FILED UNDER THE ELECTRONIC BRIEFING RULES

SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20726

JOE MARKLEY & ROB SAMPSON

v.

STATE ELECTIONS ENFORCEMENT COMMISSION

Brief of the Plaintiffs-Appellants

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TABLE OF CONTENTS

Table of Contents ....
Statement of the Issue...
Table of Authorities ....
Statement of the Nature of Proceedings and Facts
The Regulatory Scheme...
Plaintiff candidates run afoul of the law's speech restrictions by voicing opposition to the Governor's policies in their campaign materials...
Procedural History...
ARGUMENT ....
I. CONNECTICUT'S RESTRICTIONS ON THE MERE MENTION OF A NON-OPPOSING CANDIDATE'S NAME IN CAMPAIGN MATERIALS ARE UNCONSTITUTIONAL
A. Connecticut's Statute is Reviewed Under Strict Scrutiny, and the State Must Demonstrate That the Statute Serves a Compelling Government Interest in Preventing Corruption or Its Appearance in Order to Withstand Such Scrutiny…………………………….....
B. SEEC's Ruling Purporting to Limit Plaintiffs' Ability to Refer to Other Candidates is an Unconstitutional Burden on First Amendment Rights That is Not Justified by Any Compelling Government Interest….
C. Connecticut's Effort to Control a Candidate's Messaging As a Condition of Participation in the Public Financing System is Unconstitutional……….
CONCLUSION...

STATEMENT OF THE ISSUE

1. Do Connecticut's direct restrictions of candidates' political speech forbidding them from mentioning non-opposing candidates violate the First Amendment by prohibiting protected political speech?

TABLE OF AUTHORITIES

Cases

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,
564 U.S. 721 (2011) 13, 22, 23
Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 22
Batte-Holmgren v. Comm'r of Pub. Health,
914 A.2d 996 (Conn. 2007) 11
Buckley v. Valeo,
424 U.S. 1 (1976) .... *passim*
Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 12, 17, 19
Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n,
518 U.S. 604 (1996) 17, 18
Commonwealth of Pennsylvania v. Wadzinski,
422 A. 2d 124 (Pa. 1980) 16
Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 15, 22
Eu v. S.F. Cty. Democratic Central Comm.,
489 U.S. 214 (1989) 13
Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 12
Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985) 13
Fed. Election Comm'n v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 12, 21
*First National Bank of Boston v. Bellott*i,
435 U.S. 765 (1978) 19
Legal Services Corp. v. Velasquez,
531 U.S. 533 (2001)…… 22
Markley v. State Elections Enf't Comm'n,

339 Conn. 96 (2021) 11
Markley v. State Elections Enf't Comm'n,
No. CV 18 6044479, 2022 Conn. Super. LEXIS 226
(Conn. Super. Ct. Feb. 24, 2022) 11
McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 13, 16, 17, 23
Mills v. Alabama,
384 U.S. 214 (1966) 12
New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 12
Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 17
Regan v. Taxation Without Representation,
461 U.S. 540 (1983)....................21
Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 13
Roth v. United States,
354 U.S. 476, 484 (1957) 12
Rust v. Sullivan,
500 U.S. 173 (1991) 21

Statutes

§ 9-601a(a
§ 9-(a
General Statutes § 9-601b(a)(1).................... 10, 11
General Statutes § 9-607....................12
General Statutes § 9-607(g) 9, 13, 14, 21
General Statutes § 9-607(g)(1)(A)(i) 10, 11, 12
General Statutes § 9-616(a) 9, 10, 11, 13, 21
General Statutes § 9-706.................... 2, 9, 13, 21

Other Authorities

Advisory Op. 2014-04 ....1, 11, 12, 13, 18, 19, 20
Declaratory Ruling 2011-03 .... 11, 13, 20

