David Blair-Loy (SBN 229235)
**ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES**
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: 619-232-2121
Facsimile: 619-232-0036
dblairloy@aclusandiego.org

Attorney for *amicus curiae*
American Civil Liberties Union of San Diego & Imperial Counties

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PHIL THALHEIMER, et al,

Plaintiffs,

v.

CITY OF SAN DIEGO,

Defendant.

Case No. 09-CV-2862 IEG (WMc)

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS**

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

## INTRODUCTION

This is a First Amendment case. Any regulation of electoral campaigns entrenches on core First Amendment rights and must be carefully evaluated. The worthy goals of encouraging political debate and making government accountable to the people can be accomplished without violating the First Amendment. The Constitution trusts the people to evaluate the claims of candidates and their supporters. If the government is concerned with the nature and quality of political debate, the proper solution is to encourage more speech, not less.

Plaintiffs challenge various provisions of San Diego's Election Campaign Control Ordinance (ECCO). Without suggesting the other provisions are valid, this brief addresses only three issues: (1) the ban on candidates using their own resources to campaign for office more than 12 months before the primary election; (2) the prohibition on seeking or accepting contributions more than 12 months before the primary election; and (3) the restriction on independent expenditures for or against a candidate's election. Whatever their motivation, none of these restrictions survive First Amendment scrutiny.

## I. THE CITY MAY NOT EVADE THE FIRST AMENDMENT AND CENSOR POLITICAL SPEECH BY CLASSIFYING A CANDIDATE'S PERSONAL EXPENDITURES AS CONTRIBUTIONS.

As plaintiffs correctly note, it is patently unconstitutional for the City to prohibit candidates or potential candidates from spending their own time and money to campaign for office at any time. Only a few additional comments are necessary on this point. The Ethics Commission's construction of ECCO represents the "city's authoritative interpretation of its guidelines and ordinances," which is subject to First Amendment challenge.[1] *Santa Monica Food*

[1] Mr. Thalheimer has standing. Regardless of which council seat is at issue, he would engage in political speech right now, but for the City's prohibition of such speech. Complaint ¶¶ 62-64. The chilling effect on his speech creates standing. *See Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 393 (1988); *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996). ECCO covers anyone who makes an expenditure "with the intent to bring about his or her nomination for or election to any City office." San Diego Municipal Code (SDMC) § 27.2903. The Commission applies ECCO "to those who have announced their candidacy as well as to those who have yet to make that announcement." http://www.sandiego.gov/ethics/pdf/preelection_090410a.pdf, Fact Sheet, Campaigning for Elective Office before the One-Year Pre-Election Fundraising Time Period, at p. 1 (Pre-Election Fact Sheet) (visited Jan. 14, 2009). Mr. Thalheimer is thus subject to

*Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir. 2006). The Commission wrongly contends that a candidate's expenditure of personal resources may be "considered a 'contribution' to his or her own campaign." Fact Sheet at p. 1. The City cannot evade the First Amendment by classifying personal expenditures as contributions.[2] *See Anderson v. Spear*, 356 F.3d 651, 666-67 (6th Cir. 2004) ; *cf. Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring in the judgment) ("we cannot allow the Government's suggested labels to control our First Amendment analysis").

Finally, the Commission puts itself in the regrettable position of policing political speech based on its content. The Commission asserts that candidates may not "maintain a website" or "disseminate written materials that announce or advocate their candidacy, list their qualifications for office, or otherwise imply that they are qualified to hold elective office" before the 12-month window opens. See Pre-Election Fact Sheet at p. 1. To announce or advocate one's candidacy is political speech "at the core of what the First Amendment is designed to protect." *Virginia v. Black,* 538 U.S. 343, 365 (2003). The "First Amendment's hostility to content-based regulation" applies even where the regulation "does not favor either side of a political controversy." *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003). Accordingly, the government may not restrict political speech if the restriction is not "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). No legitimate much less overriding interest exists to justify censorship of a candidate's political speech, and the 12-month ban is not remotely tailored to any such interest. Therefore, "[a]s a content-based limitation on core political speech," the Ethics Commission's interpretation cannot survive "the most 'exacting scrutiny'" required by the First Amendment. *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 992 (9th Cir. 2004).

---

ECCO at this time, and the issue is ripe.

