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

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**Phil Thalheimer**, *et al*.
Plaintiffs-Appellees/Cross-Appellants

v.

**City of San Diego**,
Defendant-Appellant/Cross-Appellee

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Appeal from the United States District Court
for the Southern District of California
The Honorable Irma E. Gonzalez, Presiding
District Court No. 09-CV-2862-IEG

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# BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES IN SUPPORT OF PLAINTIFFS-APPELLES/CROSS-APPELLANTS AND REVERSAL IN PART/AFFIRMANCE IN PART

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DAVID BLAIR-LOY
ACLU Foundation of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138-7131
(619) 232-2121

Attorney for *Amicus Curiae*

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## CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae American Civil Liberties Union of San Diego & Imperial Counties (ACLU-SDIC) states that ACLU-SDIC is a California non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

DATED: May 6, 2010

**s/ David Blair-Loy**
David Blair-Loy
Attorney for Amicus

## INTRODUCTION

Restrictions on political speech or association entrench on core First Amendment rights. The worthy goals of preventing corruption and making government accountable can be accomplished without violating the First Amendment. The Constitution trusts the people to evaluate the claims of candidates and their supporters. If the City of San Diego is concerned with the nature of election campaigns, the solution is more speech, not less speech. If the problem is lack of disclosure, the solution is more disclosure, not less speech. But as this court recently confirmed in *Long Beach Area Chamber of Commerce v. City of Long Beach*, the First Amendment prohibits the City from enforcing restrictions on speech or association that bear no relationship to any interest in preventing corruption or its appearance. As a matter of law, neither campaign contributions at valid levels nor independent expenditures at any level implicate the City's anti-corruption interest. Therefore, the City may not ban otherwise valid contributions more than 12 months before an election or curtail independent expenditures of independent committees.

## INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's

civil rights laws. ACLU-SDIC is one of the ACLU's local affiliates, with over 8000 members. Since its founding in 1920, the ACLU has defended freedom of speech. In particular, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, participating as direct counsel and amicus curiae on that issue in courts throughout the country. All parties to this appeal have consented to the submission of this brief.

## ARGUMENT

### I. A BAN ON CONTRIBUTIONS MORE THAN 12 MONTHS BEFORE AN ELECTION BEARS NO RELATIONSHIP TO ANY INTEREST IN PREVENTING CORRUPTION OR ITS APPEARANCE.

For better or worse, campaigns cost money. Without 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." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Excessive "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." *Id.* at 21.

In its Election Campaign Control Ordinance ("ECCO"), the City of San Diego not only restricts the amount of campaign contributions, ECCO § 27.2935(a), but also their timing. The City categorically prohibits any contributions more than 12 months before the primary election. ECCO §

27.2938(a). As several courts have held, this kind of restriction violates the First Amendment because it bears no relationship as a matter of law to the government's interest in preventing corruption or its appearance.[1]

A federal court struck down a similar ban on contributions to judicial candidates more than 12 months before the election. *Zeller v. The Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995). 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. The court found no connection between "preventing the actuality or appearance of corruption" and the prohibition of "campaign contributions for a lengthy period of time." *Id.* 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

[1] Post-election restrictions on contributions present different issues, *see Anderson v. Spear*, 356 F.3d 651, 670-71 (6th Cir. 2004), but Plaintiffs do not challenge ECCO's post-election restrictions. § 27.2938(b).

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 1527-28.

The same is true in this case. Under ECCO, contributors can give up to the maximum donation within one year of the primary. There is no reason to believe that giving an otherwise valid contribution before that time would create any danger of corruption. Indeed, *Zeller* applies with even greater force to this case, which concerns executive and legislative rather than judicial elections, in which the government has if anything a stronger anti-corruption interest.

Likewise, 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."[2] *Id.* at 628-29. As the court noted, "the invalidation

[2] The court declined to address "eighteen-month contingent pre-election time limits" that took effect after the judgment, where "neither side … substantively discussed the validity of these contingent limits." *AkCLU*, 978 P.2d at 629-30.

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 supports an injunction against San Diego's time limits, which resemble 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 limits were not sufficiently tailored to 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 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

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The court's passing observation that such limits "are not patently unconstitutional" does not support San Diego's 12-month window. *Id.* at 630.

interest in alleviating corruption, or its appearance, cannot justify limits on the quantity of political expression." *Id.* at 1209-10.

