CONNECTICUT APPELLATE COURT

AC 42005

JOE MARKLEY, ET AL V. STATE ELECTIONS ENFORCEMENT COMMISSION

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE NATURE OF THE PROCEEDING AND OF THE FACTS

This case asks if the State of Connecticut violated the First Amendment rights of Plaintiffs Joe Markley and Rob Sampson in concluding that they violated campaign finance statutes and fining them for making communications that mention a non-opposing candidate. Although they appealed within the required 45-day period after the State Elections Enforcement Commission's denial of reconsideration, the superior court incorrectly dismissed the appeal as not timely filed after an earlier, constructive denial of reconsideration. In particular, the superior court's decision incorrectly applied the deadlines for reconsideration at General Statutes § 4-181a to the appellate deadlines at § 4-183, and it violated the demands of equity. Had the superior court properly considered Plaintiffs' appeal, it should have held that the restrictions on Plaintiffs' communications violate their First Amendment rights.

In 2014, Joe Markley ran for State Senator in the 16th District and Rob Sampson ran for State Representative in the 80th District. In joint and separate communications, they advocated their candidacies by promoting their efforts to oppose Governor Dannel Malloy's policies. *See* Exhibits 1-6 (App. A78-89). The communications did not urge voters to vote against the Governor. Rather, the ads urged voters to support Plaintiffs to "STOP Governor Malloy and the majority Democrat's dangerous agenda!" Exhibit 4 (App. A84); *see also* SEEC Final Decision at 6 (App. A96). 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 (App. A86); *see also* SEEC Final Decision at 6 (App. A96).

Mr. Sampson had used "virtually identical" mailings in his 2012 campaign. Sampson Email at 1 (App. A74). 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* App. A62-68. The Committee asked the Commission to determine whether communications like Mr. Sampson's—asking for votes as someone who would oppose "Governor Dan Malloy's failed policies"—violated state law as an expenditure "opposing non-opponent candidates." App. A68. On October 17, 2014, in the middle of the election, and after candidates had already planned and ordered communications, the Commission issued Advisory Opinion 2014-04, stating that expenditures advocating against non-opposing candidates violated state law. *See* App. A59-61.[1]

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

The Commission heard the matter on August 31, 2017, and it issued a final decision on February 14, 2018. SEEC Final Decision at 1 (App. A91). Its decision concluded that the

[1] Mr. Sampson, for example, told the Commission that Exhibit 3 was completed on September 22, 2014, and it "was delivered and paid for on October 5, 2014"; Exhibit 4 was completed on September 24, 2014, and sent to the printer on October 14, 2014; Exhibit 2 was completed on October 8, 2014, for submission to the printer for printing and mailing; Exhibit 5 "was completed on October 20, 2014 and submitted . . . for printing and mailing the same day"; Exhibit 6 was submitted to "the Wolcott Community News prior to their deadline of 10-15-14," but "did not appear until after election day"; Exhibit 1 was written and mailed on October 30, 2014. Sampson Email at 1 (App. A74).

communications had resulted in "five instances of impermissible expenditures" by Mr. Sampson and two instances by Mr. Markley. SEEC Final Decision at 12 (App. A102).

In particular, the Commission held that any communication that clearly mentions a candidate "[w]ithin 90 days of an election . . . is an expenditure to benefit (or oppose)" that candidate. SEEC Final Decision at 8 (App. A98). Communications mentioning a non-opposing candidate violated state law unless the portion of the communication mentioning that candidate was approved by and paid for by a permitted party, such as the candidate's opponent. SEEC Final Decision at 8-9, 11-12 (App. A98-99, A101-02). Furthermore, the Commission ruled that, because Plaintiffs had accepted Citizens Election Program ("CEP") funds, they violated General Statutes § 9-706 and Regs. Conn. State Agencies §§ 9-706-1 and 9-706-2, by making expenditures that "opposed Governor Malloy, who was a candidate," and that did not "*directly* further [their own] nomination for election." SEEC Final Decision at 8, 11-12 (App. A98, A101-02). The Commission ordered that Mr. Sampson pay a $5,000 civil penalty and that Mr. Markley pay $2,000. SEEC Final Decision at 13 (App. A103).

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

Plaintiffs timely filed their appeal on May 7, 2018, within the 45-day window after the Commission's denial. *Id*. at 3 (App. A26) The Commission responded with a motion to dismiss, contending that Plaintiffs incorrectly relied on the Commission's March 23 denial, because the petition was constructively denied 25 days after filing, on March 11, 2018. *Id*. at

3-4 (App. A26-27). Because the appeal was filed 45 days from the Commission's actual decision and not 45 days from the constructive denial, the trial court dismissed the appeal. *Id*. at 9 (App. A32).

