on the amounts individuals and independent committees may contribute to political campaigns* in municipal office elections . . ." Although the word "contribute" is used, since independent committees may act either through contributions or independent activities, the city council's statement strongly suggests that all independent spending is viewed as a "contribution" to the candidate, and one purpose of the ordinance is to limit independent spending *per se*.

This conclusion is reinforced by the limits imposed on the time period during which all committees – including independent committees – may accept contributions. (§§ 12.06.290 & 12.06.330.) Contributions are only allowed for approximately six months before the primary and approximately three months before a run-off election. The *collection period ends in both cases seventeen days before the election*, thus making it unlawful to make or accept contributions in the final critical weeks before the election. (§

12.06.290(B),(C).) Section 12.06.330 also appears to make it illegal for an independent committee to use any funds it has received outside the campaign collection period to support or oppose candidates.[3]

Finally, San Jose's desire to limit over-all campaign spending can be seen in the voluntary spending limits program, which allows a candidate to accept significantly larger individual contributions if he or she accepts voluntary spending caps. (§ 12.06.540.) City council candidates, for example, can accept contributions as large as $250 rather than $100. Since independent expenditures may cause the voluntary spending caps to increase (see § 12.06.560 (B)), San Jose obviously has an interest in limiting independent spending in order to maintain its voluntary spending program.

In summary, although San Jose cannot directly limit independent expenditures, its regulatory scheme attempts to do indirectly what it is not constitutionally permitted to do directly. The limits on contributions to independent committees act as an expenditure ceiling for member-based independent committees whose *sole source* of contributions are their members. More fundamentally, however, the ordinance effectively precludes SJPOA –

[3] Although not at issue in this case, it should be noted that similar temporal bans on fundraising have been struck down in a number of cases as insufficiently justified by any legitimate governmental interest. See, e.g., *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996); *see also, State v. Dodd*, 561 So.2d 263 (Fla. 1990).

whose members are not as wealthy as COMPAC's members – from pooling its resources with those of other like-minded organizations to advocate commonly held political views. Since all expenditures by independent committees that "aid or oppose" a City candidate are subject to the $250 contribution limits, SJPOA is prohibited from joining with another union to jointly pursue political communications that further their interests, even if those communications are independent of any candidate. For example, if a wealthy individual wishes to spend $5,000 for a large ad to support a candidate, he is free to do so. However, if SJPOA and another union wish to jointly form a committee in order to fund a similar communication criticizing the same official, they are prohibited from doing so even though the communication is the direct speech of both unions, and is made completely independently of any candidate and therefore has no potential to corrupt. This restriction on joint activity constitutes a significant interference with protected rights of speech and association.

B. Section 12.06.310 Is a Content-Based Restriction on Speech and Association

The district court held that section 12.06.310 not only operates to substantially burden affirmative speech by independent committees, but also imposes a restriction on speech that is based on the *content* of the communication. (Order at 8, citing *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004).) *Amicus* League of California

Cities asserts that this holding was in error because all contribution limits are effectively content-based in that they only apply to speech concerning election campaigns. (Brief of *Amicus Curiae* League of California Cities (LLC) at 26-27.) SJPOA respectfully disagrees.

In order to determine whether a regulation is impermissibly content-based, the courts have not looked at whether it establishes subject-based categories; rather, the "critical issue" is whether the asserted justification for the restriction is the "content" of the speech itself or some other concern. (*Blount Securities and Exchange Comm'n*, 61 F.3d 938, 942 (D.C. Cir. 1995.) A governmental restriction on expressive activity is content-neutral "so long as it is *justified* without reference to the content of the regulated speech." (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original emphasis).) Stated another way, the absence of a content-neutral justification indicates that regulation is content-based. (*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993), discussing *Ward,* 491 U.S. at 791.)

