Nos. 10-55322, 10-55324, 10-55434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHIL THALHEIMER, *et al*.,

Plaintiffs-Appellees and
Cross-Appellants,

v.

CITY OF SAN DIEGO,

Defendant-Appellant and
Cross Appellee.

Appeal from the United States District Court
for the Southern District of California
Judge Irma E. Gonzalez
Civil Action No. 09 CV 2862IEG

BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER, CENTER FOR GOVERNMENTAL STUDIES AND COMMON CAUSE SUPPORTING DEFENDANT-APPELLANT CITY OF SAN DIEGO AND URGING REVERSAL

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STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center, Center for Governmental Studies and Common Cause are all nonpartisan, nonprofit organizations that have for many years studied campaign fundraising and spending practices in federal, state and municipal elections across the nation. Descriptions of each of the organizations are included in an appendix to this brief.

The present case concerns a challenge brought under the First Amendment of the Constitution to five provisions of the San Diego Municipal Election Campaign Control Ordinance ("ECCO"), which limit contributions to candidates and committees supporting or opposing candidates in San Diego elections. The regulation of such candidates and committees is a key issue in campaign finance law and directly impacts the interests and activities of the *amici curiae*.

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[1] All parties, through counsel, have consented to the participation of the Campaign Legal Center, Center for Governmental Studies and Common Cause as *amici curiae* and to the filing of this brief.

SUMMARY OF ARGUMENT

In 1973, the City of San Diego (the "City") enacted the ECCO, and since its enactment, has amended the ECCO on several occasions to further its purpose and intent "to preserve an orderly political forum in which individuals may express themselves effectively" and "to avoid corruption or the appearance of corruption." ECCO § 27.2901.

The ECCO provides that a "general purpose recipient committee" may not use a contribution for the purpose of supporting or opposing a candidate unless the contribution is attributable to an individual in an amount that does not exceed $500 per candidate election. *See* ECCO § 27.2936(b). A "general purpose recipient committee" is defined as "any person that receives contributions totaling $1,000 or more during a calendar year to support or oppose more than one candidate or measure." ECCO § 27.2903. The effect of these ECCO provisions is that appellee Lincoln Club, a general purpose recipient committee, may only use individual contributions—not contributions from corporations, labor unions or other non-individual entities—to support or oppose a municipal candidate by making independent expenditures, and those contributions may only be up to $500 per individual contributor.

On February 16, 2010, the district court preliminarily enjoined the City's enforcement of ECCO § 27.2936(b), having concluded that appellees were likely

to succeed on the merits of their challenge. *See* Excerpts of Record ("ER") pp. 22-27. Additionally, on February 19, 2010, the district court issued an order clarifying that, under its February 16 order, the City is preliminarily enjoined from enforcing ECCO § 27.2936(b) with respect to contributions from both individuals <u>and non-individual entities</u>. *See* ER pp. 12-13.

Amici respectfully submits that the district court's decision was an abuse of discretion and in error, and urges this Court to reverse the decision. Specifically, this brief will focus on two conclusions of the district court that *amici* believe are contrary to controlling Supreme Court precedent and undermine the structure of campaign finance jurisprudence.

First, upending the precedent established in *Buckley v. Valeo*, 424 U.S. 1 (1976), which clearly distinguishes between contribution restrictions and expenditure restrictions, the district court erroneously relied principally on the Supreme Court's strict scrutiny of an <u>expenditure</u> restriction in *Citizens United v. Fed. Election Comm'n* (*FEC*), 130 S. Ct. 876 (2010), rather than applying the lower degree of scrutiny appropriate for contribution restrictions under *Buckley* and its progeny. The Supreme Court made clear in *Buckley* that a contribution limit is far less burdensome on speech than an expenditure limit, but the district court gave no consideration whatsoever to this distinction in burdens. In doing so, the district court misconstrued Supreme Court case law, which consistently finds

that contribution limits are not subject to strict scrutiny, while expenditure limits are subject to strict scrutiny. ECCO § 27.2936(b) restricts only the amount of contributions that a committee may use for expenditures in San Diego elections. This restriction leads only to an incidental effect on expenditures, and one that is common to all statutory contribution limits. This incidental effect does not transform ECCO § 27.2936(b) into an expenditure limit, and hence ECCO § 27.2936(b) does not warrant strict scrutiny review.