ARGUMENT

This Court reviews a trial court's legal conclusions "and resulting grant of the motion to dismiss . . . de novo." *Hayes Family Ltd. P'ship v. Town of Glastonbury*, 132 Conn. App. 218, 221 (Conn. App. Ct. 2011) (internal quotation marks omitted).

A. The trial court improperly granted the Commission's motion to dismiss

1. The trial court incorrectly applied § 4-181a to § 4-183

a. The Commission had authority to address reconsideration on March 23, 2018

The trial court incorrectly held that Plaintiffs' appeal was untimely under § 4-183. Plaintiffs properly filed their appeal within 45 days of March 23, 2018, when the Commission in fact denied the motion for reconsideration. The trial court, however, held that the appellate period began on March 11, 2018, because of a constructive denial under § 4-181a(a)(1). Dismissal Memorandum at 9 (App. A32); *see* General Statutes § 4-181a(a)(1) ("The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition.").

The trial court ignored the plain language of § 4-183(c)(2) and imported into § 4-181a(a)(1) requirements that are not there. Section 4-181a(a)(1) permits a constructive denial, after a respondent has waited 25 days from filing a petition for reconsideration, so that she may file an appeal. This rule protects respondents from bad faith action by the

Commission: It prevents the Commission from withholding a decision on a petition for reconsideration until after the deadline to file an appeal has passed.

But § 4-181a(a)(1) does not divest the Commission of jurisdiction to reconsider its decision once those 25 days have passed. That is, nothing in § 4-181a(a)(1) divests the Commission of jurisdiction or otherwise prevents it from actually granting or denying a petition for reconsideration after a constructive denial.

Indeed, the text of § 4-181a demonstrates that the Commission retains authority to grant or deny consideration after a 25-day, constructive denial. Subsection (a)(2) explicitly authorizes reconsideration by the Commission up to 40 days after its final decision, irrespective of any petition for reconsideration—and thus regardless of any constructive denial. And subsection (a)(3) then gives the Commission an additional 90 days after granting reconsideration, to conduct additional proceedings and render a "decision made after reconsideration." § 4-181a(a)(3). Thus, had the Commission voted on March 23, 2018, to reconsider its final decision, it would have had authority to address reconsideration for 105 days after any constructive denial.

Consequently, constructive denial cannot divest the Commission of authority to later grant or deny a petition for reconsideration, much less render a new decision. Any other conclusion would render subsections (a)(2) and (a)(3) "void." *Kasica v. Town of Columbia*, 309 Conn. 85, 101 (Conn. 2013) (noting that courts must construe statutes "such that no clause, sentence or word shall be superfluous, void or insignificant").

Furthermore, the position of the trial court and the Commission would lead to absurd results and judicial inefficiency that could not have been intended by the legislature. Under their interpretation, even if the Commission voted to reconsider under § 4-181a(a)(2), a

respondent would still have to file an appeal based on the 25-day constructive denial. The consequence of that interpretation would be perverse: Simultaneously, the Commission would be reconsidering the decision under subsections (a)(2) and (a)(3), and the trial court would be considering the appeal of the constructive denial. This absurd waste of judicial resources is obviated by acknowledging that the Commission can respond to a petition for reconsideration even after the 25-day period has expired, and that any appellate deadline follows from a subsequent, actual denial. *See Tayco Corp. v. Planning & Zoning Comm'n of Wallingford*, 294 Conn. 673, 686 (Conn. 2010) ("we construe a statute in a manner that will not thwart its intended purpose or lead to absurd results"); *Ford Motor Credit Co. v. B. W. Beardsley, Inc.*, 208 Conn. 13, 20 (Conn. 1988) ("Statutes must be construed, if possible, that absurdity and mischief may be avoided." (internal quotation marks omitted)).

Accordingly, even though a constructive denial occurred on March 11, 2018, the Commission had authority to place the petition for reconsideration on its March 14, 21, and 23, 2018 agendas, and to make its decision about reconsideration on March 23, 2018.

b. The Trial Court should have used the Commission's actual, later decision to measure the appellate deadline

Furthermore, the context and history of § 4-183 indicates that the trial court should have run the statute of limitations from the Commission's later, actual decision. First, § 4-183 requires that an appeal be filed "within forty-five days after the agency denies a petition for reconsideration," not within 45 days after constructive denial. Timing the appellate period from an actual rather than constructive denial better accords with the statute's plain language.

