DOCKET NO. HHB-CV18-6044479-S

JOE MARKLEY AND ROB SAMPSON, *Petitioner Plaintiffs*,	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
STATE OF CONNECTICUT STATE ELECTIONS ENFORCEMENT COMMISSION, *Respondent-Defendant*.	:	SEPTEMBER 30, 2021

DEFENDANT'S MEMORANDUM OF LAW

I. INTRODUCTION

When candidates for office in Connecticut speak from their candidate committee they are generally limited to speaking from that committee on one topic: *their own election to office*. Like any citizen, they are free to speak during an election on any topic they wish outside of their candidate committee by adhering to campaign finance source and disclosure rules. However, when they elect to speak "in" a "candidate committee" that is paid for with public taxpayer funds, as these Plaintiffs did, they agree to "directly" limit their speech to the topic of *their own election*. These Plaintiffs swore an oath to abide by this express and easily understood condition to only "directly further" their own campaigns when they paid for their speech with the taxpayer funds. They voluntarily chose to accept those public funds knowing that by doing so they were relinquishing core First Amendment rights. The SEEC relied upon Plaintiffs' oath to abide by the program rules and was induced to award them their grants because it reasonably believed they were acting in good faith and intended to abide by their oath. They failed to do so.

After taking the CEP money in 2014, Plaintiffs forgot their bargain and flouted the rules of the CEP so that they could join the chorus of other Republicans throughout the State in

bolstering that parties' statewide messaging of advocating the defeat of the other major parties' standard bearer and, thereby, bolstering the election of that parties' candidate for governor. They now contend that there existed an unwritten exception to their public funds bargain for situations where they wish to attack the leader of the opposing political party and use his name or likeness as a proxy or "shorthand" for their own political positions and views. No exception exists in the statutes and regulations and, particularly in the public financing context, no such exception is compelled by the First Amendment.

Candidates for office in Connecticut are not permitted to make contributions from their candidate committees to other candidate committees. Conn. Gen. Stat. § 9-616. A contribution is not limited to money but instead is "anything of value" provided to another candidate. Conn. Gen. Stat. § 9-601a(a)(1). Since a candidate cannot contribute to another candidate directly from a candidate committee, it follows that he or she also cannot provide anything of value indirectly to a candidate or make "expenditures" related to another candidate's race from a candidate committee. At least not without following certain rules, such as allocating the value of the expenditure attributable to each election, which these Plaintiffs declined to do.

The prohibition against contributions from one candidate committee to another candidate committee, or inter-candidate transfer, serves important anti-corruption and anti-circumvention interests. It prevents candidates from using other campaigns as conduits to circumvent contribution limits. In the private fundraising context, it protects the interests of contributors who are solicited for money for one campaign from funding a different campaign they may not support. It also protects candidates from being pressured (perhaps by more senior party leaders) to spend in other candidate's races or acting as conduits for circumvention of contribution limits. In the public financing context, it ensures that public funds are used for the purpose they were intended—

to fund the campaigns of those candidates who have agreed to participate in Connecticut's clean elections program. It also prevents the waste of public funds when candidates who do not really need the money for their own election speech—an enviable position Markley seemed to enjoy in 2014—spend it anyway to help a friend, further a party message or bolster a political ally. It also prevents the diversion of public financing money to help candidates who did not receive public financing grants, such as those candidates who opted not to participate, or who could not garner enough support to receive a grant, or who are barred by law or past CEP rule violations from receiving a grant. It also encourages candidates to participate in the CEP because the rules about who can spend against them in a race with public money are clearly delineated. The CEP statutes and regulations, which avoid the waste and diversion of public funds, help maintain the public's faith in the CEP and their willingness to pay for it. Thereby, ensuring the CEP can continue to operate effectively to achieve its compelling state interest in combating corruption, the appearance of corruption and the reducing the influence of money in our state elections.

The rule against contributions between candidate committees applies across all of Connecticut's campaign finance electoral scheme—private and public finance candidates alike. The prohibition against inter-candidate transfers in Conn. Gen. Stat. § 9-616 that Plaintiffs seek to invalidate is not actually a "condition" tied to the CEP. When called upon to do so because of a complaint or its own investigation, the SEEC applies the laws and regulations that determine when an expenditure in one race becomes an expenditure or contribution in another. It begins this process by determining whether a particular item or activity meets the definition of expenditure at all under the statute. The SEEC regulates only items or activities that fall within that expenditure definition and there are many exemptions to the definition in the statute that narrowly tailor its boundaries. Indeed, many items or activities that are clearly campaign-related fall outside the

SEEC's purview because the General Assembly has exempted them and deemed them *not* to be an expenditure. Conn. Gen. Stat. § 9-601b(b)(1)-(15) (expenditure exemptions). Relevant to this case is when a communication, like a mailer, is an expenditure in more than one race and therefore subject to regulation.

An item or activity can be an "expenditure" if it promotes or opposes a candidate for election. In some instances, whether something promotes or opposes a candidate on the ballot is very easy to discern because the speaker uses explicit language telling voters to "vote against" or "vote for" a particular candidate. *Buckley v. Valeo,* 424 U.S. 1, 44, n. 52 (1976) (upholding statute against vagueness challenge and setting forth terms of express advocacy about a "clearly identified" candidate). This explicit language is referred to as "express advocacy" in campaign finance law. In many other instances, the speaker's message is more subtle and does not expressly advocate against a candidate but nonetheless promotes or opposes that candidate, and is therefore the "functional equivalent" of express advocacy. *McConnell v. FEC,* 540 U.S. 93, 206 (2003). In circumstances such as those, a judgment about whether a particular type of speech promotes or opposes a candidate is necessary before speech can be deemed an "expenditure" subject to campaign finance regulations. Deeming something an "expenditure" under the statute does not mean that the speech is prohibited, it just means the speech is subject to certain regulations about reporting, disclosure of the speaker to the public, and funding sources. Even when speech does not use express advocacy terms it will be subject to regulation if it promotes or opposes a candidate. Conn. Gen. Stat. § 9-601b(a)(1).

The General Assembly established some "bright line" rules to assist the SEEC in determining when speech should be regulated as an "expenditure." One of those bright line interpretative rules is the presumption that when a speaker spends money on speech within the 90

days immediately preceding an election, and that speech clearly discusses or "identifies" a particular candidate for office, it is an "expenditure" under the statute. Conn. Gen. Stat. §§ 9-601b(a)(2) and 9-601b(b)(7). The statute creates a presumption that the speaker is influencing the identified candidate's race for office, whether intentionally or not. Neither the intent behind the speaker's words nor the listener's reasonable understanding of them is relevant to the statutory analysis of whether speech meets the definition of "expenditure" within the 90 days. Speech that promotes or opposes a candidate *automatically* becomes an "expenditure" within the 90 day window if it clearly talks about a candidate, even if it lacks "express advocacy" language exhorting one to "vote for" or "vote against" a specific candidate.

Again, this 90-day rule applies generally to all aspects of Connecticut's campaign finance scheme—private fundraising candidates and public financing candidates alike, Conn. Gen. Stat. § 9-607(g)—and is not limited to the CEP or a condition of it. And, like the general prohibition against candidate's making contributions to other candidates from a candidate committee, the 90 day rule is not fatal to the speech. It simply recognizes the speech for what it does, namely influence a campaign. Deeming speech an "expenditure" simply means that the speech is regulated like other campaign finance expenditures in terms of reporting, disclosure of speakers, funding sources and other requirements.

