LOCAL CAMPAIGN FINANCE ORDINANCES: IS YOUR ORDINANCE CONSTITUTIONAL?

Karen Getman
Kari Krogseng
Remcho, Johansen & Purcell, LLP
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I. INTRODUCTION

The campaign finance landscape has changed dramatically over the past few years. Although the United States Supreme Court under Chief Justice Rehnquist appeared friendly towards contribution and possibly even expenditure limits, the Court under Chief Justice Roberts has reversed course. In the past four years, the Roberts Court has gone out of its way to strike down a number of campaign finance provisions as unconstitutional.[1] In doing so, it has reinvigorated judicial scrutiny of campaign finance provisions and overturned precepts long thought to be settled law.

Given these circumstances, local entities that have enacted campaign finance reform ordinances to supplement the state's Political Reform Act should consider whether it is time to update their ordinances in order to comply with current law and minimize the risk of future litigation. This paper summarizes important recent court decisions and suggests areas of campaign finance ordinances that may need to be revisited in light of these changes.

II. RECENT DEVELOPMENTS IN CAMPAIGN FINANCE LAW

A. Expenditure Limits

1. Limits on Expenditures by Candidates

Limits on campaign expenditures are almost certainly unconstitutional, as they are subject to strict scrutiny, and the government interest in eliminating corruption or the appearance of corruption does not justify them. (*Randall v. Sorrell* (2006) 548 U.S. 230, 247; *Buckley v. Valeo* (1976) 424 U.S. 1, 45.) "Thus, 'the Supreme Court has generally approved statutory limits on contributions to candidates and political parties,' but it 'has rejected expenditure limits on individuals, groups, candidates, and parties.'" (*Long Beach Area Chamber of Commerce v. City of Long Beach* (9th Cir. 2010) 603 F.3d 684, 692, quoting *EMILY's List v. Federal Election Com.* (D.C. Cir. 2009) 581 F.3d 1, 8,

[1] *Compare McConnell v. Federal Election Com*. (2003) 540 U.S. 93 and *Austin v. Michigan Chamber of Commerce* (1990) 494 U.S. 652 with *Citizens United v. Federal Election Com*. (2010) 130 S.Ct. 876; *Davis v. Federal Election Com.* (2008) 128 S.Ct. 2759; *Federal Election Com. v. Wisconsin Right to Life, Inc.* (2007) 551 U.S. 449 and *Randall v. Sorrell* (2006) 548 U.S. 230.

emphasis omitted.) The exception is when the acceptance of public funds is conditioned on expenditure limits. (*Buckley v. Valeo*, 424 U.S. at 57, fn. 65.)

2. Limits on Independent Expenditures by Corporations and Unions

State law defines an independent expenditure as one made "in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." (Gov. Code, § 82031.)[2] That definition is commonly incorporated in local ordinances, and is substantially the same as that used in the Federal Election Campaign Act.

In *Citizens United v. Federal Election Com.* (2010) 130 S.Ct. 876, the most notable decision issued by the Supreme Court last term, the Court held unconstitutional the long-standing ban on corporations and labor unions using their general treasury funds to make independent expenditures on behalf of federal candidates. The Court expressly overruled *Austin v. Michigan Chamber of Commerce* (1990) 494 U.S. 652. The *Citizens United* Court held that political speech may not be banned based on corporate identity, and disapproved *Austin's* "anti-distortion" rationale for restrictions on corporate expenditures – that there is a government interest in preventing the distorting effects of the immense aggregations of wealth by corporations on the political marketplace. (*Citizens United v. Federal Election Com.*, 130 S.Ct. at 903-905, citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 659-660.) *Citizens United* held that the ban on corporate independent expenditures also failed to meet the only rationale constitutionally acceptable as a basis for upholding limits. That rationale, established by *Buckley v. Valeo*, 424 U.S. at 25-27, allows restrictions in order to *prevent corruption or the appearance of corruption.* (*See Citizens United v. Federal Election Com.*, 130 S.Ct. at 908-911.)

