IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-1488

LAKEWOOD CITIZENS WATCHDOG GROUP,

Plaintiff,

v.

CITY OF LAKEWOOD, COLORADO and BRUCE ROOME,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUCTION.

Defendants hereby oppose Plaintiff's motion for a preliminary injunction.

Initial Statement

At its core, this entire dispute comes down to whether the lack of a "press exemption" in a campaign finance law or ordinance renders the ordinance unconstitutional. While there is a lot of distracting noise, and Defendants readily admit that the past interpretations of terms in its ordinance, both by an independent hearing officer and by the Lakewood City Clerk, were incorrect, the fundamental dispute comes down to the issue of the press exemption. Despite Plaintiff's arguments, the terms at issue have been litigated across State and Federal Courts and, while there certainly has been interpretation and guidance, there has not been a finding of any constitutional infirmity for any of the relevant terms "Expenditure", "Independent expenditure" and "Electioneering communication".

Factual/Procedural history

Defendants do not substantively contest Plaintiff's statement of historical facts. And, importantly, the facts are not at issue. The ordinance reads as it reads and the law is the law. Any potential additional necessary facts would be impossible to determine at this time as they would rely on future actions by Plaintiff.

Argument

Plaintiff appears to argue that the definitions of "Expenditure", "Independent expenditure", and "Electioneering communication" within the Lakewood Campaign Finance Ordinance are unconstitutional, both facially and as applied. However, Plaintiff does not explain how, if the definition(s) within the Lakewood Ordinance are unconstitutional as written, almost identical definition(s) within Article XXVIII of the Colorado Constitution and within the section 201 of the Bipartisan Campaign Reform Act of 2002 are not unconstitutional. Of note, both the state and federal code sections, in general, and as to the specific definitions, have been reviewed countless times by state and federal courts and have never once been found to be unconstitutional.

I. The Lakewood definitions of "Expenditure" and "Independent expenditure" are not unconstitutional as written.

The Lakewood definitions of "Expenditure" and "Independent expenditure" are identical to the definitions within the Colorado Constitution with the exception that the Colorado Constitution definitions include a press exemption. (Plaintiff's Ex. A.; Colorado Constitution Article XXVIII, section 2.)

Therefore, aside from the press exemption, any argument that the Lakewood definitions of "Expenditure" and "Independent expenditure" are unconstitutional must

therefore also be arguing that the Colorado Constitution definitions of the same terms are unconstitutional. The Colorado Supreme Court, in *Colo. Ethics v. Senate Majority Fund, LLC*, was asked to address the meaning and application of the term "expenditure" stating "(a)fter reviewing article XXVIII and the legal context in which it was adopted as a citizens initiative in 2002…we agree with the court of appeals that "expenditure was intentionally and narrowly defined in Article XXVIII to include only "express advocacy", so that it covers only those communications that explicitly advocate for the election or defeat of a candidate in an upcoming election." *Colo. Ethics v. Senate Majority Fund, LLC* (269 P.3d 1248, 1254) (2012). The Court certainly was given the opportunity to find the definitions to be constitutionally infirm, but it did not do so. Id. at 1260. Further, the Court specifically referenced the *Buckley* standard for definitions of "express advocacy" in interpreting the term "express advocacy" as part of the definition of "expenditure" and limiting its application. *Id*. at 1254. (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). As a result, the C*olo. Ethics* decision upheld the constitutionality of the definition of "expenditure", identical to the definition in question here. *Id*.

II. The Lakewood definition of "electioneering communication" is not unconstitutional as written.

The Lakewood Ordinance definition of electioneering communication:

Electioneering communication means any communication broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed, transmitted by means of the internet, or delivered by hand to personal residences or otherwise distributed that:

(I) Unambiguously refers to any candidate without expressly advocating that candidate; and

(II) Is broadcast, printed, mailed, delivered or distributed within 60 days before a municipal election; and

(III) Is broadcast to, printed in a newspaper distributed to, mailed to, delivered by hand or electronically transmitted to any communication by persons made in the regular course and scope of their business or any to an audience that includes members of the electorate for such public office.