Regulations

Regs. Conn. State Agencies § 9-706-1 .... 2, 9, 13, 21
Regs. Conn. State Agencies § 9-706-2 .... 2, 9, 21
Regs. Conn. State Agencies § 9-706-2(b)..18
Regs. Conn. State Agencies § 9-706-2(b)(10) 13
Regs. Conn. State Agencies § 9-706-2(b)(13) 13
Regs. Conn. State Agencies § 9-706-2(b)(14) 13
Regs. Conn. State Agencies § 9-706-2(b)(8) 13

STATEMENT OF THE NATURE OF THE PROCEEDINGS AND OF THE FACTS

In the 2014 general election, Plaintiffs-Appellants Joe Markley and Rob Sampson sought election to the Connecticut state senate and state house, respectively. In their appeals to voters, both candidates argued that voters should support them because they would serve as a check in the legislature on the policies of then-Governor Daniel Malloy, who was running for re-election. Connecticut now holds that these communications are illegal because they name a candidate for office—Governor Malloy—who was not a direct opponent of either plaintiff.

Over the course of their campaigns, Markley's and Sampson's campaign literature drew the ire of Mr. Sampson's opponent, one Corky Mazurek. Mazurek filed a complaint with the Connecticut State Elections Enforcement Commission ("Commission" or "SEEC") alleging that Markley and Sampson's campaign literature ran afoul of Connecticut's statutory and regulatory provisions on permissible campaign messaging.

The SEEC ruled that because they mentioned the Governor by

name, these public communications, made in their districts, violated Connecticut state laws that limit "permissible expenditures" by a candidate's committee to ones that "promote" the candidate, Conn. Gen. Stat. 9-607(g). Further, the SEEC found a violation of Connecticut statutes that prohibit "contributions" from one candidate's committee to another's, if made to promote the recipient candidate or defeat his opponent. Conn. Gen. Stat. 9-601a(a)(1), 9-616(a)(5). The SEEC found that the ads clearly identified a candidate from another race, Governor Malloy, and that the ads painted him in a negative light. It fined Mr. Markley and Mr. Sampson $2,000 and $5,000, respectively.

This case asks if the State of Connecticut violated the First Amendment rights of plaintiff political candidates Joe Markley and Rob Sampson by fining them for mentioning Governor Malloy in their campaign ads.

1. *The regulatory scheme*

The State Elections Enforcement Commission is a state agency tasked with enforcing Connecticut's election laws and regulations, including the provisions at issue in this case.

Connecticut law defines an "expenditure," in relevant part, as "[a]ny communication that (A) refers to one or more clearly identified candidates, and (B) is broadcast by radio, television, other than on a public access channel, or by satellite communication or via the Internet, or as a paid-for telephone communication, or appears in a newspaper, magazine or on a billboard, or is sent by mail." Conn. Gen. Stat. § 9-601b(a)(2).

Not all expenditures are lawful. Conn. Gen. Stat. § 9-607(g)(2). For a candidate committee, "the lawful purposes of the committee means . .

. the promoting of the nomination or election of the candidate who established the committee." Conn. Gen. Stat. § 9-607(g)(1).

For purposes of Connecticut's election laws, "'contribution' means," among other things, "[a]ny gift, subscription, loan, advance, payment or deposit of money or anything of value, made to promote the success or defeat of any candidate seeking the nomination for election, or election," Conn. Gen. Stat. § 9-601a(a)(1), including "[a]n expenditure that is not an independent expenditure," Conn. Gen. Stat. § 9-601a(a)(4).[1] Apart from the pro rata sharing of some expenses, "[a] candidate committee shall not make contributions to, or for the benefit of . . . another candidate committee." Conn. Gen. Stat. § 9-616(a)(5).

The state has also created the Citizens' Election Fund, which provides public money to candidates who wish to participate in the Citizens Election Program ("CEP"). Conn. Gen. Stat. § 9-700, et seq. The Commission regulates "permissible expenditures" under § 9-607(g) by candidate committees receiving CEP funds. Conn. Gen. Stat. § 9-706(e)(1). SEEC regulation also require that all funds in the depository account of the participating candidate's qualified candidate committee . . . shall be used only for campaign-related expenditures made to directly further the participating candidate's nomination for election or election to the office specified in the participating candidate's affidavit certifying the candidate's intent to abide by Citizens' Election Program requirements." Conn. Agencies Regs. 9-706-1(a).