[2] ECCO itself declares that contribution limits are not "intended to limit the amount of his or her own money or property that a candidate may contribute to, or expend on behalf of, the candidate's own campaign." SDMC § 27.2935(c).

## II. A BAN ON SEEKING OR ACCEPTING CONTRIBUTIONS MORE THAN 12 MONTHS BEFORE AN ELECTION UNDERMINES THE GOAL OF REDUCING RELIANCE ON LARGE CONTRIBUTIONS AND UNFAIRLY DISADVANTAGES CHALLENGERS.

Campaigns cost money. Candidates must spend significant funds to distribute their message and compete effectively for election. What the Supreme Court said in 1976 remains true today: "virtually every means of communicating ideas in today's mass society requires the expenditure of money," and without an appropriate system of public financing, "a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy." *Buckley v. Valeo*, 424 U.S. 1, 19, 26 (1976).

Respecting the need "to limit the actuality and appearance of corruption resulting from large individual financial contributions," *id.*, the Court has approved certain limits on campaign contributions. However, those limits must be properly justified by the interest in "preventing corruption and the appearance of corruption," not simply the desire to restrict the amount of money raised and spent in campaigns. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *see also Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2773 (2008) ("[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). As the Court observed in *Buckley*, "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 424 U.S. at 57.

The Court has long recognized that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Without such resources, the freedom to run for office "is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18 (1976).

While Plaintiffs argue that the City's specific limits are too low, they do not dispute the principle that the City may impose contribution limits that are closely drawn to the interest in preventing corruption or its appearance. However, the City not only restricts the amount of contributions, San Diego Municipal Code (SDMC) § 27.2935(a), but it also prohibits any contributions more than 12 months before the primary election. SDMC § 27.2938(a). This 12-month ban violates the First Amendment.[3]

It is difficult to imagine how the City's restriction on the timing of pre-election contributions, as opposed to their amount, prevents corruption or its appearance. Indeed, the compression of fundraising into a narrow 12-month window forces candidates to raise funds as quickly as possible by focusing on large contributions and relying on persons with the access necessary to mobilize such contributions rapidly. The 12-month ban thus undermines the purpose of preventing either "*quid pro quo* improbity" or "the perception of corruption 'inherent in a regime of large individual financial contributions.'" *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000).

By contrast, expanding the fundraising period would increase the ability of candidates to diversify their funding sources by seeking a greater number of smaller contributions from a larger pool of contributors – promoting the stated goal of contribution limits to encourage candidates "to raise funds from a greater number of persons." *Buckley*, 424 U.S. at 22. Candidates would thereby reduce their reliance on large contributors and become more responsive and accountable to the community, directly furthering the interest in reducing the "threat from politicians too compliant with the wishes of large contributors," *Shrink*, 528 U.S. at 389, and promoting the City's intent "to avoid the corruption or the appearance of corruption brought about when candidates for elective City office accept large campaign contributions." SDMC § 27.2901.

[3] Mr. Nienstedt would contribute to a specific candidate right now, but for the 12-month ban, Complaint ¶ 70, and clearly has standing. The Court therefore need not consider Mr. Thalheimer's standing on that issue. In any case, Mr. Thalheimer would begin seeking campaign funds right now, but for the ban, Complaint ¶ 61, and has standing as well. The issue is ripe for both of these plaintiffs, as the City is presently chilling their speech and associational rights.

It might be argued that the 12-month ban prevents contributors from seeking to curry favor with incumbents and forestalls potential corruption arising from exploitation of incumbency. However, the desire to curry favor with incumbents and the attendant danger of corruption are equally strong before and after the 12-month trigger date. It is thus difficult to imagine how the 12-month ban is closely drawn to preventing corruption or its appearance – or indeed, how it serves that interest at all. The City's anti-corruption interest is properly served by appropriate limitations on the source and amount of campaign contributions. The amount of time before an election that contributions are made has little or nothing to do with that interest.