The Federal definition of "Electioneering communication":

> (A) In general (i) The term ''electioneering communication'' means any broadcast, cable, or satellite communication which— (I) refers to a clearly identified candidate for Federal office; (II) is made within— (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

The Supreme Court, in *McConnell v. Federal Election Comm'n*, found the regulation of "Electioneering communication" to be constitutional. *McConnell v. Federal Election Comm*'n, 540 U.S. 93, (2003). In *McConnell*, the Court directly addressed all of the various challenges that are regurgitated here, the First Amendment Challenge, the vagueness challenge, and the overbreadth challenge, and rejected all of them. *Id*. at 190-4. The Court further explained that there is no rigid First Amendment barrier between express and issue advocacy and nothing providing greater protection to either. *Id*.

The definition of "electioneering communication" has also been reviewed by Colorado appellate courts. In *Colo. Ethics Watch v. Gessler*, the Colorado Court of Appeals shot down an interpretation of the definition of "Electioneering communication" that was limited to "express advocacy". *Colo. Ethics Watch v. Gessler*, 363 P.3d 727, (Colo. App. 2014). In *Colo. Ethics Watch*, the court specifically analyzed a proposed interpretation of

the definition of "electioneering" put forth by the Colorado Secretary of State and found that the interpretation, limiting the definition to "express advocacy" was invalid. *Id*. at 733.

Additionally, in *Colorado v. Committee*, a division of the Colorado Court of Appeals analyzed exception (b)(III) of the definition of "electioneering" (the communication in regular course and scope of business exception) and found that the exception should be narrowly interpreted, to only include persons whose business is to deliver candidate specific communications. *Colorado v. Committee,* 187 P.3d 1207, (Colo. App 2008). Of note, given numerous opportunities to do so, no court, federal or state has found the definitions to be unconstitutional.

III. Plaintiff's assertion that the lack of a press exemption is fatal to the ordinance is incorrect.

So, here we are. Lakewood enacted an ordinance that is all but identical to both constitutionally sound state and federal laws. Plaintiff argues that the ordinance is extraordinary or represents "full overbreadth" simply because it lacks a press exception. While this rhetoric may sound convincing, it is does not represent the current state of the law. Under *Citizen's United v. Federal Election Comm'n*, the Supreme Court explicitly found that there is no greater First Amendment protection for any entity, including press. *Citizen's United v. Federal Election Comm'n*, 558 U.S. 310 (2010). The Court further noted that there is no precedent supporting laws that distinguish between corporations deemed exempt as media corporations and those which are not. *Id.* at 315. Therefore, any argument concerning the constitutional infirmity of the lack of a press exemption is moot. *Id*. Sometimes an issue is simply settled and there is nothing more to say.

IV. Exacting scrutiny applies to campaign finance disclosures.

Curiously, Plaintiff appears to be struggling with what standard of scrutiny, strict or exacting, applies to campaign finance disclosures. However, as stated in Plaintiff's brief, campaign finance laws are examined under the standard of exacting scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) Exacting scrutiny means that an ordinance concerning disclosures must be substantially related to an important governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

A. Lakewood has an important interest in requiring disclosure of sources: the informational interest.

1. The informational interest rationale.

As stated in Plaintiff's motion, the informational interest involves "increasing the fund of information concerning those who support candidates/interests, helping voters to define candidate's constituencies, and shedding the light of publicity on spending that is campaign related." *Id.* at 81. The Supreme Court, in Buckley, articulated numerous benefits to the electorate for disclosure. *Id*. at 66-8. Generally, disclosure provides an electorate with information about where money is coming from and for what purpose it is spent. *Id*. But, there is much more value to the electorate in disclosure. Disclosure also allows an electorate to more accurately place a candidate on the political spectrum than labels and speeches. *Id.* Disclosure also provides the electorate with a sense of what interests a candidate may be responsive or even indebted to. *Id*. And, disclosure can also discourage corruption by bringing spending to light. *Id*.

2. The informational interest does apply to The Whole Story.

The Whole Story, taken as a whole and in its constituent parts, appears to present an anti-(current) municipal government and anti-incumbent viewpoint. The tagline for the Whole Story, printed in the upper left corner of the front page is "(p)ublished quarterly by the Lakewood Citizens Watchdog Project to keep the people informed of the happenings of their local government that are ignored by a compliant news media". While this viewpoint appears clear, what is not at all clear is who or what is funding these views. Is it a candidate? It is some other group with some other agenda? Is there a financial interest involved? As an example, if a large corporation is hoping to be able to get a variance to a zoning ordinance to enable the building a large manufacturing or distribution plant, and was therefore hoping to install cooperative elected officials, and chooses to "publish" attacks on less-favored candidates, it certainly would aid the electorate to know the source of the funding for said attacks. Further, the Watchdog does not, as a traditional newspaper would, identify an author for any story or identify a story as being either factually based or opinion (editorially) based.