The district court's conclusion that section 12.06.310 is a content-based restriction flows from its finding that, while styled as a contribution limit, the ordinance operates to restrict an independent committee's ability to make expenditures for direct political speech. These expenditure restrictions are, in turn, triggered by the *content* of the speech for which an independent committee

seeks to expend funds – *e.g.*, speech that aids or opposes a City candidate. Unlimited contributions may be accepted by the committee – provided they are not used to "aid" or "oppose" candidates. The courts have held that government restrictions that apply only to direct political speech advocating the election or defeat of a particular candidate are content-based. (*Shrink Missouri Government PAC v. Maupin*, 892 F.Supp.1246, 1249 (E.D. Mo. 1995), *aff'd in relevant part by Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995).)

Limitations on contributions to candidates, on the other hand, are *not* based on the content of any protected speech; they are not based on the purpose for which funds will be used, but rather to further the content-neutral purpose of eliminating the potential for corruption or the appearance of corruption that large contributions are believed to create. In contrast to contribution limits, restrictions on expenditures have been considered content-based speech regulations. Dissenting in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), Justice Rehnquist, joined by Justices White and Stevens observed that the First Amendment "of course" prohibits governmental action "if the *effect* of [such] action approximates that of direct *content-based* suppression of speech." (*Id.* at 29, emphasis added.) The dissenting justices then noted that this was the "critical distinction" between the

disparate treatment afforded contribution and expenditure limits:

> The Court in *Buckley v. Valeo*, never suggested that the interest served by the campaign limitation provision was a "compelling" one, nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on First Amendment interests, as well as a rational basis. Nor did the Court treat the expenditure limitations differently because the governmental justification was less important. Instead, the relatively greater *effect* of these limitations on *affirmative speech* triggered heightened scrutiny [ ].

(475 U.S. at 29, n.2 (emphasis added).)

C. The Vagueness of Section 12.06.310 Compounds the Interference With Protected Speech and Association Rights

As the district court found, the ordinance purports to subject all expenditures by independent committees for communications that "aid and/or oppose" City candidates to a $250 limit but provides "neither fair or adequate warning to speakers in the political process as to what conduct is prohibited." (Order at 10.) In an area "so closely touching our most precious freedoms" – political speech and association – "precision of regulation must be [the] touchstone." (*NAACP v. Button*, 371 U.S. 415, 438 (1963).) To use the court's illustration, how is an independent committee to know, for example, whether a communication "prais[ing] a candidate's stance on a popular issue" aids or opposes that candidate? (Order at 11.)

Despite their assertions that the ordinance can easily be understood,

neither the City nor its supporting *amici* provide any meaningful answer to this question. Instead, they rely heavily on the assertion that section 12.06.310 is no more vague than language from the Bipartisan Campaign Reform Act (BCRA) approved in *McConnell*. This comparison is simply inapt.

BCRA imposed a comprehensive regulatory scheme on the national and state political parties based on extensive and detailed findings that the parties were "conduits" for large contributions to be used to benefit federal candidates, thereby circumventing the federal candidate contribution limits. (*McConnell*, 540 U.S. at 146-150.) In response, Congress crafted a broad definition of "federal election activity" *applicable only to political parties* in view of their symbiotic relationship with candidates and their unique role as "middlemen" between the candidates and would-be contributors. Specifically, section 323(b) defined certain activities that had to be funded with money subject to the contribution limits, including communications that feature a federal candidate and "promote," "attack," "support" or "oppose" that candidate. (*Id.* at 161-170.) The Supreme Court concluded that in light of the political parties' over-arching purpose of electing candidates and the established need to prevent circumvention of the candidate contribution limits, section 323(b) was not unreasonably vague. (*Id.* at 170, n. 64.)

Independent expenditures are, by definition, at the other end of the

spectrum. Persons engaging in such activity are *not* acting in coordination with the candidate, thus eliminating both the circumvention and corruption arguments that justified additional restrictions on the political parties. As the district court correctly concluded, the specific provisions of BCRA applicable to political party activity (and approved in *McConnell*) do not confer a license on government to adopt vague restrictions on political communications by non-party actors whose *independent activity* might run the gamut from sending out a monthly newsletter criticizing or praising local officials to full-blown election advertisements.