Ironically, the 12-month ban impairs the ability of challengers to raise campaign funds and thus "magnif[ies] the 'reputation-related or media-related advantages of incumbency and" helps to "insulat[e] legislators from effective electoral challenge.'" *Randall*, 548 U.S. at 248. As recognized in *Randall*, "competitive races are likely to be far more expensive than the average race," given "the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent." *Id.* at 255-56; *cf. Buckley*, 424 U.S. at 56-57 ("the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign"). Without sufficient time to raise the funds necessary to mount an effective campaign, challengers stand at a significant disadvantage to incumbents.[4]

It is recognized that "incumbent legislators … may not diligently … ensure the adequate financing of electoral challenges." *Randall*, 548 U.S. at 261. This Court must therefore determine whether the limits inherent in the 12-month ban "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage" and violate the First Amendment. *Id.* at 248. Regardless of whether the 12-month ban is motivated by a sincere

[4] Though disadvantages to challengers may not provide a freestanding basis to attack generally applicable contribution restrictions, *Buckley*, 424 U.S. at 31, they are relevant to whether the restrictions are closely drawn to the interest in preventing corruption or its appearance. *See Randall*, 548 U.S. 253-56. The same is true for relatively unknown candidates competing with well-known candidates for an open seat.

desire to promote public good or a cynical desire to protect incumbents, it is not closely drawn to any interest recognized by the Supreme Court as sufficient to justify curtailing the First Amendment rights of candidates and contributors. The Court should therefore enjoin the ban and allow candidates to begin raising necessary funds now for the 2012 election.[5]

The results of similar cases support an injunction against the 12-month ban. In a well-reasoned opinion, a federal district court struck down a ban on soliciting or accepting contributions to judicial election campaigns more than 12 months before the election. *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995). The court held that the prohibition unconstitutionally infringed "rights of political expression" and "rights of political association," even under "the less stringent level of scrutiny applied to ceilings on contributions." *Id.* at 1524. The "blanket prohibition on solicitation for and contribution of funds to judicial campaigns earlier than one year prior to an election" did not serve "the State's interest in ensuring judges avoid even the appearance of corruption." *Id.* at 1525. As the Court noted:

> Defendants have wholly failed to establish a sufficient nexus between the interest they are trying to further – preventing the actuality or appearance of corruption – to the blanket prohibition on solicitation and collection of judicial campaign contributions for a lengthy period of time. Indeed, the fact that contributors can give the same sum of money to judicial candidates within the one year period prior to an election, which they cannot give outside of that period, demonstrates that [the time limit] does not further the State's compelling interest in preventing corruption.

*Id.* Moreover, the restrictions had "a severe impact on political dialogue because they prevent the Candidates 'from amassing the resources necessary for effective advocacy,'" and thus had "the effect of unconstitutionally limiting political expenditures by Candidates" and restricting "the ability of the Public to receive access to information about Candidates' campaigns." *Id.* at 1527-

---

[5] Plaintiffs do not challenge ECCO's prohibition of contributions "more than 180 days after the withdrawal, defeat, or election to office" of a candidate. SDMC § 27.2938(b). This is not a case where a limited contribution ban in the three or four weeks before an election is justified as part of a public funding system. *North Carolina Right To Life Committee v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008). Nor is this a case about "setting different contribution limits for election and non-election years." *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1113 (8th Cir. 2005). ECCO bans any contributions or fundraising outside the 12-month window. As a result, it is arguably subject to strict scrutiny. However, as the 12-month ban fails even the "closely drawn" standard for contribution limits, the Court need not reach that question.

28. This holding applies with even greater force outside the context of contributions to judicial election campaigns, in which the government has, if anything, a greater interest in preventing corruption or its appearance than in executive or legislative elections.

The Alaska Supreme Court struck down a prohibition on "contributions before January 1 of the election year" in statewide general elections and "earlier than nine months before the election" for municipal or special elections. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 627 (Alaska 1999) (*AkCLU*). Rejecting the state's assertions about the "perpetual campaign" and the effects of contributions on incumbents, the court found that "[i]t is not apparent how the relatively short pre-election contribution window addresses corruption or the appearance of corruption."[6] *Id.* at 628-29. As the court noted, "the invalidation of the pre-election year contribution bans affords candidates a greater time period in which to raise campaign funds" and "necessarily lessens the danger that candidates may be prevented from 'amassing the resources necessary for effective advocacy.'" *Id.* at 630 n.193. That ruling strongly supports a preliminary injunction against San Diego's time limits, which are effectively similar to the limits struck down in *AkCLU*.

