DOCKET NO. HHB-CV18-6044479-S	SUPERIOR COURT
JOE MARKLEY and ROB SAMPSON, *Petitioners-Plaintiffs* v. STATE ELECTIONS ENFORCEMENT COMMISSION, *Respondent-Defendant*.	JUDICIAL DISTRICT OF NEW BRITAIN August 30, 2021

PLAINTIFFS' OPENING BRIEF

Petitioners-Plaintiffs Joe Markley and Rob Sampson ("Plaintiffs") submit this brief in support of their appeal of the Final Decision of Respondent-Defendant State Elections Enforcement Commission ("Defendant" or "SEEC" or "Commission"), dated February 14, 2018 (R562).

INTRODUCTION

"[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 754 (2011). The SEEC's decision and the statutes and regulations it is based on—Conn. Gen. Stat. §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), 9-706, and Conn. Agencies Regs. §§ 9-706-1 and 9-706-2, (the "Statutes")—violate the First Amendment by restricting a candidate's ability

to speak about other, non-opposing candidates. Such a restriction violates a candidate's First Amendment right to advocate for herself by limiting one of the most effective ways of doing so, by contrasting her views with those of other candidates, and violates her right to be free of content based burdens on political speech. The vagueness in the Statutes also violates a speaker's right, under both the First and Fourteenth amendments, to fair warning that the state will punish her for her speech. In addition, the Statutes are unconstitutional under the Connecticut Constitution's separation of powers doctrine. Finally, the SEEC cannot justify its speech restrictions as conditions voluntarily accepted when participating in the Citizens Election Program, as no exception to the unconstitutional conditions doctrine applies here.

STATEMENT OF FACTS

In their 2014 campaigns for State Senator and State Representative, Joe Markley and Rob Sampson sought votes by promoting their efforts to oppose Governor Dannel Malloy's policies. *See* Exhibits 1-6 (R78-89). The communications did not urge citizens to vote against the Governor or for any of his opponents. Rather, the communications urged voters to support Mr. Markley and Mr. Sampson to "STOP Governor Malloy and the majority Democrat's dangerous agenda!" Exhibit 4 (R78); *see also* SEEC Final Decision at 6 (R567). Mr. Sampson also urged voters to vote for him rather than John

"Corky" Mazurek because of Mr. Mazurek's support for Governor Malloy's policies. Exhibit 5 (R80); *see also* SEEC Final Decision at 6 (R567). Mr. Sampson had used "virtually identical" mailings in his previous campaign, when Governor Malloy was not a candidate. Sampson Dec. 29, 2014 Email (R107, R109).

On October 3, 2014, the Democratic State Central Committee filed a request for an advisory opinion from the State Elections Enforcement Commission, and an amended request on October 7, 2014. (*See* R36-41). The Committee asked the Commission to determine whether communications very similar to Mr. Sampson's—asking voters to support him as someone who would fight "Governor Dan Malloy's failed policies"—violated state law as an expenditure "opposing non-opponent candidates." Skretta Advisory Opinion Request at 2 (Oct. 7, 2014) (R41). On October 17, 2014, in the middle of the election, and after candidates had already planned and ordered communications, the Commission issued an advisory opinion stating that communications opposing non-opposing candidates violated state law. *See* Hearing Transcript at 134-35 (R519-20); Advisory Op. 2014-04: Negative Communications Featuring Candidates for Different Offices (Oct. 17, 2014), https://bit.ly/3kOTj3t.

On December 2, 2014, after his loss to Mr. Sampson, Mr. Mazurek responded to Plaintiffs' communications by filing a complaint against

Plaintiffs with the Commission. SEEC Final Decision at 1 (R562). 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 (R563).

The Commission heard the matter on August 31, 2017, and it issued a final decision on February 14, 2018. SEEC Final Decision at 1 (R562). Its decision concluded that the communications had resulted in "five instances of impermissible expenditures" by Mr. Sampson and two by Mr. Markley. *Id.* at 12 (R573).

In particular, the Commission held that any communication that clearly mentions a non-opposing candidate "[w]ithin 90 days of an election . . . is an expenditure to benefit (or oppose)" that candidate. *Id.* at 8 (R569). Such a communication would violate state law unless the portion mentioning a non-opposing candidate was coordinated with and paid for by another party. *Id.* at 8-9, 11-12 (R569-70, 572-73). Furthermore, the Commission ruled that, because Plaintiffs had accepted Citizens Election Program ("CEP") funds, they violated Conn. Gen. Stat. § 9-706 and Conn. Agencies Regs. §§ 9-706-1 and 9-706-2, by making expenditures that "opposed Governor Malloy" and that did not "*directly* further [their own] nomination for election." SEEC Final Decision at 8, 11-12 (R569, 572-73). The Commission ordered that Mr.