While state law does not prohibit corporations and unions from making contributions, independent expenditures or "electioneering communications" in support of or in opposition to candidates, several cities and other local public entities do. For example, both Los Angeles and San Diego had provisions that appear to be in conflict with the *Citizens United* opinion. The Los Angeles Ethics Commission has since adopted a resolution stating that it will no longer enforce the section of the Los Angeles

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[2] The FPPC will soon decide whether its long-standing interpretation of "express advocacy" under section 82031 should be changed to provide that a communication contains express advocacy if it amounts to "the functional equivalent of express advocacy" and as a result is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. FPPC staff believe that the Supreme Court's decision in *Citizens United v. Federal Election Com.* (2010) 130 S.Ct. 876 allows for a less restrictive interpretation of "express advocacy." (FPPC August 12, 2010 Meeting Agenda: Memo on Reconsidering the Meaning of Advocacy (July 30, 2010).)

Municipal Code that prohibited business corporations and labor organizations from using general treasury funds to expressly advocate for the election or defeat of candidates for elective City office. As for San Diego, a federal district court has issued a preliminary injunction allowing corporations and unions to make unlimited contributions to political action committees ("PACs") that make independent expenditures to support or oppose candidates for elective City office. (*Thalheimer v. City of San Diego* (S.D. Cal. Feb. 16, 2010) ___ F.Supp.2d ___, 2010 WL 596397, *17.)[3]

3. Limits on Expenditures for Issue Advocacy

In *McConnell v. Federal Election Com.* (2003) 540 U.S. 93, 204-206, the Supreme Court upheld against a facial challenge the federal law prohibiting corporations and unions from using their general treasury funds to broadcast communications targeted to the electorate that name a federal candidate shortly before an election. Four years later, in *Federal Election Com. v. Wisconsin Right to Life, Inc.* (2007) 551 U.S. 449, 481, the Roberts Court held unconstitutional the application of that provision to a nonprofit corporation's television advertisements urging viewers to contact their Senators regarding the filibuster of judicial candidates. The Court held that the federal campaign laws could not regulate issue advocacy, but instead only express advocacy or its "functional equivalent." It found that an ad is the functional equivalent of express advocacy only when it is susceptible to no other reasonable interpretation than that it is an appeal to vote for or against a candidate. (551 U.S. at 469-470.)

4. Voluntary Expenditure Limits

Almost any expenditure limit carries with it some risk of litigation, including a voluntary one. In *Buckley v. Valeo*, the Supreme Court upheld the use of voluntary expenditure limits as a condition of receiving public financing. (424 U.S. at 57, fn. 65.) In virtually every other context, however, it has struck down expenditure limits. (*See Randall v. Sorrell*, 548 U.S. at 242, 246.) If a city wishes to continue its voluntary expenditure limits, it should ensure that any "sweetener" used to encourage acceptance of the limit is truly voluntary and not coercive. As the Supreme Court recently reiterated, "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." (*Davis v. Federal Election Com.*, 128 S.Ct. at 2772.)

At the state level, acceptance of voluntary expenditure limits allows candidates to publish a candidate statement in the voter information pamphlet. (Gov. Code, § 85601.) Moreover, the state has specified rules for what happens when candidates change their mind about the spending limits at later stages in the process or are faced with a self-funded opponent. (*Id.*, §§ 85401-85402.)

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[3] The court's decision has been appealed to the Ninth Circuit, where the appeal is briefed and awaiting oral argument. (*See Thalheimer v. City of San Diego* (9th Cir. 2010) No. 10-55322, 10-55324, 10-55334.)

The use of differing contribution limits to encourage participation in a voluntary spending limit is especially risky, as is discussed below. (*See* Section II.B.4, *infra*.)

