INTRODUCTION

In the wake of the Watergate scandals in the early 1970s, governments at all levels – federal, state and local – struggled to devise legally defensible campaign finance regulations that discourage political corruption without undue restrictions upon political activity. Yet, almost as quickly as governments developed a new regulatory device, political committees, political parties and individuals seemed to discover a loophole to circumvent its effect.

This same pattern occurred in California, where governmental limits on contributions to candidates were frequently frustrated by donors contributing unregulated amounts of money to "independent expenditure" committees that used these funds to support the donors' favored candidates. In the 1990s, the state and a number of local jurisdictions sought to close this loophole by enacting limits on contributions to committees making independent expenditures to support or oppose candidates. Almost all of these regulations were challenged as violative of First Amendment speech and association rights, and today virtually none of these limits on contributions to independent expenditure committees are enforced – notwithstanding the fact that no reported decision holds this form of regulation unconstitutional, and despite the fact that a respectable argument can be developed from the published case law to support such a regulation.

The purpose of this paper is to summarize the decisional law that forms the backdrop for the recent litigation regarding the constitutionality of contribution limits to independent expenditure committees, and then to discuss a number of the local independent expenditure contribution limit regulations (with emphasis on the ordinance adopted by the City of Irvine in 1995), and how these regulations fared in litigation.

BUCKLEY AND ITS PROGENY

The seminal case addressing the constitutional limits of campaign finance regulation is *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Court reviewed First Amendment speech and association challenges to campaign contribution and expenditure limits contained in the then-newly enacted Federal Election Campaign Act. The *Buckley* Court drew a bright line distinction between permissible restrictions on **contributions to candidates**, on the one hand, and impermissible restrictions on **expenditures by or on behalf of candidates**, on the other. The Court held that governments have greater power to regulate contributions to candidates, because contributions are a more attenuated form of speech:

> . . . a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of the communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the

> size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

(424 U.S. at 20-21.) By contrast, the *Buckley* Court held that expenditures are a much more direct form of speech, because – at least with expenditures – "money talks":

> 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

(424 U.S. at 19.) From this, the Court concluded that, although the challenged legislation's "contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limits on financial contributions," (424 U.S. at 23).

With respect to contribution limits, the *Buckley* Court enunciated an intermediate scrutiny standard of review, somewhat less severe than the "strict scrutiny" standard applied to suspect classifications and fundamental rights. As the *Buckley* Court explained, "[e]ven a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a **sufficiently important interest and employs means closely drawn** to avoid unnecessary abridgement of associational freedoms" (424 U.S. at 25; emphasis added).[1] The *Buckley* Court identified corruption, the appearance of corruption and the circumvention of otherwise lawful regulations as "sufficiently important" interests justifying regulation. As the Court explained: "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined" (424 U.S. at 26-27). However, the Court made clear that the goal of equalizing political opportunities between candidates and parties was **not** an acceptable basis for limiting First Amendment rights; "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (424 U.S. at 48-49.)

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[1] This same standard does not, however, apply to expenditure limitations. As the Court later explained in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387 (2000); "'We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.' It has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them."

In *Buckley*, the Supreme Court specifically addressed limitations on contributions to candidates and restrictions upon candidate expenditures. The *Buckley* Court also considered limitations on independent expenditures made in support of or opposition to a candidate, and found that restrictions on independent expenditure limitations suffered from the same constitutional defect as expenditure limits placed on candidates:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. 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 expenditure will be given as a *quid pro quo* for improper commitments from the candidate.

(424 U.S. at 47.) While upholding limits on contributions to candidates, yet invalidating limits on expenditures by candidates and expenditures by persons acting independently of candidates, the *Buckley* Court was silent with respect to limits on contributions to committees making independent expenditures.

This gap appeared to be filled in *Mott v. Federal Election Commission*, 494 F.Supp. 131 (D.D.C. 1980), where the court reviewed a challenge to provisions of the Federal Elections Campaign Act which limited contributions to "political committees purportedly made to enable those committees to make independent expenditures" (494 F.Supp. at 135). The plaintiff argued in *Mott* that the *Buckley* Court's invalidation of limits on independent expenditures likewise rendered limits on contributions to independent expenditure committees unconstitutional. But the *Mott* Court rejected this linkage, characterizing the regulation as a limitation on contributions rather than expenditures, and accepting a Congressional finding in support of the legislation that "the 'independent' political committee might become a vehicle for avoiding restrictions placed on direct contributions to candidates" (494 F.Supp. at 137).