The City also offers the possibility of advisory opinions as a "cure" for any vagueness in the ordinance. However, the usefulness of an advisory opinion is likely to diminish as an election approaches. Election campaigns are fluid events – issues frequently arise during the course of a campaign that may not have been apparent at the outset. (*Anderson v. Celebrezze*, 460 U.S. 780, 790-91 (1983) (recognizing same).) Consequently, committees seeking to engage in direct speech concerning election campaigns may not be in a position to articulate the precise content of their communications until shortly before they wish to publish them. If a committee wishes to hold its communications until late in a campaign – the time when voters' attention is at their zenith – it is less likely to get an advisory opinion in time from the Commission. Thus, the

unconstitutionally vague standard that triggers the contribution limits in section 12.06.310 creates a severe risk that independent committees will be forced to voluntarily reduce the quantity of their political speech or forego their association with other organizations rather than risk violation of the ordinance.

II. EVEN IF NARROWED, SECTION 12.06.310 UNCONSTITUTIONALLY RESTRICTS THE ABILITY TO ENGAGE IN ACTIVITIES THAT ARE NOT COORDINATED WITH ANY CANDIDATE AND PRESENT NO THREAT OF CORRUPTION

As discussed above, under *Buckley*, the proper level of scrutiny depends "on the importance of the 'political activity' at issue to effective speech or political association." (*Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 161 (2003).) For this reason, limitations on independent spending have routinely been subjected to strict scrutiny since *Buckley* first recognized that expenditures made independently of candidates directly interfere with protected speech and association. (*Buckley,* 424 U.S. at 47.)

In *FEC v. National Conservative Political Action Committee*, the Supreme Court expressly 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 PAC's 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) (*NCPAC.*)

The Court also noted that while "[i]t is of course hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC expenditures . . . 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.)

In *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 614 (1996) (*Colorado I*), the Court reiterated that there was a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign."

A. Section 12.06.310 Cannot Survive Strict Scrutiny Because It Substantially Burdens Fully Protected Speech

The City and its supporting *amici*, forced to acknowledge a virtually unbroken line of cases protecting the right to engage in independent political activity, do two things: first, they pull isolated bits of language from a few cases to show that contributions into independent expenditure committees can be

limited (although no court has so held); and second, they simply ignore the Court's repeated conclusion that independent expenditures do not present problems of corruption or circumvention and assert that they do. Both strands of their argument should be rejected.

1. *California Medical Association* Strongly Suggests that Contributions to Committees Conducting only Independent Expenditures May Not Be Constitutionally Limited

The City points to *California Medical Ass'n v. Federal Elections Comm'n*, 453 U.S. 182 (1981) (*CalMed*) as support for the proposition that contributions to committees conducting only independent expenditures may be limited. But that case appears to suggest just the opposite – that restrictions on the ability to contribute to committees engaged only in direct, independent, political expression may be constitutionally impermissible.

In *CalMed*, the California Medical Association ("CMA") challenged a federal limit on contributions to multi-candidate political committees of $5,000 annually. (*Id.* at 185.) CMA had formed "CALPAC," a multi-candidate political committee, to which it made contributions for purposes of funding both direct candidate contributions and independent expenditures.

A plurality of the Court rejected CMA's assertion that CALPAC's speech was CMA's speech because, the Court found, multi-candidate political committees (by definition) accepted contributions from greater than 50 sources

and made contributions to 5 or more candidates. (*Id.*) Finding that the speech interest at issue thus involved the "symbolic" act of making a contribution rather than direct speech, the Court upheld the limit,concluding that it was necessary to prevent circumvention of the lower candidate contribution limits imposed by federal law. (*Id.*)