Sampson pay a $5,000 civil penalty and that Mr. Markley pay $2,000. *Id.* at 13 (R574).

Plaintiffs Sampson and Markley filed a petition for reconsideration the same day, and the Commission placed the petition on its agendas for March 14, 21, and 23, 2018. *Markley v. State Elections Enf't Comm'n*, No. HHB CV 18 6044479, 2018 Conn. Super. LEXIS 1737, at *1-2 (Conn. Sup. Ct. Aug. 2, 2018). The Commission did not vote on the petition—denying it—until March 23. *Id.*

The Commission responded to Plaintiffs' May 7, 2018 appeal of its final decision with a motion to dismiss, arguing that any appeal timed from the Commission's March 23 denial was untimely, because the petition had in fact been constructively denied on March 11, 2018. *Id.* at *3. This Court concluded that the appeal was untimely under § 4-183(c)(2) and that it was compelled to dismiss the appeal. *Id.* at *7-8.

On further appeal, the Connecticut Supreme Court concluded that, "under the particular facts of this case, the timeliness of [this] appeal [was] governed by . . . § 4-183(c)(3)" rather than § 4-183(c)(2). *Markley v. State Elections Enf't Comm'n*, SC 20305, 2021 Conn. LEXIS 137, at *3 (Conn. May 21, 2021). Holding that the "appeal was timely under § 4-183(c)(3)," the Supreme Court "reverse[d] . . . and remand[ed] the case . . . for a resolution of the merits of the plaintiffs' administrative appeal." *Id.* at *3-4.

STANDARD OF REVIEW

By statute, this Court must review the Commission's findings of pure fact for clear error. Conn. Gen. Stat. § 4-183. But "this deferential standard is not applicable to the court's review of an agency's construction of a statute, which is a pure question of law," *Conn. Light & Power Co. v. Tex.-Ohio Power*, 243 Conn. 635, 644, 708 A.2d 202, 207 (1998), nor to constitutional issues, *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 711, 99 A.3d 1038, 1065 (2014). Furthermore, regardless of any statutory standards of review, this Court must make an independent review of constitutional facts, or mixed questions of fact and constitutional issues. Courts have an "obligation" to independently review constitutional facts "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 567 (1995).[1]

[1] *See also Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) ("In a matter involving First Amendment rights, . . . [t]he factual findings, as well as the conclusions of law, are reviewed without deference to the trial court." (citations omitted) (internal quotation marks omitted)); *Flanigan's Enters. v. Fulton Cnty.*, 596 F.3d 1265, 1275-1276 (11th Cir. 2010) ("Where the First Amendment Free Speech Clause is involved our review of the district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, is de novo." (internal quotation marks omitted)); *Sullivan v. City of Augusta*, 511 F.3d 16, 24-25 (1st Cir. 2007) ("where the trial court is called upon to resolve a number of mixed law/fact matters which implicate core First Amendment concerns, the review . . . is plenary" (internal quotation marks omitted)); *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1056 (9th Cir. Idaho 2007), overturned on other grounds by *Ysursa v. Pocatello Educ.*

Thus, because this case involves constitutional questions, and any factual questions that might be at issue are constitutional facts, this Court's review "is plenary." *FairwindCT*, 313 Conn. at 711.

ARGUMENT

I. The First Amendment prohibits limits on candidate speech

Connecticut cannot limit a candidate's advocacy, censoring core political speech, merely because a communication that mentions a non-opponent's policies *might* affect that other candidate's election. The First Amendment guarantees a candidate's right "to speak *without legislative limit* on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam) (emphasis added); *see also id.* at 52 (noting that candidates' ability to express their views "is of particular importance"). Candidates' "*unfettered* opportunity to make their views known" helps the electorate "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").