In addition, candidates who participate in the CEP "shall not spend funds in the participating candidate's depository account for the following:

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[1] "'[I]ndependent expenditure' means an expenditure, as defined in section 9-601b, that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee." Conn. Gen. Stat. § 9-601(c).

. . .

8. Contributions, loans or expenditures to or for the benefit of another candidate, political party, or party committee.

. . .

13. Independent expenditures to benefit another candidate . . . ."

Conn. Agencies Regs. 9-706-2(b).

2. *Plaintiff candidates run afoul of the law's speech restrictions by voicing opposition to the Governor's policies in their campaign materials.*

Plaintiff Markley ran to serve as state senator from the 16th Senatorial District during the 2014 general election cycle. During the same cycle, Plaintiff Sampson ran to serve as state representative from the 80th District.

In joint and separate communications, Markley and Sampson advocated their candidacies by promoting their efforts to oppose Governor Daniel Malloy's policies. *See* Exhibits 1-6 (App. A78-89). The communications did not urge voters to vote against the Governor, nor mention Governor Malloy's candidacy or even the fact that there was a gubernatorial election on the ballot. Rather, the ads urged voters to support Plaintiffs to "STOP Governor Malloy and the majority [sic] Democrat's dangerous agenda!" Exhibit 4 (App. A84); *see also* SEEC Final Decision at 6 (App. A96). Sampson also urged voters to vote for him rather than his opponent, John "Corky" Mazurek, because of Mazurek's support for Governor Malloy's policies. Exhibit 5 (App. A86); *see also* SEEC Final Decision at 6 (App. A96). It was entirely irrelevant to these messages that Governor Malloy happened to be up for re-election. In fact, these mailings were "virtually identical" to mailings Sampson had used, without incident, in his 2012 campaign for the same office, when Governor Malloy was not on the ballot.

Commented [BS1]: Is quote correct? Is it "Democrat's" or "Democrats'"? If the former, does it merit a "[sic]"

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Sampson Email at 1 (App. A74). The ads were clearly directly promoting the elections of Sampson and Markley.

On October 3, 2014, the Democratic State Central Committee ("DSCC") sought an advisory opinion (amending the request on October 7, 2004) from the Commission. *See* App. A62-68. The DSCC asked the Commission to determine whether communications like Sampson's—asking for votes as someone who would oppose "Governor Dan Malloy's failed policies"—violated state law as an expenditure "opposing non-opponent candidates." App. A68. On October 17, 2014, less than 3 weeks before the election, and after candidates had already planned and ordered communications, the Commission issued Advisory Opinion 2014-04, stating that expenditures for any communication "that is not directly related to the candidate's own race and that also promotes the defeat of or attacks a candidate that is not a direct opponent" violate state law. App. A59-61. Mazurek eventually lost to Sampson, winning just 31% of the vote. Governor Malloy won re-election at the same time.

3. *Procedural history*

On December 2, 2014, Mazurek filed a complaint against Sampson and Markley with the Commission. He alleged "that three joint communications of the Sampson Committee and Markley Committee," as well as two mailers and a print advertisement by the Sampson Committee, violated Connecticut campaign finance law for "'naming and attacking Governor Malloy's record.'" SEEC Final Decision at 2 (App. A92).[2]

[2] Throughout this litigation, it has never been explained exactly how Mazurek was harmed if, as the complaint alleges, said expenditures were not "directly related" to Sampson's campaign.

The Commission heard the matter on August 31, 2017 and issued a final decision on February 14, 2018. SEEC Final Decision at 1 (App. A91). It concluded that the communications had resulted in "five instances of impermissible expenditures" by Sampson and two such instances by Markley. SEEC Final Decision at 12 (App. A102).