Naturally, the public financing program requires candidates to agree to abide by these generally applicable campaign finance rules before receiving a grant. But given the purposes of the CEP and the use of public funds to finance it, the SEEC applies these general rules with greater force in the context of the public financing program. Since the inception of the CEP, the SEEC has enforced and applied two regulations to CEP candidates—Regs. Conn. State Agencies §§ 9-706-1 and 706-2—that require candidates to agree to spend CEP money only on expenditures that

"directly further" their candidacies. So while all candidates are limited to "promoting" their own candidacies, Conn. Gen. Stat. § 9-607(g)(1)(A)(i) (defining lawful purpose of a candidate committee as "promoting of the nomination or election of the candidate who established the committee ...."), in exchange for their grant, CEP candidates personally swear an oath and agree to the stricter requirement that their expenditures must be in "direct furtherance" of their own campaign. Even with the "direct furtherance" standard, the SEEC permits expenditures for speech to promote multiple races so long as the candidates allocate and share the costs.

The SEEC strictly polices expenditures in the public financing program in this manner because not all candidates qualify to receive or benefit from public money, and some, like certain felons or candidates who have violated CEP rules in the past, are simply ineligible to qualify and should not be permitted to benefit from public funds. *See, e.g., Ganim v. Brandi,* Docket No. 17cv1303 (MPS) (upholding CEP prohibition on participation of felons convicted of public corruption) *available at* http://seec.ct.gov/Portal/data/Law/pdfs/GanimMSJRulingTranscript.pdf. (last viewed Sept 17, 2021). Unlike the private fundraising context, where contributors and other supporters can influence the expenditures of funds by withholding additional contributions if they disagree with how the money is expended, diverted or squandered. In the public financing context, the SEEC is the only meaningful check on how CEP money is spent.

Here, Plaintiffs voluntarily joined the CEP and were well versed in its requirement that they spend campaign committee funds to "directly further" their own candidacies. Despite their knowledge and voluntary agreement, Plaintiffs deliberately ignored the SEEC's guidance in 2014 cautioning them against the spending on mailers identifying and opposing Malloy without proper allocation. Plaintiffs relied upon a subjective and mistaken belief that spending money outside their race to expressly *oppose* an opponent of another candidate did not contravene the CEP

requirement to spend public funds on their *own race*. Consistent with clear statutory and regulatory guidance, the SEEC concluded otherwise. Plaintiffs do not seriously dispute that the SEEC's determination was consistent with the statutory scheme. They instead contend that this Court should invalidate that scheme entirely, including Conn. Gen. Stat. § 9-616, and either permit a gaping loophole allowing CEP candidates to spend in *any race* or write in a narrower exception for speech regarding the "head of the party." No such exception exists in the statutes and the SEEC was not at liberty to write in an exception the General Assembly has, thus far, declined to adopt.

Plaintiffs are incorrect in their assertion that the CEP could not require them to speak only in their own race. First, the State can prohibit candidates from making expenditures in other candidates' races in both the private and public finance context because, in many instances, those expenditures are tantamount to "contributions" to at least one of the candidates in those other races. The State has a valid interest in requiring speech funded through a candidate committee hew generally to one topic: *that candidate's election*, and not focus on other races. Second, and most relevant here, the State can condition the use of CEP funds in particular on a participating candidate's agreement to abide by requirements that the State could not otherwise impose outside of the public financing context, including the requirements at issue here. Indeed, such requirements are commonplace in the CEP, and are a bedrock of the public financing bargain that candidates strike in exchange for taxpayer money. *Compare, e.g.,* Conn. Gen. Stat. § 9-703 (CEP candidates agree to voluntarily limit their expenditures) *with Buckley*, 424 U.S. 1 58-59 (1976) (Congress cannot limit expenditure limits of privately financed candidates). So even if the State cannot regulate contributions in this manner in the private finance context, which it can, there is no question it can regulate these expenditures in the public finance context at issue here.

II. FACTUAL BACKGROUND

A. Plaintiffs' Political Background and History of Participation in the CEP.

Plaintiffs were established politicians in 2014, well versed in the campaign finance statutes and the CEP requirements in particular. Markley was first elected to the State Senate in 1984, (R454), and then five more times in 2010-2018. (R455). From 2010 to 2018, Markley applied for and received five CEP grants. (R455). Even before the CEP's inception in 2006, Markley had personal experience with the campaign finance rules that require costs to be allocated between candidates when they reference other candidates. In his campaigns in 1984 and 1986, Markley allocated an expenditure with a fellow Republican who referenced him in some campaign materials or activities. He testified: "[s]o it's always been my understanding that if you make mentions of other candidates in a way that would promote them, whether you're part of the Citizens' Election Committee (sic) or not, that you are ***responsible to share those expenses***. And that the fact of participating in the Citizens' Election Committee (sic) doesn't change the fact that you have to properly share expenses." (R454). The record establishes that Markley was aware of the requirement that he not seek to influence other races by promoting or opposing other candidates without allocating the costs of such speech. The same is true for Sampson, who testified that he understood that "you need to spend the money on your campaign." (R466).

In addition to understanding the prohibition against spending in another's race with candidate committee funds, both Markley and Sampson and their campaign treasurers were experienced in complying with the CEP's requirements. Markley participated in the CEP numerous times, (R450), and signed CEP Form 10 in 2014 where he swore "under penalty of false statement" that "I understand my obligation to abide by and will abide by the Program's requirements, *including expenditure limits*…". (R149). By signing that form he expressly agreed

to abide by the CEP rules, and he subsequently accepted (and then spent) public funds on that basis. The campaign treasurer for Markley had training and experience with the CEP requirements and served in this role in 2010, 2012, 2014 and 2016 for Markley and again in 2018 for Sampson. (R431-32) ("Did you learn about making expenditures at the training? A: Yes"). Markley understood that the rules for sharing expenditures between participating and nonparticipating candidates were the same in terms of how sharing of expenditures were handled. (R452). He agreed to abide by the rules in exchange for nearly $57,000 in taxpayer funds. (R163). Sampson did the same in exchange for nearly $28,000. (R337).

B. Plaintiffs Routinely Allocated The Expenses of Campaign Speech Between Candidates.

Plaintiffs demonstrated on several occasions that they knew they could not make an expenditure in another candidate's race because they routinely split the cost of their joint expenditures to avoid doing so. Well before 2014, Plaintiffs had experience sharing expenditure costs and did so without difficulty or burden. Markley and Sampson made joint expenditures in 2012, 14, and 16. (R472). They even consulted with the SEEC to allocate appropriately before making joint expenditures. (R472). In 2012, they sent out mailers similar to those at issue here and allocated the expenses without incident or complaint. Notably, while similar to the 2014 mailers, (R474-76), those 2012 mailers did not contravene the CEP requirements because, although Governor Malloy was clearly identified in the 2012 mailers, he was not a candidate that year so those mailers could not be "expenditures" in any race other than that of Markley and Sampson. (R495-96). Conn. Gen. Stat. § 9-601b(2).

In 2014, the Markley and Sampson campaigns again made joint expenditures on mailers and were able to allocate between their two campaigns without confusion or difficulty. (R428) ("When the joint mailers, the invoices that you received were essentially the exact same ones sent

to the Markley campaign broken down? A: Yes. We got invoiced for our portion and they got invoiced for their portion."). The campaigns were able to easily split the bill for the mailers and received separate bills from the printer allocating their portions. (R442-43). The printer did the breakdown of the allocation based on the number of mailers printed and where they were mailed. (R441). It was simple and seamless. The record is therefore undisputed that Plaintiffs understood that when they are talking about another candidate outside their own race, they are influencing and promoting the other's election and therefore must properly allocate and share the cost. *See* SEEC Decl. Ruling 2011-03 (CEP candidates must properly allocate joint expenditures).