The following year, the United States Supreme Court issued two campaign finance opinions, whose net effect was to obfuscate – rather than clarify - the validity of regulations limiting contributions to committees making independent expenditures to support or oppose candidates. In *California Medical Association v. F.E.C.*, 453 U.S. 182 (1981) a plurality of the Court upheld limits on contributions to political action committees engaging in political advocacy, on the grounds that such limitations prevent circumvention of the limitation on direct contributions to candidates (453 U.S. at 196-198). However, the Court did not clearly distinguish between contributions to political action committees which use the funds for their own contribution to candidates, on the one hand, and contributions to political action committees which use the funds for independent expenditures to support candidates, on the other. In a concurring opinion, Justice Blackmun drew this distinction, and concluded that limits on contributions to committees making independent expenditures were not constitutionally supportable, because such contributions did not, in Blackmun's view, pose a threat of actual or potential corruption (453 U.S. at 203).[2]

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), unlike prior cases, did not address issues relating to candidate elections. Instead, *Berkeley* involved a challenge to a contribution limit to committees making independent expenditures to support or oppose **ballot measures**. The Supreme Court focused on this distinction, finding restrictions on contributions to committees making independent expenditures with regard to ballot measures lack the "sufficiently important" governmental interest to support the restrictions:

> Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.

(454 U.S. at 299.) While the *Berkeley* Court seemingly intertwined the relationship of contribution limits to expenditures, on the one hand, with the distinction between ballot measures and candidate campaigns, on the other, subsequent cases support the notion that the *Berkeley* regulation was invalidated because there was no sufficiently important governmental interest in regulating contributions to ballot measures, rather than due to a concern regarding the effect upon a committee's political expenditures resulting from a limit on contributions to that committee. (See, e.g., *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1059 (9th Cir. 2000); *Lerman v. Board of Elections*, 232 F.3d 135, 148 (2nd Cir 2000).)

In *Federal Election Committee v. National Conservative PAC*, 470 U.S. 480 (1985), the Supreme Court reaffirmed and expanded upon its *Buckley* holding rejecting limits on expenditures in support of or opposition to a candidate. Invalidating the provisions of the Presidential Election Campaign Fund Act that limited independent expenditures by committees in support of or opposition to candidates, the Court reasoned that "[t]here can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment" (470 U.S. at 493); the Court concluded that the regulation did not advance any recognized governmental interest, finding that:

> [t]he 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 a candidate.

(470 U.S. at 499).

[2] Justice Blackmun's concurring opinion has been the subject of criticism by at least one court: "Justice Blackmun's view has not prevailed since his concurrence. Not only did the plurality fail to adopt his view in *California Medical*, but in fact *Shrink Missouri* made it clear that contributions infringe far less on First Amendment rights than expenditure limits, and are subject to less rigorous scrutiny," *North Carolina Right to Life, Inc. v. Leake*, 108 F.Supp.2d 498, 517 (E.D.N.C. 2000).

After a hiatus of almost ten years, the judiciary again addressed the issue of limits on contributions to committees making independent candidate expenditures in *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997). *Terry* involved a challenge to state campaign reform legislation, including limits on contributions to committees making candidate contributions and independent expenditures to support or oppose candidates. Citing *California Medical Association*, *supra*, 453 U.S. 182, the *Terry* Court characterized the contribution limit as "speech by proxy," rather than direct speech:

> [The regulation] does not limit direct contributions to candidates or independent expenditures to support candidates. Rather it only limits aggregate contributions to permanent committees, which generally have full discretion to disburse the funds in any manner. . . . The Court has clearly stated that this type of political speech, while not entirely unprotected by the First Amendment, does not receive the full First Amendment protection afforded direct political contributions because limitations on contributions to permanent committees do not significantly infringe First Amendment rights.

From this, the *Terry* Court concluded that the limit "furthers the goal of preventing corruption in Kentucky politics by avoiding evasion of the individual contribution limits," and that this goal, combined with "the limited protection afforded this type of speech," supported the constitutionality of the limitation on contributions to independent expenditure committees (108 F.3d at 649). *See also*, *Citizens for Responsible Government PAC v. Buckley*, 60 F.Supp.2d 1066 (D. Colo. 1999), vacated in part as moot, *Citizens for Responsible Government PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).

