

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

THE LONG BEACH AREA CHAMBER OF COMMERCE, *et al.*,

Plaintiffs-Appellees/Appellants-Cross-Appellants,

v.

CITY OF LONG BEACH,

Defendant-Appellant/Appellee-Cross-Appellee.

On Appeal from the United States District Court
for the Central District of California
The Honorable Philip S. Gutierrez, Presiding

**BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS
SUPPORTING PLAINTIFFS URGING AFFIRMANCE AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

The Center for Competitive Politics is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. The Center for Competitive Politics has no parent corporation and issues no stock. There are no publicly held corporations that own ten percent or more of the stock of the Center for Competitive Politics.

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STATEMENT OF AMICUS CURIAE

The Center for Competitive Politics (“CCP”) is a non-profit organization founded in 2005 by Bradley A. Smith, professor of law at Capital University Law School and former Chairman of the Federal Election Commission, and Stephen M. Hoersting, campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Both Messrs. Smith and Hoersting maintain an active involvement in CCP’s activities. Mr. Smith is Chairman of CCP’s Board of Directors, and Mr. Hoersting is Vice President of the organization and a member of CCP’s Board of Directors.

CCP is concerned that a politicized research and litigation agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. Over the last decade, well over \$100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy and legal debate. Thus, CCP’s mission — through legal briefs, empirical studies, historical and constitutional analyses, and media communications — is to evaluate and explain the actual effects of money in politics, and the results of a more free and competitive electoral process.

CCP regularly files *amicus* briefs to assist the Supreme Court of the United States, United States Courts of Appeals, and various state courts in deciding cases

involving the regulation or restriction of political speech and association. CCP has submitted *amicus* briefs in support of litigants in cases such as *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); and the currently pending *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, No. 06-17001 (9th Cir.). CCP is interested in participating in this case as *amicus curiae* because the question of whether the government can regulate contributions to a committee engaged in independent expenditures is a matter of critical importance to those, such as CCP, who oppose greater government restriction and regulation of political speech.

CCP submits this *amicus* brief pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

SUMMARY OF THE ARGUMENT

In its initial Order on Plaintiffs’ and Defendant’s Motions for Summary Judgment, the district court below properly held that constitutional strict scrutiny applied in determining whether Section 2.01.610 of the Long Beach Campaign Reform Act (the “Ordinance”) violated the First Amendment. *See generally* City of Long Beach’s Excerpts of Record (hereinafter, “City’s ER”) at 00110-00124. The Ordinance requires that “[a]ny person who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess” of

specified limits that currently range from \$350 to \$650. Long Beach Campaign Reform Act § 2.01.610 (City's ER at 00159); *see also* City's ER at 00102-00103. As a result, the district court concluded that the Ordinance needed to withstand strict scrutiny since it serves as a dual expenditure/contribution regulation under this Court's precedent in *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934 (9th Cir. 2001). *See* City's ER at 00117-00123. The district court then declared the Ordinance "unconstitutional, as applied to the [Long Beach Area] Chamber [of Commerce] and others similarly situated" because the City of Long Beach "does not argue that [the Ordinance] can pass strict scrutiny." City's ER at 00124.

Several months later, in an Order on Plaintiffs' Motion for Clarification, the district court further ruled that the Chamber's affiliated political action committees ("PACs") "are not similarly situated to the Chamber." City's ER at 00143. The district court reasoned that, "unlike the Chamber, the PACs do not have membership structures that involve member dues that are considered contributions,"¹ so "the [O]rdinance does not place a 'severe burden on fully protected speech and associational freedoms.'" City's ER at 00143, 144. For this

¹ The district court appears to be in error here since the parties had jointly stipulated not only that the "Chamber's dues constitute 'contributions' under the Long Beach Campaign Reform Act," but also that "Chamber members wishing to participate in elections may designate a portion of their dues to be diverted to the Chamber PACs." City's ER at 00103.

reason, the district court “appl[ie]d ‘a lower level of constitutional scrutiny’” in considering whether “the [O]rdinance, as applied to the PACs, survive[d]” under the First Amendment. City’s ER at 00144. The district court then concluded, “as applied to the PACs and others similarly situated,” the Ordinance “is constitutional.” *Id.* In so doing, not only did the district court improperly apply less than strict scrutiny, but it also erred in upholding the Ordinance, which infringes upon the free speech and association rights of truly independent groups, *i.e.*, independent expenditure committees.