C. Plaintiffs' Agreement to Abide By the CEP Rules.

Plaintiffs knowingly and voluntarily agreed to abide by the CEP rules in 2014. Markley's Treasurer Barbara Roberts, a person who also signed CEP Form 10, (R150), in which she agreed to abide by the requirements of the CEP, (R433-34), understood that requirements for participating in the CEP. In particular, she understood the CEP imposed different requirements on candidates and treasurers than the private campaign finance system. ("As far as from your training your experience as a treasurer, are the requirements on a candidate participant, candidate committee participating in the Citizens' Election Program different from those for a non-participating candidate? A: Are they different? Q: Yes. A: Yes."). Sampson's treasurer, while not as experienced as Markley's at the time, also understood that he was swearing to abide by the CEP rules. (R238).

Plaintiffs and their agents knew the CEP required them to forego a wide range of otherwise permissible First Amendment conduct such as making unlimited expenditures, fundraising from certain sources, coordinating expenditures with certain individuals and committees and expending CEP funds in a way that goes beyond "directly furthering" their own race. Treasurer Roberts testified that she understood that the State conditions CEP participation on candidates foregoing

the First Amendment right to fundraise from certain individuals and entities. (R435) ("I understand if you're not participating in this [the CEP] you can raise funds, you could raise funds pretty much anywhere you want and…"). So when the Markley campaign accepted nearly $57,000 in taxpayer funds, (R439), to pay for his political speech and activities, both he and Ms. Roberts knew that those funds were conditioned upon relinquishment of a host of First Amendment rights, including the right to raise and spend unlimited money and the ability to accept contributions in certain amounts and from certain individuals. Markley acknowledged this when he signed the CEP forms and accepted personal liability for violating the CEP rules. (R469). Having done so, and thereby induced the SEEC to award him a grant of public funds conditioned on complying with the CEP requirements, the Markley campaign proceeded to spend virtually all of the public CEP money it received. (R440).

Sampson likewise acknowledged that he signed the CEP forms to join the program, (R461-2; R237), and that he knew it had rules more restrictive than the private fundraising context. (R462) ("I certify that my candidate committee will expend money received from the Citizens' Election Fund in accordance with provisions of the Statute 9-607g, and with regulations adopted by SEEC."). He, like Markley, agreed to the CEP terms so the SEEC would give him a grant and then proceeded to violate the SEEC regulations—Regs. §§ 9-706-1 and 9-706-2—which prohibited him from providing anything of value to another candidate and expending money for any reason other than his own election.

D. The Plaintiffs Ignored SEEC Rules And Guidance And Distributed Mailers in 2014 that Clearly Identified and Opposed A Candidate In Another Election - Governor Malloy.

Plaintiffs distributed six communications to voters in their districts in the Fall of 2014 which clearly identified and discussed Governor Malloy and his record. (R399, R73-81).(referred

to collectively as "mailers"). Three of those six mailers, (R72, 73, 75) were jointly paid for by both Sampson and Markley, and Sampson paid for 3 communications on his own. (R77, 79, 81). Final Decision, p.5-6, (R566-67). The mailers advocated for the election of Markley and Sampson, but the SEEC found that the mailers also opposed Governor Malloy's reelection and clearly identified him by referring to him by name, repeatedly. For example, mailer 4, (R77; R567) stated that: "Rob & Joe consistently fought Governor Malloy's reckless spending and voted against his budget which resulted in nearly $4 Billion in new and increased taxes for Connecticut residents ... Fought the Malloy Tax Hike: As members of the Appropriations Committee, Rob & Joe opposed our state's largest tax hike ever, (R79) and helped craft an alternative budget that didn't raise a single tax or cut any aid to our community or its seniors .... Rob & Joe have consistently fought Governor Malloy's agenda and have tried to restore Common Sense and fiscal responsibility in state government." (R87);

There is no real dispute that a reasonable reader would have understood part of the message conveyed in the mailers was that Governor Malloy was bad for Connecticut and should not be reelected. Even though the mailers did not use express terms like "vote against" Governor Malloy the language was the equivalent of that express language. *McConnell,* 540 U.S. at 204-205; 675-76, n. 64; 688–689. Five of the mailers referred to Governor Malloy's "bad policies" (R95); "destructive policies" (R92); "wasteful spending" (R92); his "corporate welfare" policies (R93); his "reckless spending" (R91); and his being "bad for Connecticut" (R89). The SEEC found that a reasonable person would have understood that Markley and Sampson were encouraging voters to vote against Governor Malloy. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-470 (2007) ("*WRTL II")* (affirming "functional equivalent" of express advocacy standard).

The SEEC analyzed each mailer in its Final Decision in this case, (R566-73), and concluded that five of the mailers both "opposed" the reelection of Governor Malloy and unquestionably referred to him. (R572-573, ¶27). These mailers thus qualified as "expenditures" under two separate sections of Conn. Gen. Stat. § 9-601b. This factual conclusion regarding the message in the mailers by the SEEC is not in dispute and is entitled to deference. *See e.g. Cohen v. Statewide Griev. Committee*, Docket No. 20356, 2021 Conn. LEXIS 187, at *20 (July 2, 2021) (factual finding of Committee entitled to deference unless clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record).

E. Plaintiffs Allocated Costs of the 2014 Mailers Between Themselves But Declined to Allocate With Any of the Many Speakers Who Could Have Lawfully Funded the Speech in the Malloy-Foley Race.

There is no factual dispute that allocating the costs of the mailers between speakers was simple and easy to do. There also is no dispute that had Plaintiffs allocated even a small portion of the cost with a speaker who was permitted to make an expenditure in the Malloy race—and there were many—the SEEC likely would not have found any violations. *See, e.g.,* SEEC Decl. Ruling 2011-03, p. 5 (the SEEC accords "great weight to the determination [on how to allocate] made by candidate[s]"); SEEC Advisory Opinion 2010-07, p. 1 ("a candidate committee may…engage in joint expenditures with another candidate committee…so long as each…pays its pro rata share…"); *see also* Final Decision, p. 12, n. 12 ("the Commission has not disputed a committee's determination of its proportionate share of a joint expenditure unless…clearly erroneous."). (R573).

The record establishes that the burden for allocating with other speakers is light. Indeed, Plaintiffs did not have to do anything other than pay the separate invoices from the mailing house they hired to produce and distribute the mailers. (R442-43). There is no dispute that the cost of

the mailers likely could have been split between three or more speakers, and maybe up to an unlimited number of speakers if the Plaintiffs attempted to do so. The mailing house could have sent a third, fourth, or as many invoices as needed to a Republican town committee, the Republican State Central Committee, or a host of other speakers. Instead, Plaintiffs made no attempt to share the cost of the mailers even when they knew the SEEC advised in 2014 and in 2011, Declaratory Ruling 2011-03, that allocation, even *de minimus* allocation, was the more prudent course. (R476-77) (Markley testified that he preferred to take his chances with violating the program).

