DOCKET NO. HHB-CV18-6044479-S	
JOE MARKLEY and ROB SAMPSON, *Petitioners-Plaintiffs*	SUPERIOR COURT
v.	JUDICIAL DISTRICT OF NEW BRITAIN
STATE ELECTIONS ENFORCEMENT COMMISSION, *Respondent-Defendant*.	October 15, 2021

PLAINTIFFS' REPLY BRIEF

Petitioners-Plaintiffs Joe Markley and Rob Sampson ("Plaintiffs") reply to Respondent-Defendant State Elections Enforcement Commission's ("Defendant," "SEEC," or "Commission") September 30, 2021 Memorandum ("SEEC Mem."), and in support of Plaintiffs' August 30, 2021 Opening Brief. The SEEC muddles the categories used in campaign finance law to try to evade constitutional scrutiny of its speech restrictions. But, measured against the standards for each campaign finance category, the restrictions are unconstitutional. Moreover, the Commission cannot escape the conclusion that the Citizens Election Program ("CEP") restrictions are unconstitutional, as they act as restrictions on all of a recipient's actions.

STANDARD OF REVIEW

The Commission puts great weight on precedent establishing that courts defer to an agency's time-tested statutory construction. *See* SEEC Mem. at 15-16. This case does not present a challenge to the Commission's interpretation of state campaign finance law, however, but to the constitutionality of the statutes themselves. The SEEC's cases and argument are therefore inapposite. Because this case presents questions of law and constitutional challenges, this Court's review "is plenary." *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 711, 99 A.3d 1038, 1065 (2014); *see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 567-68 (1995) (noting duty of independent review of constitutional facts).

ARGUMENT

I. CONNECTICUT CANNOT CONTROL WHAT CANDIDATES SAY

The Supreme Court has held that a candidate has "a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (per curiam). This Court could resolve the case on that point. The State of Connecticut has violated this clearly explained right, and the speech restrictions the SEEC has enforced should be declared unconstitutional.

II. THE SPEECH RESTRICTIONS FAIL THE SCRUTINY REQUIRED FOR ANY TYPE OF CAMPAIGN SPEECH

To distract from a candidate's right to speak about "the election of other candidates," *id*., the Commission conflates the terms of art dividing the various categories of campaign finance regulation, hoping that its speech restrictions will escape scrutiny in the confusion. But "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotation marks omitted). Connecticut's restrictions cannot survive scrutiny when analyzed under the clear limits the Supreme Court has placed on each regulatory category. In particular, the Commission's efforts to conflate contributions with expenditures and expenditures with electioneering communications fail scrutiny.

A. The pretense of controlling contributions cannot protect expenditure restrictions

The SEEC's defense depends on the novel assertions that "expenditures are tantamount to 'contributions,'" and that contributions to candidates "can be anything of value to a candidate," whether those contributions are given to the candidate or not. SEEC Mem. at 7, 19. The Commission's strongest argument for treating communication expenditures as contributions given to a candidate is its assertion that "[s]peech attacking a candidate's opponent can be

something of value to that candidate." *Id*. at 19. When fleshed out, the SEEC's argument must be: 1) that Plaintiffs' communications were expenditures, and 2) that such expenditures were of such value to the Governor's opponents that they become contributions. This argument contradicts 45 years of Supreme Court precedent.

"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The *Buckley* Court thus reined in an attempt like Connecticut's here "to be all-inclusive," to regulate as much as possible through loose definitions. *Buckley*, 424 U.S. at 76. Congress had attempted to limit "expenditure[s] . . . relative to a clearly identified candidate," and to regulate contributions given or expenditures made "for the purpose of . . . influencing" an election. *Id*. at 41, 77 (internal quotation marks omitted). If anything, these phrases are more precise than the SEEC's attempt to limit "anything of value to a candidate." SEEC Mem. at 19. The Supreme Court, however, held that such phrases are unconstitutionally vague and required a limiting construction.

"The use of so indefinite a phrase as 'relative to' a candidate," *Buckley*, 424 U.S. at 41, or of the Commission's "something of value to [a] candidate" standard, SEEC Mem. at 19, "fails to clearly mark the boundary between permissible and impermissible speech," *Buckley*, 424 U.S. at 41. To keep the government from controlling protected speech through such vague regulatory triggers, the Supreme Court limited their reach to "explicit words of advocacy of election or defeat of a candidate." *Id*. at 43; *id*. at 44 n.52 (noting required words); *see also id*. at 76-80 (requiring narrowing construction for "for the purpose of influencing"). Given the vacuousness of the SEEC's "anything of value" standard—which creates uncertainty whether any communication even remotely related to a candidate could be proscribed and punished—Connecticut's restrictions require the same narrowing construction.