5. Expenditures by Public Agencies

Last year, the California Supreme Court reaffirmed the law set forth in *Stanson v. Mott*, holding that a governmental agency cannot use public funds "for materials or activities that reasonably are characterized as campaign materials or activities." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8.) The Court did allow agencies to "publish a 'fair presentation of facts' relevant to an election matter." (*Id.* at 25, quoting *Stanson v. Mott* (1976) 17 Cal.3d 206, 222.)

B. Contribution Limits

1. Contribution Limits Must Be Closely Drawn

In *Randall v. Sorrell* (2006) 548 U.S. 230, 261-262, the Supreme Court struck down Vermont's candidate contribution limits of $400 per 2-year election cycle for governor, and lower limits for other state offices, because they were so restrictive as to impede the ability of challengers to raise sufficient funds to mount a meaningful campaign.[4] Even before that, a federal district court in Sacramento similarly found limits of $100 to $500 for state candidates too low to allow those candidates to mount an effective campaign. (*California Prolife Council PAC v. Scully* (E.D. Cal. 1998) 989 F.Supp. 1282, 1298-1299.)[5]

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[4] Contribution limits for ballot measure committees have long been held unconstitutional because there is no governmental interest in preventing corruption in the support for or opposition to a ballot measure comparable to support for an individual candidate. (*First Nat. Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 790; *Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290, 297-299.) Whether a contribution limit on candidate-controlled ballot measure committees is unconstitutional is less clear, as the most recent case to consider the matter struck down a FPPC regulation limiting contributions to such committees because the regulation exceeded the FPPC's authority and conflicted with the Political Reform Act, not because it was unconstitutional. (*Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 739.)

[5] On appeal, the district court's preliminary injunction was affirmed and the case was remanded for the court to conduct a full trial on the merits. (*California Prolife Council PAC v. Scully* (9th Cir. 1999) 164 F.3d 1189, 1190-1191.) While the case was on remand, the voters passed Proposition 34, which repealed Proposition 208's contribution limits. The plaintiffs then agreed to dismiss their challenge to those limits as moot.

2. Contribution Limits Must Be Adjusted to Reflect Inflation

The *Randall* Court also criticized the Vermont statute's failure to index the contribution limits to inflation, with cost of living adjustments. (548 U.S. at 261.) Such adjustments can have a significant impact over time. For example, the contribution limits for California state candidates are adjusted every odd-numbered year to reflect any increase or decrease in the Consumer Price Index, then rounded to the nearest hundred. (Gov. Code, § 83124.) The state limit of $3,000 for most state candidates, first set in 2000 (*id.*, § 85301(a)), now stands at $3,900 with inflation adjustments. Likewise, the City of Walnut Creek passed a law commencing in 1996 imposing a $100 contribution limit on candidates for city council but also providing regular cost of living adjustments. (Walnut Creek Mun. Code, § 12-1.103.) The limit currently stands at $150.

3. Contribution Limits Must Be Justified By Preventing Corruption or the Appearance of Corruption

If a contribution limit is challenged, the government must point to legislative findings and a factual record – i.e., evidence of past improper *quid pro quo* contributions, overwhelming voter approval of contribution limits, etc. – to demonstrate that the city has a sufficient interest in preventing corruption or the appearance of corruption to justify the particular limit. (*Citizens for Clean Government v. City of San Diego* (9th Cir. 2007) 474 F.3d 647, 653-654; *see also Nixon v. Shrink Missouri Government PAC* (2000) 528 U.S. 377, 393-394.) The amount of the limit may also be judged by the size of the city, the costs of media and staffing in the area, and other facts particular to the jurisdiction.

4. Differing Contribution Limits Based on Acceptance of Spending Limits

Several local jurisdictions – for example, Oakland – allow candidates who accept voluntary expenditure limits to receive contributions that are larger than those allowed for candidates who decline to limit their spending.[6] There is a significant risk in having differing contribution limits for the same office that depend only on whether the candidate has agreed to accept the voluntary expenditure limit. The Supreme Court recently struck down the "millionaire's amendment" to the federal election campaign law, which increased the contribution limit for those candidates who face a self-funded opponent. (*Davis v. Federal Election Com.* (2008) 128 S.Ct. 2759.) In so doing, the Court emphasized that it has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . . ." (*Id.* at 2771; *see also id.* at 2774 ["the unprecedented step of imposing different contribution and . . . expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."].)