CCP agrees with the Plaintiffs, Long Beach Area Chamber of Commerce and its affiliated PACs — as well as with the district court’s initial decision — that the Ordinance constitutes a dual expenditure/contribution regulation under this Court’s *Lincoln Club* precedent, and, hence, is subject to strict scrutiny and constitutionally invalid. Indeed, not only does the City of Long Beach acknowledge that the Ordinance here and in *Lincoln Club* are essentially identical, *see* City’s ER at 00120, and that the Ordinance cannot withstand strict scrutiny, *see* City’s ER at 00124, but it is also the case that the characteristics of the entities who brought the First Amendment challenges both here and in *Lincoln Club* are the same in all relevant respects, *i.e.*, an independent association and its affiliated PACs that “derive their resources” for independent expenditures “from annual membership dues,” *compare Lincoln Club*, 292 F.3d at 936, *with* City’s ER at

00102-00103, 00111-00113. Thus, this Court would be correct to declare the Ordinance unconstitutional — affirming the district court’s initial decision on the Plaintiffs’ and Defendant’s Motions for Summary Judgment, and reversing the district court’s supplemental decision on Plaintiffs’ Motion for Clarification — on the grounds that *Lincoln Club* controls, that constitutional strict scrutiny applies to the entirety of the First Amendment challenge, and that the Ordinance cannot withstand such scrutiny. This argument is advanced by the Plaintiffs.

However, an alternative ground exists for reaching that same conclusion; one that is perhaps more straightforward than the dual expenditure/contribution analysis applicable via *Lincoln Club*. Specifically, since contribution limitations imposed on independent expenditure committees, such as the Chamber or its affiliated PACs, infringe directly upon the free speech and association rights of individuals to join together and pool their resources to participate in the political process independent of any particular candidate, strict scrutiny also must apply under a proper interpretation of longstanding Supreme Court precedent. In fact, since the Ordinance imposes contribution limits on “[a]ny person who makes independent expenditures supporting or opposing a candidate,” Long Beach Campaign Reform Act § 2.01.610 (City’s ER at 00159), the Ordinance is facially invalid because it is substantially overbroad.

Additionally, even if the Ordinance is only subject to “less rigorous scrutiny,” the Ordinance would still be unconstitutional. The Supreme Court has held that only contributions creating the likelihood of *quid pro quo* “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office” are sufficient to justify an infringement on free speech and association rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). But here, the City has made no empirical showing of any connection between contributions to independent expenditure committees and candidate corruption or its appearance. Indeed, the City stipulated otherwise in this litigation. *See* City’s ER at 107. In other words, the City has offered nothing but “mere conjecture,” which the Supreme Court has “never accepted . . . as adequate to carry a First Amendment burden.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392 (2000). Thus, the Ordinance must be struck down, even under less than strict scrutiny review.

ARGUMENT

I. THE ORDINANCE IS SUBSTANTIALLY OVERBROAD AND FACIALLY UNCONSTITUTIONAL BECAUSE IT RESTRICTS THE FIRST AMENDMENT RIGHTS OF ALL INDEPENDENT GROUPS

As an initial matter, it is important that this Court understand the Ordinance is not only unconstitutional as applied to the Plaintiffs who brought this case, the Long Beach Area Chamber of Commerce and its affiliated PACs, but also that the Ordinance is facially unconstitutional. That is because the Ordinance is substantially overbroad, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), since it imposes contribution limits on all independent groups “who make[] independent expenditures supporting or opposing a candidate.”² Long Beach Campaign Reform Act § 2.01.610 (City’s ER at 00159). In other words, the Ordinance prohibits even two neighbors from banding together and pooling their resources to fund an independent expenditure supporting or opposing a candidate if just one neighbor contributes “in excess of the amounts set forth in Section 2.01.310,” *id.*, currently “\$350 for . . . city council races, \$450 in city-wide non-mayoral races . . . , and \$650 in mayoral races,” City’s ER at 00102-00103, *see also* Long Beach