Apart from the impact on candidate expenditures, the cap also "effectively preclude[ed] 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. Any appropriate "limits on single donor contributions" are "properly addressed by contribution limitations and disclosure requirements," *id.* at 1210 n.8, not categorical pre-election time limits on contributions.[3]

The district court did not cite or discuss the foregoing cases. Supplemental Excerpts of Record ("SER") 14-16. Moreover, the cases on which the district court relied are distinguishable. In *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), the court upheld a conditional ban on contributions during the 28 days preceding an election, which was closely linked to the state's public funding system.

[3] ECCO requires detailed contribution disclosures beyond those already imposed by state law. *See* §§ 27.2930, 27.2931.

Significantly, the ban was lifted if a candidate not participating in the system raised more than a certain amount of money. In that event, all candidates could raise unlimited funds within the last 28 days. *Id.* at 944. The purpose of the 28-day ban was "to ensure that all contributions … are made before the final pre-election reporting date, so that, if a non-participating slate has exceeded the … threshold, the [state] can detect it in time to activate the Trigger [allowing more fundraising]. Moreover … the Trigger must be activated long enough before the election to allow participating slates a meaningful amount of time to solicit additional contributions." *Id.* at 949-50. Under these unique circumstances, the conditional 28-day ban was appropriate. *Id.*; *see also North Carolina Right To Life Committee v. Leake,* 524 F.3d 427, 440-41 (4th Cir. 2008) (upholding similar rule "because it is a key component of the state's public funding system"). But that narrow ruling does not support a categorical ban on contributions more than 12 months before an election, especially when San Diego lacks public campaign financing.

Similarly, *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) does not support the City's ban. In *Bartlett*, the court upheld a prohibition on contributions by lobbyists and their employers to members of and candidates for the state legislature while it was in session. *Id.* at 714-15. As the court noted, "lobbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the

system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful." *Id.* at 715-16. The restrictions were tailored "to lobbyists and the political committees that employ them" and operated only during the legislative session, which typically lasted only a few months. *Id.* at 716. That ruling does not support a ban on contributions by all persons for a much longer time.

The district court thus erred in stating that the City's ban "furthers the government's anticorruption interest by channeling contributions to a time period 'during which the risk of an actual quid pro quo or the appearance of one runs highest.'" SER 15 (quoting *Bartlett*, 168 F.3d at 716). *Bartlett* was premised on the unique risk of corruption inherent in donations by lobbyists to legislators during a brief legislative session. By contrast, the City's ban applies to all elected officials, executive and legislative. Also, the City Council does not have a limited session. Instead, it meets at least weekly, year round. San Diego City Charter Art. III, § 13 (council shall hold "at least one regular meeting in each week"); San Diego Municipal Code § 22.0101.5 (providing for "regular weekly meetings of the City Council"). To apply *Bartlett* to San Diego would suggest that City Council members and candidates could never receive contributions because the Council is always in session – a result at odds with the First Amendment.

It serves no plausible anti-corruption interest to compress contributions by the general public into the 12 months before the primary. Indeed, the 12-month window forces candidates to raise funds as quickly as possible by focusing on the largest possible contributions and relying on persons with the connections necessary to mobilize such contributions rapidly. By contrast, expanding the fundraising period would increase the ability of candidates to diversify their funding sources by seeking smaller contributions and raising "funds from a greater number of persons." *Buckley*, 424 U.S. at 22. Candidates would thereby become more responsive and accountable to a broader spectrum of the community.

It might be argued that the 12-month window prevents contributors from seeking to curry favor with incumbents or challengers and forestalls corruption arising from exploitation of incumbency or a challenger's need to raise funds. However, the desire to curry favor and the attendant danger of corruption are equally strong before and during the 12-month window. That is why the amount of direct campaign contributions may be capped. But the timing of those contributions bears no relationship to preventing corruption. The City's anti-corruption interest is therefore properly served by limiting the amount of contributions, not their timing.[4]

[4] This is not 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) ($500 in election year and $100 in other years). Unlike

Ironically, the 12-month window likely "magnif[ies] the 'reputation-related or media-related advantages of incumbency.'" *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). 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. Without sufficient time to raise the funds necessary to mount an effective campaign, challengers likely stand at a disadvantage.[5]

It is recognized that "incumbent legislators … may not diligently … ensure the adequate financing of electoral challenges." *Id.* at 261. The limits inherent in the 12-month window may therefore "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage" and thus violate the First Amendment. *Id.* at 248. In any case, as a matter of law, the 12-month window bears no relationship to any interest sufficient to justify curtailing the First Amendment rights of candidates and contributors.