Properly limited to express advocacy, Connecticut's speech restrictions cannot apply to Mr. Markley and Mr. Sampson's communications. *Buckley*'s express words of advocacy, *id.* at 44 n.52, are entirely absent from any statements about Governor Malloy. And any hint of the functional equivalent of express advocacy is also missing.[1] In the absence of express advocacy or its functional equivalent, Plaintiffs' communications cannot be restricted as expenditures against Governor Malloy, much less as expenditures that are of such value to his opponents that they become contributions.

Assuming, however, that Plaintiffs' communications were somehow expenditures, they would have to be treated as independent expenditures—expenditures for or against a candidate that are not coordinated with her opponents. Indeed, the SEEC's constant refrain is that Plaintiffs' communications are illegal because they were not coordinated with one of Governor Malloy's opponents or another committee. *See, e.g.*, SEEC Mem. at 14. Any attempt to regulate the communications as independent expenditures, however, fails constitutional scrutiny.

The only "legitimate governmental interest for restricting campaign finances" is that in "preventing corruption or the appearance of corruption." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 206 (2014) (Roberts, C.J., controlling op.); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) (noting that "limited to *quid pro quo* corruption"). But the anti-corruption interest cannot sustain restrictions on independent expenditures because

[1] The Supreme Court later broadened permissible regulation to include not just the express words of advocacy, but also the functional equivalent of express advocacy. This standard, discussed below, demands that a communication be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" before the government may restrict it. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (Roberts, C.J., controlling op.) (*WRTL II*). The most obvious interpretation of Plaintiffs' communications is that they are appeals to vote for Plaintiffs, not against Governor Malloy. Thus, they cannot be the functional equivalent of express advocacy against him.

there is “no tendency in [independent expenditures] to corrupt or to give the appearance of corruption.” *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (*NCPAC*). Given that they are “made totally independently of the candidate and his campaign,” independent expenditures cannot “pose” such a danger. *Buckley*, 424 U.S. at 46-47. Consequently, the *quid pro quo* required for actual or apparent “‘*quid pro quo*’ corruption” is necessarily absent. *See McCutcheon*, 572 U.S. at 207. In addition, another’s independent messaging may “provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Buckley*, 424 U.S. at 47. That is, “[t]he absence of prearrangement and coordination” in independent expenditures may in fact produce communications that hurt the candidate’s campaign and efforts. *Id*. Accordingly, the lack of coordination both “undermines the value of the expenditure to the candidate” and “alleviates the danger that expenditures will be given as a *quid pro quo*.” *Id*.; *see also Citizens United*, 558 U.S. at 357 (“independent expenditures . . . do not give rise to corruption or” its appearance). Thus, independent expenditure limits are unconstitutional. *See* Opening Br. at 11 n.5 (collecting cases).

For similar reasons, limits on a candidate’s expenditures in her own behalf are unconstitutional, whether she funds them from her campaign account or her own resources. “No governmental interest that has been suggested is sufficient to justify” restrictions on campaign expenditures from candidates’ accounts. *Buckley*, 424 U.S. at 55. In particular, any interest in fighting actual or apparent corruption is fulfilled by contribution limits. *Id*. Moreover, since candidates can’t corrupt themselves, there cannot be limits on what candidates donate to their own campaigns or spend from their own resources, as they “vigorously and tirelessly” advocate “in furtherance of [their] own candidac[ies].” *Id*. at 52. And this right to an “unfettered opportunity to make their views known” includes the right to “vigorously and tirelessly to

advocate . . . the election of other candidates." *Id*. at 52-53. Put simply, it is unconstitutional to restrict what a candidate may say independently of other candidates.

Thus, the first necessary step to the SEEC's argument fails: restrictions on Plaintiffs' communications *qua* expenditures are unconstitutional. At its second necessary step, the SEEC's argument requires that expenditures be so valuable that they become contributions. Regulating Plaintiffs' communications *qua* contributions is also unconstitutional.

Juxtaposition with the one instance discussed in *Buckley* in which expenditures may be treated as contributions—the discussion of coordinated expenditures—demonstrates the problem with the SEEC's second step. By definition, coordinated expenditures and independent expenditures like those of Mr. Markley and Mr. Sampson are utterly incompatible. Independent expenditures are "costs incurred without the request or consent of a candidate or his agent." *Id*. at 46 n.53 (internal quotation marks omitted). Coordinated expenditures are those "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate." *Id*. (internal quotation marks omitted).