The court In *Arkansas Right to Life PAC v. Butler*, 29 F.Supp.2d 540 (W.D. Ark. 1998), was less supportive of government's ability to regulate contributions to independent expenditure committees. Reviewing a $500 limit on contributions to committees making independent expenditures, the court stated that it was "hard pressed to find any 'demonstrable' evidence in the record before us that large contributions to independent expenditure committees has contributed to actual or perceived corruption in Arkansas' political process" (29 F.Supp.2d at 546). However, the *Butler* Court invalidated the contribution limit on the more limited ground that "the $500 limit is unconstitutional as a matter of law because it is too low to allow meaningful participation in the political process and, thus, is not narrowly tailored to serve the state's alleged compelling interest" (29 F.Supp.2d at 547).

The most recent – but schizophrenic – judicial statement on the issue is *North Carolina Right to Life v. Leake,* which addressed a challenge to North Carolina's campaign finance reform legislation that, *inter alia*, placed limits on contributions to independent expenditure committees. The *Leake* plaintiffs sought to enjoin the limit on the grounds that "limiting contributions to independent expenditure committees does not further North Carolina's interest in preventing *quid pro quo* corruption," and that "the provision in effect limits that political committee's spending power" (108 F.Supp.2d at 517). Denying the *Leake* plaintiffs' preliminary injunction motion, the court rejected these contentions, reasoning that limits on contributions to independent expenditure committees further the sufficiently important interest of :

> . . . preventing corruption, as without their inclusion, those wishing to spend over [the limit] in support of a candidate may easily evade North Carolina's regime by contributing only to independent expenditure political committees. That such an evasion would undermine North Carolina's attempt to control corruption is likely (108 F.Supp.2d at 516).

The *Leake* Court emphasized that the state's concerns were well founded, noting that, since *Buckley* "the corruptive influence of 'soft money' has since been noted in several opinions." (*Id.*) Finally, in denying the preliminary injunction, the *Leake* court acknowledged the many alternative avenues of expression open to the plaintiff and its members, and found the regulation closely drawn to further the state's sufficiently importantly purposes. (108 F.Supp. 2d at 517-518). Reasoning that, because the members may make their own individual expenditures and volunteer their time, "those who wish to contribute money to this group have neither their speech nor their associational rights substantially infringed" (108 F.Supp.2d at 517).

Subsequent to its preliminary injunction ruling, however, the *Leake* court seemingly reversed itself, granting a summary judgment motion brought by the plaintiffs to invalidate the North Carolina regulation. (*North Carolina Right to Life v. Leake*, No. 5: 99-CV-798-BO3 (E.D.N.C. Oct. 24, 2001) ("*Leake II*")). Based on the text of the unpublished opinion, this seemingly inconsistent ruling seems to have resulted from the fact that the *Leake* court ruled upon the state regulation at the preliminary injunction stage as a facial challenge, while the *Leake II* court evaluated the regulation at the summary judgment motion stage based upon evidence presented by the parties. Further, at trial the state apparently attempted to present evidence to support the campaign finance regulations on the anomalous ground that the independent expenditures were themselves corruptive: "Defendants claim that limiting contributions to [the PACs] curbs corruption because the expenditures ultimately made by the [PACs] have a potentially corruptive (or apparently corruptive) effect on candidates" (*Leake II*, at 14). It thus appears that the state did not argue in *Leake II* that contributions could themselves lead to corruption or its appearance. Instead, and despite the fact that, from *Buckley* onward, courts have uniformly invalidated restrictions on **expenditures**, the state chose to base its defense on the dangers resulting from expenditures, rather than the corruptive effect of making large contributions to committees.

THE FATE OF STATE AND LOCAL REGULATIONS LIMITING CONTRIBUTIONS TO INDEPENDENT EXPENDITURE COMMITTEES

Beginning in the early 1990s, a group of California grass roots organizations developed a comprehensive campaign finance reform ordinance, and advocated its adoption by cities throughout the state. The substance of the comprehensive regulation eventually was redrafted as a proposed state-wide initiative, and passed as Proposition 208 at the November 5, 1996 election. Developed by California Common Cause and the League of Women Voters, among others, Proposition 208 extensively amended the campaign finance provisions of the Political Reform Act of 1976, as amended, Government Code Section 81000, *et seq.*

Among Proposition 208's myriad of reform provisions was Government Code Section 85500(b), which provided that committees making independent expenditures of $1,000 or more supporting or opposing a candidate may not accept any contributions in excess of $250 per election. This provision, like many contained in Proposition 208, was substantially similar to the regulations proposed in the comprehensive local campaign finance reform ordinance being advocated by those groups throughout California.