Markley testified that he never asked any of the four town committees in his or Sampson's district or the state central committee to share even one dollar of the expenditures. (R503). He also did not ask the Republican candidate who mutually benefitted from his opposition to Governor Malloy to share the expense. (R504). He simply relied upon his own subjective and erroneous belief that the statutes did not apply to him because he was opposing a candidate and not promoting one. He concluded that "[w]e did not believe we were doing anything on behalf of the Foley campaign." (R473). Markley's interpretation of what was an "expenditure" was erroneously narrow because it failed to recognize the value that an oppositional communication may have in an election. (R496). Sampson also did not bother to attempt to allocate with another speaker. (R547), even though he acknowledged that the mailers could be helpful to Foley, (R516, lines 17-22). The law is not as asymmetrical as Plaintiffs would have it. It also applies to speech that opposes candidates and not, as Markley posits, only to speech that promotes a candidate. Both types of speech affect elections and can be "something of value" to another candidate, and at least Sampson conceded that fact. *Id.*

Instead of seeking guidance from the SEEC about their mailers either before or shortly after sending them, as they had in past elections, Plaintiffs flouted the SEEC's instruction that

speech opposing a candidate could also be an expenditure. When faced with a 2014 Advisory Opinion indicating attacks on Governor Malloy would be expenditures in the Malloy race, Markley opted not to seek additional SEEC clarification about the planned mailers and instead followed his own misguided interpretation of the law. (R476-77) ("…I figured that if the SEEC had a problem with it I'd find myself here where I am and we'd figure out whether they were right about it or I was"). In fact, it is not even clear Markley bothered to read the 2014 Advisory Opinion. (R499-500).

Five of the six mailers were ultimately found by the SEEC to have contravened the CEP's requirement that CEP candidates only spend on their own campaigns. (R573) The SEEC imposed minimal fines on both Sampson and Markley of $5,000 and $2,000 respectively, (R574), and did not impose fines equal to or double the cost of the communications or require they return the CEP grants that each had received in 2014. (R574).

III. STANDARD OF REVIEW

The SEEC's Final Decision is entitled to deferential review by this Court because the SEEC adhered to its long-standing interpretation that expenditures must directly further a candidate's campaign—a standard that has existed in clearly articulated regulation since the inception of the CEP. The SEEC has consistently articulated and applied the "directly further" standard for CEP expenditures since 2007 and its interpretation and regulations constitute a "time-tested interpretation" entitled to deference. *Stec v. Raymark Indus., Inc.*, 299 Conn. 346, 356–57 (2010) citing *Board of Selectmen v. Freedom of Information Commission,* 294 Conn. 438, 447–48 (2008) (numerous decisions over thirty-one year period was time-tested), *Curry v. Allan S. Goodman, Inc.,* 286 Conn. 390, 405–407 (2008) (numerous decisions over twelve year period was time-tested), and *Hartford v. Hartford Municipal Employees Assn.,* 259 Conn. 251, 268 (2002)

(numerous decisions over twenty-five year period was time-tested); *but see Dept. of Public Safety v. State Board of Labor Relations,* 296 Conn. 594, 600, 996 A.2d 729 (2010) (agency interpretation was not time-tested and entitled to deference when agency only had applied interpretation twice and interpretation had not been subject to judicial review). Likewise, the prohibition on candidates contributing to other candidates from their candidate committees has been in place since 1975 and the SEEC's interpretation of it is entitled to deference. *See* Public Act 75-571, Sec. 10.

To the extent the SEEC's decision rests on its factual determination that Plaintiffs' expenditures opposed a candidate in another race that factual determination is entitled to deference and should only be overturned if it is clearly erroneous. *Cohen v. Statewide Griev. Committee*, Docket No. 20356, 2021 Conn. LEXIS 187, at *20 (July 2, 2021) (factual finding of Committee entitled to deference unless clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record). Thus, the Court should accord the SEEC deferential review on its factual findings and affirm the agency's determinations of fact and time tested interpretation of Connecticut statutes.

IV. ARGUMENT

A. The State Can Lawfully Prohibit Candidates From Making Contributions to Other Candidates Through Their Candidate Committee.

Candidates for Connecticut Office may only expend their candidate committee funds to promote their own elections. Conn. Gen. Stat. § 9-607. If they make expenditures that jointly promote their campaign with another campaign, they must allocate the cost of their joint expenditure. *See* SEEC Declaratory Ruling 2011-03: Candidate Committees and Joint Communications (May 18, 2011) (permitting allocating joint expenditures by CEP candidates); *see also* Advisory Opinion 2014-04: Negative Communications Featuring Candidates for Different Offices, (Connecticut State Elections Enforcement Commission, October 17, 2014) (reiterating

that candidate committees may not make expenditures to benefit other candidate committees, including negative communications attacking candidates running in other races). Candidates cannot make contributions to influence other races, by promoting or opposing candidates in those races, through direct cash contributions or anything else of value. These rules have been in place for over a decade or more and apply to all candidates for office in Connecticut. Conn. Gen. Stat. §§ 9-607 (g); 9-616 (a); 9-622 (10); 9-706 (b) (5) and (7)[1].

Although Plaintiffs do not acknowledge it in their brief, several courts have upheld inter-candidate transfer bans like those here. Such laws advance the state's important interest "to prevent circumventing the contribution/spending limits, to avoid the appearance of corruption, and to restrict those in power from funneling money to those seeking power." *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1112 (8th Cir. 2005); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 633 (Alaska 1999). In the public financing context in particular, they also ensure that public funds are spent only on qualifying candidates who agree to abide by

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[1] The SEEC has applied the prohibition on inter-candidate transfers, Conn. Gen. Stat. § 9-616, in numerous cases ranging in dollar value from small amounts to thousands. These are just a few of them. *See, e.g., In the Matter of a Complaint by Sandra Astarita*, File No. 87-141 (mayor promoted other municipal candidates in mailer, $200 penalty); *In re the Matter of a Complaint by Kathryn Dennon*, File No. 2003-248 (Oxford)(First selectman included two other council members in newspaper advertisements and campaign literature resulting in penalties of $2,692); *In the Matter of a Complaint by J. Lawrence* Price, File No. 2003-258 (West Hartford)(Council candidate identified, described or supported other candidates with committee expenditures resulting in-kind contributions to those other candidates and $4,673 in penalties); *In re Matter of a Complaint by Joseph R. Romano, Jr.,* File No. 2018-008 (Southington)(municipal candidate committee spent $76,164 to support five other municipal candidates resulting in civil penalties of $52,000).

In the public financing context, it has also enforced the inter-candidate transfer prohibition in approximately 25 decisions in the 14 years the program has existed, most of them resolved by settlement. *See, e.g., In the Matter of a Complaint by Selim Noujaim,* File No. 2009-009 (Waterbury)(2008 CEP candidate used public funds on mailer urging readers to vote yes for candidates in two other races resulting in $300 civil penalty); *In the Matter of a Complaint by Raymond Ingram*, File No. 2014-148 (Branford) (allegations that CEP candidate had improperly spent public funds on two other races were dismissed where found that expenses had been properly allocated with political committee properly spending on those races).

the program's requirements by preventing "'a revolving door' where legislators—even those running unopposed—often accepted thousands of dollars in taxpayer-provided public financing while making substantial contributions to other candidates." *Minn. Citizens Concerned for Life v. Kelley*, 291 F. Supp. 2d 1052, 1061 (D. Minn. 2003). Further, such laws are closely drawn to advancing those interests because they only prohibit transfers of funds from a candidate's candidate committee, and do not prevent candidates from supporting candidates in other races through any number of other lawful means, including but not limited to contributing to another's campaign with the candidate's own personal funds, endorsing another candidate, and encouraging contributors to support another candidate. *Minn. Citizens Concerned for Life, Inc.*, 427 F.3d at 1113; *Alaska Civil Liberties Union*, 978 P.2d at 633 (Alaska 1999).[2] Plaintiffs' suggestion that contribution restrictions in the CEP are subject to strict scrutiny because they reduce speech is incorrect. Contributions limits are not analyzed under that level of heightened scrutiny because they impose a "limited burden…on First Amendment freedoms." *McConnell,* 540 U.S. at 136. "[A] contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest. *McConnell,* 540 U.S. at 136; citing *FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *Nixon v. Shrink Missouri Government Pac*, 528 U.S. 377, 387 (2000) (internal quotations omitted).