The state may control coordinated expenditures as contributions because there may be a *quid pro quo*, or at least the appearance of it. The speaker has gone to the candidate and discussed what expenditure would most benefit her, and this prearrangement has a double effect. It raises the specter of apparent corruption, as others will wonder if the resulting expenditure was part of a trade for the candidate's future vote. And the risk of actual corruption grows because the prearrangement ensures that the expenditure will be valuable to the candidate. Thus, coordinated expenditures may be treated as "disguised contributions." *Id*. at 47. Controlling coordinated expenditures is thus closely drawn to the interest in combatting actual or apparent corruption.

But for the same reason the Supreme Court rejected limits on independent expenditures,

Connecticut's speech restrictions must fail tailoring—under either strict or closely drawn scrutiny—as applied to Plaintiffs' independent communications.[2] Limits on independent expenditures fail scrutiny because there is no *quid pro quo* and because the communications may in fact harm the candidate. *Id*. at 47. The SEEC has not established any hint of coordination or prearrangement in Plaintiffs' communications. Their communications cannot therefore "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions," *id*. at 46, or to those identified with coordinated communications.

The SEEC's cases on inter-candidate transfers are not to the contrary. Those cases are about coordinated expenditures or about actual contributions to or transfers of funds between candidates, not about independent speech that the government is grasping to control by calling it a contribution. *See Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1112 (8th Cir. 2005) (noting that the law "prohibits the transfer of funds," and that candidate claimed a right "to receive money"); *State v. Alaska Civ. Liberties Union*, 978 P.2d 597, 632 (Alaska 1999) (addressing prohibition on "using campaign funds to contribute to another candidate" under AS 15.13.112(b)(7), which is limited to shared, i.e. coordinated, campaign activity).

B. Using electioneering communications concepts does not save the restrictions

The SEEC fruitlessly appeals to concepts used in regulating electioneering communications to save its unconstitutional restrictions. The SEEC argues that it may regulate Plaintiffs' communications as advocacy against the governor based on a presumption allowed for electioneering communications: that communications made within a short pre-election window

[2] Expenditure limits must "promote[] a compelling interest and [be] the least restrictive means to further" that interest. *McCutcheon*, 572 U.S. at 197. Contribution limits must be "closely drawn" to the anticorruption interest, and the state must employ "a means narrowly tailored to achieve the desired objective." *Id*. at 218 (internal quotation marks omitted).

may be treated as advocacy and regulated. But this conflation of electioneering communications and expenditures ignores the stronger presumption, that the communications here are about Plaintiffs' own campaigns, and it fails to conceal the unconstitutionality that would still exist if the law restricted electioneering communications instead of independent expenditures.

Concerned that *Buckley*'s narrow test for express advocacy allowed a great deal of advocacy for and against candidates to escape regulation, Congress created a new category of speech called electioneering communications. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 189 (2003). This covered any communication that clearly refers to a candidate, is made within a particular pre-election window, and is targeted to that candidate's electorate. *Id*. Congress then imposed disclosure requirements on those making electioneering communications, and it attempted to ban corporations and unions from making them altogether. *Id*. at 190.

The Supreme Court affirmed the constitutionality of electioneering communication disclosure, but not the ban on making electioneering communications. The *McConnell* Court limited any such ban to communications that are express advocacy—communications using *Buckley*'s express words of advocacy—or that were "the functional equivalent of express advocacy." *Id*. at 206. In *Citizens United*, however, the Supreme Court went further, holding that the government "may not suppress" electioneering communications, even when they are the functional equivalent of express advocacy. *Citizens United*, 558 U.S. at 318, 324-25.

The Commission would like to use the presumption underlying electioneering communications, that all communications mentioning a candidate right before an election are political advocacy and thus subject to electioneering communication disclosure laws. But even if a presumption related to disclosure could be applied to speech restrictions, a stronger presumption applies here. Going back to *Buckley*, campaign finance law regarding disclosures

already "assume[s]" that all communications by a political candidate's committee are political advocacy. *See Buckley*, 424 U.S. at 79. "They are, by definition, campaign related." *Id*. That is, they are by definition related to that candidate's campaign. Thus, the Commission's argument—that Plaintiffs' communications are assumed to be advocacy against Governor Malloy because they mention him—fails because there is already another, stronger presumption, that the purpose of all communications made by their campaign committees was to bolster Plaintiffs' campaigns.