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[6] California Government Code section 85300 prohibits general law city candidates from accepting public funding. Charter city candidates, however, may participate in public funding programs. (Cal. Code Regs., tit. 2, § 18530.)

Even before *Davis*, however, a federal district court in Sacramento struck down as unconstitutional a state law – Proposition 208 – that provided differing contribution limits depending solely on whether the candidate had accepted voluntary contribution limits. The district court reasoned that if the higher limits for candidates who accepted the spending limits were sufficient to combat corruption, then the lower limits must be "constitutionally infirm." (*California Prolife Council PAC v. Scully*, 989 F.Supp. at 1296.)

5. Contributions by Corporations and Unions to Candidates

Citizens United did not address the constitutionality of bans on direct contributions to candidates by corporations and labor unions. The Supreme Court upheld a federal ban on corporate contributions to candidates in *Federal Election Com. v. Beaumont* (2003) 539 U.S. 146, 159-160, based on the now overruled decision in *Austin*. A Southern District of California court recently analyzed *Beaumont* and *Austin* in light of the *Citizens United* decision, and found that the City of San Diego's ban on corporate contributions to city candidates remains constitutional, because there is a significant difference between the limits on contributions to candidates and independent expenditures. (*Thalheimer v. City of San Diego* (S.D. Cal. Feb. 16, 2010) ___ F.Supp.2d ___, 2010 WL 596397, *15.)

6. Contributions by Political Parties to Candidates

Randall v. Sorrell, 548 U.S. at 256-259, found unconstitutional state contribution limits that severely restricted a political party's ability to help its candidates win elections. The State limits treated national parties and all of their affiliates as a single entity to which the contribution limit for individuals also applied. *Randall* distinguished an earlier Supreme Court decision that had upheld federal limits on political party expenditures that were coordinated with candidates (*Federal Election Com. v. Colorado Republican Federal Campaign Com.* (2001) 533 U.S. 431, 456), because the party limits under federal law were much higher than limits on individual contributions. (548 U.S. at 258.)

Relying on *Randall*, a district court in the Southern District of California recently enjoined a ban on contributions by political parties to candidates for nonpartisan city offices, although the court allowed that the city may limit the amount that political parties may contribute. (*Thalheimer v. City of San Diego* (2010) 2010 WL 596397, at *17.)

7. Contributions by Contractors and Lobbyists to Candidates

Very recently, the United States Court of Appeals for the Second Circuit upheld Connecticut's ban on contributions by state contractors, prospective state contractors, their principals, and their immediate family members to either the executive branch or legislative branch, depending on the contract in question, finding the ban was closely drawn and justified by Connecticut's well-documented recent corruption scandals involving state contractors. (*Green Party of Connecticut v. Garfield* (2d Cir. July 13,

2010) ___ F.3d. ___, 2010 WL 2737134, **7-11.) This ruling contrasts with a recent decision by the Supreme Court of Colorado, which struck down as vague and overbroad a constitutional amendment enacted by the voters in Colorado which banned contributions to candidates by state contractors and contributions made on behalf of their immediate family, for the duration of the contract and for two years thereafter. (*Dallman v. Ritter* (Colo. 2010) 225 P.3d 610.)