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the statute in *Kelley*, which allowed candidates to "raise money years in advance of an election," *id.* at 1114, ECCO categorically bans any contributions outside the 12-month window.

[5] Though disadvantages to challengers may not provide a freestanding basis to attack contribution restrictions, *Buckley*, 424 U.S. at 31, they are relevant to whether the restrictions are closely drawn to the anti-corruption interest. *See Randall*, 548 U.S. 253-56.

## II. THE CITY HAS NO VALID INTEREST IN CURTAILING INDEPENDENT EXPENDITURES OR CONTRIBUTIONS TO INDEPENDENT COMMITTTEES.

On the day Plaintiffs filed their opening brief, this court decided *Long Beach Area Chamber of Commerce v. City of Long Beach*, ___ F.3d ___, No. 07-55691, 2010 WL 1729710 (9th Cir. Apr. 30, 2010), striking down an ordinance that "limits the amount of contributions an entity may receive while simultaneously prohibiting independent expenditures by any entity that receives contributions exceeding those limitations." *Id.* at *5. Whether viewed as an expenditure or contribution limitation, the ordinance was unconstitutional because it "does not withstand scrutiny under the constitutional standards applicable to either type of campaign finance regulation." *Id.* at *6. First, "Supreme Court precedent forecloses the City's argument that independent expenditures by independent expenditure committees … raise the specter of corruption or the appearance thereof." *Id.* at *8. Second, the City could not show that "contributions to the … PACs for use as independent expenditures raise the specter of corruption or the appearance thereof." *Id.* at *9. For similar reasons, ECCO § 27.2936 is unconstitutional regardless of whether it is an expenditure or contribution limit.

### A. ECCO Curtails Independent Expenditures.

The City's position proceeds from a central flaw. It contends that ECCO limits only contributions to independent committees, not expenditures of such

committees. But the ordinance says otherwise. ECCO "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," § 27.2936(f), which by definition is "not controlled by a candidate." § 27.2903. Therefore, the ordinance disclaims any limit on contributions to independent committees.

Undoubtedly, the City Council knew how to limit contributions to such committees.[6] *Compare* 2 U.S.C. § 441a(a)(1)(C) ("no person shall make contributions … to any other political committee … in any calendar year which, in the aggregate, exceed $5,000 …"). But it did not do so. As a result, ECCO does not limit contributions to independent committees.

Instead, ECCO curtails how much an independent committee may spend. The committee 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." ECCO § 27.2936(b). This provision "shall be construed to limit the source and *amount* of contributions a general purpose recipient committee may *use to participate* in City candidate elections." ECCO § 27.2936(f) (emphasis added). Plainer language is difficult to find. ECCO

[6] It likely cannot now do so constitutionally. *See SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

means what it says. Independent committees may spend only specified amounts of money on political speech. That is an expenditure limit.

The D.C. Circuit agrees that similar provisions "are best considered spending restrictions" on independent expenditures. *Emily's List v. FEC*, 581 F.3d 1, 15 n.14 (D.C. Cir. 2009). 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.* Such regulations "force non-profit entities to pay for … 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." *Id.*

The same is true here. Section 27.2936 effectively forces an independent committee to pay for independent expenditures out of a hard-money account subject to source and amount limitations, thereby reducing the amount of political speech in which the non-profit may engage. As a result, it is an expenditure limit, not a contribution limit, and must be analyzed as such.[7]

[7] Though the district court apparently analyzed it as a contribution limit, this court may affirm on a different rationale, especially one that was argued below. *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). In any case, as shown below, section 27.2936 remains invalid even if deemed a contribution limit.