In particular, the Commission held that any communication that clearly mentions a candidate "[w]ithin 90 days of an election . . . is an expenditure to benefit (or oppose)" that candidate, SEEC Final Decision at 8 (App. A98), and those communications mentioning a non-opposing candidate violated state law unless the portion of the communication mentioning that candidate was approved by and paid for by a permitted party, such as the candidate's opponent. SEEC Final Decision at 8-9, 11-12 (App. A98-99, A101-02).

The Commission then ruled that, because Plaintiffs had accepted CEP funds, they violated General Statutes § 9-706 and Regs. Conn. State Agencies §§ 9-706-1 and 9-706-2, by making expenditures that "opposed Governor Malloy, who was a candidate," and that did not "*directly* further [their own] nomination for election." SEEC Final Decision at 8, 11-12 (App. A98, A101-02). The Commission ordered that Sampson pay $5,000 and Markley pay $2,000 in civil penalties. SEEC Final Decision at 13 (App. A103).

The same day the Commission issued its final decision, Sampson and Markley filed a petition for reconsideration. Dismissal Memorandum at 2 (App. A25). The Commission placed the petition on its agenda three times, on March 14, 21, and 23, 2018, *Id,* but did not vote until March 23, when it denied the petition. *Id*.

Plaintiffs timely filed their appeal on May 7, 2018, within the 45-day window after the Commission's denial. *Id*. at 3 (App. A26) The Commission responded with a motion to dismiss, contending that Plaintiffs incorrectly relied on the Commission's March 23 denial,

because the petition was "constructively denied" on March 11, 2018. *Id.* at (App. A26-27). Because the appeal was filed 45 days from the Commission's actual denial and not 45 days from this alleged "constructive denial," the trial court dismissed the appeal on August 2, 2018. *Id.* at 9 (App. A32).

On further review, this Court concluded that the appeal was timely, and reversed and remanded the case for resolution of the merits of plaintiffs' administrative appeal. *Markley v. State Elections Enf't Comm'n*, 339 Conn. 96, 100-01 (2021). On remand, the Superior Court held that the Commission did not violate Plaintiffs' First Amendment rights. *Markley v. State Elections Enf't Comm'n*, No. CV 18 6044479, 2022 Conn. Super. LEXIS 226 (Super. Ct. Feb. 24, 2022). Plaintiffs timely appealed that decision on March 15, 2022.

After a pre-argument conference on June 21, 2022, the Appellate Court transferred the case to this Court on July 5, 2022.

ARGUMENT

"It is well established that when a [party's] claims involve a question of law, we review them *de novo*." *Batte-Holmgren v. Comm'r of Pub. Health*, 914 A.2d 996, 1007 (Conn. 2007) (internal quotation marks omitted).

I. CONNECTICUT'S RESTRICTIONS ON THE MERE MENTION OF A NON-OPPOSING CANDIDATE'S NAME IN CAMPAIGN MATERIALS ARE UNCONSTITUTIONAL

A. Connecticut's Statute is Reviewed Under Strict Scrutiny, and the State Must Demonstrate That the Statute Serves a Compelling Government Interest in Preventing Corruption or

Its Appearance in Order to Withstand Such Scrutiny.

The First Amendment protects most speech, but it "affords the broadest protection . . . to political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . *of course includ(ing) discussions of candidates*. . ." *Id.* (emphasis added) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

"For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (quoting *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.),

Limits or prohibitions on expenditures are burdens on political speech that are subject to strict scrutiny. *Id. See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 197 (2014) (noting that limits "necessarily reduce[] the quantity of expression") (quoting *Buckley*, 424 U.S. at 19)).