With respect to a ban on lobbyist contributions, however, the *Green Party of Connecticut* court found that Connecticut's ban violated the First Amendment, because there was limited evidence of corruption involving lobbyists and their family members, and thus the ban was not closely drawn to meet a sufficiently important government interest. (*Green Party of Connecticut v. Garfield*, 2010 WL 2737134, at **13-14.) It did, however, leave open the possibility that a contribution limit for lobbyists might meet constitutional muster. (*Id*. at *14.) This contradicts the state of the law in California, where an Eastern District of California court has upheld the state's ban on contributions to candidates by individuals who are registered lobbyists for the candidate's agency, finding the law narrowly tailored to serve the State's important interest in avoiding the potential for corruption. (*Institute of Governmental Advocates v. Fair Political Practices Com*. (E.D. Cal. 2001) 164 F.Supp.2d 1183, 1193-1194.) The *Green Party of Connecticut* Court also struck down Connecticut's ban on the solicitation of contributions by contractors and lobbyists, because it did not survive strict scrutiny and burdened political speech. (2010 WL 2737134, at **14-17.) The California Supreme Court similarly struck down as overbroad a statute that sought to ban contributions arranged or recommended by lobbyists. (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 43-45.)

8. Limits on Contributions to Independent Expenditure Committees

As discussed above, while the Supreme Court has struck down prohibitions on independent expenditures made from a corporation or union's general treasury fund as unconstitutional in *Citizens United*, it has not yet squarely addressed the issue of whether restrictions on contributions to independent expenditure committees are unconstitutional. The Ninth Circuit and the D.C. Circuit, however, have recently utilized the rationale expressed in *Citizens United* to strike down restrictions on contributions by individuals to independent expenditure committees. (*Long Beach Area Chamber of Commerce v. City of Long Beach* (9th Cir. 2010) 603 F.3d 684, 696; *Speechnow.org v. Federal Election Com*. (D.C. Cir. 2010) 599 F.3d 686, 696, en banc; *see also EMILY's List v. Federal Election Com*. (D.C. Cir. 2009) 581 F.3d 1.)

In *Long Beach*, the Ninth Circuit found that limits on contributions to independent expenditure committees cannot be justified by an anti-corruption argument that the city failed to support its anti-corruption rationale with any evidence, and no other rationale survived *Citizens United* and its predecessors. (603 F.3d at 693-699.) Prior to the ruling regarding Long Beach's ordinance, ordinances that limit contributions to independent expenditure committees that support or oppose local candidates had already been struck down in San Diego, San Francisco, were not being enforced in Oakland, and

had questionable legal standing in San Jose.[7] Only Los Angeles's ordinance had been upheld by a federal court in recent years.[8]

In the wake of *Citizens United* and cases like *Long Beach* and *Speechnow.org*, the Federal Election Commission recently issued an advisory opinion concluding that federal independent expenditures committees may accept unlimited contributions from individuals, political committees, corporations and unions. (FEC Advisory Op. 2010-11 (July 22, 2010).)

9. Public Financing

In June 2010, the Supreme Court issued an emergency order in *McComish v. Bennett* (2010) ___ S.Ct. ___, 2010 WL 2265319, enjoining Arizona from providing matching funds to candidates who accept public funding and whose opponents make expenditures that exceed the initial grant of public funds, pending its decision whether to grant a petition for cert to review a Ninth Circuit opinion finding that the regime imposed only a minimal burden on the opponents' First Amendment rights and was justified by the state's desire to clean up its "long history" of corruption. (*See McComish v. Bennett* (9th Cir. 2010) ___ F.3d ___, 2010 WL 2595288.) The Supreme Court's order makes it very likely that the Court will in fact hear the case next term, and may overturn at least a portion of Arizona's public funding program as a de facto expenditure limit violative of the First Amendment under *Davis*. This likelihood is increased by the fact that both the Second Circuit and the Eleventh Circuit issued opinions in July 2010 that are at odds with *McComish*. The Second Circuit held that Connecticut's public funding program's "trigger provision," which provided additional funding when a participating candidate faces a self-financed opponent or large independent expenditures against the candidate, is unconstitutional. (*Green Party of Connecticut v. Garfield* (2d Cir. 2010) ___ F.3d ___, 2010 WL, 2737153, *25.) The Eleventh Circuit held that Florida's public funding program's "excess spending subsidy"