² The City appears to acknowledge — as it must — that it will not attempt to enforce the Ordinance against individuals who make independent expenditures. *See* City of Long Beach’s Principal Br. (hereinafter, “City’s Principal Br.”) at 42 (“Any individual . . . has the unrestricted right to use his or her funds . . . to directly advance his or her own political speech.”). However, the City has represented in this litigation that it intends to, and will, enforce the Ordinance against groups, like the Long Beach Area Chamber of Commerce and its affiliated PACs, that make independent expenditures. *See* City’s ER at 00106-00107.

Campaign Reform Act § 2.01.310 (City’s ER at 00155-00156 (stating contribution limits before adjustments for inflation)).

Thus, even if the Ordinance may have some constitutional application as to the Chamber or its affiliated PACs — a proposition that *Amicus*, not to mention the Plaintiffs, vigorously dispute — it is well established under the First Amendment overbreadth doctrine that an individual or group whose own speech or association may be prohibited is permitted to challenge a statute on its face because such a restriction also chills or threatens others not before the court. *See Board of Airport Comm’rs of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Indeed, the availability and success of such facial challenges ensures the full protection of First Amendment rights for “those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.” *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). This is why litigants are “permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Broadrick*, 413 U.S. at 612.

The Supreme Court has made it clear in the campaign finance area that, “[w]here at all possible, government must curtail speech only to the degree

necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.” *Federal Election Comm’n v. Mass. Citizens for Life, Inc.* (hereinafter, “MCFL”), 479 U.S. 238, 265 (1986). However, as another court noted in striking down a nearly identical statute to the one at issue here, “the [O]rdinance sweeps broadly to regulate a significant amount of protected speech.” *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, No. C 06-04252 JW, 2006 U.S. Dist. LEXIS 94338, at *18 (N.D. Cal. Sept. 20, 2006) (appeal currently pending, No. 06-17001). Indeed, the increase in independent expenditures in California indicates that the amount of protected speech and association burdened by statutes like the Ordinance here — not to mention elsewhere in the state had other courts not invalidated or enjoined similar provisions — is even more substantial than previously believed. *See generally* California Fair Political Practices Comm’n, *Independent Expenditures: The Giant Gorilla in Campaign Finance* (June 2008), available at <<http://www.fppc.ca.gov/ie/IEReport2.pdf>> (visited Oct. 1, 2008); Derek Cressman, *Sneak Preview of Testimony on Exploding Independent Expenditures Before California Assembly Committee*, CAL. PROGRESS REP. (Sept. 12, 2006), available at <http://www.californiaprogressreport.com/2006/09/sneak_preview_o.html> (visited Oct. 1, 2008).

Specifically, the Ordinance at issue in this case, Section 2.01.610 of the Long Beach Campaign Reform Act, provides that “[a]ny person who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess of the amounts set forth in Section 2.01.310,” which currently range from \$350 for city council races to \$650 for mayoral races. *See* City’s ER at 00102-00103 (stating current contribution limits adjusted for inflation); *see also* City’s ER at 00155-00156 (showing Section 2.01.310 with originally enacted limits). Thus, by its terms, the Ordinance imposes limits on contributions even to associations that are wholly independent of candidates or officeholders — groups that neither coordinate their speech or activities with candidates nor make contributions to candidates. These contributions, however, are entitled to the full protection of the First Amendment. *See* Part II, *infra*. Moreover, limiting contributions to independent expenditure committees does not address any interest in preventing the corruption of candidates or officeholders or the appearance of such corruption. *See* Part III, *infra*. Accordingly, the Ordinance is substantially overbroad and must be held facially unconstitutional so that the First Amendment rights of not only the Plaintiffs here, but also others not before the Court, are protected and not chilled.

