Case No. 06-17001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

THE CITY OF SAN JOSE; SAN JOSE ELECTIONS COMMISSION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE CENTER FOR COMPETITIVE POLITICS (CCP) IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT OF AMICUS CURIAE

The Center for Competitive Politics ("CCP") is a non-profit organization founded in 2005 by former FEC Chairman Bradley A. Smith, professor of law at Capital University Law School, and Stephen M. Hoersting, campaign finance attorney and former general counsel to the National Republican Senatorial Committee. Both Chairman Smith and Mr. Hoersting maintain an active involvement in CCP's activities. Mr. Smith is Chairman of CCP and Mr. Hoersting is Executive Director and a member of the Board of Directors. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication, is to evaluate and explain the actual effects of money in politics, and the results of a more free and competitive electoral process.

CCP regularly files amicus briefs to assist the Supreme Court of the United States, United States Courts of Appeals, and various state courts in deciding cases involving regulation of political speech. CCP has submitted amicus briefs on behalf of litigants in cases such as *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479 (2006), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006), and the currently-pending *Shays v. FEC*, 06-CV-1247 (D.D.C.). CCP is interested in participating in this case as amicus curiae because the question of whether the government can regulate contributions to a committee engaged in independent expenditures is a

matter of critical importance to those such as CCP who oppose greater government regulation of political speech.

All parties have stated that they do not oppose the filing of this brief.

SUMMARY OF THE ARGUMENT

The District Court properly held that strict scrutiny applies to the contribution limits found in SJMC § 12.06.310 (the "Ordinance"). It concluded that the Ordinance should receive strict scrutiny because it serves as a dual expenditure/contribution regulation under this Court's precedent in *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir. 2001). CCP agrees with the San Jose Silicon Valley Chamber of Commerce Political Action Committee ("COMPAC") and the Court below that the Ordinance ***is*** a dual expenditure/contribution regulation under *Lincoln Club*, and that this Court would be correct to affirm on those grounds. The City of San Jose and San Jose Elections Commission (collectively, the "City") are incorrect here.

However, an alternative ground exists for affirming that conclusion, which is perhaps more straightforward than the dual expenditure/contribution issue found in *Lincoln Club*. Because a contribution limit to an independent PAC such as COMPAC impinges directly upon the associational rights of individuals to band together and pool their resources to participate in the political arena independent of

support for any particular candidate, strict scrutiny must apply under a proper interpretation of longstanding Supreme Court precedent.

Even if the City is correct, and the Ordinance need only pass "less rigorous review," this Court should still hold that the Ordinance is invalid. The Supreme Court has held that the only financial contributions that create the likelihood that *quid pro quo* arrangements will take place or that create "the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" are sufficient to justify an infringement upon associational rights. *Buckley v. Valeo*, 424 U.S. 1, 25, 28 (1976).

Here, the City has made no empirical showing of a link between independent committees and candidate corruption. The City has offered nothing but "mere conjecture" that there is a link, which is inadequate "to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). The Ordinance cannot be upheld, even under "less rigorous review."

ARGUMENT

I. In Addition To The Arguments Raised By Appellees, The Court Below Should Be Affirmed Because Contribution Limits To PACs Making Only Independent Expenditures Significantly Burden Rights Of Free Expression And Association, And Are Therefore Subject To Strict Scrutiny.

A. The Ordinance Is Overbroad Because It Would Substantially Burden Speech From Groups Other Than COMPAC.

The Ordinance is unconstitutional because it is substantially overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). While the ordinance may have some constitutional application as to COMPAC, it is well established that under the First Amendment overbreadth doctrine that an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens organizations not before the court, "those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Litigants, therefore, are "permitted to challenge a statute *not because their own rights of free expression are violated*, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from

constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612 (emphasis added).

"Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). In this case, however, as the District Court correctly noted, "[the ordinance] sweeps broadly to regulate a significant amount of protected speech." (ER, Vol. II at RT 0396). Indeed, the increase in independent political spending in California and other states indicates that the amount of protected speech burdened by statutes like the San Jose Ordinance is even more substantial than the District Court's description suggests. *See generally*, Derek Cressman, *Sneak Preview of Testimony on Exploding Independent Expenditures before California Assembly Committee*, California Progress Report, Sept. 12, 2006, http://www.californiaprogressreport.com/2006/09/sneak_preview_o.html; John Howard, *The Rise of the IE*, Capitol Weekly, May 18, 2006, available at http://www.capitolweekly.net/news/article.html?article_id=717.