Indeed, one of the most highly effective ways for a candidate to make known her positions on vital public issues is to compare and contrast them to those of other, well-known candidates. Thus, a candidate's right to speak "on

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Ass'n, 555 U.S. 353 (2009) ("Mixed questions of law and fact and ultimate conclusions of law receive de novo review.").

behalf of his own candidacy," *Buckley*, 424 U.S. at 54, includes the "right to engage in the discussion of public issues and" of other candidates, *id*. at 52. Indeed, although not at issue here, that right extends even to "vigorously and tirelessly . . . advocat[ing] . . . *the election of other candidates*." *Id*. (emphasis added). Because of this unfettered right to advocate for one's own election, the Supreme Court has struck down other attempts to limit candidates' speech, whether by prohibiting expenditures from their own funds or through general expenditure caps. *See id.* at 51-59; *Davis*, 554 U.S. at 738-42.

But Connecticut's restrictions on candidate speech go beyond a mere cap on candidate expenditures, unconstitutional as that is. Regardless of the funding source, Connecticut prohibits any candidate expenditure that has a purpose other than promoting "the nomination or election of the candidate who established the committee." Conn. Gen. Stat. § 9-607(g)(1)(A)(i). The Statutes further prohibit "contributions . . . for the benefit of" another candidate, § 9-616(a), where a contribution is defined as "[a]ny gift, payment or deposit . . . made to promote the success or defeat of any candidate," § 9-601a(a); *see also* Declaratory Ruling 2011-03 at 3 (holding that "a communication which benefits another candidate . . . results in an impermissible in-kind contribution"); Advisory Op. 2014-04 at 1 (noting that

"[t]he answer . . . is, essentially, the same" when a communication opposes rather than supports a candidate).[2]

Thus, despite candidates' right to advocate "vigorously and tirelessly" for or against "the election of other candidates," Connecticut's speech restrictions prohibit candidates from speaking about non-opposing candidates. *Buckley*, 424 U.S. at 52. Given candidates' rights to make expenditures and communicate with voters "without abridgement," *Davis*, 554 U.S. at 740, Connecticut's restrictions are unconstitutional.

II. The Statutes' content based burdens on political speech fail strict scrutiny

A. The Statutes trigger strict scrutiny because they burden political speech and impose content based restrictions

i. Strict scrutiny required for burdens on political speech

Even if Plaintiffs' communications were not specially protected as candidate speech, Connecticut's statutes fail the scrutiny that courts must apply to restrictions on political speech in general. "Discussion of public issues and debate on the qualifications of candidates are integral to the

[2] The SEEC may argue that Connecticut's restrictions are not prohibitions because a candidate may speak about a non-opponent through another committee. But, as discussed below, that speech must be allocated to and paid for by that other committee, meaning that it is the other committee's speech, not the candidate's. And, with the burdens and difficulties of finding others willing to speak and pay for the speech, it is certainly not an unfettered right.

operation" of our system of government. *Buckley*, 424 U.S. at 14. As a result, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Nonetheless, the General Statutes force a candidate to choose between punishments for violating the law on the one hand or losing her voice on the other—losing it either by ceasing to speak altogether or by letting someone else speak in her stead. That is, Connecticut unconstitutionally forces on her one of three choices: being punished for exercising constitutional rights, not speaking, or seeking out a committee that will speak about the non-opponent for her.[3] The first two clearly violate the First Amendment, but so does the third. An alternative speaker, one who takes over the portion of the communication about the non-opponent and pays for it, will demand editorial control over the portion of the communication that belongs to it. And with the new committee's editorial control, the candidate's original message will be changed, diluted, or lost altogether.

[3] The Statutes permit that "state central committees, the town committees, . . . candidates in the race directly opposing the candidate being attacked," or "[l]egislative leadership and legislative caucus committees," "may all bear the portion of the cost allocated" to attacking that candidate. Advisory Op. 2014-04 at 2.

A restriction that forces a candidate to give up her message, speaking through another, is no less a ban on protected speech that must face First Amendment scrutiny. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337-39 (2010) (treating requirement that speak through another committee—an affiliated PAC—as a ban on political speech); *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 252-256 (1986) ("*MCFL*") (requiring strict scrutiny of requirement that speak through a separate segregated fund, or PAC); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013) (addressing requirement that entity speak through an affiliate).

Furthermore, if the candidate gives in to the state's demands by choosing one of the non-opponent's challengers to pay for and approve the message, the communication will become a coordinated expenditure. And, by forcing coordination on a speaker, the state will have de facto banned independent expenditures against non-opposing candidates,[4] even though any ban on independent expenditures is unconstitutional.[5] Thus, Connecticut's regime

[4] "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 558 U.S. at 360. Connecticut bans a communication mentioning a non-opposing candidate *unless* it is coordinated with a candidate opposing the subject of the communication, or some similarly interested party.

