No. 00-56444

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE LINCOLN CLUB OF ORANGE COUNTY, *et al*.,

Plaintiffs-Appellants,

v.

CITY OF IRVINE, CALIFORNIA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF AMICI CURIAE CENTER FOR INDIVIDUAL FREEDOM AND JAMES MADISON CENTER FOR FREE SPEECH IN SUPPORT OF PETITIONERS FOR REHEARING

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INTEREST OF AMICI[1]

The Center for Individual Freedom (the "Center") is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and

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[1] A motion for leave to file this brief has been submitted herewith.

religious freedoms. More on the Center can be found at its web-site www.cfif.org. Of particular importance to the Center in this case are constitutional protections for the freedom of speech and association, including each citizen's freedom to associate and pool resources for the purpose of engaging in joint independent expenditures on speech regarding elections.

The James Madison Center For Free Speech (the "Madison Center") is an internal educational fund of the James Madison Center, Inc., a District of Columbia non-profit corporation. The mission of the Madison Center is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution. More on the Madison Center can be found at its web-site www.jamesmadisoncenter.org. The Madison Center has supported First Amendment litigation on behalf of citizens and citizens' groups in order to challenge state and federal election laws and regulations that suppress their free speech and free association rights.

ARGUMENT

Appellants in this case, the Lincoln Club and its affiliated PACs, engage in independent political speech relating to elections and other matters in California using annual membership dues of $2000 per member. The City of Irvine adopted an ordinance that would forbid any person or group from making independent

expenditures for speech regarding election campaigns if they accepted more than $320 from any person over a two-year election cycle. That restriction would thus forbid the Lincoln Club from making independent expenditures for political speech for two years after they had received any membership dues and force them to reduce their dues to a mere $160 per year thereafter if they wished to speak during future election cycles. The City ordinance is an egregious violation of the First Amendment and, if adopted broadly, would stifle the political speech of virtually all expressive organizations that receive dues or contributions greater than the designated limit from even a single person or member and would bar all individuals from associating in order to spend (independent of any candidate) more than a trivial amount on combined political speech.

The three-judge panel in this case accepted the application of strict scrutiny to the restrictions at issue in this case and accepted the central and unavoidable premise of the City ordinance that "[b]y definition, an independent expenditure committee neither contributes money to a candidate nor coordinates expenditures with a candidate. See Cal. Gov. Code § 82031." Slip Op. at 17097-98. The panel also accepted, as it must, the Supreme Court's holdings in *Buckley* and *NCPAC* that restrictions on independent expenditures themselves do not implicate sufficient concerns regarding the elimination of corruption or the appearance of corruption to overcome strict scrutiny. *See* Slip Op. at 17098 (quoting *NCPAC* and citing

Buckley). In *NCPAC* in particular, the Supreme Court addressed the concern that candidates might

> take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that the expenditures will be given as a quid pro quo for improper commitments from the candidate.

FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985); *see also Buckley* v. *Valeo*, 424 U.S. 1, 47-48 (1976) ("the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process"). There is simply no question, therefore, that under current controlling law, independent expenditures themselves may not be restricted even where the purported justification for such restriction is a concern for corruption or the appearance of corruption.

The panel nonetheless distinguished this case as involving not independent expenditures themselves, but rather, "*contributions* to an independent expenditure committee." Slip Op. at 17099 (emphasis in original). It went on to hold that

> It seems highly unlikely that a candidate for local office would not notice the identities of the individual contributors (*i.e.* The Lincoln Club's dues-paying members) who made contributions to the independent expenditure committee that independently spent money on the candidate's behalf. This situation creates, at the very least, the possibility of an appearance of improper political influence. …. Further, this situation could give rise to political quid pro quos, with candidates being more inclined to provide favors and attention to those individuals who contributed large sums to the candidate's

> campaign through the independent expenditure committee intermediary.

Slip Op. at 17099.

With respect, the reasoning in the above-quoted paragraph cannot and does not follow from the premises in this case and from the clear holdings of *Buckley* and *NCPAC*. While it is true that contributions to independent expenditure committees are different from the resulting expenditures themselves, such difference actually *lessens* any concern for corruption relative to the resulting expenditures. Whatever the validity of the court's speculation that a candidate might notice *contributions* to an independent expenditure committee, the exact same speculation would be all the more true of the *expenditures themselves*. Indeed, the cases on independent expenditures do not deny the possibility that candidates will notice and be grateful for independent expenditures. They merely hold that such possibility is too attenuated to overcome strict scrutiny.

If the dangers from the expenditures themselves are insufficient to justify restrictions, then it unavoidably follows that contributions to such independent expenditures do not pose a danger sufficient to survive strict scrutiny even assuming a legislative purpose to combat the appearance or possibility of "corruption." Such contributions or membership dues for independent expenditures are necessarily one step further removed from any candidate's awareness and by definition lesser in magnitude than the expenditures themselves.

If the candidate's supposed gratitude towards the independent expenditure committee and its leaders – which are visibly responsible for any pro-candidate speech and which direct the combined contributions of all the members – is not a sufficient basis for restrictions, then the far less visible and less valuable individual contributions towards such expenditures cannot, as a matter of law, be deemed sufficient. To hold otherwise is to repudiate the holdings of *Buckley* and its progeny on independent expenditures.

The panel raised the further argument that contributions to independent expenditure committees

> could also give rise to the appearance that contributors are evading valid limitations on contributions to candidates by funneling their contributions to independent expenditure committees, rather than directly to candidates, knowing full well that their contributions will be spent (albeit "independently") on behalf of the candidates that they seek to support."