II. THE ORDINANCE SUBSTANTIALLY BURDENS FREE SPEECH AND ASSOCIATION RIGHTS OF INDEPENDENT GROUPS AND IS SUBJECT TO AND CANNOT WITHSTAND STRICT SCRUTINY

The Supreme Court has held that “[i]ndependent expenditures constitute expression ‘at the core of our electoral process and of the First Amendment freedoms.’” *MCFL*, 479 U.S. at 251 (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quotation omitted)); accord *Federal Election Comm’n v. Nat’l Conservative PAC* (hereinafter, “*NCPAC*”), 470 U.S. 480, 493 (1985) (“There can be no doubt that . . . [independent] expenditures . . . produce speech at the core of the First Amendment.”). Yet the Ordinance at issue in this case limits “[a]ny person who makes independent expenditures” from “accept[ing] any contribution in excess of” specified amounts. Long Beach Campaign Reform Act § 2.01.0610 (City’s ER at 00159). By imposing such an across-the-board restriction, the Ordinance regulates not only contributions made to candidates for their speech, but also contributions made to truly independent groups who wish to exercise their First Amendment rights to associate and speak directly for themselves. This the Ordinance cannot do — at least not without passing muster under constitutional strict scrutiny.

The distinction between governmental regulation of candidate-controlled speech and purely independent speech dates back to the Supreme Court’s seminal campaign finance decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the

Court decided a First Amendment challenge to limits imposed on contributions to candidates and their campaigns, *see generally id.* at 23-38, as well as expenditure limits, *see generally id.* at 39-58. The Court held that “contribution and expenditure limitations both implicate fundamental First Amendment interests.” *Id.* at 23. The Court subjected the expenditure limits to a higher degree of constitutional scrutiny, however, because they “impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions” to candidates. *Id.* The Court explained that, while any expenditure limit “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,” *id.* at 19, a limit on candidate contributions “entails only a marginal restriction upon the contributor’s ability to engage in free communication,” *id.* at 20-21. This was because a candidate contribution only “serves as a general expression of support for the candidate and his views,” and “rests solely on the undifferentiated, symbolic act of contributing.” *Id.* at 21. Thus, “[a] limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on [the contributor’s] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates or issues.” *Id.*

This rationale led to the holding in *Buckley*, and since, that limits on candidate contributions impose a less significant burden on the First Amendment, and were permissible “as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important governmental interest.’” *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25). The Court has also invoked this “less rigorous scrutiny” in the context of contribution limits to multicandidate committees, which are organized to contribute to candidates, see *California Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182, 196-97 (plurality), 202-03 (Blackmun, J., concurring), and political party committees, which are comprised of candidates and inherently involved with candidates, *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 135-36, n.39 (2003); see also Parts II, III, *infra*.

However, the Supreme Court has never extended — and, in fact, has consistently refused to extend — this “less rigorous scrutiny” outside the context of contributions to candidates and committees that are inherently involved with or directly contribute to candidates. Indeed, the Court has been clear that strict scrutiny applies to contribution limits outside of candidate-controlled contexts — specifically with respect to independent groups.

Nevertheless, the City argues that the Ordinance here “is not subject to strict scrutiny,” City’s Principal Br. at 42, because “limits on contributions do not equate

to limits on expenditures,” *id.* at 41. *See also id.* (“Long Beach ordinance is a contribution limit that only restricts the amount individuals may contribute to IECs”). In asserting a constitutional dichotomy between the standard of review for contribution versus expenditure limits, the City is advancing the erroneous proposition — used at least once before by this Court — that it is the “act of contribution, rather than the context in which the contribution occurs, [that] determines the constitutional standard of review.” *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 651 (9th Cir. 2007). But that is not what the harmonization of *Buckley* and its progeny teaches. Rather, not only has the Supreme Court consistently made it clear that context is everything in determining the standard of review for contribution limitations, but the Court also has made it clear just what context matters — namely, whether the limitation is imposed on contributions to candidates as opposed to truly independent groups.