SJMC § 12.06.310(A) provides that "[n]o person shall make . . . any contribution to . . . an independent committee expending funds . . . in aid of and/or in opposition to the nomination or election of a candidate . . . [in excess of] two

hundred fifty dollars per election." By its terms, the Ordinance places a contribution limit upon organizations wholly independent of candidates or officeholders, groups who neither coordinate their speech or activities with candidates nor make contributions to candidates. These contributions, however, are entitled to the full protection of the First Amendment, regardless of how COMPAC is classified. *See infra* Parts I.B., II. Accordingly, the statute is facially overbroad and must be held unconstitutional.

B. Because The Statute Impermissibly Burdens Associational Rights, Strict Scrutiny Should Be Applied.

The distinction between governmental regulation of candidate-controlled speech and purely independent speech harkens back to *Buckley v. Valeo*. 424 U.S. 1 (1976). In *Buckley*, the Supreme Court held that both contribution and expenditure limits implicate First Amendment concerns. It subjected the expenditure limits to a higher degree of scrutiny, however, because they "impose significantly more severe restrictions on protected freedoms of political expression and association than [did] limitations on financial contributions" to candidates. *Id.* at 23. Expenditure limits "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

By contrast, contribution limits to candidates are thought to impose a less significant burden on free expression and are permissible "as long as the

Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important government interest.'" *Randall v. Sorrell*, __ U.S. __, __, 126 S.Ct. 2479, 2491 (2006) (quoting *Buckley*, 424 U.S. at 25). This "less rigorous scrutiny" has also been invoked in the context of contribution limits to political party committees, which are comprised of candidates and inherently involved with candidates. *McConnell v. FEC*, 540 U.S. 93, 136 n.39 (2003). *See also infra* Part II.

However, the Court has not extended this "less rigorous scrutiny" outside the context of contributions to candidates and groups that have direct contact with candidates, such as multicandidate PACs and party committees. Indeed, the Court has been clear that strict scrutiny applies to contribution limits outside of those contexts. In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, the Court considered whether a limitation on contributions to support or defeat a ballot measure could withstand constitutional scrutiny. 454 U.S. 290 (1981). The Court applied "exacting judicial scrutiny" to the regulation, *id.* at 294, which it has elsewhere defined to mean "strict scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (defining "exacting scrutiny" to mean that a restriction can be upheld "only if it is narrowly tailored to serve an overriding state interest.") In reaching this conclusion, the Court noted that freedom of association "is diluted if it does not include the right to pool money

through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Berkeley*, 454 U.S. at 296. (citing *Buckley,* 424 U.S., at 65-66). Like the regulation here, the regulation in *Berkeley* was triggered "only when contributions are made in concert with one or more others in the exercise of the right of association." *Id.* The Court was clear that "[t]o place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Berkeley*, 454 U.S. at 296.

The City argues that *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647 (9th Cir. 2007), forecloses the application of strict scrutiny. *See* Appellants' Replacement Opening Brief at 40, 42. *Amicus* disagrees. The reviewed ordinance in *Citizens for Clean Government* could have burdened the independent speech of wholly independent entities and should have been subject, in that application, to strict scrutiny. In that case, Citizens for Clean Government argued that a limit on contributions to recall proponents was analogous to the limitation on contributions to ballot measure committees struck down in *Berkeley*. 474 F.3d at 651. Nevertheless, a panel of this Court held that because the contributions were to a group that directly advocated the recall of an official, the case was squarely controlled by the contribution analysis of *Buckley, id.* at 654, and remanded for further proceedings under the *Buckley* standard, rather than the

standard articulated in *Berkeley*. Respectfully, the *Citizens for Clean Government* panel's misapplied controlling Supreme Court precedent in *Berkeley*, and its holding as to the standard of review should not be extended outside of the candidate recall petition context, most particularly while final resolution of that case remains pending.

Relying on statements in *Berkeley's* two concurring opinions, the *Citizens for Clean Government* panel of this Court stated erroneously that the *Berkeley* Court had "avoided any direct statement regarding the standard of review." 474 F.3d at 651. As discussed above, however, the five majority Justices in *Berkeley* made clear that the statute was subjected to "exacting" review, 454 U.S. at 293, 296-97, a phrase that the Court has used interchangeably with "strict scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (defining "exacting scrutiny" to mean that a restriction can be upheld "only if it is narrowly tailored to serve an overriding state interest."). This misreading of *Berkeley* led the panel to the erroneous conclusion that it is "the act of contribution, rather than the context in which contribution occurs, [that] determines the standard of review." *Citizens for Clean Government*, 474 F.3d at 651. But *Buckley* and *Berkeley* make clear that context is everything in determining the standard of review.