The Supreme Court has recognized only one interest compelling

enough to justify such burdens political speech—"preventing corruption or the appearance of corruption." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (NCPAC). Furthermore, the Court has made clear that by "corruption" it does not mean any vague notion of impropriety or unfairness. Rather, it means *quid pro quo* exchanges of money for favors. *Buckley*, 424 U.S. at 26, 46, 47; *McCutcheon*, 572 U.S. at 192 ("Any regulation must … target what we have called 'quid pro quo' corruption or its appearance ... the notion of a direct exchange of an official act for money."); *NCPAC*, 470 U.S. at 497 ("The hallmark of corruption is the financial quid pro quo: dollars for political favors.").

Connecticut's statute is subject to strict scrutiny because it burdens core political speech. As Plaintiffs show below, it fails strict scrutiny because the state has failed to demonstrate that the law serves the acceptable compelling interest of preventing corruption or its appearance.

B. SEEC's Ruling Purporting to Limit Plaintiffs' Ability to Refer to Other Candidates is an Unconstitutional Burden on First Amendment Rights That is Not Justified by Any Compelling Government Interest.

"[T]he 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) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). "The State may not regulate the content of candidate speech merely because the speakers are candidates." *Republican Party of Minnesota v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring).

Connecticut, however, limits candidate speech by explicitly prohibiting campaign expenditures about a non-opposing candidate, even when such communications directly aid a candidate's campaign by explaining his positions on contested issues and his priorities as an elected official. Under § 9-607, an expenditure is for a "lawful purpose[]" only when it "promot[es] the nomination or election of the candidate." Conn. Gen. Stat. § 9-607(g)(1)A)(i). Even if this were not unconstitutional on its face, it is certainly unconstitutional in the manner which the SEEC has interpreted it—to apply to a description of the speaking candidate's own positions and priorities should he be elected.

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 purpose or 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" (by which the State appears to actually mean "*might* benefit 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). Thus, to summarily describe one's views with reference to those of a better-known candidate appearing elsewhere on the ballot (for example, "opposed to Trump's racist MAGA agenda," or "a vote to repeal President Obama's socialist health care bill") is impermissible under Connecticut law.

The First Amendment, however, secures for candidates the right to advocate for their own elections, including in what might arguably be the most effective way of doing so: by contrasting their views with those of other, well-known candidates. The state cannot limit a

candidate's advocacy, especially highly effective advocacy, merely because that advocacy might influence another candidate's election. The First Amendment guarantees a candidate's right "to speak *without legislative limit* on behalf of his own candidacy." *Buckley*, 424 U.S. at 54 (emphasis added); *see also id*. at 52 (noting that candidates' ability to express their views "is of particular importance"). "[A] candidate, no less than any other person, 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." *Id*. At 52. This "*unfettered* opportunity to make their views known" is vital if the electorate is to "intelligently evaluate the candidates' personal qualities and their positions on vital public issues." *Id*. at 52-53 (emphasis added); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (noting "right to engage in unfettered political speech"). One of the most highly effective ways for candidates to make their positions on vital public issues known is to compare them to those of other, well-known candidates. Thus, the 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 . . . the election of other candidates." *Id*. at 52. Candidates must be allowed to campaign against—even to promise to oppose--"Trump's border wall;" "Biden's debt forgiveness plan;" "Pelosi's liberal agenda;" "McConnell's obstructionism;" or "Governor Malloy's reckless spending"--even if those officeholders appear elsewhere on the ballot. In each such case, it is the association of the policy with an officeholder/candidate that gives the promise instant recognition and a clear picture of what, exactly, the candidate opposes. It could be no other way, because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. The State's effort to regulate a candidate's discussion of issues by

associating those issues with other officeholder/candidates is unconstitutional. *See Commonwealth of Pennsylvania v. Wadzinski*, 422 A. 2d 124 (Pa. 1980) (holding unconstitutional a law that merely required notice before mentioning the candidate in an ad was unconstitutional.)