Indeed, that Plaintiffs' communications are self-advocacy and not against the governor is demonstrated by *McConnell*'s test. Under that test, any restriction on making electioneering communications must apply only to speech that is the functional equivalent of express advocacy—here, speech that it "is susceptible of no reasonable interpretation other than as an appeal to vote . . . against" Governor Malloy. *WRTL II*, 551 U.S. at 470. This the Commission cannot do, as the wording, tenor, and focus of the communications demonstrate that they were appeals to vote for the Plaintiffs, not against the Governor. *See* R73-82; Opening Br. at 20-21. Indeed, it is telling that Mr. Sampson made almost identical communications in 2012, when the communications could not have been advocacy against Governor Malloy. *See* SEEC Mem. at 9 (noting similar communications); R467, 474-75, 484-86, 507-08, 511, 514; *cf. WRTL II*, 551 U.S. at 468 (noting "bizarre result" when identical communications are protected in one instance and punished in another). Thus, even if electioneering communications could be restricted after *Citizens United*, the SEEC could not apply electioneering communications restrictions to Plaintiffs' communications because their most reasonable interpretation is as self-advocacy.

But after *Citizens United* any prohibition on making electioneering communications is unconstitutional. Citizens have a "right . . . to hear . . . and to use information [as] . . . a precondition to enlightened self-government," and "political speech must prevail against laws

that would suppress it." 558 U.S. at 339-40. Even more than with corporations, candidates "possess valuable expertise" about public issues and qualifications for office in discussions of other candidates, and voters "must be free" to obtain that information. *Id*. at 340-41, 364. Thus, even restrictions on electioneering communications must "further[] a compelling interest and [be] narrowly tailored to achieve that interest." *Id*. at 340 (internal quotation marks omitted).

Recalling that this case presents a challenge to Connecticut's ban on candidates speaking about one another, and not about the constitutionality of public campaign funding, the only recognized governmental interest is that in combatting actual or apparent corruption. *See id*. at 337-39 (noting that the requirement that a party speak through another is "a ban on speech"); *NCPAC*, 470 U.S. at 496-97 (noting only recognized interest). And, as with the SEEC's other attempts to justify its restrictions, laws restricting independently made electioneering communications cannot further the anticorruption interest, or any other interest the Commission attempts to raise. *Citizens United*, 558 U.S. at 345, 356-61 (not related to the anti-corruption interest); *id*. at 346-356 (rejecting anti-distortion interest and the interest in protecting against undue influence); *id*. at 350 (no interest in protecting against increasing costs of elections).

Any other interests the SEEC asserts for the constitutionality of public campaign financing in general are irrelevant to speech restrictions, and the restrictions therefore necessarily fail tailoring. But, even if those interests were somehow relevant to the CEP's speech restrictions, and not to sustaining public financing in general, the asserted interests are "mere conjecture" that is not "adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 392 (2000); *see also Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (requiring that justification be "more than 'purely hypothetical'"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (requiring that justifications under heightened scrutiny not be

"hypothesized" or "rely on overbroad generalizations"). Despite its burden under heightened scrutiny, the state provides no evidence for its assertion that allowing Plaintiffs to mention the governor will somehow unravel its entire campaign finance regime. For example, it has not shown that any other state system has crashed because candidates mentioned one another while advocating for themselves. It has not given any evidence of candidates using up their precious funds in advocacy—properly defined—for others instead of themselves. And it has certainly provided no evidence that numerous candidates sit on massive war chests, with nothing to use the money for but talk about issues irrelevant to their campaigns. The Commission's entire argument about the danger to its public campaign financing is conjecture.

Indeed, the Commission's action elsewhere shows that the interests asserted here are mere pretense. In the 2019 legislative session, the Commission proposed an exception to its speech restrictions for communications like Plaintiffs', without any reservations that such speech would undermine Connecticut's campaign finance system or public funding of elections. *See* SEEC, *Testimony Presented Before the Government Administration and Elections Committee in Support of H.B. 7323, H.B. 7329, S.B. No. 1042, S.B. 1043, S.B. 1044, S.B. 1045, and Opposing S.B. No. 641* at 9 (Mar. 13, 2019), https://bit.ly/3p2hpeA ("*Our proposed bill* would allow candidate committees to spend money on communications that identify . . . gubernatorial candidates right before the election without creating the requirement for reimbursement or joint campaigning. Such communications would not be considered contributions or expenditures on behalf of candidates for Governor . . . ." (emphasis added)). Their asserted interests are not only conjecture, they are false.