The constitutional validity of Proposition 208's limitation on contributions to independent expenditure committees was never definitively adjudicated. Shortly after the passage of Proposition 208, challengers sued to declare the measure unconstitutional, and a preliminary injunction was issued restraining its enforcement. (*California Pro Life Council PAC v. Scully*, 989 F.Supp. 1282 (E.D. Cal. 1998), aff'd 164 F.3d 1189 (9th Cir. 1999)). Subsequently, California voters passed Proposition 34 at the November 2000 election, which repealed all of the substantive provisions of the former law, including the contribution limitations on committees making independent expenditures for candidates that had been contained in Government Code Section 85500(b).

The grass roots comprehensive campaign finance regulation that led to Proposition 208 was, however, adopted in various forms in a number of California jurisdictions, including Irvine, Huntington Beach, Orange, and the County of Orange. Other jurisdictions – notably San Francisco and Long Beach – were motivated by different circumstances to adopt similar regulations. Each regulation contained some form of a limitation upon contributions to committees making independent expenditures in support of or in opposition to candidates. Lawsuits were filed against each of these regulations; while none of the contribution limits were litigated to a final judgment on the merits of the contribution limit, none of the regulations are currently being enforced due to the litigation.

Huntington Beach

In the early 1990s, § 2.07.050 of the Huntington Beach Municipal Code was added to limit to $300 the amount that a committee making independent expenditures supporting or opposing municipal candidates may accept from any person during an election cycle. At the start of the 1994 municipal election campaign, *Righeimer v. Huntington Beach*, No. SACV-94676 (C.D. Cal. 1994) was filed to invalidate the limitation. Huntington Beach brought a motion to dismiss under Federal Rule of Civil Procedure Section 12(b), but the trial court denied the motion. Citing *Citizens Against Rent Control v. Berkeley*, *supra*, and *F.E.C. v. National Conservative PAC*, *supra*, the District Court applied the strict scrutiny standard of review and, reasoning that the effect of the limitation on contributions was functionally to restrict expenditures by the independent expenditure committee, concluded that the limitation was not justified by any compelling governmental interest. The author is informed that, following the November, 1994 municipal election, the lawsuit was dismissed as moot. However, it is also understood that Huntington Beach has not enforced this limitation at any time since the court ruled in *Righeimer* on October 13, 1994.

San Francisco

Unlike the limits on independent expenditure committees adopted by Southern California jurisdictions as part of the political momentum leading to the passage of Proposition 208, San Francisco's limit was enacted much earlier. In 1973, San Francisco voters passed that city's

"Municipal Election Campaign Control Ordinance," codified as Article XII of the San Francisco Administrative Code, which included Section 16.508(a):

> No person other than a candidate shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or opposition to such candidate, including contributions to political committees supporting or opposing such candidate, to exceed $150.

Prior to San Francisco's 1999 election campaign for mayor, *San Franciscans for Sensible Government v. Renne*, No. 99-02456 (N.D. Cal. 1999) was filed to enjoin enforcement of Section 16.508(a). The trial court ruling in that case shows that the San Francisco City Attorney interpreted this provision as requiring committees making independent expenditures to ensure that funds used to make expenditures consisted entirely of monies from contributors which, when aggregated with reported contributions made by these contributors to the candidate, did not exceed the limitation set forth in the ordinance. Reviewing the challenged ordinance in the context of a preliminary injunction motion, the trial court interpreted *California Medical Association*, *supra*, and *F.E.C. v. National Conservative PAC*, *supra*, as holding that "contributions to PACs and political parties, which make only independent expenditures and neither make contributions to, nor coordinate their expenditures with, candidates or candidate-controlled committees, is highly protected speech and may not be regulated" (No. 99-02456 (N.D. Cal., Sept. 18, 1999), at p. 13). Based on this, the court enjoined the ordinance insofar as it limited contributions to independent expenditure committees which make only independent expenditures for the purpose of supporting or opposing candidates in a municipal election. The Ninth Circuit affirmed the issuance of the preliminary injunction (No. 99-16995 (9th Cir., Oct. 20, 1999)). The author is informed that, like the Huntington Beach ordinance, San Francisco's limitation has not been enforced since the court issued its preliminary injunction in 1999.