[5] The United States Supreme Court has repeatedly held that limits on independent expenditures are unconstitutional. *See, e.g.*, *Buckley*, 424 U.S. at

seeks to accomplish an unconstitutional aim, indirectly, through the back door.

Nonetheless, unless a candidate gives someone else control over her message about a non-opposing candidate, Connecticut bans her speech in no less than three ways. First, Connecticut limits speech by explicitly prohibiting expenditures for such communications, even when doing so functions as valuable "shorthand" for explaining her positions on a range of vital public issues. *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (addressing party affiliation as "shorthand" for stances on issues). Under § 9-607, the only "lawful purpose[]" for a communication is to "promot[e] the nomination or election of the candidate" making it. § 9-607(g)(1)(A)(i). And Connecticut interprets any mention of another candidate as promoting that candidate instead. *See* Declaratory Ruling 2011-03: Candidate Committees and Joint Communications at 3 (May 18, 2011), https://bit.ly/38o4Gt3 (stating that any communication that mentions a non-opposing candidate must

52-54 (invalidating limits on campaign expenditures); *Citizens United*, 558 U.S. at 357 (striking down prohibition on corporate independent expenditures, noting that "that independent expenditures" cannot "give rise to corruption or the appearance of corruption"); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 608 (1996) (Breyer, J., plurality op.) (invalidating restrictions on independent expenditures by political parties); *MCFL*, 479 U.S. at 256-65 (invalidating restraints on independent expenditures by non-profit groups).

benefit or oppose her, and that any "communication which benefits [or opposes] another candidate" in any way "results in an impermissible in-kind contribution"); Advisory Op. 2014-04 (applying to communications opposing candidates).

Second, Connecticut limits speech through its broad statutory definition of contributions, by prohibiting expenditures opposing a non-opponent as "contributions to, or for the benefit of . . . another candidate committee." § 9-616(a); *see* § 9-601a(a) ("'contribution' means . . . [a]ny gift, payment or deposit of money or anything of value, made to promote the success or defeat of any candidate").

Finally, by broadly interpreting actions that benefit a non-opponent, Connecticut expressly prohibits participants in the Citizens Election Fund from making "expenditures . . . for the benefit of another candidate" and from making "[i]ndependent expenditures to benefit another candidate," regardless of the source of the funds. Conn. Agencies Regs. § 9-706-2(b)(8) and (b)(13); *see also* Conn. Gen. Stat. § 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); Conn. Agencies Regs. § 9-706-1 (requiring that "[a]ll funds in the depository account . . . be used only for campaign-related expenditures made to directly

further the participating candidate's nomination for election or election"); *id.* at § 9-706-2(b)(10) and (14) (prohibiting expenditures "made in conjunction with another candidate for which the participating candidate does not pay his or her proportionate share" and "[e]xpenditures in violation of any . . . state . . . law").

Connecticut thus burdens political speech in three ways. And such "burden[s on] political speech" must survive strict scrutiny. *Citizens United*, 558 U.S. at 340; *see MCFL*, 479 U.S. at 256; *see also McCutcheon v. Fed. 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) (alteration in original)).

ii. Strict scrutiny required for content based restrictions

Even if this case did not involve protected political speech, Connecticut's speech restrictions would still have to survive the strict scrutiny required for content based regulations of speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* Second, a law is content based if it applies to speech because of "its function or purpose." *Id.* Connecticut's speech restrictions are content based in both ways. They restrict speech about non-opposing candidates, a restriction on a particular subject matter. And they restrict

speech based on purpose, by prohibiting speech that it interprets as benefitting another candidate, as well as speech that does anything other than meet the Commission's narrow interpretation of "promoting the nomination or election of the" speaker. Conn. Gen. Stat. § 9-607(g).

B. Connecticut cannot assert a compelling interest

Connecticut's speech restrictions "cannot stand" under strict scrutiny "unless [they are] 'justified by a compelling state interest.'" *Ariz. Free Enter.*, 564 U.S. at 748 (quoting *Davis*, 554 U.S. at 740). The state cannot demonstrate a compelling interest, however, because "[n]o governmental interest . . . is sufficient to justify . . . campaign expenditure limitations." *Buckley*, 424 U.S. at 55.