Second, the district court erred in concluding that San Diego's interest in preventing actual or apparent corruption would justify only limits on "direct contributions to candidates," not limits on contributions to committees making independent expenditures. *See* ER p. 24. This holding is directly contrary to the Supreme Court decision in *McConnell v. FEC*, 540 U.S. 93 (2003). There, the Supreme Court upheld the "soft money" provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which imposed federal limits on contributions to national and state parties, even if the party committees engaged only in independent, non-coordinated activities. *McConnell*, 540 U.S. at 134-73. Further, the *McConnell* Court explicitly noted that its earlier decisions, such as *California Medical Ass'n (CalMed) v. FEC*, 453 U.S. 182 (1981), had construed the state's "anti-corruption" interest to justify limits on contributions to political committees that made only independent expenditures.

540 U.S. at 151-52, n.48. The *McConnell* decision thus dispelled any doubt regarding the constitutionality of limits on contributions to committees making independent expenditures. The Supreme Court in *Citizens United* did not analyze any contribution restriction or the anti-corruption interests that the Supreme Court has repeatedly cited to justify contribution restrictions. The *Citizens United* decision, therefore, did not disturb the *McConnell* Court's decision on this point of law—*McConnell* remains controlling precedent with respect to the constitutionality of limiting contributions used to make independent expenditures.

Finally, *amici* wish to stress to this Court the potentially far-reaching impact of the district court's order permitting non-individual entities—corporations, labor unions and other organizations—to make unlimited contributions to general purpose recipient committees. Neither the plaintiffs in *Citizens United*, nor the plaintiffs in the recently-decided D.C. Circuit *SpeechNow* case, challenged corporate contribution restrictions. *See SpeechNow.org v. FEC*, ___ F.3d ___, 2010 WL 1133857 (D.C. Cir. 2010) (en banc). Consequently, neither the *Citizens United* Court nor the *SpeechNow* court even considered, much less invalidated, restrictions on non-individual entity contributions. Reliance upon these decisions in a challenge to non-individual entity contribution limits—a challenge in which a factual record has not yet been developed—is wholly inappropriate and would unsettle campaign finance law in more than 30 states around the nation that have,

for decades, limited or prohibited political contributions by corporations and labor unions.[2]

For the above reasons, *amici* respectfully asks this Court to reverse the district court's preliminary injunction order on ECCO § 27.2936(b).

ARGUMENT

I. ECCO § 27.2936(b) Is a Contribution Limit, and Is Not Subject to Strict Scrutiny Review.

A. The District Court Erroneously Relied on the Supreme Court's Strict Scrutiny Analysis of an Expenditure Limit in *Citizens United*.

A threshold issue in this case is the appropriate degree of scrutiny to be applied to ECCO § 27.2936(b), which provides that a "general purpose recipient committee" may not use a contribution for the purpose of supporting or opposing a candidate unless the contribution is attributable to an individual in an amount that does not exceed $500 per candidate election. Although ECCO § 27.2936(b) sets no limits on the spending of a general purpose recipient committee, the district court erroneously began its analysis of this provision by reviewing and applying the Supreme Court's recent decision in *Citizens United*—a decision in which the

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[2] According to the National Conference on State Legislatures, 34 states limit or prohibit contributions from corporations/unions to non-candidate/non-party political committees (*i.e.*, "PACs"). *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, LIMITATIONS ON CONTRIBUTIONS TO POLITICAL COMMITTEES, http://www.ncsl.org/Portals/1/documents/legismgt/limits_PACs.pdf. Additionally, federal law bans contributions from corporations/unions to all political committees. *See* 2 U.S.C. 441b.

Supreme Court invalidated the federal law expenditure restriction at 2 U.S.C. § 441b, not a contribution restriction.

The *Citizens United* Court appropriately began its analysis with an examination of the precise burden on speech resulting from the challenged federal statute, because only when the precise nature of the burden is identified can the appropriate degree of scrutiny be determined. The *Citizens United* Court concluded:

> The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.

Citizens United, 130 S. Ct. at 897 (emphasis added).