Similarly, the Massachusetts Supreme Court held that it would violate the First Amendment as a matter of law to impose "an aggregate limit on the total contributions that may be received in nonelection years." *Opinion of the Justices to the House of Representatives*, 418 Mass. 1201, 1206, 637 N.E.2d 213, 216 (1994). The court found that the limits were not sufficiently tailored to guard against the "concern that contributions will be made for the purpose of affecting a candidate's stance on a particular issue or matter." *Id.* at 1209. Moreover, "[b]y limiting the amounts that may be raised in nonelection years," the cap "also has the potential effectively to restrict the amount that can be expended in those years," because [u]nless a candidate has personal wealth available," the candidate could not "spend in excess of the off-year

---

[6] The court declined to address the validity of "eighteen-month contingent pre-election time limits" that took effect as a result of the judgment, where "neither side … substantively discussed the validity of these contingent limits." *AkCLU*, 978 P.2d at 629-30. In that context, the court's passing observation that such limits "are not patently unconstitutional" does not support San Diego's 12-month ban. *Id.* at 630.

limitation to promote his or her candidacy or office, to deliver other political messages to the electorate, or to engage in other lawful political activities." *Id.* While the cap "does not explicitly set expenditure ceilings, its provisions could have the practical effect of doing so in nonelection years. An interest in alleviating corruption, or its appearance, cannot justify limits on the quantity of political expression." *Id.* at 1209-10.

Apart from the effect on candidate expenditures, the cap also had the effect of "effectively precluding contributions to candidates or elected officials" and thus "wholly prevent[ed] potential contributors from offering support to a candidate prior to the election year." *Id.* at 1210. To prohibit "a contributor from expressing support and affiliation with a candidate for a lengthy period constitutes a significant interference with the right of association" protected by the First Amendment, and the "interest in avoiding corruption, and its appearance, cannot justify what will amount, in some cases, to an outright ban on a contributor's right to express support for a candidate." *Id.* at 1210-11. Finally, any interest in "equalizing the funds available to candidates for expressive purposes to encourage more competitive elections, has been expressly disapproved by the Supreme Court." *Id.* at 1211 (citing *Buckley*, 424 U.S. at 48-49); *see also Davis*, 128 S. Ct. at 2773. Any appropriate "limits on single donor contributions" are "properly addressed by contribution limitations and disclosure requirements," *Opinion of the Justices*, 418 Mass. at 1210 n.8, not categorical pre-election time limits on contributions.[7] That holding and reasoning directly and persuasively apply to this case. Under the foregoing cases, the 12-month ban violates the First Amendment as a matter of law.

## III. THE FIRST AMENDMENT DOES NOT PERMIT THE CITY TO RESTRICT INDEPENDENT EXPENDITURES UNCOORDINATED WITH ANY CANDIDATE.

Advocacy for or against the election of a candidate is core political speech entitled to the highest level of protection under the First Amendment. The Supreme Court has explained that the anti-corruption interest justifies only the regulation of speech coordinated with candidates, not the independent speech of political committees, because the "absence of prearrangement and

[7] ECCO requires detailed campaign contribution disclosures. SDMC §§ 27.2930, 27.2931.

coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*).

Therefore, when operating independently of a candidate, "individuals, candidates, and ordinary political committees" have the First Amendment "right to make unlimited independent expenditures."[8] *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 618 (1996). This rule applies both to "lone pamphleteers or street corner orators in the Tom Paine mold" and to political committees that "spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements." *NCPAC*, 470 U.S. at 493. Neither the "form of organization" nor "method of solicitation" of political committees "diminishes their entitlement to First Amendment protection." *Id.* at 494.

As the D.C. Circuit recently explained, summing up the relevant Supreme Court cases, "non-profit advocacy groups are generally entitled to raise and spend unlimited money on elections," if such spending is not coordinated with candidates.[9] *Emily's List v. Federal Election Comm'n*, 581 F.3d 1, 10 (D.C. Cir. 2009). The regulation of independent expenditures by "non-profits does not fit within the anti-corruption rationale, which constitutes the sole basis for regulating campaign contributions and expenditures." *Id.* at 11. Under First Amendment law, "those expenditures are not considered corrupting, even though they may generate gratitude from and influence with officeholders and candidates." *Id.* The Supreme Court has recognized that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley*, 424 U.S. at 47. Therefore, a cap on independent expenditures "fails to serve any substantial governmental interest in stemming the reality or

---

[8] The Supreme Court is currently considering whether to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which allowed the government to prohibit corporations from spending general treasury funds on independent expenditures. *See Citizens United v. Federal Election Comm'n.*, 129 S. Ct. 2893 (2009) (order setting case for re-argument).