This constitutionally sound distinction — between strict scrutiny for limits on contributions to independent expenditure committees and “less rigorous scrutiny” for limits on contributions to candidates and their campaigns — has been amply illustrated by the Court in both *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), and *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). For instance, in *Citizens Against Rent Control*, the Supreme Court considered whether a

limitation on contributions to support or defeat a ballot measure could withstand constitutional scrutiny. *See generally* 454 U.S. 290. Emphasizing that the statute could “not be allowed to hobble the collective expressions of a group,” *id.* at 296, the Court noted that “*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment” — “the perception of undue influence of large contributors to a candidate,” *id.* at 296-97. And, since the law limited contributions that were neither donated to nor controlled by any candidate, the Court proceeded to apply “exacting judicial scrutiny,” *id.* at 294, which has been defined in other cases to mean “strict scrutiny.” *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (explaining that “exacting scrutiny” means a restriction can be upheld “only if it is narrowly tailored to serve an overriding state interest”). In fact, just like the Ordinance at issue in this case, the regulation in *Citizens Against Rent Control* was triggered “when contributions are made in concert with one or more others in the exercise of the right of association.” 454 U.S. at 296. But such a regulation against any and all groups, regardless of their independence from candidates was constitutionally unacceptable, according to the Court, because the freedom of association “is diluted if it does not include the right to pool money through contributions, for funds are essential if ‘advocacy’ is to be truly or optimally ‘effective.’” *Id.* (citing *Buckley*, 424 U.S. at 65-66). This is why the Court struck down the statute, stating

clearly that “[t]o place a Spartan limit — or indeed any limit — on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.”

Id.

The Supreme Court’s decision in *California Medical Association* draws the same line. *See* 453 U.S. at 197, n.17 (plurality), 203-204 (Blackmun, J., concurring). In that case, the Supreme Court upheld the federal \$5,000 contribution limit to multicandidate political committees. However, not only did the four-justice plurality “distinguish[]” contributions made to multicandidate committees from those made “to express common political views” independent of candidates, *id.* at 197 n.17, but also Justice Blackmun explained in his controlling concurrence “that a different result would follow” if the government attempted to limit “contributions to a political committee established for the purpose of making independent expenditures.” *Id.* at 203. Limiting contributions to a multicandidate committee was constitutionally permissible because, “[b]y definition, a multicandidate political committee . . . makes contributions to . . . candidates,” thus enabling the candidates, rather than the contributors, to more effectively speak. *Id.* But the same was not true of contributions to independent expenditure committees. “By pooling their resources, adherents of an [independent] association amplify their own voices; the association ‘is but the medium through which its individual

members seek to make more effective the expression of their own views.’” *Id.* (quoting *NAACP v. Alabama*, 357 U.S. 449, at 459) (citing *Buckley*, 424 U.S. at 22).

Thus, the critical distinction — the one that resulted in the *Citizens Against Rent Control* and *California Medical Association* decisions — is “between independent expenditures (and the contributions that make them possible), on one hand, and contributions to candidates, on the other.” John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 CATH. U. L. REV. 13, 35 (2000). This distinction makes sense because contributions to candidates and contributions to truly independent groups, such as independent expenditure committees, do have a qualitatively different expressive value based on the investment of the speaker. Indeed, the distinction between contributions to independent expenditure committees and contributions to candidates (or groups associated with candidates) is the difference between citizens banding together at the grassroots to directly fund the expression of their own views, and merely facilitating a candidate’s expression of the candidate’s views. Compare *California Med. Ass’n*, 453 U.S. at 196 (plurality) (upholding contribution limits to multicandidate PACs and suggesting that “‘speech by proxy’ . . . is not the sort of political advocacy . . . entitled to full First Amendment protection”), with *NCPAC*, 470 U.S. at 495 (“the ‘proxy speech’ approach is not

useful in this case [because] the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money”).