But even if the Statutes involved a campaign finance restriction other than expenditure limits, the state could assert only one compelling interest: "preventing corruption or the appearance of corruption." *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 496-497 (1985). Any other interest would "impermissibly inject the Government 'into the debate over who should govern.'" *McCutcheon*, 572 U.S. at 192 (quoting *Ariz. Free Enter.*, 564 U.S. at 750).

For example, the Supreme Court has rejected any interest in curbing "rapidly increasing campaign expenditures." *Buckley*, 424 U.S. at 55. The only concern related to rising campaign costs is the potential for corruption

created by reliance on large contributions. And the government must address that risk of corruption in the same way as it does all corruption concerns, through "contribution limitations and disclosure provisions," not with expenditure limits. *Id*.

Similarly, the Supreme Court has repeatedly rejected any interest in leveling the playing field or equalizing resources. In *Buckley*, the Court held that the leveling interest "is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights." *Id.* at 54. In *Davis*, the Court held that there was "no support for the proposition that [leveling electoral opportunities] is a legitimate government objective." *Davis*, 554 U.S. at 741. And in addressing the requirements of a system for publicly financing candidates, the Court in *Arizona Free Enterprise* held that the leveling interest is not "'a legitimate government objective,' let alone a compelling one." 564 U.S. at 750 (quoting *Davis*, 554 U.S. at 741). Put succinctly, "the First Amendment simply cannot tolerate [such a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54.

Thus, there is no recognized interest for the expenditure restrictions at issue here. And there is only one recognized interest for other types of restrictions, the anti-corruption interest. As follows, Connecticut's

restrictions would fail tailoring even if those other types of restrictions were at issue, and the state could claim that the anti-corruption interest applied.

C. Connecticut's speech restrictions do not further any compelling interest

Furthermore, the SEEC cannot prove that the speech restrictions "further[] a compelling interest and [are] narrowly tailored to achieve that interest." *Reed*, 576 U.S. 155, 171 (2015) (quoting *Arizona Free Enter.*, 564 U.S. at 734); *see also McCutcheon*, 572 U.S. at 197 (requiring "the least restrictive means to further" the required compelling interest).

Connecticut's restrictions on expenditure limits cannot be narrowly tailored to a compelling interest—given that there is no recognized compelling interest for campaign expenditure limits. But even if the anticorruption interest applied here, Connecticut's restrictions are not narrowly tailored to it. The anticorruption interest is limited to combatting actual or apparent *quid pro quo* corruption—the actual or apparent trading of dollars for government action. *See McCutcheon*, 572 U.S. at 192 (requiring the real or apparent risk "of a direct exchange of an official act for money"). Furthermore, that risk must be real and not hypothetical. *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 644-645 (requiring "substantial threat"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (holding that "mere conjecture" is inadequate); *United States v. Va.*, 518 U.S. 515, 533, 535–36

(1996) (under heightened scrutiny, a state's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Any assertion of the anti-corruption interest here would be hypothetical and fall far short of actual or apparent *quid pro quo* corruption. The SEEC has not alleged coordination between Plaintiffs and other candidates, but rather has punished Plaintiffs for *not* coordinating with other candidates. And there can be no risk of actual or apparent *quid pro quo* corruption with communications made independently from—not coordinated with—the candidate mentioned in the communication (or that candidate's opponents, for opposition communications). The "absence of prearrangement and coordination" for such independent expenditures "undermines the value of the expenditure to the candidate," because the non-speaker cannot direct the communication in the ways that will most benefit her campaign. *Buckley*, 424 U.S. at 47. In fact, the communication may end up harming her campaign. *See id*. (stating "may prove counterproductive"). Furthermore, and more importantly, the absence of coordination "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*.

The SEEC has never demonstrated any coordination between Plaintiffs and Governor Malloy's opponents—that Plaintiffs planned their communications with Governor Malloy or any of his opponents. It has not

shown that any money passed from them to the governor's opponents—that there is any danger of "a *quid pro quo* for improper commitments from the" governor's opponents. *Id*. And, while Plaintiffs' communications were a highly effective way for Plaintiffs to explain their positions, the SEEC has not shown that Governor Malloy's opponents would have approved or benefitted from the communications—that the communications were anything but "counterproductive" to those opponents. *Id*. Therefore, there is no risk of actual or apparent corruption.