<u>Irvine</u>

In the early 1970s, Irvine adopted a limitation on contributions to candidates for municipal office. In 1994, however, a coalition of organizations, including the local chapter of the League of Women Voters, the Orange County Common Cause, and a County-wide campaign finance watchdog group known as "TINCUP II," presented a comprehensive campaign finance reform regulation to the Irvine City Council, and advocated its adoption. One of the key provisions of the proposed regulations was a new limit on contributions to committees making independent expenditures:

> Any person, including any committee, that makes any independent expenditure during an election cycle in support of or opposition to any City candidate, shall not accept any contribution(s) from any person which exceeds in the aggregate the amount set forth in this section for that election cycle.

The coalition sponsoring the campaign finance reform regulation argued that this limit on contributions to independent expenditure committees was needed to avoid the deleterious affects of unlimited contributions to independent expenditure committees made in order to circumvent the candidate contribution limit. After holding public hearings on the issue, the Irvine City Council acted in September 1995 to adopt the ordinance, including the limit on contributions to independent expenditure committees.

In 1996, portions of Irvine's ordinance, including the limit on contributions to committees making independent expenditures, was included in an initiative passed by the Irvine voters, which also had the effect of increasing the contribution limit from $180 to $300 per election cycle. Thereafter, the Irvine City Council repealed most of the ordinance's provisions not reenacted by the 1996 initiative, due to a concern regarding its redundancies to and conflicts with Proposition 208.

The City administered its ordinance limiting contributions to independent expenditure committees without controversy in the 1996 and 1998 municipal elections. However in the fall of 1998, the City received an inquiry regarding the ordinance from the Lincoln Club of Orange County - the largest, most powerful Republican-affiliated political club in Orange County. The Lincoln Club charges annual dues of $2,000 per year, and limits its membership to approximately 300 members. The Lincoln Club asserts that it uses its membership revenues both for contributions to candidates, and for independent expenditures to support or oppose candidates. Prior to 1998, the Lincoln Club had no history of making independent expenditures to affect any Irvine municipal candidate campaigns. However, because it claimed a desire to make independent expenditures in Irvine, the Lincoln Club filed a civil rights lawsuit against Irvine in late 1999, *The Lincoln Club of Orange County, etc., et al. v. City of Irvine*, No. SA CV 99-1262 (C.D. Cal. 1999), arguing that its $2,000 per year dues structure precluded the Lincoln Club from making any independent expenditures in Irvine due to the Irvine ordinance limiting contributions to independent expenditure committees to no more than $300 per election cycle.

In an effort to obtain judicial resolution of a dispute prior to the beginning of Irvine's 2000 municipal election campaign season, the attorneys for the Lincoln Club and Irvine agreed to file cross-motions for summary judgment, and entered into a stipulation regarding the principal facts relevant to the case. This stipulation stated, *inter alia*, that the challenged ordinance (i) regulated only contributions, not expenditures, (ii) did not restrict the Lincoln Club members from individually making independent expenditures of any amount for or against any Irvine candidate; and (iii) did not limit the number of individuals who may make contributions to any independent expenditure committee. But the stipulation also acknowledged the lack of any evidence of any political corruption resulting from political contributions in any Irvine election as of that date.

The district court heard the cross-motions on August 16, 2000. Later that day, the court issued its ruling upholding Irvine's limits on contributions to independent expenditure committees.[3] Applying the "less than strict scrutiny" standard of review enunciated in *Buckley, supra* and *Nixon, supra*, and reasoning from *Mott, supra*, *California Medical Association, supra*, and *Buckley, supra*, that the Ordinance regulated contributions rather than expenditures, the district court concluded that "the City has serpentined its way through the applicable cases and

[3] Ironically, a district court judge who upheld Irvine's limits on contributions to independent expenditure committees was the same jurist who invalidated a substantively identical provision in *Righeimer v. Huntington Beach*.

drafted an ordinance that escapes unconstitutionality" (No. SA CV 99-1262, August 16, 2000 minute order, p. 2).