CalMed did not directly address the constitutionality of a contribution limit on committees that did not in turn make candidate contributions. The Court explained that it had no occasion to answer that question because, as a multi-candidate political committee, CALPAC had accepted contributions from multiple sources, could not purport to speak solely on CMA's behalf alone, and was organized to make candidate contributions which allowed for possible circumvention of the lower candidate limits. (*CalMed,* 453 U.S. at 197, n.17 (emphasis added).) Although approving the limits, Justice Blackmun added that "a different result would follow if [the cap] were applied to contributions to a political committee established for the purpose of making independent expenditures." (*Id.* at 203 (Blackmun, J., concurring in part.) The Court explicitly distinguished the limits on contributions from CMA to CALPAC from contribution limits that restrict "expenditures made jointly by groups of individuals in order to express common political views." (*Id.*)

Indeed, the contribution limits imposed by section 12.06.310 on joint

speech by committees that wish to engage only in independent expenditures appears to be precisely what the plurality was referring to in *CalMed*. Unlike the multi-candidate committee in *CalMed*, SJPOA wishes to join with others to engage in *direct, independent* speech. As the plurality in *CalMed* strongly appears to suggest, such restrictions are constitutionally problematic because they touch upon direct political speech.

2. *McConnell* Did Not Change The Law Regarding Independent Spending

SJPOA strongly disagrees with the suggestion by the City and its supporting *amici* that the Supreme Court's decision in *McConnell* somehow changed the law to allow contribution limits to committees engaged only in independent activity. As stated above, *McConnell* confronted the question of whether Congress could prohibit state and local *political party committees* from engaging in certain activities – defined as "federal election activity" – with funds raised outside the federal campaign finance system. (*McConnell*, 540 U.S. at 134, 139 & 161.) The Court held that such a restriction was justified by Congress' interest in preventing a well-documented pattern among the *political parties* of acting with both contributors and candidates to circumvent federal campaign contribution limits. (*Id.* at 164-65.) While some of the activities may well have been "independent," the Court focused not on the precise activities but on the larger role played by the parties as "conduits" between the candidates

and contributors. Underlying the Court's rationale was the assumption that the overlapping identity of interests between political parties and their candidates made broad prophylactic restrictions necessary. (*Id.* at 170, n. 64.)

The comparison thus fails when applied to independent non-political-party actors. As previously discussed, non-coordinated expenditures by independent committees pose no similar threat because the lack of a similar nexus between the independent committee and the candidate reduces the potential value of the committees' expenditure from the candidate's standpoint. (*See, e.g., Colorado Republican Federal Campagin Comm. v. Federal Elections Comm'n,* 518 U.S. 604, 618 (1996).) Thus, *McConnell* in no way changes the basic premise that independent spending is constitutionally protected.

3. In *Lincoln Club*, this Court Recognized that Limitations On Independent Spending May Substantially Burden Fully Protected Speech

In *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002), this Court applied strict scrutiny – and invalidated – a municipal campaign finance restriction that, while styled as a contribution limit, operated to substantially burden fully protected speech and associational activities of an independent committee. Although the district court found that section 12.06.310 does not burden COMPAC as severely as the ordinance did in *Lincoln Club*, it nonetheless acts as a "dual contribution and expenditure limit," and requires

strict scrutiny. (Order at 7.) While perhaps understating the harm to COMPAC, the district court's reasoning was essentially correct.

Lincoln Club involved a challenge to an Irvine municipal ordinance that imposed a $320 limit on the amount that a person could contribute to a candidate or committee over a two-year cycle. (*Lincoln Club*, 292 F.3d at 936.) As here, the City argued that the ordinance was merely a contribution limit; the Lincoln Club contended that it effectively precluded important associational activity by preventing organizations whose political activity was financed purely by membership dues in excess of $320 from engaging in direct political speech, including independent expenditures. (*Id.* at 938.)

Lincoln Club affirmed that the degree of constitutional scrutiny to be applied depends both on the strength of the speech and associational freedoms at issue, and the magnitude of the burden imposed thereon by the restriction. (*Lincoln Club*, 292 F.3d at 938 (citing NCPAC, 470 U.S. 480, 496 (1985) & *Buckley,* 424 U.S. at 44-45.)) Where an ordinance "places a severe burden on fully protected speech and associational freedoms, we apply strict scrutiny." (292 F.3d at 938.) It then found that the Irvine ordinance effectively prevented the Lincoln Club from engaging in its own direct, independent activity, it went beyond the regulation of "indirect" or "symbolic" speech and impacted the Club's ability to engage in its own direct communications about the candidates.