Based on its conclusion that the challenged federal law was "an outright ban" on speech, the *Citizens United* Court determined that it was "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest." *Id*. at 898 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). The Court then went on to consider whether the "outright ban" on speech was justified by any compelling government interest. The government in *Citizens United* argued that the challenged "outright ban" on speech was narrowly tailored to the interest of preventing corruption or its appearance. The Court explained:

> In *Buckley,* the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U.S., at 25, 96 S. Ct. 612. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." *Id.,* at 45, 96 S. Ct. 612.

Citizens United, 130 S. Ct. at 908 (emphasis added).

The Court stated plainly that Citizens United had "not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny" and, indeed, the Court did not reconsider its longstanding application of lower scrutiny to contribution limits. *Id.* at 909.

The *Citizens United* Court applied strict scrutiny to the challenged expenditure ban and held that it was unconstitutional, explaining:

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

Id. at 911 (emphasis added).

The *Citizens United* Court decided that the challenged "outright ban on corporate political speech" was unconstitutional, but that other remedies for the problem of "elected officials succumb[ing] to improper influences from independent expenditures"—remedies not before the Court in *Citizens United*—might well be constitutionally permissible.

Although the district court did not state the level of scrutiny it applied to ECCO § 27.2936(b), its extensive discussion and application of the *Citizens United* analysis, combined with its citation of strict scrutiny analysis of expenditure limits in *Buckley*, 424 U.S. at 45, and *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*"), and its approving citation of two district court decisions in which strict scrutiny was erroneously applied to contribution limits—suggests that the district court erroneously applied strict scrutiny to ECCO § 27.2936(b). *See* ER pp. 23 n.9 and 24 (citing *Comm. on Jobs Candidate Advocacy Fund v. Herrera*, 2007 WL 2790351, at * 3 (N.D. Cal. Sept. 20, 2007) and *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 2006 WL 3832794 (N.D. Cal. Sept. 20, 2006)).

B. *Buckley* and Its Progeny Make Clear That Contribution Limits, Including ECCO § 27.2936(b), Are Not Subject to Strict Scrutiny.

Beginning with *Buckley*, the Supreme Court has subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. *See McConnell*, 540 U.S. at 134; *FEC v. Beaumont*, 539 U.S. 146, 147-48 (2003);

Randall v. Sorrell, 548 U.S. 230, 236, 247 (2006). The difference in treatment is based on the Supreme Court's conclusion that a cap on expenditures imposes a greater burden on First Amendment rights than does a limit on contributions. The Court found that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial … restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19-20. In contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id*. at 20, 21. It is essentially "speech by proxy." *CalMed*, 453 U.S. at 195. *See also Beaumont*, 539 U.S. at 147-48 (holding that contributions "lie closer to the edges than to the core of political expression"). Furthermore, in terms of practical effect, a contribution limit leaves donors free to "engage in independent political expression," to "associate actively through volunteering their services," and to "assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Buckley*, 424 U.S. at 28. Because contribution limits thus impose a lesser burden on First Amendment rights than do expenditure limits, they are constitutionally "valid" if they "satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136,

(quoting *Beaumont*, 539 U.S. at 148 (internal quotations omitted)); *see also Randall*, 548 U.S. at 247 ("contribution limitations are permissible as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important interest').

The district court's application of the *Citizens United* strict scrutiny expenditure restriction analysis to the ECCO § 27.2936(b) contribution limit was inconsistent with Supreme Court precedent and plainly in error.

ECCO § 27.2936(b) in no way caps or limits the total amount of money a general purpose recipient committee can spend for independent expenditures. General purpose recipient committees are free to accept contributions from as many individuals as are willing to contribute—and to spend every penny supporting or opposing candidates for City office. Similarly, ECCO § 27.2936(b) does not restrict contributors to general purpose recipient committees from making unlimited expenditures for their own "independent political expression." *Buckley*, 424 U.S. at 28. In seemingly subjecting ECCO § 27.2936(b) to strict scrutiny, the district court misapprehends the nature of the campaign finance laws that have been subjected to strict scrutiny in Supreme Court precedent:

- *Buckley*, 424 U.S. 1, found unconstitutional Section 608(e)(1) of the Federal Election Campaign Act (FECA), which capped independent expenditures "relative to a clearly identified candidate during a calendar year" at $1,000.