In this case, the Long Beach Ordinance limits contributions to any and all groups that make independent expenditures regardless of their independence from candidates, officeholders, and political parties — thus including pure independent expenditure committees. While candidates may ultimately benefit from these expenditures — and hence the contributions that made them possible — neither candidates nor candidate-associated groups are the recipients of or speakers using these funds. Instead, the Long Beach Ordinance directly limits the ability of citizens to pool their resources and amplify their own voices, a right that is “entitled to full First Amendment protection.” *NCPAC*, 470 U.S. at 495. Thus, the Ordinance is subject to exacting, or strict, scrutiny, which the City has already conceded it cannot withstand. *See* City’s ER at 00124 (“In this case, the Defendant does not argue that the [Ordinance] can pass strict scrutiny.”).

III. THE ORDINANCE IS UNCONSTITUTIONAL EVEN IF SUBJECT TO LESS THAN STRICT SCRUTINY BECAUSE THE CITY HAS NOT SHOWN ANY RISK OF CORRUPTION OR ITS APPEARANCE

Even if this Court subjects the Ordinance to less than strict scrutiny, it is still unconstitutional. Under this “less rigorous scrutiny,” contribution limits are permissible only if those limits are “closely drawn to match a sufficiently

important government interest.” *McConnell*, 540 U.S. 136, n.39 (quotations omitted); *see also Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 25). But this is not cursory review and, to date, the Supreme Court has identified one — and only one — governmental interest “sufficiently important” to justify contribution limits: preventing the corruption of candidates and officeholders or the appearance such corruption.³ *See, e.g., NCPAC*, 470 U.S. at 496-97; *Randall*, 548 U.S. at 247. Moreover, since *Buckley*, the Court has repeatedly demonstrated that it will only find an interest in preventing corruption or its appearance in contexts that involve contributions to candidates or groups intimately associated with candidates, such as political party committees and multicandidate PACs. *See, e.g., McConnell*, 540 U.S. at 155; *California Med. Ass’n*, 453 U.S. at 197-99 (plurality), 203 (Blackmun,

³ The one narrow exception to this statement, so-called corporate-form corruption, is not applicable to this case. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Indeed, the City admits “the Long Beach ordinance . . . does *not* limit a corporation from making independent political expenditures.” *See City’s Principal Br.* at 23 (emphasis added). Rather, the Ordinance imposes an across-the-board regulation that “[a]ny person who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess” of specified limits. Long Beach Campaign Reform Act § 2.01.610 (City’s ER at 00159). Thus, this is “not [a] ‘corporations’ case[] because [the Ordinance] applies not just to corporations but to any ‘committee, association, or organization (whether or not incorporated)’ that . . . makes expenditures in connection with electoral campaigns. The terms of [the Ordinance]’s prohibition apply equally to an informal neighborhood group . . . as to the wealthy and professionally managed PACs.” *NCPAC*, 470 U.S. at 496. While it may be that the City could enact a law that specifically regulated the political participation of corporations, *see generally Austin*, 494 U.S. 652; *Federal Election Comm’n v. Beaumont*, 539 U.S. 146 (2003); the City has not done so here.

J., concurring); *see also McConnell*, 540 U.S. at 138 n.40 (collecting cases). The Supreme Court has found that only these types of contributions create the likelihood of “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” *Buckley*, 424 U.S. at 25, 28 (“The Act’s \$1,000 [candidate] contribution limitation focuses precisely on the problem of large *campaign* contributions — *the narrow aspect of political association where the actuality and potential for corruption have been identified* — while leaving persons free to engage in independent political expression” (emphasis added)). Indeed, facing precisely the constitutional issue here, the Fourth Circuit recently invalidated contribution limits as “unconstitutional as applied to independent expenditure political committees,” explaining that the Supreme “Court has never held that it is constitutional to apply contribution limits to political committees that make solely independent expenditures.” *North Carolina Right to Life, Inc. v. Leake* (hereinafter, “*NCRL*”), 525 F.274, 292 (4th Cir. 2008).