Slip Op. at 17099. This argument misconstrues the nature of *independent* expenditures and the nature of contributions or membership dues given to *independent* expenditure committees. Such expenditures and contributions thereto are, by definition, made without coordination with the candidate and are used for direct private speech, not candidate contributions. That they may be used for speech in support of a candidate does not mean that they are spent on "behalf" of the candidate. Indeed, if they were spent at the candidate's behest, the expenditures and contributions thereto would no longer be "independent" and

would violate state law. The panel's suggestion that contributions to independent expenditure committees involve "funneling" of contributions indirectly to candidates for use "on behalf of the candidates" and its earlier suggestion that committee contributors "contributed large sums to the candidate's campaign through the independent expenditure committee intermediary" imply that the panel doubts the genuine independence of the contributions and resulting expenditures or even calls into question the whole notion of *independent* expenditures. But it is not for this court to question the constitutional line between independent and coordinated expenditures established by the Supreme Court, and there is no question whatsoever of the *bona fide* independence of the contributions and resulting expenditures regulated by the ordinance in this case.

Accepting, as this court must, that the ordinance at issue applies only to contributions for expenditures that are in fact independent, this court cannot *ipse dixit* suggest that such contributions for expenditures are an improper evasion of direct contribution limits. If the direct expenditure of funds by a person or committee in excess of the amount one could contribute to a candidate is not, under binding case law, an improper "evasion" of candidate contribution limits, then it is necessarily true that giving money to an independent committee – not coordinated with the candidate – cannot be deemed a greater supposed evasion of candidate contribution limits. The court's current reasoning, if maintained, would apply with

far greater force to the ultimate expenditures than it would to the subsidiary contributions thereto, and thus cannot be squared with existing precedent. Nothing in this case or elsewhere even remotely suggests that contributions or membership dues for independent expenditures pose a *greater* danger of the appearance or actuality of corruption than the resulting expenditures themselves. It thus is legally impossible for the lesser supposed danger targeted by the ordinance in this case to satisfy strict scrutiny.

Given that restrictions on contributions or dues to independent expenditure committees *cannot* fare better under strict scrutiny than restrictions on the resulting expenditures themselves, the remand to the district court was unnecessary and cannot change the proper outcome of the case. Even if the City subjectively intended to combat what it thought was the corrupting influence and appearance of contributions to independent expenditures, such an asserted interest is insufficient in this case as a matter of law. The exact same interest was asserted and rejected regarding independent expenditures themselves, and thus can fare no better as applied to the attenuated contributions for such expenditures regulated in this case.

As a final matter, *amici* note the tremendous national importance of a correct ruling in this case, and the dangers of allowing the panel decision to remain as currently written. The notion that strict scrutiny would allow regulation based on the attenuated "possibility" of an appearance of improper influence threatens to gut

the entire notion of a safe-harbor for independent expenditures themselves. Indeed, as this court itself recognized the ordinance at issue here is a direct attack on both expenditures and association in that it completely forbids expenditures – of whatever size – if any individual contribution of membership fee to an organization is above an oppressively low limit. And the ordinance would require organizations to restructure themselves and their funding in vast and sweeping ways if they wished to make independent expenditures at all.

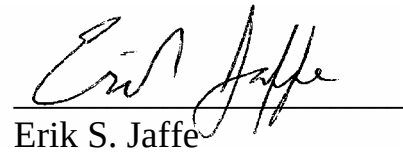
If accepted as law in the Ninth Circuit or elsewhere, the precedent set by the panel decision would effectively preclude independent expenditures by an overwhelming number of groups. Groups such as the NAACP, the ACLU, the Sierra Club, the NRA, and virtually any organization receiving a diversity of contributions large and small, could not possibly comply with the City's ordinance or others like it. Indeed, even two friends or relatives, if they wished to pool their resources for independent speech under both of their names and if they spent more than $640 could be forbidden from doing so under this ruling, despite the fact that each one individually could spend many thousands alone and be protected by the First Amendment. But as the Supreme Court has long noted with constitutional approval, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP* v. *Alabama*, 376 U.S. 449, 460-61 (1958).

Against the tide of First Amendment protection for expressive association and group speech, the panel decision sanctions rules having the precise same effect as a direct limitation on expenditures by groups and leads to the perverse consequence that group association would actually "preclude[] most associations from effectively amplifying the voice of their adherents." *Buckley*, 424 U.S. at 22. The result, as a practical matter, is the complete destruction of any meaningful right of private persons to associate for the purposes of engaging in joint political speech in the campaign context. Drastically restricting private individuals from associating for more effective advocacy is contrary to law and would deal a crushing blow to political speech in the Ninth Circuit and throughout the nation.

CONCLUSION

The panel should rehear this case and grant judgment for plaintiffs-appellants.

Respectfully Submitted,



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January 14, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of January, 2002, I caused two copies of the foregoing Brief of *Amici Curiae* to be served by fax and First Class Mail, postage pre-paid, on:

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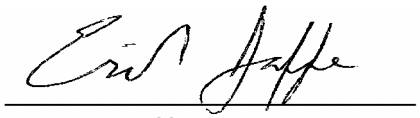

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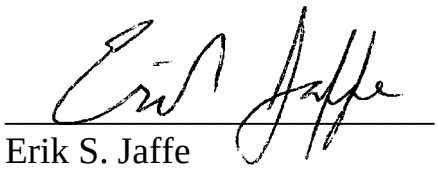
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amici Curiae complies with the 2100 word type-volume limitation of Fed. R. App. P. 29(d) and Circuit Rule 40-1(a) in that it contains 2084 words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word 97. Counsel agrees to furnish to the Court an electronic version of the brief upon request.



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