

To: CFEWG

From: Geoff Wilson

**Re: Outline of judicial parameters affecting local campaign finance ordinances**

Date: March 12, 2018

The following is an effort to distill the leading federal cases affecting limits on, or reporting of, contributions and expenditures, including “electioneering communications”, and what are often referred to as “independent expenditures.”

Members of the Working Group have already received summaries and citations to the cases on which I rely: *Citizens United* (CU); *Ind. Inst. v. Williams* (Wil.); and *McConnell* (Mc C). All these cases are the progeny of *Buckley* (US S Ct, 1976). I use a minimal form of citation in the following outline.

**What parameters affect local disclosure ordinances concerning contributions and expenditures?**

*Legal standard to which the local ordinance will be subject:* “to impose disclosure requirements the government must only satisfy ‘*exacting scrutiny*’, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” Wil. at 792; CU. at 366-367

*“Sufficiently important governmental interests” may include:* (1) providing the electorate with information about election spending, (2) deterring corruption and its appearance, and (3) gathering data to detect violations of election laws. *Id.*

**What sort of contributions or expenditures are subject to government disclosure requirements?**

- 1) *Those for “express advocacy”*, that is advocacy that expresses “words of advocacy” of election or defeat, such as “vote for”, “elect”, “support” and etc. Wil. at 793, citing Buckley
- 2) *Those for speech that is the “functional equivalent” of express advocacy*, that is, speech that is susceptible to no other reasonable interpretation than as an appeal to vote in a given manner. CU at 324-325
- 3) *Those for what is defined as “electioneering communications”*, that is, advocacy that doesn’t expressly advocate a candidate, but is made within a certain period before an election. McC at 189-198; Wil. at 792-796

*Less sure* would be requiring disclosure in connection with advocacy that is doesn't qualify as "express" (what is confusingly referred to as "issue advocacy" in the court cases), and which is also outside the proximity to an election that would permit requiring disclosure of these activities as "electioneering".

**Aside from disclosure requirements, what sort of contribution or expenditure *limits* may be applied?**

- 1) Limits on direct *contributions* to candidates have been upheld, as these can serve public interest in avoiding reality or appearance of quid pro quo corruption. "Exacting scrutiny" applied. Wil at 791
- 2) Limits on *expenditures* implicate important political and free speech interests, and are legally perilous-regulations that limit must therefore be narrowly tailored to serve a compelling governmental interest. CU at 340
- 3) Limits on "*independent expenditures*" also perilous, as, unlike direct contributions, the possibility of quid pro quo corruption not present. CU at 357