[9] The court also explained that nothing in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) changed this result. *See Emily's List*, 581 F.3d at 14 n.13.

appearance of corruption in the electoral process" and "heavily burdens core First Amendment expression." *Id.* at 47-48. By definition, independent expenditures are not coordinated with candidates. Cal. Gov't Code §§ 82031, 85500. Therefore, the City may not constitutionally restrict independent expenditures by a non-profit advocacy group.[10]

The City cannot plausibly claim that SDMC § 27.2936 does not limit independent expenditures. The ordinance specifies that a "general purpose recipient committee," which by definition "is not controlled by a candidate," may not "use a contribution" to support or oppose a candidate "unless the contribution is attributable to an individual in an amount that does not exceed $500 per candidate per election." SDMC §§ 27.2903, 27.2936(b). ECCO clearly provides that section 27.2936 "shall not be construed to limit the amount of money that an individual or any other person may give to a general purpose recipient committee … but shall be construed to limit the source and *amount* of contributions a general purpose recipient committee may *use to participate* in City candidate elections." SDMC § 27.2936(f) (emphasis added). The City has therefore expressly declared its intent to limit the amount of money an independent committee can spend to participate in candidate elections. That limit directly restricts protected speech.

The D.C. Circuit recently noted that similar provisions "are best considered spending restrictions" on independent expenditures. *Emily's List*, 581 F.3d at 15 n.14. As the court explained, "forcing an entity to spend out of a segregated fund subject to source and amount limitations, rather than its general treasury, [is] a spending restriction." *Id.* The regulations at issue in *Emily's List* "force non-profit entities to pay for a large percentage of their varied

[10] The government may regulate such a group's direct donations to candidates. "To prevent circumvention of contribution limits by individual donors, non-profit entities may be required to make their own contributions to … candidates and parties out of a hard-money account – that is, an account subject to source and amount limitations," and "to use their hard-money accounts to pay an appropriately tailored share of administrative expenses associated with their contributions." *Emily's List*, 581 F.3d at 12. Also, under present law, "[t]o the extent a non-profit receives donations from for-profit corporations or unions, those donations cannot be placed in the non-profit's hard-money account" and "the soft-money account into which such donations are deposited cannot be used to fund express-advocacy election activities that for-profit corporations and unions are themselves banned from conducting." *Id.* at 12 n.11.

political activities out of hard-money accounts subject to source and amount … limits rather than out of soft-money accounts that may receive unlimited donations. Through this mechanism, the regulations limit how much non-profits ultimately can spend on advertisements … [and] therefore '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.*

The same is true here. Section 27.2936 forces a non-profit to pay for independent expenditures out of a hard-money account subject to strict source and amount limitations, thereby reducing the amount of speech in which the non-profit may engage. It therefore violates the First Amendment rule that "non-profits may not be forced to use their hard-money accounts for expenditures such as advertisements …. Non-profits – like individual citizens – are entitled to spend and raise unlimited money for those activities." *Id.* at 16.

In a similar case, the Ninth Circuit addressed a restriction on independent expenditures by a non-profit group. As the court held, an ordinance is subject to strict scrutiny under the First Amendment if it "does not merely restrict contributions" but "also restricts expenditures by barring an independent expenditure committee from making any independent expenditures whatsoever if the source of the committee's money is membership dues that exceed the Ordinance's prescribed maximum." *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). The ordinance burdened both speech and associational rights, because the plaintiff was forced to choose between accepting the limit on the amount of its speech and radically altering its membership structure. *Id.* at 939 ("expenditure limitation is a double-edged sword, placing a substantial burden on protected speech (i.e., barring expenditures) while simultaneously threatening to burden associational freedoms (i.e., by requiring a restructuring").

Following *Lincoln Club*, two district court decisions have enjoined restrictions similar to section 27.2936. In San Francisco, the court issued a preliminary injunction against an ordinance that "restricts expenditures by barring an independent expenditure committee from making independent expenditures over the limits if the source of the committee's money is membership contributions that exceed the Ordinance's prescribed maximum." *Committee on Jobs Candidate Advocacy Fund v. Herrera*, No. C 07-03199 JSW, 2007 WL 2790351, *3 (N.D. Cal. Sept. 20,

2007). Because independent expenditures are not coordinated with candidates, the court found that the ordinance was not justified by the need to ensure "protection from corruption or the appearance of corruption of candidates for public office." *Id.* at *4.