- *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), struck down a law making it a criminal offense for an independent political

committee to spend more than $1,000 to further the campaign of a presidential candidate in the public financing system.

- *Colorado I*, 518 U.S. 604, invalidated a section of FECA that capped the total independent expenditures a political party could make in general elections.

- *Wisconsin Right to Life*, 551 U.S. 449, invalidated a section of FECA that prohibited corporations and labor unions from spending treasury funds to make certain "electioneering communications."

- *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008), invalidated a section of FECA that "impermissibly burdens [a candidate's] First Amendment right to spend his own money for campaign speech."

- *Citizens United*, 130 S. Ct. 876, invalidated a section of FECA that prohibited corporations and unions from making express advocacy expenditures with treasury funds.

The case law makes clear that those only laws that function as restrictions on political expenditures are subject to strict scrutiny.

Here, ECCO § 27.2936(b) is not a restriction on political committee expenditures. To be certain, every contribution limit in municipal, state and federal campaign finance law, however, has the indirect effect of reducing the funds available to the recipient candidate, party or committee to make expenditures. This does not transform a contribution limit into an expenditure limit. If it did, then the Supreme Court would not have been able to uphold the contribution limit at issue in *Buckley*. The case law since *Buckley* further confirms this conclusion. In *McConnell*, the Supreme Court considered a challenge to several provisions of BCRA that sought to check the stream of large "soft money"

contributions into national, state and local party committees. One soft money provision—which resembles ECCO § 27.2936(b)—imposes federal contribution limits on all funds raised and spent by national party committees, regardless of whether the funds are ultimately used for candidate contributions or wholly independent expenditures. *See* 2 U.S.C. § 441i(a). The *McConnell* Court rejected plaintiffs' argument that, because BCRA's soft money provisions restricted not only a party's contributions to candidates but also its "spending of funds," the provision should be reviewed under strict scrutiny. 540 U.S. at 138. Instead, the Court found that the soft money provisions did not "in any way limit[] the total amount of money parties can spend," and only restricted the "source and individual amount" of donations. *Id*. at 139. The overall effect of such a contribution limit was "merely to require candidates and political committees to raise funds from a greater number of persons." *Id*. at 136 (citing *Buckley*, 424 U.S. at 21-22). *See also Republican Nat'l Comm. v. FEC*, ___ F.Supp.2d ___, 2010 WL 1140721 at *4 (D.D.C. March 26, 2010) (three-judge court) ("To be sure, every limit on contributions logically reduces the total amount that the recipient of the contributions otherwise could spend. But the Court has stated that this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny.").

Similarly, here ECCO § 27.2936(b) only restricts the "source and individual amount" of donations to political committees. If a San Diego general purpose recipient committee wishes to increase its independent expenditures in City elections, it can do so through the simple expedient of increasing its donor base—exactly as the *McConnell* Court advised national party committees. Thus, under the reasoning of *McConnell*, ECCO § 27.2936(b) functions purely as a contribution limit, and should be reviewed as such.

This Court should also note that the conflation of contributions and expenditures has implications that extend beyond the instant case. A decision to apply strict scrutiny to San Diego's contribution limits here would undermine the structure of campaign finance jurisprudence, which since *Buckley*, has relied upon the distinction between contribution limits and expenditures limits in determining the appropriate standard of review. It is no answer to say that the appellees' expenditures are independent, and that the application of strict scrutiny is warranted on that basis.[3] There are many municipal, state and federal contribution

[3] Nor does this case present the extraordinary facts that characterized *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002). In *Lincoln Club of Orange County*, the challenged statute prohibited any entity that accepted contributions over $320 from making independent expenditures and considered membership dues to be contributions subject to the limit. The plaintiff received membership dues that exceeded the contribution limit and, consequently, was prohibited by the Irvine law from making any independent expenditures.

