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SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 20726

JOE MARKLEY ET AL.
v.
STATE ELECTIONS ENFORCEMENT COMMISSION

Reply Brief of the Plaintiffs-Appellants

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TO BE ARGUED BY ADAM J. TRAGONE

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ARGUMENT

The State Elections Enforcement Commission acknowledges that this case presents "a straightforward application" of "established" principles related to campaign finance. Appellee Br. 8. However, the Commission's application does not consider that Connecticut's statutes violate Plaintiffs/Appellants' unfettered and fundamental right to advocate for their election.

The premise of the Commission's argument is that the First Amendment cannot be violated when speakers enter the Citizens' Election Program (CEP). Specifically, per the Commission, CEP candidates essentially lose their First Amendment rights upon choosing to receive public funds because candidates can only speak to "directly further" their campaigns. Appellee Br. 9. However, Connecticut cannot violate the Plaintiffs/Appellants' fundamental First Amendment rights by penalizing their speech by denying them the benefit of exercising that speech.

Because Connecticut's "directly further" rule implicates the Plaintiffs/Appellants' First Amendment right, Connecticut cannot restrict their speech because of its message, its ideas, its subject matter, or its content. Here, the "directly further" rule indeed restricts the then-candidates' speech because it prohibits what the candidates can and cannot say about their election. Any content-based restriction, like the "directly further" rule, must satisfy strict scrutiny.

Connecticut must bear the burden of showing that the challenged "directly further" rule furthers a compelling government interest and is narrowly tailored in doing so. The Commission articulates several interests allegedly advanced by the "directly further" requirement, namely: (1) that it "enhances stability and predictability" and therefore "encourages participation" in the CEP; and (2) that it serves anti-corruption and anti-circumvention interests.

Appellee Br. 9-10. But the first interest, however desirable, is not compelling, and nothing in the record, nor anything in Appellee's brief, indicates that the "directly further" requirement furthers stability and predictability in the CEP or that Plaintiffs/Appellants used or intended to use the CEP funds to circumvent any election requirements or to improperly influence any election.

Yet the challenged provision prohibits core First Amendment political speech. The Commission prohibited Plaintiffs/Appellants from using the CEP funds to emphasize their own policy positions and distinguish these positions from those of other candidates. The Commission's decision eviscerates the Plaintiffs/Appellants' First Amendment rights to speak about their candidacy, and denies any candidate who chooses to participate in the CEP the ability to engage in robust discourse on political issues.

A. The CEP's Requirements Directly Implicate The First Amendment.

The Commission argues that the "directly further" rule is not subject to heightened scrutiny because the Plaintiffs/Appellants voluntarily entered the CEP and had other "lawful alternatives" to speak. *See* Appellee Br. 25. However, the fact that Plaintiffs/Appellants voluntarily entered the program does not permit Connecticut to dictate *how* a candidate can speak and what the candidate can say.

The state cannot justify the restrictions on candidate communications as voluntary conditions accepted when using CEP funding. The government cannot violate "constitutional guaranties, so carefully safeguarded against direct assault," by requiring that individuals "surrender" a privilege or benefit. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926); *see also United States v. Butler*, 297 U.S. 1, 70-71 (1936) (holding that the government "may not indirectly accomplish . . . by taxing and spending" what it

"has no power to enforce [by] commands"). It is irrelevant that "a person has no 'right' to a valuable governmental benefit" or that "the government may deny him the benefit for any number of reasons." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The government may not "penalize[] and inhibit[]" the exercise of freedoms by denying a benefit for exercising those freedoms. *Id.*

The CEP denies candidates the use of CEP funds if they exercise their "unfettered" right "to make their make their views known . . . on vital public issues" by making known their views on "the election of other candidates." *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976). But comparing and contrasting oneself with and against other, well-known candidates is a protected right because it is a highly effective way to make known one's own views. Calling oneself a "Bernie progressive," or vowing to "oppose the Trump agenda" may or may not impact Sanders or Trump, but such statements offer an effective shorthand for defining oneself and expressing one's views.