Indeed, the SEEC has demonstrated that the state has no concern about actual or apparent corruption with regard to such candidate expenditures: The SEEC's contention is that Plaintiffs Markley and Sampson violated the statutes because they *failed to coordinate* with the governor's opponents, not because they illegally coordinated with them. Thus, far from protecting against *quid pro quo* corruption, the restrictions might encourage it.

Regardless, the restrictions do not further any interest in combatting actual or apparent *quid pro quo* corruption. And, if the state were really interested in preventing actual or apparent corruption, it would prohibit coordination, not require it. Accordingly, the Statutes are not "narrowly tailored to achieve that interest" and fail strict scrutiny. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) ("*WRTL II*") (Roberts, C.J., controlling op.).

Furthermore, even if there could be a relationship between the anticorruption interest and independent expenditures, Plaintiffs' communications cannot be regulated as independent expenditures. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 558 U.S. at 360. But the government can only categorize speech as an independent expenditure and thus regulate it if it meets one of two tests: Under the first, the state can regulate only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. That is, communications must use "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n.52. Under the second test, speech must be the functional equivalent of express advocacy, meaning that the communication must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 469-70 (Roberts, C.J., controlling op.).

The SEEC cannot regulate Plaintiffs' communications as express advocacy against Governor Malloy under the first test. The communications do not use the express words of advocacy to tell the public to vote against Governor Malloy. *See* Exs. 2-6 (R86-95).

The SEEC similarly cannot demonstrate that the communications are susceptible of no reasonable interpretation other than as appeals to vote against Governor Malloy. Rather, the wording, tenor, and focus of the communications all act as appeals to vote for the Plaintiffs. For example, although Exhibit 2 mentioned Governor Malloy—noting that Plaintiffs "consistently fought [his] reckless spending and voted against his budget," that they "[f]ought the Malloy tax hike," and that they "consistently fought [his] agenda and have tried to restore common sense"— the communication's focus is in urging constituents to vote for Plaintiffs: At the very top the communication proclaims, "Joe and Rob are who we need to turn Connecticut around! Right for Southington! Right for Connecticut!" R73. Similarly, Mr. Sampson in Exhibit 6 notes his pride in fighting "the many bad policies put forth by Gov. Malloy and the Democrats in Hartford," and based on that encourages voters to "Re-Elect Rob this November 4th!" R.82. And the other communications similarly encouraged votes for Plaintiffs, not against Governor Malloy. *See* Exhibits 3-5 (R75-R80).

III. The Statutes are unconstitutionally vague

The Statutes are "void for vagueness" because they "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague

that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"). "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). And "[w]here First Amendment rights are involved," as here, "an even greater degree of specificity is required" than under normal Due Process Clause vagueness review. *Buckley*, 424 U.S. at 77 (internal quotation marks omitted).

The Statutes supposedly regulate speech that "promotes" a candidate. *See* Conn. Gen. Stat. § 9-601a(a)(1) ("promote the success or defeat"); § 9-601b(a)(1) ("promote the success or defeat"); § 9-607(g) ("promoting of the nomination or election"). The Supreme Court has held that, in general, laws targeting speech that "promotes" or "opposes" a candidate are not unconstitutionally vague. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 170 n.64 (2003) (rejecting challenge that "[t]he words 'promote,' 'oppose,' 'attack,' and 'support'" are unconstitutionally vague). That is because those words in general "clearly set forth the confines" of what the government will and will not regulate as advocacy. *Id*. Candidates do not have fair warning here, however.

In enforcing the restrictions, the SEEC employs a standardless definition of promoting or opposing a candidate, one that can be used to regulate any speech that merely mentions a candidate. As discussed above, Plaintiffs' communications advocated their own election. They did not advocate against Governor Malloy, and certainly not as advocacy is defined under the U.S. Supreme Court's "no reasonable interpretation" test. *WRTL II*, 551 U.S. at 469-70. Thus, as with Plaintiffs, a person of "common intelligence must necessarily guess" whether the Statutes will apply to her, and the Statutes are thus unconstitutionally vague. *Connally,* 269 U.S. at 391.

IV. The Statutes violate the Connecticut Constitution's separation of powers requirement

The Connecticut Constitution divides "the powers of government . . . into distinct departments, and" confides to them each "a separate magistracy." Conn. Const. Art. II. This separation of powers doctrine serves both to "limit[] the exercise of power within each branch[and to] ensure[] the independent exercise of that power." *Whitaker v. Comm'r of Corr.*, 90 Conn. App. 460, 480, 878 A.2d 321, 335 (2005) (internal quotation marks omitted).