The City cannot escape this reality by asserting that "groups can collect unlimited amounts in membership and other fees, so long as they are not earmarked for City candidate elections." City Brief at 38 n.13. The only reason for the "earmarking" is ECCO's cap on the source and amount of independent expenditures. But for that cap, independent committees would be free to spend unlimited amounts on independent expenditures. With the cap, independent committees can only spend specified amounts of money on political speech. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached … because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. A restriction on independent expenditures "is thus a ban on speech." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

This case therefore resembles *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002), which held that an ordinance is subject to strict scrutiny if it "does not merely restrict contributions" but "also restricts expenditures" of independent committees through source and amount limits. *Id.* at 938. It makes no difference that Irvine's expenditure limit was tied to "membership funds." Appellant's/Cross-Appellee's

Principal Brief ("City's Brief") at 38 n.13. In both Irvine and San Diego, the clear intent and effect of the ordinance is to limit independent expenditures by independent committees and therefore to limit political speech.

### B. ECCO's Limits on Independent Expenditures Violate the First Amendment.

Advocacy to support or oppose a candidate is core political speech entitled to the highest level of protection. *Citizens United*, 130 S. Ct. at 898 (citing cases). The City's anti-corruption interest may justify the regulation of expenditures coordinated with candidates to prevent circumvention of valid contribution limits. But that rationale does not cover independent expenditures, because the "absence of prearrangement and 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." *FEC 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." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (*Colorado I*). This rule applies both to "lone pamphleteers or street corner orators" and to 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 independent committees "diminishes their entitlement to First Amendment protection." *Id.* at 494.

Even before *Citizens United*, non-profit advocacy groups were "generally entitled to raise and spend unlimited money on elections" independently of the candidates. *Emily's List*, 581 F.3d at 10. 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." *Id.* By definition, independent expenditures covered by ECCO are not coordinated with candidates. Cal. Govt. Code §§ 82031, 85500. Therefore, the City may not constitutionally restrict independent expenditures by an independent committee.[8]

The City's assertion that independent expenditures create the potential for corruption founders on the rock of long-established precedent. *Long Beach Area Chamber of Commerce*, 2010 WL 1729710 at *8 ("long and growing line of Supreme Court cases concluding that limitations on independent expenditures are unconstitutional"). As the district court aptly noted, "Given the Supreme Court's consistent treatment of independent expenditures, it is implausible that limiting the

[8] The City may require such a group to make direct donations to candidates out of a hard-money account. *Emily's List*, 581 F.3d at 12.

amount of money that committees can use to make independent expenditures furthers an anticorruption interest." SER 11.

Beginning with *Buckley*, the Court has consistently held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [a] ceiling on independent expenditures." 424 U.S. at 45. Independent advocacy does not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions" because unlike coordinated expenditures, "expenditures for express advocacy of candidates [are] made totally independently of the candidate and his campaign." *Id.* at 46-47. A cap on independent expenditures thus "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process" and "heavily burdens core First Amendment expression." *Id.* at 47-48. Such "restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Id.* at 50.

Indeed, *Buckley* recognized that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.*; *see also FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 446 (2001) (*Colorado II*) ("independent expenditures … are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view"); *NCPAC*, 470 U.S. at 490

(independent expenditures "were at times viewed with disfavor by the official campaign as counterproductive to its chosen strategy").

The City's review of *Buckley* and subsequent cases is misguided. The City ignores the clear holding of *Buckley* that independent expenditures cannot be capped. 424 U.S. at 45. It also fails to acknowledge that *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (*CMA*) concerned "the amount an unincorporated association may contribute to a multicandidate political committee" which in turn made direct contributions to candidates. *Id.* at 184, 185 n.1. Moreover, the City's position is undermined by Justice Blackmun's concurrence, which states the Court's First Amendment holding because it represents the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Blackmun emphasized that while "contributions to multicandidate political committees may be limited … as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee … 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." *CMA*, 453 U.S. at 203 (Blackmun, J., concurring in the judgment). Unlike contributions to committees that are "essentially conduits for contributions to candidates," which "pose a perceived threat of actual or potential corruption …

contributions to a committee that makes only independent expenditures pose no such threat." *Id.*

Justice Blackmun thus followed *Buckley* and foreshadowed the Court's subsequent holdings that independent expenditures pose no threat of corruption. The City cannot dismiss his controlling concurrence as a mere comment on a "hypothetical situation," City's Brief at 50 n.21, especially where it conforms to the Court's consistent jurisprudence on independent expenditures and this court's recent recognition that independent committees do not "operate as middlemen through which funds merely pass from donors to candidates." *Long Beach Area Chamber of Commerce*, 2010 WL 1729710 at *9.