Under the ordinance, the *Lincoln Club* would either have to cease making political expenditures or dramatically alter its organizational structure. (*Lincoln Club*, 292 F.3d at 939.) Finding that the ordinance substantially burdened fully protected speech and associational activity, this Court thus struck down the ordinance employing the traditional strict scrutiny standard. (*Id.*)

Like the ordinance at issue in *Lincoln Club*, section 12.06.310 is a "double-edged sword" that substantially burdens the fully protected speech and associational rights of persons in San Jose who wish to associate in order to engage in independent activity. As the district court correctly observed, section 12.06.310 places "restrictions on *expenditures*" by independent committees to pay for communications that aid or support candidates, by requiring them to finance such messages with monies traceable to contributions (or portions thereof) of $250 or less. (Order at 8.)[4] The ordinance substantially burdens an independent committee's ability to engage in protected speech in several ways.

First, as pointed out in COMPAC's brief, the practical problems

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[4] SJPOA strongly disagrees with the suggestions of *amicus* Campaign Legal Center that only direct political speech concerning issues is fully protected – not direct political speech concerning candidates. (CLC at 26.) That suggestion is directly contradicted by the Court's decision to strike down expenditure limits on the amount that a person could expend in support of a particular candidate. (*Buckley*, 424 U.S. at 51.)

associated with complying with the ordinance are significant and have effectively curtailed COMPAC's political activity.

Second, section 12.06.310 severely burdens the rights of organizations who wish to associate. The ordinance makes it unlawful for two or more organizations, such as COMPAC and SJPOA, to jointly expend more than $250 *each* for purposes of funding an independent expenditure "in aid of and/or opposition to" a City candidate. This means that – even assuming they were able to determine whether their intended message triggered the ordinance's contribution limits – SJPOA and COMPAC would only be permitted to spend a *total* of $500 for a joint communication expressing their commonly held political views.

The City and its supporting *amici* suggest § 12.06.310 is less burdensome because it does not "bar" expenditures by independent committees. SJPOA respectfully disagrees. The basis for this court's holding in *Lincoln Club* was that the ordinance there substantially burdened the Club's ability to organize itself in a particular way and engage in protected speech and associational activities. (*Lincoln Club*, 292 F.3d at 939.) Nowhere did this Court suggest that the only substantial burden that is problematic is interference with a particular membership structure. The burdens imposed by section 12.06.310 effectively bar like-minded organizations from organizing themselves and

acting jointly in the political process. In this sense, the difference between the burdens imposed here and in *Lincoln Club* are not constitutionally significant. Like the Lincoln Club members, SJPOA and other organizations seek to band together to engage in direct, independent political activity, and are effectively precluded from doing so by section 12.06.310.

4. *Citizens for Clean Government* Did Not Involve an Analogous Ordinance

Nor does this Court's recent decision in *Citizens for Clean Government v. City of San Diego* 474 F.3d 647 (9th Cir. 2007) (*Citizens*) lead to a contrary result. The City points to language in that decision that "it is the act of contribution," not the context in which it operates, that determines the proper level of constitutional scrutiny. (City at 42, citing *Citizens,* 474 F.3d at 651.) The City thus suggests that since section 12.06.310 on its face regulates only contributions, the district court was bound to apply a lower standard of review. SJPOA disagrees.

The cited language refers to this Court's interpretation of the Supreme Court decision in *Federal Elections Comm'n v. Beaumont*, 539 U.S. 146, 161 (2003). *Beaumont* involved a challenge by North Carolina Right to Life (NCRL) to the federal law banning contributions to federal candidates by all

corporations – including nonprofit advocacy groups.[5] NCRL argued that the ban should be reviewed under strict scrutiny because advocacy organizations like NCRL did not raise the same "corruption" concerns as with other corporations.

