CITY OF BOULDER, COLORADO

Office of the City Attorney
Municipal Building
1777 Broadway
Post Office Box 791
Boulder, Colorado 80306
Telephone (303) 441-3020
Facsimile (303) 441-3859

MEMORANDUM

TO: David Gehr and Kathy Haddock

FROM: Joseph R. Rigney, Law Clerk

SUBJECT: Campaign Finance Citation List

DATE: 9 February 2018

Below is a non-exclusive list of court cases from the Colorado Supreme Court, Tenth Circuit Court of Appeals and the Supreme Court concerning campaign finances.

Buckley v. Valeo, 424 U.S. 1 (1976) –

In the wake of the Watergate affair, Congress attempted to ferret out corruption in political campaigns by restricting financial contributions to candidates. Among other things, the law set limits on the amount of money an individual could contribute to a single campaign and it required reporting of contributions above a certain threshold amount. The Federal Election Commission (FEC) was created to enforce the statute.

In this complicated case, the Court arrived at two (2) important conclusions. First, it held that restrictions on individual contributions to political campaigns and candidates did not violate the First Amendment since the limitations of the FEC enhance the "integrity of our system of representative democracy" by guarding against unscrupulous practices. Second, the Court found that governmental restriction of independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures did violate the First Amendment. Since these practices do not necessarily enhance the potential for corruption that individual contributions to candidates do, the Court found that restricting them did not serve a government interest great enough to warrant a curtailment on free speech and association.

The case also held that a statute that places limits on expenditures related to a clearly identified candidate must, in order to preserve the provision against invalidation based on vagueness, be construed only to expenditures which in oppress terms advocate for the election or defeat of a clearly identified candidate. Footnote 52 said: communications containing express words of advocacy of election or defeat are: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.”

McConnell v. FEC, 540 U.S. 93 (2003) –

In early 2002, a years-long effort by Senators John McCain and Russell Feingold to reform the way that money is raised for--and spent during-- political campaigns culminated in the passage of the Bipartisan Campaign Reform Act (BCRA) of 2002 (the so-called McCain-Feingold bill). Its key provisions were (1) a ban on unrestricted ("soft money") donations made directly to political parties (often by corporations, unions, or wealthy individuals) and on the solicitation of those donations by elected officials; (2) limits on the advertising that unions, corporations, and non-profit organizations can engage in up to 60 days prior to an election; and (3) restrictions on political parties' use of their funds for advertising on behalf of candidates (in the form of "issue ads" or "coordinated expenditures").

The Supreme Court ruled that because the regulations dealt mostly with soft-money contributions that were used to register voters and increase attendance at the polls, not with campaign expenditures (which are more explicitly a statement of political values and therefore deserve more protection), the Court held that the restriction on free speech was minimal. It then found that the restriction was justified by the government's legitimate interest in preventing "both the actual corruption threatened by large financial contributions and the appearance of corruption" that might result from those contributions.

In response to challenges that the law was too broad and unnecessarily regulated conduct that had not been shown to cause corruption (such as advertisements paid for by corporations or unions), the Court found that such regulation was necessary to prevent the groups from circumventing the law. Justices O'Connor and Stevens wrote that "money, like water, will always find an outlet" and that the government was therefore justified in taking steps to prevent schemes developed to get around the contribution limits.

Citizens United v. FEC, 558 U.S. 310 (2010) –

This case overruled *McConnell v. FEC*. Citizens United sought an injunction against the Federal Election Commission to prevent the application of the Bipartisan Campaign Reform Act (BCRA) to its film *Hillary: The Movie* which expressed opinions about whether Hillary Clinton would make a good president.

In an attempt to regulate "big money" campaign contributions, the BCRA applied a variety of restrictions to "electioneering communications." Section 203 of the BCRA prevented corporations or labor unions from funding such communication from their general treasuries. Sections 201 and 311 required the disclosure of donors to such communication and a disclaimer when the communication was not authorized by the candidate it intended to support. Citizens United argued that: (1) Section 203 violates the First Amendment on its face and when applied to *The Movie* and its related advertisements, and that (2) Sections 201 and 203 are also unconstitutional as applied to the circumstances.