Any which way one turns, Connecticut's attempt to restrict Plaintiffs' communications is unconstitutional. But if Connecticut's campaign finance law is really the convoluted mixture of

contributions, expenditures, and electioneering communications that the Commission portrays, then the entire campaign finance regime is unconstitutionally vague and not sufficiently tailored to the state's asserted interests. But looking at the narrower issue, whether the state can limit the speech of Mr. Sampson and Mr. Markley, forty-five years of black letter campaign finance law says that it cannot.

III. THE CEP'S REQUIREMENTS ARE UNCONSTITUTIONAL CONDITIONS

The Commission incorrectly asserts that the First Amendment does not apply to the CEP restrictions, both because the program encourages speech and because citizens do not have a right to subsidized speech. But the Commission's citation to *Buckley* to sustain the first position is unavailing. Unlike in *Buckley*, Plaintiffs do not wish to eliminate public campaign funding or the speech it enables. Rather, this case challenges CEP restrictions that in fact "abridge, restrict, [and] censor speech." *Buckley*, 424 U.S. at 92-93. And the second contention fails because this case challenges restrictions that act on the recipient and not just on the use of program funds.

The government can decide "not to subsidize the exercise of a fundamental right." *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983). It can "insist[] that public funds be spent for [authorized] purposes." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). But Connecticut "may not deny a benefit to a person because he exercises a constitutional right" outside the scope of the program. *Regan*, 461 U.S. at 545. And the SEEC has fined Plaintiffs—not just denied them a benefit—based on restrictions that extend beyond the program's scope.

The crucial "distinction that has emerged from [the Supreme Court's] cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). That is, the government crosses the line when it

"place[s] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct [even] outside the scope of the . . . program." *Rust*, 500 U.S. at 197.[3]

Connecticut crossed that line. The SEEC does not simply limit the use of CEP funds. It prohibits *all speech* about a non-opponent as a condition of taking CEP funds. *See* Conn. Agencies Regs. § 9-706-2(b)(8) and (13); Opening Br. at 13-14, 25. Thus, Connecticut has "leverage[d] [CEP] funding to regulate speech outside the contours of the program itself," *Agency for Int'l Dev.*, 570 U.S. at 214-15, imposing a condition on Mr. Markley and Mr. Sampson, not just on their use of CEP funds, *Rust*, 500 U.S. at 197. The conditions imposed for participating in the CEP program are therefore unconstitutional. If the SEEC is as concerned about its interests as it claims, it will "adopt a revised version" of the CEP program that allows candidates to speak about non-opponents using non-program funds. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

Furthermore, there is a vital distinction between the limit on total expenditures that the *Buckley* Court affirmed as a condition of participating in public financing—which the Court affirmed before it developed much of the unconstitutional conditions doctrine—and the CEP's restriction on speaking about another candidate. The former is content-neutral. It limits all expenditures, regardless of the content of the communications funded. The CEP, however, imposes a content-based condition. A prohibition on speech about a non-opponent necessarily

[3] The SEEC's cited cases are not to the contrary. *See* SEEC Mem. at 27. None of the cases dealt with restrictions on the content of a recipient's speech, or that acted on the recipient rather than on the use of program funds. Moreover, other courts have called into question whether *Daggett* and *Leake* are valid after the Supreme Court's decision in *Davis*. *See*, *e.g*., *Green Party v. Garfield*, 648 F. Supp. 2d 298, 372 (D. Conn. 2009) (noting that the *Daggett* line of cases, including *Leake*, do not survive *Davis*); *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 U.S. Dist. LEXIS 4932, at *27 n.14 (D. Ariz. Jan. 20, 2010) (doubting pre-*Davis* cases).

"applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). And the CEP conditions must therefore "satisfy strict scrutiny." *Id*. at 164.

The only recognized governmental interest for restricting campaign finances is that in "preventing corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 206. But, as with the other speech restrictions, there is no relationship between the CEP's speech restrictions and the interest in fighting actual or apparent corruption. And, as the Commission's legislative efforts have shown, its asserted interests are post-hoc pretense. The restrictions thus fail the strict scrutiny required for content-based laws.

CONCLUSION

Based on the foregoing, Plaintiffs Markley and Sampson ask that the Court hold unconstitutional Conn. Gen. Stat. §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), and 9-706, as well as Conn. Agencies Regs. §§ 9-706-1 and 9-706-2, that the Court reverse any findings and conclusions that Plaintiffs violated the Statutes or other election law, and that it rescind any fines or other penalties assessed against Plaintiffs.

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CERTIFICATION

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