In contrast, San Diego law does not count membership dues towards the contribution limit. *See* ECCO § 27.2936(f). Appellees are free under ECCO §

limits that potentially reduce the money available to parties and political committees for independent expenditures—but that have been upheld by the Supreme Court as constitutionally permissible. *See, e.g.*, *CalMed*, 453 U.S. 182 (1981) (upholding $5,000 limit on contributions to federal multicandidate political committees). Indeed, the *McConnell* decision depends upon the constitutionality of limiting contributions to political parties even if the limits affect the parties' independent spending. *Cf. Colorado I*, 518 U.S. 604 (striking down party independent expenditure limit, but not touching limits on contributions to party committees used for this purpose). Were this Court to apply strict scrutiny to ECCO § 27.2936(b) because of its indirect effect on independent expenditures, the logic of this decision would conflict with longstanding Supreme Court precedent and dictate application of strict scrutiny to many existing contribution limits, which hitherto have been subject to a less rigorous standard of review.

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

The instant case turns on whether the City can limit contributions to committees that make only independent expenditures, and whether such contribution limits are justified by a "sufficiently important state interest." Until

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27.2936 to make unlimited independent expenditures in City elections and to accept unlimited funds for purposes other than participating in City candidate elections (*e.g.*, membership dues).

the 2003 Supreme Court decision in *McConnell*, this issue was an open question in campaign finance law. In *McConnell*, however, the Supreme Court upheld BCRA's provisions limiting contributions to party committees, even those used for independent spending, and made clear that contribution limits on political committees making independent expenditures are justified by the state's anti-corruption interest.

A. The *McConnell* Decision Makes Clear that Limiting Contributions to Committees Making Independent Expenditures Is Constitutionally Permissible.

The Supreme Court has long held that contributions to political action committees can be limited without running afoul of the First Amendment. In *CalMed*, the Supreme Court upheld FECA's $5,000 limit on contributions to non-candidate/non-party political committees. *See* 543 U.S. at 185 (citing 2 U.S.C. § 441a(a)(1)(C)).[4] The contribution limit challenged in *CalMed* is a federal law corollary to ECCO § 27.2936(b). Although the *CalMed* plaintiffs argued that the contribution limit was "akin to an unconstitutional expenditure limit," *id*. at 195, the Court applied a less rigorous standard of review, and found that the contribution limit served the state's interest in preventing actual or apparent

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[4] Under FECA, candidate committees are subject to lower contribution limits, while party committees are subject to higher contribution limits. *See* 2 U.S.C. § 441a(a)(1)(A), (B) and (D).

corruption, and preventing circumvention of FECA's other contribution restrictions.

To be clear, the plaintiff in *CalMed* had made contributions to candidates and the *CalMed* Court did not directly address the constitutionality of limits on contributions to committees making only independent expenditures.[5] The *McConnell* decision, however, explains that the Court's *CalMed* decision had necessarily upheld limits on contributions <u>even as applied to committees that make only independent expenditures</u>:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals

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

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

> from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.

540 U.S. at 151-52 n. 48 (emphasis added). As the last sentence makes clear, in the view of the *McConnell* Court, *CalMed* held that Congress could limit contributions to entities that would use them for independent expenditures.

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

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

Id. at 152, n.48. In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called "pass-

through" corruption and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed such pass-through corruption concerns. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if contributions to committees making only independent expenditures were sacrosanct. *McConnell* thus clarifies that *CalMed* necessarily stands for the proposition that the state may limit contributions to political committees making independent expenditures.

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

The Supreme Court's decision in *McConnell* to uphold BCRA's soft money provisions reinforces *CalMed*'s proposition that the regulation of contributions to committees making independent expenditures is constitutionally permissible. If contributions that were eventually used as independent expenditures in federal elections had no corruptive potential, then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*. Instead, the Court found that the soft money provisions were justified by the state's interest in preventing actual and apparent corruption, defined as "undue influence on an officeholder's judgment, and the appearance of such influence." *Id*. at 150

(quoting *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 441 (2001) ("*Colorado II*")).

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

Even though BCRA limited contributions that were ultimately used for independent spending, *McConnell* held that Sections 323(a) and (b) were constitutional, and closely drawn to match the important state interests of preventing corruption and the circumvention of the campaign finance laws. The *McConnell* majority construed the state's anti-corruption interest broadly. It expressly rejected the reasoning of Justice Kennedy's dissenting opinion, which asserted that only contributions "made directly to" or used "in coordination with" a

federal office holder or candidate were potentially corrupting. 540 U.S. at 152 (emphasis added); *see also id*. at 286-341 (Kennedy, J., concurring in judgment in part, and dissenting in part). The majority instead determined that large contributions, even those made to political parties and used for independent expenditures, threatened the integrity of the political system. *See id.* at 146-56. As the Court noted, "large soft-money contributions … are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." *Id*. at 156.