Addressing this argument, the Court noted that the level of scrutiny depends on the "importance of the political activity at issue." (*Beaumont*, 539 U.S. at 161.) It followed this statement by reiterating the well-settled rule that contribution limits are reviewed under less exacting scrutiny than expenditure limits because the latter lie closer to "the core of political expression." (*Id.* at 161 (citing *Shrink Missouri,* 528 U.S. at 386-88 & *Colorado I,* 533 U.S. at 440-442, n.6-7.) Of course, there was no dispute that NCRL was challenging the federal ban on corporate *contributions*, and the Court's discussion of the standard is therefore unremarkable.

The Court's reference also makes sense in light of the precise (and limited) issue before the Court in *Citizens*. Plaintiffs in that case had mounted a straightforward challenge to the ordinance's contribution limits as applied to recall committees that was based largely on the Supreme Court's holding in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290. (*Citizens*, 474 F.3d at 651.) That case did not involve any claim that the ordinance at issue acted as a

[5] California imposes no similar ban on contributions by corporations or other tax-exempt entities.

dual contribution/expenditure limit like that advanced in *Lincoln Club* and by COMPAC here. Indeed, the decision in *Citizens* makes no mention of *Lincoln Club* whatsoever. Thus, the City and its supporting *amici* are simply incorrect when they suggest that *Citizens* resolved the same question presented here. Cases are not authority for propositions not considered therein. (*Central Virginia Community College v. Katz*, 546 U.S. 356, ---, 126 S.Ct. 990, 996 (2006).)

B. The District Court Correctly Determined that Section 12.060.310 Could Not be Upheld Under Strict Scrutiny

At bottom, the City and its supporting *amici* assert that section 12.06.310 is justified by the same anti-corruption rationale that has been relied upon to sustain candidate contribution limits. SJPOIA respectfully submits that there is no factual or legal basis for simply "transferring" the rationale for limits on candidate contributions to limits on contributions for independent expenditures. Moreover, the anti-corruption rationale has been expressly rejected as a basis for limiting independent spending.

In addition, while Appellants and *amici* (and other cities) may believe that large independent expenditures *may* result in undue influence over officials, to date the courts have rejected such a claim, allowing unlimited independent spending. Similarly, while the City may have concluded that large independent spending may unduly affect elections, that rationale has likewise been rejected

as a legitimate basis for government regulation. Finally, no circumvention argument can reasonably be made, as independent committees are bound by the same limitations as any other person if they make direct candidate contributions.

In sum, the ordinance at issue here shares all of the shortcomings of expenditure measures previously invalidated and little with pure regulation of "contributions." This Court should therefore affirm the district court's decision to apply strict constitutional scrutiny to section 12.06.310 and the Court's subsequent determination that the ordinance violates the First Amendment under that standard.

III. SECTION 12.06.310 SHOULD STILL BE ENJOINED EVEN IF THIS COURT HOLDS THAT IT IS SUBJECT TO LESS RIGOROUS SCRUTINY

Even if this Court determines that section 12.06.310 is subject to only "rigorous" review under *Buckley*, SJPOA submits that the ordinance should still be enjoined. The City has offered no evidence *specific to San Jose elections* adequately demonstrating that the spending limits here further a "sufficiently important state interest." (*Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2002).) Even if the City were able to demonstrate such an interest, it still could not show that section 12.06.310 is "closely drawn" since, due to its vagueness, it does not "focus narrowly" on any articulated interest. (*Id.*)

The City and its supporting *amici* assert that section 12.06.310 is primarily justified by the City's interest in preventing corruption or the appearance thereof, in municipal elections. (City at 47; CLC at 19-23; LCC at 29-31.) The short answer is that no case has accepted the view of "corruption" offered by the City, and the City offers nothing else.