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[2] The Ninth Circuit struck down an inter-candidate transfer ban in *Serv. Emps. Int'l Union, etc. v. Fair Political Practices Com.*, 955 F.2d 1312, 1323 (9th Cir. 1992). *See also Reed v. Fair Political Practices Comm'n*, 2014 Cal. Super. LEXIS 24380, *23 (2014). As the Alaska Supreme Court noted, however, *Serv. Emps. Int'l Union* is distinguishable because the Court's rationale depended on its determination that the State's contribution limits were themselves unconstitutional, and the anti-circumvention rationale for the inter-candidate transfer ban therefore did not apply. *Alaska Civil Liberties Union*, 978 P.2d at 632-33. Here, by contrast, Plaintiffs make no claim that Connecticut's contribution limits are unconstitutional or that the State does not have an interest in enforcing those limits.

Here, the Plaintiffs contravened the prohibition on inter-candidate transfers because they made expenditures that related to another race and provided a benefit to another candidate. A contribution is not limited to money and can be anything of value to a candidate. Speech attacking a candidate's opponent can be something of value to that candidate. And, as discussed above, speech can oppose a candidate with explicitly advocating voters to "vote for" or "vote against" that candidate. *McConnell,* 540 U.S. at 204-205 (contrasting "genuine issue ads" with express advocacy against a specific candidate or its functional equivalent)*, WRTL II*, 551 U.S. at 469-70 (affirming issue ads can be the "functional equivalent" of express advocacy when it is "susceptible of no reasonable interpretation other than as an appeal to vote for against a specific candidate."). Thus, a mailer targeted at defeating a candidate, even without express words, can be a contribution to a candidate in that race.

Under Connecticut's scheme, speech becomes an "expenditure"–and therefore a potential contribution—under clear and easily understood timing guidelines. The General Assembly has determined that one interpretative tool the SEEC is required to use when determining whether speech is an "expenditure" in a race is the timing of the speech. If the expenditure is made within 90 days of an election and clearly identifies a candidate in a race, then it is an expenditure "in that race." Here, the SEEC applied that rule and found that five of the mailers clearly identified Governor Malloy. Therefore, the mailers were expenditures in the Malloy-Foley race and, since candidates cannot make "independent expenditures" from their CEP candidate committee, Reg. 9-706-2(b)(13) (CEP candidates shall not make "independent expenditures to benefit another candidate."), the expenditures were contributions "for the benefit of another candidate" in violation of the CEP rules. Reg. 9-706-2(b)(8). The SEEC's finding of violations was supported on this basis alone and was further supported by Plaintiffs' status as CEP candidates.

B. The State Can Lawfully Prohibit Publicly Financed Candidates From Making Contributions to Other Candidates with their CEP Taxpayer Money.

In addition to concluding the Plaintiffs had violated the generally applicable prohibition against making contributions to other candidates in Conn. Gen. Stat. § 9-616, the SEEC also properly concluded that Plaintiffs had violated the specific requirements of the CEP. The State's interest in prohibiting candidates from making contributions from their candidate committees to other candidates is that much stronger in the context of a public financing program. In the public finance context, the State's power and interests are different and broader. In this context, the State is free to set conditions and to ensure that in addition to its primary interest in reducing public corruption, other state interests such as protecting the public fisc and maintaining the viability of the program are also advanced. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (public financing of campaigns is an "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process…".); *Green Party*, 616 F.3d 189, 227 (2d Cir. 2010) (same).

The State's interest in establishing and maintaining a healthy and viable public financing program is itself a compelling governmental interest because public financing reduces the influence of private contributors in elections and government. *Green Party v. Garfield*, 648 F. Supp. 2d 298, 352 (D. Conn. 2009) ("There can be no dispute that a public financing scheme, generally speaking, serves a compelling state interest in removing actual and perceived corruption by cutting off avenues for influence by eliminating the need for, and opportunity to make, large campaign contributions."); *see also Buckley,* 424 U.S. at 96 ("It cannot be gainsaid that public financing as a means of eliminating improper influence of large private contributions furthers a significant governmental interest"). If the CEP is undermined and its purposes called into question, the State will be impeded in its ability to advance its compelling interest in having the

program at all. Moreover, the ability to protect the public fisc from the diversion, improper circumvention and waste of public money is an important governmental interest. *Id.* The requirement that candidates limit their expenditures to their own election unquestionably furthers these interests which have been recognized as "compelling" and "significant." Notably, however, in the public financing context the State is not even required to make such a high showing of a compelling state interest, although the CEP nonetheless satisfies any heightened standard of review because its rules are closely drawn and narrowly tailored to the State's interest.

1. As A Public Financing Program, The CEP Is Not Subject To Heightened Scrutiny Because It Expands First Amendment Interests And Does Not Abridge Them; And Plaintiffs Are Under No Obligation To Participate In The CEP.

Because the CEP is a public financing program, this Court should find that its conditions do not even implicate First Amendment rights. Programs like the CEP have been found to not implicate First Amendment speech because the public's money is being expended to further public discussion and participation in the electoral process. *Buckley*, 424 U.S. at 92, 93. Therefore, a public financing system like the CEP furthers the First Amendment's central goal. *Id*. The Supreme Court and Second Circuit both have reached the conclusion that public financing programs do not implicate the First Amendment because ineligible candidates, or those who choose not to participate, remain free to speak and associate with voters by raising and spending unlimited amounts of money outside of the program. *Buckley*, 424 U.S. at 92-93; *Green Party*, 616 F.3d at 227 (public financing programs do "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process….").

First Amendment rights are not implicated by a public financing program because citizens generally do not have a First Amendment right to government-subsidized speech. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) ("the Government is not required

to subsidize the exercise of fundamental rights"); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 546, 549-50 (1983) ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. . . . 'although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation.'") (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)). So because the Plaintiffs here had no right to the CEP funding in the first instance and could have privately financed their campaigns to avoid application of the "direct furtherance" standard, the First Amendment is not even implicated.

A candidate who wishes to avoid being constrained by the conditions of the Program, such as these Plaintiffs who object to being limited to "direct furtherance" of their own campaigns, remains free to forego the CEP's additional strictures and raise and spend money privately. Any obstacles Plaintiffs may encounter outside of the CEP in effectively disseminating their anti-Malloy, anti-Democrat Governor or anti-Democrat Majority message under a private fundraising scheme will stem from their "inability to raise private contributions," *Buckley*, 424 U.S. at 94-95, and is not attributable to the State. Accordingly, this Court should reject Plaintiffs' claim of a First Amendment burden "out of hand," *Green Party*, 616 F.3d at 227; *Buckley*, 424 U.S. at 94-95, because their First Amendment rights are simply not implicated by their voluntarily acceptance of public funds and the attendant reasonable and neutral limitations on expenditure that come with those funds. Indeed, it is the CEP funds that enabled Plaintiffs' speech in the first instance.