The United States District Court denied the injunction. Section 203 on its face was not unconstitutional because the Supreme Court in *McConnell v. FEC* had already reached that determination. The District Court also held that *The Movie* was the functional equivalent of express advocacy, as it attempted to inform voters that Senator Clinton was unfit for office, and thus Section 203 was not unconstitutionally applied. Lastly, it held that Sections 201 and 203 were not unconstitutional as applied to the *The Movie* or its advertisements. The court reasoned that the *McConnell* decision recognized that disclosure of donors "might be unconstitutional if it imposed an unconstitutional burden on the freedom to associate in support of a particular cause," but those circumstances did not exist in Citizen United's claim.

The Supreme Court held, however, that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited. The majority maintained that political speech

is indispensable to a democracy, which is no less true because the speech comes from a corporation. The majority also held that the BCRA's disclosure requirements as applied to *The Movie* were constitutional, reasoning that disclosure is justified by a "governmental interest" in providing the "electorate with information" about election-related spending resources. The Court also upheld the disclosure requirements for political advertising sponsors and it upheld the ban on direct contributions to candidates from corporations and unions.

Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010) –

A group of individual residents who joined together to oppose an annexation election challenged Colorado's reporting and registration requirements for ballot issue committees. Douglas County, Colorado conducted an annexation election via the ballot issue process. Members spoke publicly and circulated fact sheets and postcards opposing the annexation. Their activities and the expenditures brought them within the state's definition of a ballot issue committee; however, they did not register and report the ballot issue committee.

The court ruled that the campaign finance laws did burden the individual citizens' constitutional freedom of association. For example, the residents were burdened by attorney's fees that cost more than the money used to speak on the issue. What's more, the residents were burdened by the large amount of time, energy, and money needed to research the law and comply with its requirements. The Court found that the burdens imposed on the residents' First Amendment rights outweighed the public interest in the disclosure of donors. The Court held that the residents' right to association was infringed upon because there was not a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Gessler v. Colorado Common Cause, 327 P.3d 232 (Colo. 2014) –

The court considered the lawfulness of the Secretary of State's Rule 4.1 which was promulgated by Colorado Secretary of State Scott Gessler in response to *Sampson v. Buescher*. Significantly, Rule 4.1 increased the contribution and expenditure threshold that triggered issue committee status from $200 to $5000 and exempted retrospective reporting of contributions and expenditures once issue committee status was achieved. The court held that *Sampson* did not invalidate either the $200 contribution and expenditure threshold under article XXVIII of the Colorado Constitution or the retrospective reporting requirement under section 1-45-108(1)(a)(I), C.R.S. of the Fair Campaign Practices Act. Thus, because Rule 4.1's $5000 threshold and its retrospective reporting exemption clearly conflict with these provisions, the court held Rule 4.1 unlawful and set it aside.

Now, there is no clear "cutoff" for contributions and expenditures that would exempt an issue committee from Colorado's registration and reporting requirements. While *Sampson* indicates the requirements are unconstitutional as applied to some small-scale committees, the court specifically declined to create a bright line contribution and expenditure threshold under which issue committees cannot be required to register and report. In his partial dissent in *Colorado Common Cause*, Justice Eid noted that by denying Secretary Gessler's authority to clarify the current threshold by rulemaking, the court left the determination of which committees are exempt from the $200 threshold to case-by-case adjudication of whether a committee is sufficiently similar to the one in *Sampson*.

Coalition for Secular Government v. Williams, 815 F.3d 1267 (10th Cir. 2016) –

A nonprofit corporation that was planning to raise and spend $3,500 to advocate against a statewide ballot initiative brought action against the Colorado Secretary of State, seeking exemption from Colorado's registration and expenditure disclosure requirements. The Court of Appeals held that Colorado's issue-committee registration and disclosure requirements did not satisfy exacting scrutiny and thus violated the First Amendment as applied to the corporation.