The City's characterization of *NCPAC* is similarly mistaken. In *NCPAC*, the Court held that the anti-corruption interest cannot justify the regulation of independent expenditures because of the "absence of prearrangement and coordination of an expenditure with the candidate or his agent." 470 U.S. at 497. This rule applies regardless of the amount of money spent on independent expenditures. *Id.* at 493. Though the Court alluded to the size of contributions to the committees in question, *id.* at 497-98, that fact was not dispositive. Instead, the dispositive issue was the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.* at 497. Even

if committees spend large amounts on independent expenditures, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id.* at 498.

Neither *Colorado I* nor *Colorado II* assists the City's position. In *Colorado I*, the Court confirmed that "ordinary political committees" have the First Amendment "right to make unlimited independent expenditures." 518 U.S. at 618. Again, "the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617. While *Colorado II* recognized "the government's important interest in avoiding the circumvention of valid contribution limits," City's Brief at 52, it did so in the context of "spending coordinated with a candidate." *Colorado II*, 533 U.S. at 437. Therefore, *Colorado II* was not a case about independent expenditures, and the Court noted "we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups." *Id.* at 441.

Nor does *McConnell* support the City's position. *McConnell* upheld limits on political parties receiving or spending soft money, not limits on independent committee spending. *McConnell v. FEC*, 540 U.S. 93, 143 (2003) (discussing "ban on national parties' involvement with soft money"). The City concedes as

much. *See* City's Brief at 47-48 (*McConnell* concerned limit on "funds received or spent by the national parties," and "*McConnell* majority determined that large contributions to political parties … threaten the integrity of the political system").

*McConnell* relied on the uniquely "close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship...." *Id.* at 154. The Court repeatedly emphasized the "special relationship and unity of interest" between parties and candidates and officeholders, *id.* at 145, and noted "examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 150; *see also Emily's List*, 581 F.3d at 13 n.12 (citations to *McConnell* on unique relationship between parties and officials). *McConnell* was thus based on the nature of parties as "entities uniquely positioned to serve as conduits for corruption." 540 U.S. at 156 n.51.

Unlike parties, independent committees are not uniquely capable of selling access for cash. *Emily's List*, 581 F.3d at 14. *McConnell* recognized "the real-world differences between political parties and interest groups …. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the Legislature that vastly exceeds that of any interest group." 540 U.S. at 188.

Therefore, the district court correctly distinguished *McConnell* on the ground that it "involved soft money contributions in the context of national political parties, not independent expenditure committees." SER 12.

The City attempts to transform *McConnell*'s cryptic footnote 48 into a sweeping holding at odds with decades of precedent. City's Brief at 50. In that footnote, the majority rebutted the "contention that *Buckley* limits Congress to regulating contributions to a candidate" by asserting that *Buckley* upheld a "limit on aggregate yearly contributions to candidates, *political committees,* and *party committees*." *McConnell*, 540 U.S. at 152 n.48 (emphasis in original) (citing *Buckley*, 424 U.S. at 38). But the cited portion of *Buckley* concerned evasion of contribution limits "through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. It said nothing about contributions for independent expenditures. To accept that footnote 48 allows restrictions on independent expenditures would silently overrule a core holding of *Buckley*. As Professor Hasen noted even before *Citizens United*, "Is that what the Court really intended buried in a few sentences of a footnote in one of the longest cases in Supreme Court history?" Richard L. Hasen, Buckley *is Dead, Long Live* Buckley,

153 U. Pa. L. Rev. 31, 70 (2004).[9] Certainly after *Citizens United*, if not before, the answer is clearly no.

Footnote 48 also contains a cursory description of the *CMA* opinion, acknowledging that *CMA* decided only the issue of "contributions to multicandidate political committees." *McConnell*, 540 U.S. at 152 n.48. To assert that "*CMA* necessarily upheld limits on contributions to committees that were then used to make independent expenditures," City's Brief at 50, ignores Justice Blackmun's controlling concurrence that the statute could not be applied to independent expenditures. *CMA*, 453 U.S. at 203 (Blackmun, J., concurring in the judgment). Moreover, *McConnell* noted that independent groups remain free to raise unlimited funds for mailings and advertising, which parties could not do. 540 U.S. at 187. This court should therefore decline to read a footnote addressing a different issue in *McConnell* "to indirectly (i) overrule *Buckley,* (ii) discard Justice Blackmun's opinion in *Cal-Med,* and (iii) equate non-profits with political parties, contrary to other discussion in *McConnell*." *Emily's List*, 581 F.3d at 14 n.13. In any case, whatever the merits of the City's argument before *Citizens United*, it