The distinction between *Buckley* and *Berkeley's* seemingly contradictory holdings is not, as the *Citizens for Clean Government* panel framed it, whether

"contributions to ballot measure campaigns convey a different type or degree of speech from contributions to candidates or parties." *Id.* at 652. That is the wrong distinction to consider. *See* John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 Cath. U. L. Rev. 13, 35 (2000) (observing that, "[w]hen dealing with independent expenditure committees, drawing the line between the ballot-measure-election and the candidate election simply does not hold analytical water."). Rather, the critical distinction is "between independent expenditures (and the contributions that make them possible), on one hand, and contributions to candidates, on the other . . . ." *Id.* This distinction makes sense because contributions to candidates and contributions to independent expenditure PACs have qualitatively different expressive value. Contributions to independent expenditure PACs *do* convey "a different type or degree of speech" than contributions to candidates or candidate-controlled groups.

As the *Buckley* Court observed, the expression conveyed by a candidate contribution "rests solely on the undifferentiated, symbolic act of contributing," *Buckley*, 424 U.S. at 21. By, contrast, an independent expenditure committee "is but the medium through which its individual members seek to make more effective the expression of *their own* views." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (emphasis added). This distinction between contributions to independent expenditure PACs and contributions to candidates (or groups associated with

candidates) is the difference between citizens banding together at the grassroots to directly fund the expression of their own views, and merely facilitating a candidate's expression of the candidates' views. *Compare California Medical Association v. FEC*, 453 U.S. 182, 196 (1981) (upholding contribution limits to multicandidate PACs and suggesting that "'speech by proxy' . . . is not the sort of political advocacy . . . entitled to full First Amendment protection"), *with FEC v. Nat'l Conservative PAC* (*NCPAC*), 470 U.S. 480, 495 (1985) ("[T]he 'proxy speech' approach is not useful in this case [because] the contributors obviously like the message they are hearing from these organizations and want to add ***their*** *voices* to that message; otherwise they would not part with their money") (emphasis added).

In this case, the San Jose ordinance limits contributions to independent committees that ***only*** engage in independent expenditures. SJMC § 12.06.310 (applying contribution limit to any "independent committees expending funds . . . in aid of and/or opposition to" a local political candidate). While candidates may ultimately benefit from these expenditures, neither candidates nor candidate-associated groups are the recipients of these funds. Instead, the San Jose Ordinance directly limits the ability of citizens to pool their resources and amplify their own voices, a right that is "entitled to full First Amendment protection."

NCPAC, 470 U.S. at 495. Thus, the Ordinance is subject to *Berkeley*'s "exacting," or "strict," scrutiny.

II. Even If Reviewed With "Less Rigorous" Scrutiny, The Statute Is Unconstitutional Because The City Has Not Shown Any Risk Of Corruption.

Even if the district court was wrong and the Ordinance is actually subject to "less rigorous review," it is still unconstitutional. Under this "less rigorous review," contribution limits are permissible only if those limits are "closely drawn," to match a "sufficiently important government interest." *Randall v. Sorrell*, ___ U.S. ___, ___, 126 S.Ct. 2479, 2491 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 25). This is not cursory review and, to date, the Supreme Court has identified one, and only one, government interest "sufficiently important" to justify contribution limits: combating corruption of officeholders or the appearance such corruption. Moreover, since *Buckley*, the Court has repeatedly shown that it will only find corruption or its appearance in situations that involve contributions to candidates or to groups intimately associated with candidates.[1] The Supreme Court has found that these are the only financial contributions that create

[1] The one, narrow exception to this statement, so-called "corporate-form corruption," is not applicable to this case. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (identifying the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" as "a different type of corruption").

the likelihood that *quid pro quo* arrangements will take place or which create "the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25, 28 (1976) ("The Act's $1,000 contribution limitation focuses precisely on the problem of large *campaign* contributions--*the narrow aspect of political association where the actuality and potential for corruption have been identified*--while leaving persons free to engage in independent political expression. . . ." (emphasis added)).

This required candidate nexus was reaffirmed five years after *Buckley* in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). In that case, the Supreme Court considered the constitutionality of a $5,000 limit on contributions to a multicandidate political action committee, an organization that, by definition, made candidate contributions. The Court upheld the limit after considering several challenges to the law, but with regard to the First Amendment question, it mustered only a four-member plurality. Justice Blackmun concurred with the result reached by the plurality and provided the fifth vote, but did so on narrower grounds which control. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Justice Blackmun accepted, as a matter of *stare decisis*, that the contribution limits in *Buckley v. Valeo* were constitutional. *Id.* at 201-02. He continued,

however, that "it does not follow that I must concur in the plurality conclusion today that political contributions are not entitled to full First Amendment protection." Applying the "rigorous standard of review," Justice Blackmun concluded that "contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions," though it was a "close[] question." *Id.* at 202. However, he cautioned that "a different result would follow if [the statute] were applied to contributions to a political committee *established for the purpose of making independent expenditures*, rather than contributions to candidates" because "contributions to a committee that makes only independent expenditures pose no such threat [of corruption]." *Id* at 203; *accord NCPAC*, 470 U.S. at 498 ("[T]he absence of prearrangement and coordination [with a candidate] . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate").