In San Jose, the court struck down an ordinance which "limits contributions that the committee can use to support or oppose a candidate for municipal government to $250" and thus "serves as a content-based expenditure limit – independent committees may spend only $250 per donor, if they are spending to aid or oppose a candidate for San Jose municipal office." *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, No. C 06-04252 JW, 2006 WL 3832794, *5 (N.D. Cal. Sept. 20, 2006), *vacated on other grounds*, 546 F.3d 1087 (9th Cir. 2008). While "preventing corruption and the appearance of corruption is an important government interest when applied to contribution limits on candidates or committees who coordinate with candidates," the ordinance "is not narrowly tailored to serve that interest, because it also serves as an expenditure limit on independent committees." *Id.* at *6.

Here, as in the San Francisco case, "because the practical effect of the Ordinance limitations … is to bar independent expenditures over the restrictive limits, the Ordinance functions as an expenditure limit" and must be enjoined as a matter of law to the extent it restricts independent expenditures. *Committee on Jobs*, 2007 WL 2790351 at *3. But even if section 27.2936 were somehow construed only as a limit on contributions made for the purpose of independent expenditures, notwithstanding its express language, it must still be enjoined, because it is not closely drawn to the interest in preventing corruption or its appearance. Under the controlling case law, there is simply no connection between such contributions and the potential for corruption of an elected official. *See Emily's List*, 581 F.3d at 10 ("mere *donations* to non-profit groups cannot corrupt candidates and officeholders") (emphasis in original).

The independent expenditure cap cannot be justified by the desire to make a committee's effectiveness depend on the number of its members. The "interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections' cannot support a cap on expenditures for 'express advocacy of the election or defeat of candidates,' as 'the concept that government may restrict the speech of some elements of our society in order to enhance the

relative voice of others is wholly foreign to the First Amendment.'" *Davis*, 128 S. Ct. at 2773. The government thus has no "legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections." *Emily's List*, 581 F.3d at 6 (quoting *Davis*, 128 S. Ct. at 2773); *see also id.* at 10 ("if one person is constitutionally entitled to spend $1 million to run advertisements supporting a candidate (as *Buckley* held), it logically follows that 100 people are constitutionally entitled to donate $10,000 each to a non-profit group that will run advertisements supporting a candidate").

Any argument that "speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit [government] to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Davis*, 128 S. Ct. at 2773. The "people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by [independent committees], it is a danger contemplated by the Framers of the First Amendment." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

The City's disclosure and disclaimer requirements, which plaintiffs do not challenge, provide ample information for the press and public to evaluate the source and credibility of arguments advanced by independent committees for or against candidates. *See* SDMC §§ 27.2930, 27.2931, 27.2970, 27.2971, 27.2972, 27.2974 (requiring disclosure reports and "paid for by" disclaimers in communications made to support or oppose candidates). But the government may not decide which speech should be favored and disfavored in the electoral arena or "which strengths should be permitted to contribute to the outcome of an election." *Davis*, 128 S. Ct. at 2774. "The First Amendment rejects the 'highly paternalistic' approach of statutes … which restrict what the people may hear," and "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." *Bellotti*, 435 U.S. at 791 & n.31; *cf. Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 228 (1989) (any claim that government is

"enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism").

If the City is concerned that the voices of certain candidates may be drowned out, it may consider an appropriate system of public financing of campaigns. But the City may not manipulate the marketplace of ideas by restricting political speech. Ultimately, it is for the public to decide if speech is persuasive – whether that speech is disseminated by a popular grassroots organization or a committee supported by a few contributors. For these reasons, the expenditure limitation on independent committees violates the First Amendment on its face.[11]

## CONCLUSION

For the foregoing reasons, amicus respectfully suggests that the Court should issue a preliminary injunction against the challenged provisions of San Diego's Election Campaign Control Ordinance, to prevent irreparable harm to First Amendment rights.

Dated: January 15, 2010

Respectfully submitted,

By: **s/David Blair-Loy**
David Blair-Loy
Attorney for Amicus Curiae

[11] To the extent the limit is triggered by expenditures made "for the purpose of supporting or opposing a candidate," it is also invalid, because the First Amendment prohibits an intent-based test for regulating political speech, even if such regulation is otherwise justified. *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 468-69 (2007).