[9] Professor Hasen further noted, "Expenditure limits may tend to benefit incumbents by giving them a chance to limit funds spent opposing them," and such limits also "raise troubling questions … to the extent they inhibit vibrant election-related participation by a wide group of nongovernmental actors." 153 U. Pa. L. Rev. at 71.

cannot survive the Supreme Court's clear mandate that independent expenditures of domestic persons or entities may not be limited. 130 S. Ct. at 913.

In recently holding that "independent expenditures … do not give rise to corruption or the appearance of corruption," the Court relied on a long line of precedent. *Citizens United*, 130 S. Ct. at 909. The City cannot escape that precedent merely by asserting this is a case about contribution limits. Nor can the City plausibly assert this case is about "making contributions to associate oneself with someone else's speech," rather than "engaging in speech directly." City's Brief at 46. The Lincoln Club and Associated Builders & Contractors PAC challenge ECCO because they want to engage in speech directly by making independent expenditures. SER 108-110. Their ability to speak is curtailed by ECCO's limit on how much they can spend on political speech. While they may receive contributions from others, that fact is no different from *Citizens United*, where the plaintiff paid for its speech with donations from others. 130 S. Ct. at 887. Committees that receive donations to make independent expenditures "produce speech at the core of the First Amendment." *NCPAC*, 470 U.S. at 493. Independent committees thus "provide a distinct medium through which citizens may collectively enjoy and effectuate those expressive freedoms that they are entitled to exercise individually." *Long Beach Area Chamber of Commerce*, 2010 WL 1729710 at *11.

### C. A Limit on Contributions to Independent Committees Violates the First Amendment.

Even if viewed as a contribution limit, section 27.2936 violates the First Amendment. As the D.C. Circuit explained before *Citizens United*, "mere *donations* to non-profit groups cannot corrupt candidates and officeholders." *Emily's List*, 581 F.3d at 10 (emphasis in original). The court noted:

> After all, 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.

*Id.* After *Citizens United*, the D.C. Circuit confirmed that contribution limits to independent committees violate the First Amendment. *SpeechNow.org*, 599 F.3d at 694-95. Like the City, the government argued that "independent expenditures … benefit candidates and that those candidates are accordingly grateful to the groups and to their donors," leading to "preferential access for donors and undue influence over officeholders." *Id.* at 694. However, in light of *Citizens United*, which held "as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption…. Given this analysis from *Citizens United,* we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group." *Id.* at 694-95. This court now agrees. *Long*

*Beach Area Chamber of Commerce*, 2010 WL 1729710 at *9-10 (citing, e.g., *SpeechNow.org*).

Moreover, the Supreme Court previously expressed skepticism of an assertion similar to the City's unsubstantiated claim that "there is a greater danger that *contributions* to independent expenditure committees will corrupt candidates or create a public perception of corruption compared to the danger that *independent spending itself* will do so." City's Brief at 44 (emphasis in original). Discussing donations to political parties, the Court noted, "If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor." *Colorado I*, 518 U.S. at 617. The same is true, only more so, for an independent committee that lacks a party's uniquely close relationship to a candidate. The district court thus correctly rejected "the City's assertion that contributions to committees making only independent expenditure can corrupt or create the appearance of corruption." SER 14.

Nor can the City plausibly claim that a cap on donations to an independent committee is necessary to avoid circumvention of limits on contributions to candidates. By definition, independent expenditures are not coordinated with a candidate and may not be considered contributions to the candidate. *Buckley* itself

recognized that "people who would otherwise contribute amounts greater than the statutory limits" may "expend such funds on direct political expression" independent of candidates. 424 U.S. at 22. If the problem is covert coordination, the government may address it directly by enforcing existing law. *See Long Beach Area Chamber of Commerce,* 2010 WL 1729710 at *8 ("PACs could be subject to criminal liability if they made payments in coordination with candidates or their campaigns but failed to disclose the payments as contributions"); Cal. Govt. Code § 85500(b) (listing circumstances under which "expenditure may not be considered independent, and shall be treated as a contribution").