And because the CEP prohibits grantees from using any funds in their campaign accounts for communications mentioning another candidate, as a purported "benefit" to the candidate, Regs. Conn. State Agencies § 9-706-2(b), the state cannot argue that it is "simply insisting that public funds be spent for the purposes for which they were authorized[.]" *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). That exception to the unconstitutional conditions doctrine cannot apply when a program limits the recipient and not just the use of program funds: The grantee must be free to "conduct those activities through programs [or funding sources] that are separate and independent from" the public funding. *Id.* Otherwise, if the use of public funding "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the . . . program," the government has

exceeded its authority and the restrictions are unconstitutional. *Id.* at 197.

The Commission suggests that the Plaintiffs/Appellants could "speak[] through their political party, other political committees, and even their own separate personal political committees." Appellee Br. 25. However, this argument is unavailing. A program in which affiliated organizations (such as a political party or a political committee) speak on behalf of separately funded recipients that are prohibited from speaking on certain topics will be found constitutionally permissible. *See Rust*, 500 U.S. at 197-98; *see also FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984) (noting in dicta possible constitutionality if statute permitted affiliate editorials). However, the use of affiliated organizations is only an adequate alternative when the condition is that a funding recipient espouses a specific belief as its own. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013). Attempts to use the affiliate exception fail scrutiny when program restrictions require the use of a separate entity over which a speaker has no control. "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the recipient to express its beliefs." *Id.*

The CEP does not allow a candidate to fund communications mentioning non-opponents from a separate candidate account. Rather, when a candidate's ad attacks a non-opponent, the portion of the ad opposing the non-opponent must be paid for by a separate entity, such as "the state central committees, the town committees, [or] any candidates in the race directly opposing the candidate." Advisory Op. 2014-04 at 2-3; see also Declaratory Ruling 2011-03 at 1, 3-4 (stating that candidates must allocate expenses of a communication with committees permitted to speak about a non-opponent).

In that case, the message will no longer be the candidate's. The organizations "bear[ing] the portion of the cost allocated to the negative advertising," Advisory Op. 2014-04 at 2, will demand control over the content of that advertising, as well as a voice in the content of the ad overall. Thus, allocation under the CEP "does not afford a means for the [CEP] recipient to express its beliefs." *Agency for Int'l Dev.*, 570 U.S. at 219.

"How the State chooses to encourage participation in its public funding system matters." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721,753 (2011). With respect to communications mentioning non-opponents, the CEP "tell[s] candidates . . . how much money they can spend to convey their message, when they can spend it, [and] what they can spend it on." *Id.* at 764. And it does so in a way that "place[s] a condition on the recipient of the subsidy rather than on a particular program or service." *Rust*, 500 U.S. at 197. Because Connecticut has not left a CEP "grantee unfettered in its other activities," *id.* at 196, the restrictions on communications about non-opponents implicate the First Amendment.

Moreover, and contrary to the Commission's argument, the Supreme Court has explained that its decisions permitting restrictions on the use of public funding did not "suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Rust*, 500 U.S. at 199.

Subsidies and benefits cannot "justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'" *Id.* at 200 (citations omitted). For example, the Supreme Court held that the

state could not force educators to choose between employment at a public college and giving up their First Amendment rights. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). Because the "university is a traditional sphere of free expression so fundamental to the functioning of our society," any attempt to "control speech within [such a] sphere by means of conditions attached to" government benefits must meet First Amendment scrutiny. *Rust*, 500 U.S. at 200.

This case involves one of those areas "expressly dedicated to speech activity." *Id*. Indeed, because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government, *Buckley*, 424 U.S. at 14, "the First Amendment 'has its fullest and most urgent application' to speech uttered during [such] a campaign." *Eu v. S.F. Cty. Democratic Central Comm.,* 489 U.S. 214, 223 (1989). And candidates' ability to express their views "is of particular importance." *Buckley*, 424 U.S. at 52.

The First Amendment protects candidates' political speech, even if they accept CEP funding.

B. The CEP's Conditions Violate The First Amendment Because They Fail Strict Scrutiny.

Because the CEP's conditions implicate the First Amendment, Connecticut has the burden to prove that the stated reasons for the conditions satisfy strict scrutiny. Connecticut has failed to do so.