This understanding of the state's anti-corruption interest was based on the *McConnell* Court's understanding of the "realities of political fundraising," where information about fundraising flowed freely between party committees and candidates. *Id*. at 152. The record in *McConnell* indicated that party committees made candidates "well aware" of contributors to the party, and donors themselves "would report their generosity to officeholders." *Id*. at 147. Indeed, candidates were active participants in the circumvention of campaign finance laws and "commonly asked donors to make soft-money donations to the national and state committees" in order to assist their campaign. *Id*. at 146.

In addition, the *McConnell* Court recognized that Sections 323(a) and (b) served Congress's interest in preventing circumvention of campaign finance laws. Regarding the constitutionality of Section 323(b), for instance, the *McConnell*

Court affirmed that Congress could limit all contributions to state party committees used "for the purpose of influencing federal elections." *Id*. at 167. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees:

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

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

In upholding BCRA's soft money provisions, then, *McConnell* necessarily found that contributions to party political committees can corrupt, regardless whether such contributions are used for coordinated or independent expenditures.

Though the Supreme Court's dicta in *Citizens United* may have narrowed the definition of corruption, the *Citizens United* Court did not disturb the *McConnell* Court's recognition that "large soft-money contributions … are likely to create actual or apparent indebtedness on the part of federal officeholders,

regardless of how those funds are ultimately used." *McConnell*, 540 U.S. at 156; *see also Citizens United*, 130 S. Ct. at 910 ("Ingratiation and access, in any event, are not corruption."). Nor did the *Citizens United* Court disturb the *McConnell* Court's recognition that limiting contributions to party committees—even with respect to funds used for independent expenditures—serves the government's interest in preventing circumvention of campaign finance laws.

This Court is bound by the *McConnell* Court's conclusion that large soft money contributions pose a threat of actual and apparent corruption, as well as circumvention of candidate contribution limits, even when such contributions are given to a political committee for the purpose of making independent expenditures. *McConnell*, 540 U.S. at 156.

C. The State's Anti-Corruption Interest Articulated in *McConnell* Also Supports ECCO § 27.2936(b).

The state interest that justified the contribution limits on party committees in *McConnell* also supports San Diego's limit on contributions to non-party committees used to make independent expenditures. The San Diego campaign finance statute, including ECCO § 27.2936(b), was enacted to avoid corruption and the appearance of corruption in San Diego politics. *See* ECCO § 27.2901. In enacting ECCO § 27.2936(b), the City recognized that contributions to political committees are potentially corruptive—regardless of whether the contributions are ultimately used for direct candidate contributions or independent expenditures.

The district court failed to recognize that in reality contributions to independent committees, like contributions to political parties, lead to actual and apparent corruption in the electoral system. Political parties and independent committees share essential features that make both entities ideal conduits for contributors who seek to gain undue influence over candidates and officeholders.

First, both parties and independent committees are founded primarily to advocate for the nomination or election of candidates. Appellee Lincoln Club of San Diego County is a registered political committee, formed for the purpose of "recruiting, endorsing, and financing business-friendly candidates and ballot measures that reflect the Club's commitment to responsible public policy, the expansion of economic opportunity, and an enhanced quality of life throughout San Diego County." THE LINCOLN CLUB OF SAN DIEGO COUNTY, ABOUT US, http://www.sdlincolnclub.org/mc/page.do?sitePageId=47726&orgId=lcsdc. Because of this focus, appellee Lincoln Club of San Diego County, like a party committee, has the "capacity to concentrate power to elect candidates." *Colorado II*, 533 U.S. at 455. By pooling individual resources and monitoring, rewarding, and punishing more effectively than can any individual the behavior of candidates and officeholders, political committees "marshal the same power and sophistication for the same electoral objectives as the political parties themselves." *Id*. This focus and "capacity to concentrate power" distinguishes both parties and

political committees from other independent political players, such as private individuals, which have fewer resources, broader commitments and less inclination to concentrate on influencing candidate elections.