### D. The City May Address its Concerns by Other Means, Including Rigorous Disclosure Requirements.

The City's chief complaint seems to be that persons "who wish to curry favor with elected officials … will want to do so 'below the radar,' hiding behind the name of an innocuous-sounding group." City's Brief at 44. That is a disclosure problem, not a corruption problem. The proper solution to that problem is robust and timely disclosure, not a limit on speech. The Supreme Court recently noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech" and has upheld "disclosure requirement[s] for independent expenditures" regarding candidates. *Citizens United*, 130 S. Ct. at 915. As the Court said, "the public has an interest in knowing who is speaking about a candidate," especially "shortly before an election." *Id.* Because "modern

technology makes disclosures rapid and informative … [a] campaign finance system that pairs … independent expenditures with effective disclosure has not existed before today…. With the advent of the Internet, prompt disclosure of expenditures can provide … citizens with the information needed to hold … elected officials accountable for their positions and supporters." *Id.* at 916.

California law, which the City has imported into ECCO § 27.2930, "requires all committees to file periodic reports of contributions and expenditures," with additional reports near elections. *Californians for Fair Representation – No on 77 v. Superior Court*, 138 Cal. App. 4th 15, 24 (2006) (citing statutes); *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) ("committees must disclose for public scrutiny the source and amount of political expenditures and contributions"). In particular, California "requires reporting of independent expenditures on a 24-hour basis during an election cycle." *Californians for Fair Representation*, 138 Cal. App. 4th at 26.

Independent committees must report detailed contributor information if they receive or spend $1,000 or more in a calendar year. Cal. Govt. Code §§ 82013, 84200(a)-(b), 84211(f); *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1182-83 (9th Cir. 2007) (summarizing contributor disclosure

requirements).[10] In addition, the state has particular reporting requirements for "City general purpose committees." Cal. Govt. Code § 84200.5(g). Specific independent expenditure reports are also required. Cal. Govt. Code § 84203.5. Special provision is made for "late independent expenditure reports," with detailed and timely contributor information. *Id.* § 84204 (citing § 84211(f)).

The City has imposed additional requirements to promote effective disclosure: alphabetical listing of contributors, separate statements for contributions made to support or oppose candidates, pre-election statements filed immediately before elections, and online reporting for committees that received or spent more than $10,000 in connection with a City election. *See* ECCO §§ 27.2930, 27.2931. State law also provides for electronic disclosure statements, with public access. Cal. Govt. Code §§ 84605, 85505.

If this comprehensive regime still presents problems of contributor secrecy, the City may consider more robust disclosure requirements or make information more accessible to the public. But the City may not curtail political speech to solve a disclosure problem. *Cf. FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 475 (2007) (rejecting "argument that 'protected speech may be banned as a means to ban unprotected speech'").

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[10] Though disclosure may be limited in other contexts, *see Randolph*, 507 F.3d at 1187-88, this case concerns candidate elections, for which *Citizens United* upholds strong disclosure requirements. 130 S. Ct. at 915.

Ultimately, the people "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 government may not decide "which strengths should be permitted to contribute to the outcome of an election." *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008). "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 certain voices may be drowned out, it may consider an appropriate system of public financing. 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 grassroots organization or a committee supported by a few

contributors. Accordingly, the City's limitations on independent committees violate the First Amendment as a matter of law.

## CONCLUSION

For the foregoing reasons, the court should reverse the district court's order to the extent it declined to enjoin the 12-month window and affirm the district court's order to the extent it enjoined the City from restricting independent expenditures or contributions to independent committees.

Respectfully submitted,

**s/ David Blair-Loy**
David Blair-Loy
Attorney for Amicus

## CERTIFICATE OF COMPLIANCE

I certify this brief is proportionally spaced, has a typeface of 14 points or more, and based on the word count function of the software used to prepare the brief contains 6,980 words, in compliance with Fed. R. App. P. 29(d), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: May 6, 2010

**s/ David Blair-Loy**
David Blair-Loy
Attorney for Amicus

## CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, through which all counsel of record are deemed served.

**s/ David Blair-Loy**
David Blair-Loy
Attorney for Amicus