After unsuccessfully seeking appellate stays and an expedited appeal from the Ninth Circuit, the Lincoln Club filed a traditional appeal of the judgment resulting from the court's August 16, 2000 ruling. On June 5, 2002, the Ninth Circuit issued an amended decision in *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002).[4] The court recognized that contributions are not fully protected speech under *Buckley*, and a contribution limit, standing alone, does not warrant strict scrutiny. 292 F3d at 937. But the court found that Irvine's ordinance also restricts expenditures by prohibiting an independent expenditure committee from making any independent expenditures if the source of the committee's funds is membership dues that exceed the regulation's prescribed maximum. The court found that, if the Lincoln Club maintained its present organizational structure, it would be precluded from making any political contribution.[5] On the other hand, the court found that if the Lincoln Club chose to comply with Irvine's ordinance, it would be forced to make dramatic changes to its organizational structure, by reducing dues from $2,000 per year to $160 per year (representing one-half of the then-effective contribution limit for a two year election cycle), thereby resulting in an expansion of its membership from 300 to approximately 3750 members, in order to maintain the same funding level.[6] From this, the court concluded that the substantial burdens on protected speech and associational freedoms necessitated the application of strict scrutiny, rather than a lower standard enunciated by the Supreme Court in *Buckley, supra*, 424 U.S. at 25, and *Nixon, supra*, 528 U.S. at 388 [Supreme Court 904]. Reversing the trial court decision, the Ninth Circuit remanded the matter to the district court for consideration in light of this standard of review.

No further court proceedings took place in *Lincoln Club v. Irvine*. Given the acknowledged lack of evidence of political corruption in any prior Irvine campaigns, and the unusual factual context in which the Lincoln Club could argue from the fact that its dues exceeded the City's contribution limit that the ordinance did not provide the Lincoln Club with meaningful alterative avenues to participate in the political process, the City concluded that it

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4 The Ninth Circuit issued its original decision in *Lincoln Club* on December 20, 2001 (274 F.3d 1262). In that decision, the court imposed the strict scrutiny standard, but then concluded that the government's interest in avoiding corruption may be implicated in the context of contributions to independent expenditure committees, and remanded the case to the district court for further proceedings. Following the *Lincoln Club's* petition for panel rehearing, however, the Ninth Circuit excised all but its strict scrutiny analysis and holding.

5 It should be noted that, at trial and during the appeal, Irvine pointed out that "the Lincoln Club" in fact comprised multiple political committees, such that the organization could easily create a separate political committee for the specific purpose of making independent expenditures in Irvine. Similarly, any one of the existing Lincoln Club entities could comply with the Irvine regulation simply by disaggregating on its billing statement a portion of the membership dues and specify that this portion represented the dues for independent expenditures that may be made in Irvine.

6 The Ninth Circuit finding seemingly conflicts with *Buckley*, where the Supreme Court found that, merely because a contribution limit may require a committee "to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expressions," these affects do not undermine the validity of the contribution limits. 424 U.S. at 21-22.

would not be able to meet the strict scrutiny standard of review. As a result, Irvine negotiated with Lincoln Club to conclude the litigation by stipulated judgment.[7]

County of Orange and Cities of Anaheim, Fountain Valley, Huntington Beach and Orange

The Ninth Circuit decision in *Lincoln Club v. Irvine*, and the subsequent negotiated resolution of that case, empowered the Lincoln Club to challenge other Orange County regulations limiting contributions to committees making independent expenditures. In the late summer of 2002, the Lincoln Club filed a federal civil rights lawsuit challenging the contribution limits imposed upon independent expenditure committees by the County of Orange and the Cities of Anaheim, Fountain Valley, Huntington Beach and Orange, *The Lincoln Club of Orange County v. City of Anaheim*, No. SA CV 02 – 874 (C.D. Cal. 2002) Most of these jurisdictions had adopted their respective regulations as a result of the grass roots efforts of the same coalition that had lobbied Irvine to adopt a restriction on contributions to committees making independent expenditures. However, each of the jurisdictions' regulations differed in scope and amount. For example, the regulations enacted by Anaheim, City of Orange and Orange County provided that the contribution limit was triggered only if the independent expenditure committee expended at least 25% of its total expenditures within that jurisdiction during the prior 12 months. By contrast, Fountain Valley and Huntington Beach enacted regulations similar to the Irvine Ordinance, with no expenditure threshold triggering the contribution limit. The limit on contributions to expenditure committees ranged from $300 per election cycle in Huntington Beach to $1,000 per election cycle in Anaheim and the County of Orange.