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

Lastly, and closely related to the first two similarities, is the potential for circumvention posed by parties and political committees. *See, Colorado II*, 533 U.S. at 454-55. Because of their narrow focus, electoral power and publicly-recognized fundraising abilities, independent committees, like parties, are "effective conduits for donors desiring to corrupt … candidates and officerholders." *McConnell*, 540 U.S. at 156, n.51. Indeed, the *McConnell* court

acknowledged that independent tax-exempt organizations, such as political organizations registered under Section 527 of the Internal Revenue Code, represented the new front for large-scale circumvention of FECA. *Id.* at 176-80. The Court recognized that political parties themselves used independent tax-exempt organizations to circumvent the law, noting that the record demonstrated "a robust practice" of parties "rais[ing] large sums of money to launder through tax-exempt organizations engaging in federal election activities." *Id*. at 179; 2 U.S.C. 441i(d). Similarly, the Lincoln Club of San Diego County presents an attractive opportunity for donors to "launder" large contributions through an independent entity that supports their preferred candidates. This is especially true given the district court's order allowing unlimited contributions from non-individual entities—including corporations, labor unions and political parties—to general purpose recipient committees. Passing contributions through non-individual entities to general purpose recipient committees like the Lincoln Club of San Diego will serve as an easy means of circumventing both contribution limits and donor identity disclosure requirements. Finally, even if donors to independent committees are not actually seeking to "corrupt" candidates, this situation certainly gives rise to the appearance that donors are attempting to circumvent San Diego's campaign finance statutes to acquire undue political influence over candidates and officeholders.

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

This conclusion was confirmed by the Supreme Court less than one year ago. In *Caperton v. Massey*, 129 S. Ct. 2252 (2009), the Court held that a <u>$2.5 million contribution by an individual to an independent expenditure group</u> in a West Virginia judicial election, together with a $1,000 contribution to a judicial candidate and a $500,000 independent expenditure, created "a serious risk of actual bias—based on objective and reasonable perceptions"—such that the Due Process guarantee of the Constitution required the elected judge to recuse himself from hearing a case involving the contributor. *See Caperton*, 129 S. Ct. at 2257, 2263. The *Caperton* decision reflects the Supreme Court's recognition of the fact that large <u>contributions to independent expenditure committees</u> create a serious risk of bias, which few would deny is a form of corruption. Though the Court in *Citizens United* held that *Caperton* did not require the conclusion that independent expenditures were sufficiently corrupting to justify limits on independent expenditures, the *Citizens United* Court did not consider whether the facts in *Caperton* were sufficient to justify the lesser burden of contribution limits.

Citizens United, 130 S. Ct. at 910 ("*Caperton*'s holding was … not that the litigant's political speech could be banned.").

D. *Citizens United* and *SpeechNow* Do Not Dictate a Different Result.

Yet the district court rejected San Diego's articulated anti-corruption interest in the contribution limit, noting that the Fourth Circuit and the D.C. Circuit have "refused to extend the rationale of *McConnell* to independent expenditure committees, at least in the absence of some '*McConnell*-like evidence.'" ER p. 26. The district court continued: "[I]n this case, the City has produced no evidence linking contributions to independent expenditure committees with undue influence on a candidate or officeholder's judgment." *Id*.

While the district court focused on evidence of corruption, it ignored the fact that the only evidence of a burden put forward by appellees were a few conclusory statements in their Verified Complaint. *See* ER pp. 115-121; *see also* Appellant's/Cross-Appellee's Principal Brief, n. 9 (April 2, 2010) (listing each such statement). Appellees have not met their duty of establishing a burden on their speech. Specifically with regard to non-individual entity contributions, the district court acknowledged the Supreme Court's longstanding view that a "ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information." ER p. 36 (citing *Beaumont,* 539 U.S. at 162 n.8).

In *Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007), this Court reversed a district court's grant of preliminary injunction because the Court concluded that the district court should have engaged in "further factual development" before adjudicating the claims before it. So too in this case should the court reverse the district court's grant of preliminary injunction on the ground that the district court abused its discretion by enjoining enforcement of ECCO § 27.2936(b) without requiring appellees to provide a sufficient factual basis to support their motion for a preliminary injunction.