Nevertheless, the City argues that “the First Amendment does not prohibit regulations on contributions to IECs because donations to independent expenditure committees also have a corruptive potential.” City’s Principal Br. at 50. And, to support that argument, the City relies upon *California Medical Association v.*

Federal Election Commission, 453 U.S. 182 (1981), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). Unfortunately for the City, however, both cases only reinforce the well-established rule requiring a candidate nexus in order to raise the interest in preventing corruption or the appearance of corruption. *See, e.g., NCRL*, 525 F.3d at 291-93.

Indeed, the constitutional distinction between regulable political committees that have the required candidate nexus versus unregulable independent expenditure committees that do not was specifically examined, explained, and reiterated in *California Med. Ass'n*. In that case, the Supreme Court considered the constitutionality of a \$5,000 limit on contributions to a multicandidate PAC, an organization that, by definition, had a nexus to candidates by directly making contributions to them. 453 U.S. at 197-98 (plurality), 203 (Blackmun, J., concurring). The Court upheld the federal contribution limit after considering both First and Fifth Amendment challenges to the law, but with regard to the First Amendment question, the Court could muster only a four-member plurality. Justice Blackmun concurred in the result reached by the plurality and provided the necessary fifth vote, but did so on narrower grounds which control. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

In providing that necessary fifth deciding vote, Justice Blackmun accepted, as a matter of *stare decisis*, that the contribution limitations challenged in *Buckley*

were constitutional. *Id.* at 201-02 (Blackmun, J., concurring). He continued to hold, however, that “it does not follow that I must concur in the plurality conclusion today that political contributions are not entitled to full First Amendment protection.” *Id.* at 202. Justice Blackmun concluded that “contributions to multicandidate political committees may be limited to \$5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized committee upheld in *Buckley*,” though it was a “close[] question.” *Id.* He explained that, “[b]y definition, a multicandidate political committee . . . makes contributions to five or more candidates,” and is “therefore essentially [a] conduit[] for contributions to candidates.” As a result, multicandidate committees “pose a perceived threat of actual or potential corruption.” *Id.* But Justice Blackmun went on to caution that “a different result would follow if [the statute] were applied to contributions to a political committee *established for the purpose of making independent expenditures*, rather than contributions to candidates,” because “contributions to a committee that makes only independent expenditures pose no such threat” of “actual or potential corruption.” *Id.* at 203 (emphasis added); *accord NCPAC*, 470 U.S. at 498 (“[T]he absence of prearrangement and coordination [with a candidate] . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate”).

Likewise, the Supreme Court emphasized and reaffirmed the constitutional necessity of a corruptive candidate nexus in *McConnell*. In that case, the Court upheld limits on contributions to political party committees because such committees are “run by, and largely composed of, federal officeholders and candidates,” and therefore serve as direct funnels to candidates. 540 U.S. at 155-56, n. 51 (2003) (“Thus . . . we rely not only on the fact that they regulate contributions used to fund activities influencing federal elections, but also that they regulate contributions to, or at the behest of, entities uniquely positioned to act as conduits for corruption.”). In doing so, the *McConnell* Court took special note of the close and corruptive candidate nexus of political party committees, noting that “[t]he record in the present case is replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.” *Id.* at 151; *see generally id.* 146-52, 155-56 (providing examples and discussing how “large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used”). Indeed, the Court went so far as to cite an expert report concluding “[t]here is no meaningful distinction between the national party committees and the public officials who control them.” *Id.* at 155 (quotations omitted).

However, while “*McConnell* did expand” the permissible “application of contribution limits to political parties, . . . it also made clear that independent expenditures do not present a danger of corruption.” *NCRL*, 525 F.3d at 295 (citing *McConnell*, 540 U.S. at 221). In fact, the Court explicitly rejected the argument that regulating contributions to political parties would allow Congress to limit contributions to organizations truly independent of candidates. *See McConnell*, 540 U.S. at 156 n.51 (“Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a benefit on the candidate.”).⁴ And, more specific to the Parties at issue here, the Court explained that “[i]ndependent expenditures ‘are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view.’” *McConnell*, 540 U.S. at 221 (quoting *Federal Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001)). Thus, “[i]t is not an exaggeration to say that *McConnell* views political parties as different in kind than independent expenditure committees” because “there is little ‘danger’ that independent expenditures ‘will be