In September, 2002, the federal court issued a preliminary injunction against Anaheim, Fountain Valley, Huntington Beach, Orange and the County of Orange, restraining each agency from enforcing its limit on contributions to independent expenditure committees, based upon the reasoning in *Lincoln Club v. Irvine*. Shortly thereafter, each of the challenged jurisdictions entered into settlement discussions with the Lincoln Club to resolve the case. The City of Orange and the County of Orange entered into stipulated judgments in October, 2002, to enjoin enforcement of their respective contribution limits. It is the author's understanding that Anaheim, Huntington Beach and Fountain Valley also entered into settlements with the Lincoln Club to refrain from enforcing their contribution limits.

City of Long Beach

In 1994, the electorate of the City of Long Beach passed an initiative, entitled the Long Beach Campaign Reform Act, as amendments to that city's municipal code. The Long Beach Campaign Reform Act included a provision restricting any person who makes an independent expenditure in support of or in opposition to a candidate in a city election from accepting any contribution in excess of $600. In April, 2002, the City filed an enforcement action under the Long Beach Campaign Reform Act, against the "California Citizens for Neighborhood Empowerment" ("CCNE") and its treasurer, alleging that CCNE had accepted campaign

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[7] Because Irvine's Ordinance had been reenacted by initiative, the Irvine City Council could not settle a case by repealing the limit on contributions to independent expenditure committees. Consequently, Irvine and the Lincoln Club entered into a stipulation for judgment invalidating that contribution limit.

contributions in excess of the limitations permissible under Long Beach's initiative for making independent expenditures in support of a mayoral candidate in the April, 2002 election. *City of Long Beach v. California Citizens for Neighborhood Empowerment, et al.*, Los Angeles Superior Court Case No. BC272177. The basis for the Long Beach action was campaign statements filed by CCNE showing five contributions, ranging from $400 to $15,000, and aggregating $28,900, and one expenditure in the amount of $26,700 on behalf of a mayoral candidate.

CCNE responded to the Long Beach complaint by filing an anti-SLAPP motion to strike the complaint pursuant to Code of Civil Procedure Section 425.16. In September, 2002, the trial court found that CCNE had satisfied the two prongs of Section 425.16 – that the Long Beach complaint "arises from the defendant's free speech or petition activity," and that Long Beach had failed to meet its burden to show a probability that it would prevail on the merits – and dismissed the enforcement action in its entirety, but without reaching the underlying constitutionality of the city's restriction upon contributions to committees making independent expenditures. Long Beach has appealed the trial court judgment, *City of Long Beach v. California Citizens for Neighbor Empowerment, et al.*, No. B162197 (Second Appellate District, Division Seven), and the appeal is presently in the briefing stage.

CONCLUSION

While resolving most of the issues raised by campaign finance reform efforts over the past 30 years, the holdings in *Buckley v. Valeo, supra*, and the decisions interpreting it do not provide any clear insights into the constitutionality of regulations that limit contributions to committees seeking to make independent expenditures to support or oppose candidates. *Lincoln Club v. Irvine* stands for the proposition that, when faced with an independent expenditure committee with established membership dues substantially in excess of the contribution limit, the limit on contributions to that independent expenditure committee will be reviewed under strict scrutiny. However, *Lincoln Club v. Irvine* does not enunciate the applicable standard of review when these contribution limits are challenged by independent expenditure committees that do not have substantial membership dues, and the decision is entirely silent with respect to whether limits on contributions to committees making independent candidate expenditures can serve the recognized governmental interests of preventing corruption, the appearance of corruption, or the circumvention of other campaign finance reform regulations.

Under these circumstances, and given the history of other types of limits enacted by Huntington Beach, San Francisco, Long Beach, Orange and the County of Orange, on contributions to committees making independent expenditures, cities should act with caution in adopting and administering restrictions on contributions to independent expenditure committees, and city attorneys should take care to develop the strongest possible evidentiary record to support the need for the regulations.