This required nexus was reaffirmed again in *McConnell v. FEC.* In that case, the Supreme Court upheld contributions to ***party*** committees because such committees are composed of candidates, and are direct funnels to candidates. 540 U.S. at 156-157 n. 51 (2003) ("Thus . . . we rely not only on the fact that they regulate contributions used to fund activities influencing federal elections, but also that they regulate contributions to, or at the behest of, entities uniquely positioned

to act as conduits for corruption."). Indeed, the Court explicitly rejected the argument that the majority's holding would allow Congress to restrict the funding of independent activity that merely benefits a candidate. *See id.* ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate.") (emphasis in original).[2]

Justice Kennedy's discussion in *McConnell* is also instructive on this point. There, he noted that, quite apart from whether a candidate benefits, a contribution limit could not "withstand constitutional challenge unless it was shown to advance the anticorruption interest." *McConnell*, 540 U.S. at 291-292. As Justice Kennedy put it: "To ignore the fact that in *Buckley* the money at issue was given to candidates, creating an obvious *quid pro quo* danger. . . is to ignore the Court's comments in *Buckley* that show *quid pro quo* was of central importance to the analysis." *Id.* at 295-96 (Kennedy, J., dissenting in part).

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[2] That the independent groups addressed were members of the institutional press is of no constitutional significance. "The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (citing *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946).

While the City of San Jose cannot rely on *Buckley* or its progeny to establish that contribution limits to pure independent expenditure groups pose a sufficiently important threat of corruption or its appearance, it may attempt to demonstrate such a threat independently. Even under "less rigorous review, however, the City would bear a heavy burden. The claim that pooling funds to engage in purely independent speech poses a risk of corruption or its appearance is extraordinary, and thus requires a commensurately extraordinary empirical showing to survive judicial review. *Shrink*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised").

The City, however, has made no empirical showing of a link between independent committees and candidate corruption. *See* Appellee's Brief at 40. At best, the City has offered nothing but the sort of "mere conjecture" that this Court has already rejected as inadequate "to carry a First Amendment burden." *Shrink*, 528 U.S. at 392. Moreover, the City is incapable of making such a showing. As one leading commenter put it, "the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. Indeed, *McConnell* clearly held that ***benefit (even benefit followed by gratitude and temptation) is not sufficient to justify a campaign***

restriction." Richard Briffault, *The 527 Problem...and the* Buckley *Problem*, 73 Geo. Wash. L. Rev. 949, 988 (2005) (emphasis added). Nor would it be sufficient to show that candidates respond to independent expenditures by changing their positions on issues, for "the fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political message . . . can hardly be called corruption." *NCPAC*, 470 U.S. at 498. Indeed, far from being corruption, "the presentation to the electorate of varying points of view" is "one of the essential features of democracy." *Id.*

Because the City of San Jose has not demonstrated, and cannot demonstrate, that any corruption results from the independent aggregation of funds for the purpose of disseminating political messages, it has failed to carry its burden under "less rigorous scrutiny" and, *a fortiori*, under the strict scrutiny that should be applied.

CONCLUSION

The Ordinance simply cannot pass strict scrutiny -- the proper standard of review in this case. But even if strict scrutiny is inapplicable, it cannot meet the "less rigorous" review this Court would then embark upon, because there is no showing of a nexus between the contributions and the type of corruption about which the Supreme Court has expressed concern. The court below should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus* brief complies with the type-volume limitation, typeface requirements and type style requirements set forth in Rules 29(d) and 32(a)(5)-(7) of the Federal Rules of Appellate Procedure. This brief uses a proportionally-spaced Times New Roman 14 point typeface and contains 3691 words, as determined by the "word count" feature of Microsoft Word software.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

This is to certify that on March 22, 2007, I sent for filing the original and fifteen copies of the foregoing motion and attached brief by overnight delivery via a third party commercial carrier to:

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This is to further certify that on March 22, 2007, I served two copies of the foregoing motion and attached brief on each of the following counsel by overnight delivery via a third party commercial carrier:

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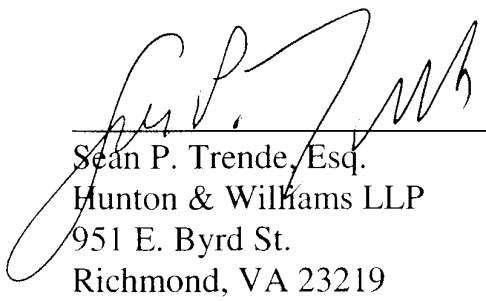

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