Colorado Ethics Watch v. Senate Majority Fund, LLC, 269 P.3d 1248 (Colo. 2012) –

Watchdog group filed a complaint with the secretary of state alleging that two "527" tax-exempt political organizations had violated campaign finance provisions of the state constitution by engaging in advertising for the purported purpose of expressly advocating elections of certain candidates and failing to adhere to registration and reporting requirements for groups engaged in such advertising.

The Supreme Court held that: (1) "express advocacy" within the meaning of campaign finance provision of the state constitution was limited to speech that contained either "magic words" listed in *Buckley v. Valeo* or substantially similar synonyms which explicitly exhort the viewer or reader to vote for or against a candidate in an upcoming election; (2) advertisements that identified candidates for office by name or picture, favorably presented positions candidates had taken on certain issues, and encouraged voters to call the candidates to thank them were not "express advocacy" within meaning of campaign finance provision of state constitution; and (3) advertisement stating that local leaders endorsed a candidate for office was not "express advocacy" within meaning of campaign finance provision of state constitution.

Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) –

Various groups, including labor unions, companies, and hospitals brought this action against the governor challenging the constitutionality of an amendment to the Colorado Constitution that prohibited campaign donations from those holding sole source government contracts to any candidate for any elected office of the state or its political subdivisions. The Supreme Court of Colorado held that: (1) the amendment was overbroad in restricting protected speech; (2) the punishment for violating the amendment provisions was disproportionate and served to chill protected speech; (3) the amendment was unconstitutionally vague; (4) the amendment provisions prohibiting contributions from union political action committees violated the Equal Protection Clause; (5) the provision that prohibited any person who contributed to ballot issue from entering into sole source government contract related to that issue violated the First Amendment; and (6) the unconstitutional portions of the amendment could not be severed.

Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016) –

A nonprofit corporation sued the Colorado Secretary of State for electioneering communication consisting of television advertisement with pure issue advocacy to be broadcast before upcoming gubernatorial election that allegedly would violate First Amendment rights of association and privacy as applied to donors who contributed $250 or more to support advertisement. The Court of Appeals held that: (1) the sufficiently tailored political campaign contribution disclosure requirements could reach at least some types of issue speech, including speech that did not reference particular election campaign but did mention candidate shortly before election, and (2) the Colorado political campaign contribution disclosure requirements served important government interests and were sufficiently tailored to justify compelled disclosure of donors to advertisement mentioning candidate prior to election.

Campaign Integrity Watchdog v. Alliance for a Safe and Independent, 2018 CO 7 (Colo. 2018) –

The Supreme Court held that a political committee must report payments to a law firm for its legal defense as contributions, but not as expenditures. "Expenditures and obligations" under CRS § 1-45-108(1)(a)(I) are limited to payments and obligations for expressly advocating the election or defeat of a candidate; payments for legal defense are not for express electoral advocacy. But, pursuant to Colo. Const. art. XXVIII, § 2(5)(a)(II), payments to a third-party law firm for a political committee's legal defense count as reportable contributions because they are payments "made to a third party for the benefit of any political committee."

The Court reversed the administrative law judge's determination that the contribution-reporting requirement is unconstitutional as applied to Alliance for a Safe and Independent Woodmen Hills. Under *Buckley v. Valeo*, for political committees like Alliance whose major purpose is influencing elections, the governmental interests in political transparency and preventing corruption justify the First Amendment burdens of reporting and disclosure. It makes little difference that the payments here were made post-election and for legal defense; elections are cyclical and money is fungible.

Coloradans for a Better Future v. Campaign Integrity Watchdog, 2018 CO 6 (Colo. 2018) –

A lawyer filed a report for Coloradans for a Better Future, a political organization, without charging a fee. The Supreme Court reversed the Court of Appeals' determination that Better Future was required to report the donated legal service as a "contribution" under Colorado's campaign-finance laws. The constitutional definition of "contribution" does not address political organizations, and neither part of the statutory definition relied on by the Court of Appeals covers legal services donated to political organizations. CRS § 1-45-103(6)(b) does not apply to political organizations, and the word "gift" in CRS § 1-45-103(6)(c)(I) does not include gifts of service.