2. Even If This Court Applies A Heightened Level Of Scrutiny To The CEP Requirement That Candidates Only Spend CEP Funds To Directly Further Their Own Candidacies, The CEP Satisfies Heightened Scrutiny.

This Court should not analyze the CEP's requirements under heightened scrutiny, but even if it does do so, the CEP's requirement that candidates limit spending of CEP funds to their own

elections advances compelling and significant governmental interests and is closely drawn and narrowly tailored to achieving those interests.

The continued existence, fiscal viability and public support for the CEP has been found to be a compelling governmental interest in Connecticut, in light of Connecticut's long and difficult history of public corruption at the highest level of the State. In an early challenge to the CEP, the District of Connecticut noted that, "[t]he plaintiffs do not seriously dispute that the prevention of actual and perceived corruption in state politics is a well-recognized compelling government interest. …[T]he CEP is designed to serve the interest of eliminating the appearance of corruption by encouraging candidates for state office to abstain from raising private donations, the traditional source of political contributions and logical basis of potential corruption, in exchange for public funding." *Green Party v. Garfield*, 648 F. Supp. 2d 298, 351 (D. Conn. 2009); *see also Buckley,* 424 U.S. at 96 ("It cannot be gainsaid that public financing as a means of eliminating improper influence of large private contributions furthers a significant governmental interest").

The CEP requirement that candidates spend only on their own races protects the ethical and fiscal integrity of the program and prevents public money from being wasted and diverted. By requiring that CEP funds only be spent in the races of candidates who are entitled to them, the public is reassured that the Program is fulfilling its intended purpose. This bolsters the public's faith in the integrity in the program, and, thus, their willingness to expend millions of dollars on it every two years. Belief in the CEP also encourages citizens to give the small qualifying contributions needed by candidates to participate and thereby helps sustain the health of the CEP into the future. The public recognizes the value the CEP provides in reducing corrupting influences on our politics. *Green Party v. Garfield*, 648 F. Supp. 2d 298, 352 (D. Conn. 2009) ("There can be no dispute that a public financing scheme, generally speaking, serves a compelling state interest

in removing actual and perceived corruption by cutting off avenues for influence by eliminating the need for, and opportunity to make, large campaign contributions."). However, that support for the CEP can easily be eroded if loopholes to the Program, such as the one Plaintiffs contend for here, are allowed.

Allowing unlimited attack ads with CEP funds, as these Plaintiffs would permit, will also eventually erode participation in the program by candidates. Candidates will quickly recognize that they will be facing off not just against their opponent, who is probably a CEP participant with similar expenditure limits, but against an entire network of candidates ready to expend in his or her race. A CEP candidate who follows the rules, and therefore limits expenditures to the CEP grant, may not be able to fully respond to a deluge of negative speech against him or her. The Legislature likely recognized the need for candidate committees to stay generally within one designated topic in candidate committee—that candidate's election—and in so doing balanced competing interests to keep the CEP strong while fostering participation in it. *Green Party,* 616 F.3d at 241 (recognizing interest in fostering participation in the CEP), *compare Id.* at 245 (declining to find interest in participation compelling to support trigger provisions). Plaintiffs' loophole will surely diminish the value of participating in the CEP for many candidates.

The State can also seek to avoid wasteful spending. The CEP prevents candidates from wasting CEP funds by speaking for other candidates simply because the CEP candidate has extra cash on hand and does not need to spend it all to win his own race. Plaintiffs' elimination of the requirement that candidates only spend in their race will free them up to speak in any race in Connecticut if they, or their political party, think it is advantageous to a colleague. Markley conceded that he was in such a favorable position in 2014. He testified that he was in a "strong" position in the election as he did not have a major party opponent. (R485) ("I was in a strong

position electorally in 2014, I wasn't in so much in need of promoting myself…".) Consequently, Markley did not need to focus exclusively on furthering his own election and had the luxury of using CEP funds to attack his party's opponent for the highest office in the State in 2014. He did so by "educating" the voters in his district about what a terrible leader Malloy was for the State. The sincerity of Markley's belief that he was expressing his views on his own political philosophy intertwined with a direct attack on Malloy personally is irrelevant. He still chose to attack a clearly identified candidate in another race.

In addition to discouraging candidate's spending of public money simply because they have it, the State can also seek to prevent circumvention of its rules through intentional diversion of public funds to benefit non-CEP candidates. The requirement candidates spend only on their own election advances that important interest as well. The State can ensure that CEP funds are not improperly diverted or expended on races that are not eligible for CEP grants. The idea of CEP funds being diverted to ineligible candidates is not a far-fetched or hypothetical situation. In 2017, a candidate for governor sued the SEEC claiming he was improperly barred from receiving CEP grant because he had been convicted of public corruption felonies. *Ganim v. Brandi,* Docket No. 17cv1303 (MPS) (D. Conn. 2017). His exclusion from the program was upheld and he did not receive a CEP grant for his run for governor. Under Plaintiffs' approach, every participating CEP candidate for the General Assembly would now be free to support any CEP-prohibited candidate for election by speaking in a way that was favorable of his agenda, *i.e.* promoting him, or attacking his opponents. Markley acknowledged that he intended to "attack" Governor Malloy (R490). While he may have sincerely believed this attack or opposition to Malloy was indivisible from his own political message, there is little to prevent the next candidate from adopting the same tact in another race for less than sincere reasons if it suits political expediency. A CEP candidate

in 2017, might similarly have believed Ganim was a terrific candidate for Governor and he should spend his CEP money bolstering Ganim because he was the best candidate for his region or city. The SEEC cannot police the intent behind the speech and must simply examine the speech and apply rules that are easy to understand. The 90 day rules is such a rule and it advances the State's compelling interest in preserving the program and important interest in protecting the public fisc.

There is little doubt that under Plaintiffs' proposed spending loophole, regulation of the CEP would quickly become chaotic and the public's faith in its integrity and purpose seriously eroded. The State can seek to avoid and head off these problems and preserve the public's faith in the public financing program. "The First Amendment does not confine a State to addressing evils in their most acute form." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 435 (2015).

C. Connecticut's Prohibition On Making Expenditures From Campaign Committee Funds On Other Candidate's Races Is A Lawful Condition On The Receipt Of CEP Funds.

The prohibition on making expenditures in other candidate's races with CEP funds is a constitutional condition on the acceptance of public money. This is because restrictions contained in public financing programs do not implicate the First Amendment at all, and even if they do, the requirement is a reasonable and appropriate condition on the awarding of public funds. It advances the important governmental interest in protecting the public fisc and the compelling interest in maintaining the fiscal and ethical integrity of—and therefore continued viability of—the CEP. The General Assembly imposed this condition on CEP in an appropriate exercise of its discretion to balance the "competing interests" at play in any public financing program. This Court should accord the legislature deference on those public financing policy choices.

Plaintiffs incorrectly argue that the First Amendment does not tolerate the surrender of any speech rights in exchange for taxpayer funds. (Pl. Br. 24). This is flatly incorrect. The

relinquishment of core First Amendment rights to unlimited speech and unlimited fundraising are at the heart of every public financing program, *Buckley,* 424 U.S. at 57, n. 65 ("Congress…may condition acceptance of public funds on an agreement by the candidate to abide by specific expenditure limitations. Just as a candidate may voluntarily limit the size of contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding"). Since *Buckley,* Courts have followed its reasoning to uphold public financing programs against challenges that they were unconstitutionally conditioning a benefit on the relinquishment of a fundamental right. *See Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 205 F.3d 445, 467 (1st Cir. 2000); *N. Carolina Right To Life Comm. Fund For Indep. Pol. Expenditures v. Leake,* 524 F.3d 427, 436 (4th Cir. 2008); *Corren v. Condos,* 898 F.3d 209, 230 (2d Cir. 2018).