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[7] *Thalheimer v. City of San Diego*, 2010 WL 596397, at *17; *Committee on Jobs Candidate Advocacy Fund v. Herrera* (N.D. Cal. Sept. 20, 2007) 2007 WL 2790351, *5 (granting preliminary injunction against enforcement of ordinance limiting contributions to independent expenditure committees); *OakPAC v. City of Oakland* (N.D. Cal. Oct. 19, 2006) No. C06-5266 MJJ (granting temporary restraining order against enforcement of Oakland ordinance restricting contributions to independent expenditure committees). In *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose* (N.D. Cal. Sept. 20, 2006) 2006 WL 3832794, *9, the federal district court struck down as unconstitutional the City of San Jose's limits on contributions to committees that make independent expenditures in city candidate elections. On appeal, the Ninth Circuit vacated and remanded on abstention grounds. (*San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose* (9th Cir. 2008) 546 F.3d 1087.)

[8] *Working Californians v. City of Los Angeles* (C.D. Cal. Nov. 24, 2009) No. CV-09-08327.

for participating candidates is likewise unconstitutional. (*Scott v. Roberts* (11th Cir. July 30, 2010) ___ F.3d ___, 2010 WL 2977614, *14.)

C. Disclosure Requirements

"Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' *Buckley*, 424 U.S. at 64, and 'do not prevent anyone from speaking,' *McConnell*, 540 U.S. at 201." (*Citizens United v. Federal Election Com.*, 130 S.Ct. at 914.) Thus, while campaign disclosure laws are not subject to strict scrutiny, the U.S. Supreme Court recently reiterated that First Amendment challenges to campaign disclosure requirements are reviewed under an "exacting scrutiny" standard, requiring "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." (*Id.*) To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (*Davis v. Federal Election Com.* (2008) 128 S.Ct. 2759, 2774-2775, quoting *Buckley v. Valeo*, 424 U.S. at 64 ["'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment'" and thus disclosure requirements are "closely scrutinized."]; *California Pro-Life Council, Inc. v. Randolph* (9th Cir. 2007) 507 F.3d 1172 [California has compelling interest in requiring disclosure of contributions and expenditures made to support or oppose ballot measures].)

The courts have upheld disclosure requirements meeting this standard. For example, federal disclaimer and disclosure requirements for televised advertisements were upheld in *Citizens United v. Federal Election Com.*, 130 S.Ct. at 914-916. In one of the final opinions issued by the Supreme Court last term, the Court held that the disclosure of the names and addresses of signers of controversial referendum petitions is constitutional, although it left open the possibility of an as-applied challenge if plaintiffs can prove they faced a realistic threat of harassment by disclosure. (*Doe v. Reed* (2010) 130 S.Ct. 2811 [signatures on referendum petition on Washington State domestic partnership law must be disclosed under that state's Public Records Act].) Last year, the District Court for the Northern District of California came to a similar conclusion regarding the disclosure of names and other personal information of individuals who contributed $100 or more to support Proposition 8 in the November 2008 election. (*ProtectMarriage.com v. Bowen* (E.D. Cal. 2009) 599 F.Supp.2d 1197.)

III. CHECKLIST OF ISSUES TO REVISIT IN LOCAL CAMPAIGN FINANCE ORDINANCES

A. Expenditure Limits

- ☑ Involuntary expenditure limits are never okay
- ☑ Voluntary expenditure limits cannot be coercive
- ☑ Public funds can never be used for campaign materials or activities

B. Contribution Limits

- ☑ Contribution limits cannot be too low
- ☑ Contribution limits should have a cost of living adjustment
- ☑ Contribution limits must be supported by a factual record demonstrating the need to prevent corruption or the appearance of corruption
- ☑ Differing contribution limits are highly suspect
- ☑ Must narrowly tailor special limits for contractors, lobbyists and the like
- ☑ Cannot limit contributions to independent expenditure committees

C. Disclosure Requirements

- ☑ Must be substantially related to a sufficiently important governmental interest.
- ☑ Should be updated to conform with the Political Reform Act

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