Connecticut can offer no compelling state interest in limiting candidate speech about other candidates. Indeed, the SEEC does not even attempt to argue that the restriction is necessary to prevent "*quid pro quo*" exchanges. Corruption of this kind takes place in the raising of funds, not in spending. *See Buckley*, 424 U.S. at 47 (noting that "the absence of pre-arrangement . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.") "Corruption," as recognized by the Supreme Court, is inherently tied to contributions, not to how the money is spent. *McCutcheon*, 572 U.S. at 207-08 (the legislature "may permissibly seek to rein in "large contributions [that] are given to secure a political quid pro quo from current and potential office holders. … Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption."). Connecticut does not argue that there was any pre-arrangement in this case. And it wisely makes no attempt to argue that spending campaign funds to broadcast the message "Rob and Joe consistently fought Governor Malloy's reckless spending" is in any way more "corrupting" than spending campaign funds to broad the message, "Rob and Joe consistently fought reckless spending," or perhaps "liberals' reckless spending."

Emphasizing the lack of any constitutionally accepted compelling state interest, the SEEC specifically noted that its investigation "did not reveal any coordination between Respondent[s] and [Republican

gubernatorial candidate] Thomas Foley, his candidate committee or its agents or the Republican Party," and "there is no allegation of facts discovered to show that Respondent[s] coordinated the mailers at issue with Thomas Foley's candidate committee." Rather, it concluded that any portion of the Markley and Sampson communications that promoted Foley or attacked Governor Malloy was an "independent expenditure."[3] (A110).

The Supreme Court has consistently and unequivocally held that independent expenditures cannot be limited precisely because they lack the corrupting potential of direct contributions to candidates. *Buckley*, 424 U.S. at 46 (independent expenditures "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."); *Citizens United*, 558 U.S. at 357 ("[I]ndependent expenditures ... do not give rise to corruption or the appearance of corruption.")

Contrary to what Connecticut may state, the interest in preventing actual or apparent corruption is entirely absent here. The state's interest must target *quid pro quo* corruption, and it cannot be hypothetical. *See McCutcheon*, 572 U.S. 185 at 192 (requiring the real or apparent risk "of a direct exchange of an official act for money"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644-645 (1996) (requiring "substantial threat"); *Nixon v. Shrink Mo. Gov't*

[3] Plaintiffs note that the law may not treat an uncoordinated, independent expenditure, as if it were a coordinated expenditure or "contribution." Only the fact of actual coordination, not the label placed on a communication by the government, can convert an independent expenditure into a "contribution." *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 613-14 (1996); Id. at 608 ("the First Amendment prohibits the application of this provision [treating certain spending as *per se* coordinated] to the kind of expenditure at issue here—an expenditure that the [plaintiff] has made independently, without coordination with any candidate.")

PAC, 528 U.S. 377, 392 (2000) (holding that "mere conjecture" is inadequate).

Connecticut's assertion of the anti-corruption interest here would be hypothetical and fall far short of actual or apparent *quid pro quo* corruption. There can be no risk of actual or apparent *quid pro quo* corruption with communications made independently from—that is, not coordinated with—the candidate mentioned in the ad (or that candidate's opponents, for an attack ad).

The communications made by Plaintiffs-Appellants Markley and Sampson explained their efforts to fight the governor's agenda. The governor was well known, as was his agenda, and highlighting their actions in relation to the governor and his agenda was a highly effective way to explain their positions. And the SEEC has never demonstrated that the Markley and Sampson communications were directed by the governor's opponents, or even that the communications were helpful to those opponents. *Buckley*, 424 U.S. at 47. More to the point, there was no money that passed from them to the governor's opponents, and hence no danger of "a *quid pro quo* for improper commitments" from the governor's opponents. *Id.* Thus, there is no risk of actual or apparent corruption.