Like the plaintiffs in those cases, Plaintiffs can choose not to participate in the CEP and avoid the application of its more stringent "directly further" rule to them. Thus, Plaintiffs' contention that "any condition attached to the grant of a governmental benefit is unconstitutional if it requires the relinquishment of a constitutional right," (R401), was clearly rejected by *Buckley* and its progeny.

Plaintiffs have at all times throughout their political careers remained free to solicit and receive private campaign donations and thereby not abide by *any* of the requirements unique to the CEP. No government agent or entity has compelled, coerced or even really encouraged Plaintiffs to participate in the CEP. They have participated in the CEP, and collectively received over a half a million dollars in taxpayer funds for multiple elections over many years, of their own volition. Indeed, Markley successfully ran for office in the 1980s before the inception of the CEP in 2006. They both knew they were relinquishing rights when they joined the CEP. Sampson recalled that he "certify[ied] that my candidate committee will expend money received from the

Citizens' Election Fund in accordance with provisions in Statute 9-607g, and with regulations adopted by the SEEC. (R462). Sampson also conceded that he agreed to some relinquishment of his First Amendment rights when chose to participate in the CEP. "I believe it is, is that you are limited in what you can spend on your campaign to things that are for the benefit of your nomination or election, and I imagine the law exists to prevent you from raising money and then spending it on a beach house somewhere. And I think that's pretty much understood by all candidates that if you're going to …be receiving money for your campaign you have to spend it on your campaign." (R465). Markley acknowledge: "It seems to me that it [the CEP] asks you to swear additionally that you will abide by the rules, but the rules would be the same." (R454). The rules are not the same.

Plaintiffs provided no evidence that they were coerced or forced to live by the CEP rules or that they could not run for office without participating in the CEP. The record on this question of coercion is not extensive and rests on Markley's one remark that it would be more difficult for him to run outside of the CEP. (R455-456). Sampson did not even claim that much. An unsupported and conclusory claim of "difficulty" by one Plaintiff is not sufficient to establish he and Sampson were *forced* to join the CEP. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (upholding a public financing programs because Plaintiffs had not established "disparities so profound that they become impermissibly coercive"); *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286 (S.D.N.Y. 1980), *affd*, 445 U.S. 955 (1980) (a "candidate has a legitimate choice whether to accept public funding and forego private contributions."). Since "coercion" is the standard by which unconstitutional conditions are measured in the context of public financing, Plaintiffs' claim clearly fails.

Recently, the Second Circuit upheld a challenge to the conditions in Vermont's public financing program. *Corren v. Condos,* 898 F.3d 209, 230 (2d Cir. 2018). In *Corren*, the Court determined that Vermont's public financing program requirement that candidates relinquish First Amendment rights to receive contributions and make unlimited expenditures did not violate the candidates' First Amendment rights. *Id.* The cases, like *Corren*, upholding public financing programs recognize that the programs advance compelling governmental interests and simply cannot exist with significant regulations and conditions. "There can be no dispute that a public financing scheme, generally speaking, serves a compelling state interest in removing actual and perceived corruption by cutting off avenues for influence by eliminating the need for, and opportunity to make, large campaign contributions. Certainly no state lawmakers have admitted to being unduly influenced by contributors who make significant donations to their campaigns. No such admission is necessary. There exists a natural connection in the public's mind between large contributions and increased influence and access to lawmakers, which a public financing system goes a long way towards eliminating." *Green Party v. Garfield*, 648 F. Supp. 2d 298, 352 (D. Conn. 2009). The rules challenged here are integral to the sustainability of the CEP and the State appropriately conditions the award of a CEP grant on a candidate's agreement to abide by them.

In creating a public financing program, the legislature balanced different "competing interests," the choices regarding the conditions of the program were for the legislature to make and they are entitled to deference. *Buckley,* 424 U.S. at 103 (deferring to Congress on its chose of eligibility requirements for the presidential public financing program.). This Court should not second guess the appropriateness of the legislature's policy choice. If Plaintiffs object to the conditions of the program, they can choice not to participate in it.

D. The Availability Of An Easily Attainable Option Of Sharing The Expense Of The Mailers, Or Avoiding Express Reference To Governor Malloy, Provided Plaintiffs With Ample Opportunities To Convey Their Message And Imposed Little Hardship On Plaintiffs.

Not only is the "condition" that Plaintiffs not spend on other candidate's races reasonable and constitutional, but Plaintiffs could also have very easily avoided its application to their speech *entirely* by taking any one easy step. Indeed, the ease with which Plaintiffs could have avoided application of the requirement on these facts demonstrates the appropriateness of its tailoring. Plaintiffs could have lawfully made these exact expenditures if they had shared even a small portion of their cost with a speaker—any speaker—who could lawfully contribute to the Malloy race. The value of the expenditures at issue here were easily discernable and could have been shared by either the state committee, the benefiting candidate or a third party independent speaker. Plaintiffs had a number of options to lawfully send the mailers they did with minimal effort but they refused to use any of them. These Plaintiffs, like all CEP participating candidates, were free to reference other candidates who are not their opponents even within the 90 day period so long as they allocated costs with candidates in the targeted campaigns.

Plaintiffs also could have engaged in substantially similar speech if they had avoided express reference to another candidate's campaign. Thousands of candidates in Connecticut do so each election cycle and still get their messages out to voters. For example, candidates can avoid application of the contribution prohibition within 90 days by using euphemistic terms like "Democratic Leaders" or "Republican Leaders." Reasonably well informed voters will hear substantially the same point Plaintiffs attempted to convey here. Plaintiffs can also engage in political speech against any sitting Governor or other non-opponent by speaking through their political party, other political committees and even their own separate personal political committees so long as their CEP funds are not used. There were numerous options for Plaintiffs

to engage in their speech and thus the burden imposed by the CEP was not only constitutionally justified; it was insignificant.

E. The SEEC's Factual Determinations That The Mailers Clearly Identified Governor Malloy And Opposed His Reelection Were Supported By Law And Evidence And Are Entitled To Deference.

The SEEC applied general and well settled campaign finance rules to the Plaintiffs in this case. It determined that 5 of the 6 mailers clearly identified Governor Malloy and went further to oppose his reelection within the 90 day window. Because any communication that references a clearly identified candidate is deemed to be an "expenditure" in that candidate's election, the mailers were found to be, at least partially, expenditures in the Malloy race. Plaintiffs could have brought the mailers into compliance with campaign finance laws by sharing the cost of the mailers, even to a minimal degree, with a speaker who was able to lawfully expend in the Malloy race such as a town committee, a state central committee, a political committee or Malloy's opponent. Plaintiffs rejected these options and determined that they were free to provide a benefit to Malloy's opponent with their candidate committee funds.

The mailers were appropriately deemed to be expenditures by the SEEC for two reasons. First, because they were sent within the 90 day window which is a bright line definitional rule for expenditures. Conn. Gen. Stat. § 9-601b. Second, even if the mailers had been sent on the 91st day before the election, they would still have been properly deemed expenditures because their message that Malloy should not be reelected was so apparent. Final Decision, ¶ 27 (R571-572). Indeed, Plaintiffs do not even really dispute that they opposed Malloy and thought he should be defeated. Markley went so far as to openly acknowledge that he intended to attack Malloy, (R489-90), and at other times hedged and conceded that whether his mailers were attack ads was "debatable." (R486). Sampson's testimony was largely the same, suggesting his intent may not

have been to attack but to instead demonstrate his opposition to Malloy and, by necessary implication, opposition to Malloy's re-election. *E.g.* (R509, 511, l12-16).