⁴ That the independent speakers offered as examples were members of the institutional press is of no constitutional significance. “The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ‘. . . the liberty of the press is no greater and no less . . .’ than the liberty of every citizen of the Republic.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (citation omitted).

given as a *quid pro quo* for improper commitments from [a] candidate.’” *NCRL*, 525 F.3d at 294 (citing *McConnell*, 540 U.S. at 221 (quoting *Buckley*, 424 U.S. at 47)).⁵

All of this means that the City cannot rely on *Buckley* or its progeny to establish as a matter of law that contribution limits to independent expenditure committees pose a sufficiently important threat of corruption or its appearance to merit upholding the Ordinance. Nevertheless, the City may attempt to demonstrate such a corruptive threat independently. Even under “less rigorous scrutiny,” however, the City would bear a heavy burden. The claim that individuals banding together and pooling their resources to engage in purely independent speech and association poses a risk of corruption or its appearance is extraordinary, and thus requires a commensurately extraordinary empirical showing to survive judicial review. *See Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000) (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised”).

⁵ Justice Kennedy’s discussion in *McConnell* is also instructive on this point, explaining clearly that a contribution limit could not “withstand constitutional challenge unless it was shown to advance the anticorruption interest.” *McConnell*, 540 U.S. at 291-292 (Kennedy, J., dissenting in part). As Justice Kennedy put it: “To ignore the fact that in *Buckley* the money at issue was given to candidates, creating an obvious *quid pro quo* danger . . . is to ignore the Court’s comments in *Buckley* that show *quid pro quo* was of central importance to the analysis.” *Id.* at 295-96.

The City, however, has made no empirical showing of any connection between independent expenditure committees and candidate corruption. Indeed, before submitting its cross Motion for Summary Judgment, the City stipulated that it was “unaware of any instances of *quid pro quo* corruption of candidates in Long Beach municipal elections caused by contributions to independent expenditure committees, either since the adoption of the Ordinance or which served as a basis for the Ordinance.” City’s ER at 00107. Instead, the only evidence offered by the City was that, “[d]uring the 2002 . . . election cycle, an Independent Expenditure Committee [that represented construction interests] . . . participated in the City’s election by paying for the creation and distribution of a mailer intended to benefit a candidate,” and “solicited and accepted contributions in excess of” the Ordinance’s applicable limits.” City’s ER at 00107-00108. Not only does that singular anecdotal example fail to come close to the “substantial evidence” of “corruption and the appearance of corruption” cited in *McConnell*, 540 U.S. at 154, *see also id.* at 150 (“replete with similar examples”), 151 (“pervasive”), but it also leaves entirely to the imagination whether a candidate or officeholder was even affected by the independent expenditure. At best, the City has offered nothing but the sort of “mere conjecture” that the Supreme Court has already rejected as inadequate “to carry a First Amendment burden.” *Nixon*, 528 U.S. at 392.

Moreover, the City is incapable of making the necessary evidentiary showing. As one leading commentator put it, “the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. Indeed, *McConnell* clearly held that benefit (even benefit followed by gratitude and temptation) is not sufficient to justify a campaign restriction.” Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 988 (2005). Nor would it be sufficient to show that candidates respond to independent expenditures by changing their positions on issues, for “the fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political message . . . can hardly be called corruption.” *NCPAC*, 470 U.S. at 498. Indeed, far from being corruption, “the presentation to the electorate of varying points of view” is “one of the essential features of democracy.” *Id.*

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

CONCLUSION

For the reasons stated herein, this Court should declare the Ordinance unconstitutional, thus affirming in part and reversing in part the decisions below.

Respectfully submitted,

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October 11, 2008

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I certify that the attached Brief of *Amicus Curiae* Center for Competitive Politics complies with the type-volume limitation, as well as the typeface and type style requirements, set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(5)-(7). This brief uses a proportionally spaced Times New Roman 14 point typeface, and contains 6,414 words, as determined using the “word count” feature of Microsoft Office software.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

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