One of the purposes of the legislative branch is to serve as a check on the executive. To fulfill that role, members of the legislature must be free to reach out to the public, to argue against the Governor's policies and agenda and raise support for their own. By prohibiting any mention of the Governor's

policies by candidates who are members of the legislature, the SEEC restricts and limits the role of the legislature with respect to the executive branch, in violation of the Connecticut Constitution.

V. The CEP's requirements are unconstitutional conditions

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, 74 (1936) (holding that the government "may not indirectly accomplish . . . by taxing and spending" what it "has no power to enforce [by] commands"). Thus, Connecticut cannot justify its restrictions on Plaintiffs' communications as voluntary conditions accepted in exchange for CEP funding. It is irrelevant that "a person has no 'right' to a valuable governmental benefit"—to the CEP funding—or that "the government may deny [Plaintiffs] 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 someone a benefit after he exercises those freedoms. *Id.*

Yet Connecticut does penalize candidates who dare exercise their First Amendment freedoms, forcing them to choose between CEP funds or their right to share their views on "the election of other candidates." *Buckley*, 424 U.S. at 52. Mr. Markley and Mr. Sampson communicated their efforts to fight

the Governor's agenda, so that they might attract the votes of those who similarly opposed it. There was no advocacy for or against the governor, except under the SEEC's assumption that any mention of another candidate is advocacy, an assumption that violates the Supreme Court's "no reasonable interpretation" test. *WRTL II*, 551 U.S. at 469-70. But, even if Plaintiffs had advocated against the Governor's election, the Supreme Court has held that candidates have a protected right to such advocacy, one that the state cannot take away directly or as a condition for receiving a state-provided privilege or benefit.

And the SEEC cannot claim that any exception to the unconstitutional conditions doctrine applies here, because the CEP does not merely control the use of program funds. It prohibits grantees from using *any* funds in their campaign accounts to make a communication that mentions a non-opposing candidate, treating any such mention as a purported "benefit" to the other candidate or his opponent. Conn. Agencies Regs. § 9-706-2(b)(8).[6] Given that the CEP prohibits any communications about non-opposing candidates, regardless of the funding source, the SEEC cannot argue that it is "simply insisting that public funds be spent for the purposes for which they were

[6] *See also* Advisory Op. 2014-04 at 2 (stating that "a CEP participant may not attack candidates opposing other members of such candidate's party").

authorized," *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). That exception applies only if the grantee is free to "conduct [program-restricted] activities through [funding sources] that are separate and independent from" the public funding. *Id.* Thus, as the CEP "effectively prohibit[s] the [candidates] from engaging in the protected conduct outside the scope of the . . . program," the Connecticut has exceeded its authority and the speech restrictions are unconstitutional. *Id.* at 197.

Likewise, the state cannot avail itself of the affiliate exception—requiring that affiliates make the prohibited speech instead of the candidate. *See id.* at 197-98. Affiliates provide an adequate alternative only when "they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the . . . program." *Agency for Int'l Dev.*, 570 U.S. at 219. Affiliates are not an adequate alternative, and restrictions fail constitutional scrutiny, when program restrictions require that the affiliate be 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.* (emphasis in original).

The CEP does not allow a candidate to make communications mentioning non-opponents from a separate candidate account. Rather, when a candidate's communication attacks a non-opponent, the portion of the ad opposing the non-opponent must be paid for by a completely 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 speech. Under CEP rules, it cannot be, as they forbid a candidate from attacking other candidates. Advisory Op. 2014-04 at 2 ("[T]he candidate committee of a CEP participant may not attack candidates opposing other members of such candidate's party."). The part of the message mentioning a non-opposing candidate must belong to another committee, and that committee must "bear[] the portion of the cost allocated to the negative advertising." *Id*. And, given that the other committee is paying for the message about the non-opposing candidate, it will demand control over the content of that message. 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 (emphasis added).

As the Supreme Court held in *Arizona Free Enterprise*, "[h]ow the State chooses to encourage participation in its public funding system matters." 564 U.S. at 753. With respect to communications mentioning non-opposing candidates, 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 are unconstitutional conditions.

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

I hereby certify that a copy of the foregoing was filed and served on the following counsel of record on this date:

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