The substantial evidence demonstrated the mailers were intended to oppose Governor Malloy. Plaintiffs do not really dispute this but instead claim the statutes and regulations do not properly reach oppositional speech. Markley appears to be of the view that his interpretation of what the CEP rules are should be accorded equal weight to the agency charged with enforcing and interpreting them. "I would say that—let's say as an English teacher you say those two words, advisory and opinion, could not be more delicate in the nudge they give you. And I think that I would look at it seriously and *consider the advice and weigh the opinion and then make a decision myself on what I believe the statute and the regulation requires."* (R457). The SEEC's determination on the meaning of the statutes and their application should be accorded more weight than either Plaintiff's subjective belief.

F. The Statutes and Regulations Are Not Unconstitutionally Vague.

The statutes and regulations at issue here—Conn. Gen. Stat. §§ 9-601b; 9-607; 9-616; 9-706 and Regulations 9-706-1 and 706-2—are not unconstitutionally vague. Not only have these rules applied to Plaintiffs conduct for many elections, *see footnote 1 supra,* but Plaintiffs also had a specific opportunity to question their application to their conduct in 2014 before they knowingly and voluntarily swore an oath to abide by them at the time they joined the CEP that year. They did not question the application of the rules to them with the SEEC at the time or after. They also did not seek clarification from the SEEC regarding the permissibility of the mailers when they sent them out, even though they had sought the SEEC's counsel in the past. They also knew they were subject to more stringent regulation when they agreed to the program rules. Those rules have been in place for over a decade and Plaintiffs have run for office under them on multiple occasions.

There is no basis to conclude that Plaintiffs did not understand the rules or that a reasonable person in their position could not understand the rules.

Plaintiffs claim they could not understand where the lines were for their expenditures, (Pl. Br. 22-23), because "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." None of the rules applied in this case are standardless and, for the most part, they are interpreted in the exact same manner as federal rules that have withstood constitutional review by the United States Supreme Court. *McConnell*, 540 U.S. at 170 n. 64 (upholding terms promote, oppose, attack, and support as not unconstitutionally vague); *see also Vermont Right to Life Cmte, Inc. v. Sorrell*, 758 F.3d 118, 128-29 (2d Cir. 2014) *cert denied*, 135 S. Ct 949 (2015); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 63-64 (1st Cir. 2011) (cert denied in companion case).

A statute is unconstitutionally vague only if it "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." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (internal quotation marks omitted). A "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 19 (internal quotation marks omitted). A facial vagueness challenge will succeed only when the challenged law can never be validly applied. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

Here, Sampson and Markley's vagueness challenge fails under either a facial or as applied analysis because the requirements of the CEP were known to them, they voluntarily joined the CEP and they had ample opportunity to clarify the lawfulness of their conduct. Plaintiffs, as sitting legislators, knew or should have known that the SEEC has required CEP candidates only spend to

"directly further" their own campaigns since 2007. The SEEC has explained in Declaratory Rulings, decision, formal and informal advice what that means. Plaintiffs were on even more specific notice that the SEEC interpreted the statutes and regulations in this manner when they learned of the issuance of Advisory Opinion 2014-04. (R54-56). They did not make further inquiry and in fact concluded they were likely at odds with the SEEC in their own subjective interpretation and invited, even welcomed, the dispute with the SEEC. (R476-77). Not only are the standards clear in this case, but Plaintiffs also make no meaningful argument that they did not understand them. Instead, they bring this action to dismantle campaign finance rules they clearly understood but simply oppose.

G. The Statutes and Regulations Do Not Violate Separation of Powers.

As an alternative ground to challenge the SEEC's decision in this case, Plaintiffs contend that because they were candidates for seats in the General Assembly they cannot be regulated by an agency of the executive branch without contravening the separation of powers doctrine. This Court should reject such a novel and sweeping claim because it has no support in law or logic. Moreover, Plaintiffs offer no authority for this claim, and in their brief they do not meaningfully discuss or analyze it. Thus, this Court should deem it to be an abandoned claim and need not address it at all. *Connecticut Light & Power Co. v. Gilmore*, 289 Conn. 88, 125-26 (2008) (noting "where parties cite no law and provide no analysis of claims, we do not review them" (internal quotations and citations omitted); *see also Diaz v. Commissioner of Correction*, Docket No. CV114003999S, 2020 Conn. Super. LEXIS 1084, at *24 (Super. Sep. 4, 2020) (Court found Plaintiff's claims of ineffective assistance of counsel were abandoned because he failed to brief them.)

Even if this Court does reach Plaintiffs' separation of powers claim, which it should not because it is abandoned, it should reject it because the separation of powers doctrine does not

sweep so broadly as to prevent the SEEC's application of campaign finance rules to current or aspiring members of the General Assembly. In Connecticut, the separation of powers doctrine is intended to limit the exercise of power within each branch and ensure the independent exercise of that power. *Casey* v. *Lamont*, Docket No. 20494, 2021 Conn. LEXIS 78, at *31 (Mar. 29, 2021). The regulation of candidates for office is not a ground to find such an encroachment into the legislature's function.

Plaintiffs were not being regulated in their capacity as legislators but instead as candidates. Moreover, they have not adduced any facts to show how or why they would be inhibited in their legislative role because of the potential for SEEC enforcement of campaign finance rules. Many, probably most, candidates are never even elected to the General Assembly, or fail in their reelection bids. The SEEC regulates them all in the same manner. Sitting incumbents are not accorded preferential treatment in how their campaign speech is regulated because they might be returned to the General Assembly by voters. Moreover, there is no basis to conclude that a candidate is even acting in a legislative capacity when he runs for office and Plaintiffs have provided no authority for this conclusion.

The SEEC would apply this prohibition against expending in other candidates' races even if Plaintiffs had expended in another General Assembly race and not an executive branch race. So the branch in which the office resides is irrelevant to the application of the rule. The Connecticut Supreme Court has recognized, "the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers . . . of necessity overlap each other, and cover many acts which are in their nature common to more than one department." *Casey,* at *31-

32. (Internal citations and quotation marks omitted.). So even if the SEEC were exercising some legislative power, which it clearly is not, Plaintiffs' separation of powers arguments are out of step with the Supreme Court's admonition to take a flexible non-rigid approach to analyzing separation of powers claims.

The campaign finance statutes regulating General Assembly candidate do not contravene the separation of powers doctrine simply because they are enforced by an agency of the executive branch. Under Plaintiffs' theory, each branch should have its own enforcement agency. Not only would this be absurd and wasteful, and probably unworkable, but it is also complete speculation to think such an agency would reach a different outcome on the law in this case. This Court should reject Plaintiffs' separation of powers claim because it is illogical, lacking authority and Plaintiffs abandoned it by not properly briefing it for this Court.

V. CONCLUSION

The Plaintiffs knowingly and intentionally violated the terms of the CEP after swearing an oath to abide by the program rules and inducing the SEEC to grant them nearly $100,000 in taxpayer funds. The decision of the SEEC imposing minimal fines on them should be affirmed.

Respectfully Submitted,

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT
COMMISSION,

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CERTIFICATION

I hereby certify that a copy of the foregoing *Defendant's Memorandum of Law* was publicly filed on the docket and served on counsel via electronic mail this 30th day of September, 2021 to:

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