Setting aside appellees' failure to show that ECCO § 27.2936(b) imposes a serious burden on their speech, appellees rely on *Citizens United*, and on the recent opinion of the United States Court of Appeals for the D.C. Circuit in *SpeechNow*, 2010 WL 1133857, to argue that if independent expenditures cannot corrupt or create the appearance of corruption, then contributions to fund independent expenditures cannot corrupt. In *SpeechNow*, the D.C. Circuit invalidated the federal law $5,000 political committee contribution limit as applied to SpeechNow, which does not accept contributions from non-individual entities and which intends only to make independent expenditures. Appellees and the *SpeechNow* court are incorrect that limits on contributions to independent expenditure committees can not be justified on the basis of the government's interest in preventing actual and apparent corruption. As explained above, *see supra*, at 23-26, independent

expenditure committees are ideal conduits for the real and apparent corruption of candidates and officeholders. Contributing to an innocuously-named conduit committee, rather than making expenditures directly, enables donors to hide behind the committee and shield their efforts to unduly influence candidates from public scrutiny when it matters most—in the weeks leading up to an election. This potential for corruption is further exacerbated by the district court's order allowing non-individual entities to contribute unlimited sums to general purpose recipient committees. Even to the extent a committee is required to report its contributors after the election, it can simply report the name of non-individual entity donors—a practice that serves as another layer of obfuscation. The *SpeechNow* case involved only individual contributions, so the court gave no consideration to this heightened potential for corruption presented by non-individual entity contributions.

The *Citizens United* Court, in its strict scrutiny of an "outright ban" on political expenditures, did not contemplate the government interests that justify the lesser burden of a contribution limit. On the contrary, as explained above, *see supra*, 7-8, the *Citizens United* Court made clear that, though "[a]n outright ban on corporate political speech … is not a permissible remedy" to the problem of corruption, less burdensome remedies might well be supported by sufficient government interests. *Citizens United*, 130 S. Ct. at 911. The *McConnell* Court's

holding that contributions can constitutionally be limited, even when used for independent expenditures, remains controlling precedent for this Court.

For all of these reasons, the City would likely prevail at a trial on the merits in showing that ECCO § 27.2936(b) closely drawn to the City's its anti-corruption interests.

CONCLUSION

For the reasons set forth above, the district court's preliminary injunction order on ECCO § 27.2936(b) should be **REVERSED**.

RESPECTFULLY SUBMITTED this 9th day of April, 2010.

THE CAMPAIGN LEGAL CENTER

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(5), (7)(B), the attached Brief *Amici Curiae* is proportionally spaced, has a typeface of 14 points and contains 6,976 words.

DATED this 9th day of April, 2010.

Respectfully submitted,

/s/ Paul S. Ryan
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APPENDIX

Amicus curiae Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating public policy proposals and participating in state and federal court litigation throughout the nation. The CLC has provided legal counsel to parties and *amici* in campaign finance cases at both the federal and state court level, including representing intervenors Senators John McCain and Russ Feingold in *McConnell v. Federal Election Commission (FEC)*, 540 U.S. 93 (2003). More recently, the CLC represented Senators John McCain and Russ Feingold and former Representatives Christopher Shays and Martin Meehan as *amici curiae* in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and participated as *amicus curiae* in *SpeechNow.org v. Fed. Election Comm'n*, ___ F.3d ___, 2010 WL 1133857 (D.C. Cir. 2010)(en banc).

Amicus curiae Center for Governmental Studies is a nonpartisan, nonprofit organization which uses research, advocacy, technology, and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication between voters and candidates for office, and help implement effective public policy reforms.

Amicus curiae Common Cause is a nonprofit, nonpartisan organization with approximately 300,000 members and supporters nationwide. Common Cause has long supported efforts to reform campaign finance laws at the local level in order to reduce the potential for actual and apparent *quid pro quo* corruption. Consistent with this approach, Common Cause has worked to defend the contribution limits in the ECCO. In 2007, Common Cause testified before the San Diego Ethics Commission regarding pending changes to the law and has a direct interest in this litigation.

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amici Curiae* for the Campaign Legal Center, Center for Governmental Studies and Common Cause with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 9, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that two of the participants in the case are not registered CM/ECF users. I have mailed the foregoing Brief *Amici Curiae* for the Campaign Legal Center, Center for Governmental Studies and Common Cause by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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