Under the First Amendment, Connecticut "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). A law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 171. Content-based laws like the "directly further" condition—those that target

speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

The regulations restrict speech both based on its "particular subject matter" and "by its function or purpose." *Reed*, 576 U.S. at 171. Under § 9-607, an expenditure is for a "lawful purpose[]" only when it "promot[es] the nomination or election of the candidate" making it. CGS § 9-607(g)(1)(A)(i). Even though the "unfettered" advocacy protected by the First Amendment includes "vigorously and tirelessly [advocating for or against] the election of other candidates," *Buckley*, 424 U.S. at 52, Connecticut has narrowly circumscribed a candidate's advocacy. Regardless of the effect of a communication about a non-opponent on a candidate's campaign, Connecticut has decided that "a communication which benefits [or opposes] another candidate" in any way "results in an impermissible in-kind contribution." Dec. Rule. 2011-03; Advisory Op. 2014-04 (applying to communications opposing candidates).

Connecticut's restrictions additionally limit CEP participants from making "expenditures . . . for the benefit of another candidate" and from making "[i]ndependent expenditures to benefit another candidate." Regs. Conn. State Agencies § 9-706-2(b)(8) and (b)(13); see also CGS § 9-706 (requiring that candidates "expend all moneys received from the fund in accordance with the provisions of subsection (g) of section 9-607 and regulations adopted by the State Elections Enforcement Commission," the lawful purposes restrictions discussed above).

The Commission's argument that candidates must modify their speech or the way they run their campaigns if they accept CEP funds strains credulity. Connecticut cannot limit the right of unfettered political speech by second-guessing the candidates' choices about which speech will support their election. Candidates have the right to speak about whatever they believe will explain their views and goals for office and whatever will appeal to their constituents. Explaining one's support or opposition to other candidates and politicians is one of the best ways to signal to voters where a candidate stands. Thus, a candidate's right to speak "on behalf of his own candidacy," *Buckley*, 424 U.S. at 54, includes the "right to engage in the discussion of public issues and vigorously and tirelessly to advocate . . . the election of other candidates," *id.* at 52.

While Connecticut's stated motive for the "directly further" rule, that it allegedly "enhances stability and predictability" and therefore "encourages participation" in the CEP, may be admirable, it is not a compelling interest. The Supreme Court has noted three interests that may be compelling in support of campaign finance restrictions—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest. *Buckley*, 424 U.S. at 66-68. *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010)(anticorruption interest applies only to expenditures made in cooperation with candidates); *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013) (anti-circumvention interest cannot exist apart from the anticorruption interest). The Supreme Court has not recognized "stability and predictability" for the purpose of "encouraging participation" in a public finance scheme as a compelling interest. Simply put, these reasons do not satisfy strict scrutiny and the conditions necessarily fail constitutional scrutiny.

As for the anti-corruption and anti-circumvention interests, while the Supreme Court has recognized them as valid, Connecticut has proffered no evidence that the Plaintiffs/Appellants' expenditures reflected actual or apparent corruption. The Supreme Court has required that any risk of actual or apparent corruption be substantial, *not hypothetical. See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644-45 (1996) ("a substantial threat of corruption must exist before a law purportedly aimed at the prevention of corruption will be sustained against First Amendment attack") (emphasis added). The record is bereft of any evidence that Plaintiffs/Appellants' expenditures were evidence of a "substantial threat of corruption." All of Connecticut's proffered reasons for support of the CEP's conditions fail.

CONCLUSION

"When it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter.*, 564 U.S. at 754. For the reasons above, Connecticut's statutes restricting candidates' discussions of non-opposing candidates fail strict scrutiny. Messrs. Markley and Sampson respectfully request that this court hold unconstitutional restrictions on candidates' speech about non-opponents in the Connecticut General Statutes.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A., that on March 16, 2023:

(1) the electronically submitted brief and appendix have been delivered electronically to each counsel of record for whom an e-mail address has been provided:

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(2) the electronically submitted brief and the filed paper brief have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief have been sent to each counsel of record in compliance with §§62-7 and 62-7A as applicable, as published below; and

(4) the brief being filed with the appellate clerk are true copies of the brief that were submitted electronically; and

(5) the word count of the brief is 2,487 words; and

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(8) no rule deviations were requested.

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