Indeed, the SEEC has demonstrated that it has no concern with actual or apparent corruption about such candidate expenditures: The State's contention is that Plaintiffs-Appellants Markley and Sampson violated Connecticut law because they failed to coordinate with any of the governor's opponents. The SEEC insists that the ads would have been legal had Sampson and Markley coordinated their activity with the Foley campaign, and had the Foley campaign chip in a portion of the cost. The SEEC wanted the plaintiffs to negotiate with with the Foley campaign before spending on ads that mentioned Foley. In other words, SEEC demands that Markley and Sampson perform the

prerequisites for *quid pro quo* corruption, not avoid them. It is nonsensical, and highlights the lack of any anti-corruption interest

Despite this overwhelming authority that independent expenditures are not, as a matter of law, corrupting in a way that supports a compelling state interest in their limitation, the Court below seemed to believe that even though the spending by the Markley and Sampson campaigns was not coordinated with the Foley campaign, it could somehow be regulated because the term "promote" is not, in this context, unconstitutionally vague. *Markley,* 2022 Conn. Super. Lexis at 8-9. Plaintiffs disagree, but see no reason to argue the point, because nothing in the Supreme Court's jurisprudence would suggest that limitations on the content of independent expenditures, constitutionally vague or not, are somehow acceptable under the First Amendment, or that some speakers are not allowed to address particular issues in making expenditures. Indeed, to the contrary, after the *Buckley* Court specifically narrowed the definition of "expenditure" in order to address vagueness concerns, it nonetheless proceeded to strike down limitations on expenditures regardless of the vagueness or specificity of the language. *Buckley*, 424 U.S. at 44-51. *See also First National Bank of Boston v. Bellott*i, 435 U.S. 765, 784-85 (1978) ("the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speaker who may address a public issue.")

For these reasons, SEEC's factual finding that there was no coordination between the Markley and Sampson campaigns and the Foley campaign, and that the communication was an independent expenditure, is fatal to the state's case, because independent expenditures are not, as a matter of law, corrupting. *Citizens United*, 558 U.S. at 357.

Because the state's limitation on naming a non-opposing candidate cannot be justified by any compelling state interest in preventing corruption, it fails to pass strict scrutiny.

C. Connecticut's Effort to Control a Candidate's Messaging As a Condition of Participation in the Public Financing System is Unconstitutional

Finally, the SEEC claims that the state can condition the Plaintiffs' participation in Connecticut's public financing system (the "CEP") on the Plaintiffs' surrendering their right to control their campaign message—specifically, surrendering the right to use language that "attacks" a non-opposing candidate.

Any such limit on Plaintiffs-Appellants' speech about political issues because they took government funds places impermissible conditions on candidate speech. Connecticut cannot penalize candidates who dare exercise their First Amendment freedoms, forcing them to choose between refusing a public benefit or surrendering their right to share their views about other candidates, describe their priorities in terms of thwarting or supporting the policies of other officeholders, or describe their positions on issues in ways that are concise, easily understood, and appealing to voters (what the SEEC calls "the election of other candidates," but which in fact, in this case, are not views on the election of other candidates but statements of their own legislative priorities should they win office.)

Commented [BS3]: This cite to Buckley seems wrong, should go to SEEC in the record.

Markley and Sampson communicated their efforts to fight the Governor's agenda, so that they might attract the votes of those who similarly opposed it, or even those who might generally favor it but had concerns about overreach. Critically, there was no advocacy for or against the governor's election, except under the SEEC's incorrect

assumption that any mention of another candidate constitutes advocacy for that candidate, an assumption that violates the Supreme Court's "no reasonable interpretation" test. *WRTL*, 551 U.S. at 469-70. But, even if Plaintiffs-Appellants had advocated against the Governor's election, the Supreme Court has held, as demonstrated above, that candidates have a protected right to such advocacy, one that the SEEC cannot take away directly or as a condition for receiving a state-provided privilege or benefit like the CEP.

The lower court's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1990), and *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983) is misguided. It is true that in each case, the government conditioned the public benefit on the recipient not using the funds to engage in certain activities. But that is because those activities were outside the purpose of the grant. In *Regan*, organization's wishing to retain status as tax exempt, with deductible contributions, agreed not to lobby. The purpose of the tax exemption was not to foster lobbying, but to foster charitable activities. Hence the restrictions on tax deductability directly served the purpose of the program, while leaving the organizations free to lobby if they wished. Similarly, in *Rust*, the purpose of the grant was to promote certain types of family planning. Abortion was not one of those practices that the government sought to promote, so the government could restrict use of the funds to advocate for that purpose.