As this Court recently recognized, governmental entities may not justify the imposition of contribution limits by arguing that unregulated contributions could affect the outcome of an election. (*Citizens for Clean Govt.*, 474 F.3d at 652.) Speculative or "illusory" threats will not sustain such limits. (*Shrink Missouri*, 528 U.S. at 392.) Rather, the City must demonstrate that the contributions limits imposed by § 12.06.310 target "some imminent threat to the democratic process" in San Jose. (*Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-58 (9th Cir. 2000).) And the Supreme Court has instructed that the quantum of evidence necessary to make this showing will "vary up or down with the novelty and plausibility of the justification raised." (*Montana Right to Life Ass'n*, 343 F.3d at 1092 (citing 528 U.S. at 391).)

This court recently invoked this standard in *Citizens for Clean Government*. There, it vacated and remanded a decision upholding municipal contribution limits on recall committees on the basis that the record lacked sufficient "factual development" to substantiate the district court's conclusion

that the ordinance was supported by a sufficiently important interest. (*Citizens*, 474 F.3d at 653.) Specifically, the district court had based its decision on the "purposes" language in the ordinance at issue, as well as "hypothetical situations not derived from any record evidence or governmental findings." (*Id.*) The record contained no evidence, however, demonstrating corruption or the potential for corruption in the precise context in which the ordinance imposed limits. (*Id.* at 654.) Nor was the City able to resort to legal authority to save its asserted interests because none existed that squarely addressed the validity of such interests.

SJPOA is not aware of any specific report or study addressing the precise justification posited by the City here; namely, that independent communications by independent committees pose an "imminent threat" of corrupting candidates, and, specifically, candidates in San Jose municipal elections. As discussed above, all cases and commentary are to the contrary. The City has failed to adduce any evidence that the established legal and factual analysis relied upon by the courts to date is wrong.

Nor is it sufficient to justify restrictions, as *amicus* League of California Cities suggests, by relying on the purposes and/or intent language employed by other municipalities that have assertedly enacted similar restrictions. (LCC at 3-6.) As this Court indicated in *Citizens*, such language is no substitute for

specific evidence of actual the actual or perceived corruptive influence of the regulated conduct. (*Citizens*, 474 F.3d at 653.)

In fact, the City's asserted justification for section 12.06.310 is actually inconsistent with the concern articulated in the League of Women Voters report. That Report suggested – albeit without reference to specific instances – that independent committees could be used to circumvent municipal candidate contribution limits, if "consultants or others who participate in the formulation of a candidate's campaign strategy" are permitted to manage or direct the operations of independent committees. If this is indeed the impetus for section 12.06.310, then the ordinance is akin to using a hammer to squash a fly. For, rather than preventing persons associated with a candidate's campaign from also managing or directing the operations of independent committees, the ordinance instead simply restricts the use of any funds which could, in the Commission's view, conceivably aid or oppose a candidate.

Since the City cannot show that San Jose Municipal Code is closely drawn to further a sufficiently important state interest, the district court's decision to enjoin the ordinance should be affirmed even if this Court determines that only "rigorous" scrutiny applies.

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CONCLUSION

For the aforementioned reasons, SJPOA respectfully submits that this court should affirm the decision of the district court to enjoin enforcement of section 12.06.310.

Dated: March 23, 2007

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 29 (d) and 9th Circuit Rule 32-1, I hereby certify that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,965 words according to the word counting feature of Microsoft Office Word 2003, the program used to produce it.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 23, 2007.

Deborah B. Caplan

CERTIFICATE OF FILING AND DECLARATION OF SERVICE

This is to certify that on March 23, 2007, I sent for filing the original and fifteen copies of the foregoing brief by overnight delivery via a third party commercial carrier to:

Office of the Clerk
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95 Seventh Street
San Francisco, CA 94103-1526

This is to further certify that on March 23, 2007, I served two copies of the foregoing brief on each of the following counsel as follows:

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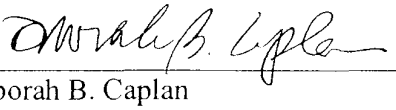

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