At present, and without disclosure, there is simply no way for anyone who receives the Watchdog to have any idea about who's views are being presented, make any assessment of the motivations for said views, and make any assessment about what effects those views and that support may have on elected officials. The only way to bring forth that information for the good of the citizenry is to require disclosure.

B. Lakewood's Ordinance does not require disclosure of any/all mentions of any candidate.

Lakewood's Ordinance reads, in relevant part, that an electioneering communication is "one that unambiguously refers to any candidate without expressly advocating that candidate". If express advocacy occurs, this would fall under the expenditure (and independent expenditure) portion of the ordinance, which read, in relevant part, that an expenditure is a contribution "for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question".

However, the Electioneering definition does not require, as implied by Plaintiff, of any statement made by any person concerning a candidate that is made within 60 days of an election. The Colorado Court of Appeals, in *Harwood v. Senate Majority Fund*, examined the all but identical definition of Electioneering from the Colorado Constitution. *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962 (2006); Colo. Const. art. XXVIII, § 2(7)(a). The *Harwood* court, in examining whether the act of conducting a telephone poll constituted electioneering, concluded that it did not as the definition of Electioneering must necessarily include taking an active part in an election campaign; trying to sway public opinion. *Id.* at 966. The Court reasoned that it had an obligation to construe a legislative act in a manner that would be constitutional and not result in an unreasonable and absurd result. *Id*. Based on the direct holding of Harwood, Lakewood's Electioneering communications definition should similarly have the same meaning. Therefore, only an action that takes an active part in a campaign or tries to sway public opinion constitutes an electioneering communication. Based on the foregoing, Lakewood argues that relevant portions of the campaign finance ordinance are not facially unconstitutional.

V. Lakewood's ordinances are not unconstitutional as applied.

A. Lakewood concedes that both the Independent Hearing Officer and the previous City Clerk misinterpreted the Campaign Finance ordinance.

Both the Independent Hearing Officer and the previous City Clerk misinterpreted the Campaign Finance ordinance when addressing these issues as to the 2019 election. The Independent Hearing Officer, in finding that The Whole Story to be an electioneering communication, found that the statements made therein constituted express advocacy. And, as noted in Plaintiff's motion, the Lakewood City Clerk dismissed complaints concerning statements made by media sources that were found not to be express advocacy. In both instances, for unknown reasons, the definitions within the ordinance were read incorrectly to require express advocacy despite the statement within the definition that electioneering is a communication "that unambiguously refers to any candidate **without** expressly advocating that candidate." (emphasis added). This is simply inarguable and Lakewood has no explanation of the previous errors. Of note, for reasons unknown, the Watchdog choose not to continue to pursue their appeal, to the State District Court of the Independent Hearing Officer's ruling in the 2019 case.

B. Plaintiff cannot show a reasonable likelihood of threats, harassment, or reprisals from Government officials or private parties.

In order for a plaintiff to articulate an "as-applied" challenge, a plaintiff must establish a reasonable probability that disclosures of the names of contributors will result in threats, harassment, or reprisals from either Government officials or private parties. *Citizens United* at 315. Plaintiff has not to this point articulated a reasonable probability of

harm or reprisals due to disclosures. In fact, Plaintiff appears, based on the operative motion, to only fear potential sanction for not complying with the ordinance.

Conclusion

For the foregoing reasons, Defendants respectfully request that Plaintiff's motion for a preliminary injunction be denied. Lakewood's campaign finance definitions are no more facially unconstitutional than similar if not identical state and federal definitions. Additionally, Lakewood's ordinance is not unconstitutional as applied as, despite errors in previous applications, a correct application of the ordinance would not violate Plaintiff's constitutional rights.

Dated this 6th day of July, 2021.

City of Lakewood

/s/ Alex Dorotik

Alexander James Dorotik
480 S. Allison Pkwy
Lakewood, CO 80226
(303) 987-7456/Fax: (303) 987-7671
adorotik@lakewood.org

Attorney for Defendants City of Lakewood and Bruce Roome

CERTIFICATE OF SERVICE

I certify that on this 6th day of July, 2021, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such to the following:

Owen Yeates
oyeates@ifs.org
Attorney for Plaintiff

/s/ Alex Dorotik