Here, by contrast, the legitimate purpose of the state grant is to relieve candidates of the obligation to raise private funds, and the corresponding danger, recognized by the Supreme Court, of creating opportunities for *quid pro quo* corruption, or its appearance. That purpose is in no way served by limiting the topics on which candidates can speak, or the way they address those topics. The government can fund a program "to advance certain permissible goals," and limit use of

the funds to advancing those goals. *Rust*, 500 U.S. at 194. But the key is that those goals must be "permissible." It cannot require the recipient to give up constitutional rights unrelated to those "permissible" goals, and in particular "it has no power to restrict expression because of its message, its ideas, its subject matter, or its content" using selective subsidies or tax breaks. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). When the government program is designed to facilitate private speech—as is exactly the case here—as opposed to government speech, as in *Rust*, the government cannot discriminate based on the views expressed by grant recipients. *Legal Services Corp. v. Velasquez,* 531 U.S. 533 (2001). When a government program "presumes that private, nongovernmental speech is necessary," it may not then place substantial content restrictions on that speech. *Id.* at 544.

The state's only plausible interest in its speech restrictions here is to prevent a recipient of CEP funds from spending that money in another race involving a CEP-participating candidate, thereby providing an edge to the preferred candidate in that race. But the state cannot pursue that type of financial equality by suppressing or penalizing speech. *Buckley*, 424 U.S. at 49.

In addressing the requirements of a system for publicly financing candidates, the Supreme Court has held that the leveling interest is not "'a legitimate government objective,' let alone a compelling one." *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 748-50 (2012).564 U.S. at 750 (quoting *Davis*, 554 U.S. at 741). Put succinctly, "the First Amendment simply cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54.

Notwithstanding Connecticut's lack of evidence of a *quid pro quo* for "improper commitments," there is no other interest that can justify

the limits imposed on the Plaintiffs-Appellants' pure political speech. "Campaign finance restrictions that pursue" objectives other than fighting actual or apparent corruption "impermissibly inject the Government 'into the debate over who should govern.'" *McCutcheon*, 572 U.S. at 192 (quoting *Ariz. Free Enterprise*, 564 U.S. at 750)).

Nor may the state argue that this assurance of monetary equality is necessary to encourage candidates to participate in the program. This interest was proferred by the government in *Arizona Free Enterprise*, but as the Supreme Court held in that case, "[h]ow the State chooses to encourage participation in its public funding system matters." 564 U.S. at 753. It rejected the notion that the state could do so by penalizing speech by others. Here, Connecticut's statutory scheme regulates the content of candidates' speech if they participate in the CEP program and take government funds for their campaigns, and penalizes them if they advocate for their own campaigns by mentioning other candidates. But the CEP cannot hinder Mr. Markley and Mr. Sampson's ability to speak for fear of hurting Governor Malloy's campaign. Accordingly, the CEP rules fail under the First Amendment.

CONCLUSION

Because the SEEC has unconstitutionally limited their core political speech in violation of the First Amendment, Plaintiffs-Appellants 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 of the SEEC.

Respectfully submitted,

Joe Markley and Rob Sampson
Plaintiffs-Appellants

Dated: October 26, 2022

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2 et seq., that on September 26, 2022:

(1) the electronically submitted brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and
(2) the electronically submitted brief and appendix and the filed paper brief and appendix 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 and appendix 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 and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and
(5) the word count of the brief is ####words; and
(6) the paper brief complies with all provisions of the rules, §§ 62-7 and 62-7A, as may be applicable, to the best of counsel's ability; and
(7) the electronic brief complies with all provisions of the rules, §§ 62-7 and 62-7A, as may be applicable, to the best of counsel's ability; and
(8) no rule deviations were requested.

Respectfully submitted,

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