Second, where different dates might trigger the statute of limitations, § 4-183 protects respondents by requiring that a court use "whichever [date] is applicable and is later." § 4-183(c); *Truglia v. Conn. Comm'n on Human Rights & Opportunities*, 1997 Conn. Super. LEXIS 893, at *5-7 (Conn. Super. Ct. Apr. 7, 1997) (noting the legislature's solicitousness, that it "cannot have intended that a person requesting an agency reconsideration of a final decision risk[] losing their right to appeal to court"); *see also Citizens Against Overhead Power Line Constr. v. Conn. Siting Council*, 139 Conn. App. 565, 574 (Conn. App. Ct. 2012) (noting that § 4-183(c) "provides that a plaintiff shall appeal within whichever time frame . . . occurs latest").

Because the Commission had authority to deny the petition for reconsideration on March 23, 2018, and because the trial court should have used the later, actual denial to begin running the appellate deadline, the trial court incorrectly dismissed Plaintiffs' timely appeal.

2. Equity demands that the statute of limitations run from the Commission's actual decision

Furthermore, because of the Commission's misleading actions, equity demands that the statute of limitations run from the Commission's actual denial on March 23, 2018. As stated in Plaintiffs' objections to the motion to dismiss, the Commission "lulled Plaintiffs with the promise of good faith proceedings while simultaneously running down the clock for any appeal from its final decision." Memorandum in Opposition to Dismissal at 2 (App. A106). While the Commission now claims that the petition for reconsideration became final by default on March 11, it repeatedly led Plaintiffs on with promises to consider the petition, on March 14, 21, and 23. And it issued a final decision following reconsideration on March 23,

2018, even though it now claims that it had no authority to act or issue a decision after March 11. *See* Dismissal Memorandum at 4 (App. A27).

The Commission's position turns its agendas and final decision into farces with no value except to fool unsuspecting parties into forfeiting their appellate rights. Fundamental fairness principles demand that agencies should not be administered under the rules of ambush. Even assuming the Commission's good faith, however, would not save its motion to dismiss. Instead, it would mean that even the Commission's executive director and general counsel, who put the petition on the agenda three times, believed that the Commission could and needed to address the petition, even after March 11. *See id.* at 6 n.1, 8-9 (App. A29 n.1, A31-32). This indicates that the statute is a trap for the unwary, especially for a party relying on the Commission's good faith.

Equity prohibits such a trap here, because Connecticut courts must ensure "fairness in an area of our law where the slightest misstep by a party seeking judicial review of agency action can deprive the trial court of subject matter jurisdiction." *Ierardi v. Comm'n on Human Rights & Opportunities*, 15 Conn. App. 569, 576 (Conn. App. Ct. 1988). This is particularly true where, due to vagaries in law and regulation, "a plaintiff attempts to file his application for reconsideration in a timely manner, only to be informed long after the appeal period otherwise would have expired, that he is out of luck." *Id*. Indeed, as this Court has held, "the UAPA [does not] contemplate[] such . . . harsh result[s]" from rigid enforcement of the rules. *Id*.

Furthermore, equitable tolling is necessary here because of Plaintiffs' reliance on the Commission's repeated invitations to wait for a decision on reconsideration. *Cf. Godaire v.*

Dep't of Soc. Servs., 174 Conn. App. 385, 401 (Conn. App. Ct. 2017) (applying equitable tolling where plaintiff detrimentally relied on notice from the state).

As this Court has noted, equitable tolling does not apply to the forty-five day appellate filing requirement under § 4-183, as it is jurisdictional. *See Godaire v. Freedom of Info. Comm'n*, 141 Conn. App. 716, 718-19 (Conn. App. Ct. 2013). But § 4-183 is not the provision raising equitable concerns. It is the Commission's use of § 4-181a(a)(1)'s default decision provision, which was intended to protect the rights of respondents in civil proceedings, as a weapon against those same respondents. *See Truglia*, 1997 Conn. Super. LEXIS 893, at *5-7 (noting that the "legislature cannot have intended that a person requesting an agency reconsideration of a final decision risk[] losing their right to appeal to court").

The Commission led Plaintiffs on with the hope that it would reconsider its decision on three separate dates. Had the Commission not placed Plaintiffs' petition on the agenda on March 14, March 21, or March 23, they would have known that they needed to seek relief in the courts. Instead, as the days passed after the constructive denial, wearing down what the Commission asserts was the appellate period, the Commission led Plaintiffs to believe that a constructive denial was not final, and that it still had authority to decide whether to reconsider. Plaintiffs understandably awaited the Commission's decision, as full or partial reconsideration would simplify the issues on appeal and impose fewer costs on the Plaintiffs. And, given that the Commission waited until March 23, 2018, to make its decision, Plaintiffs required the full 40 days under § 4-181a from the Commission's final decision to know whether reconsideration would take place and what issues needed to be appealed.

Plaintiffs reasonably relied on the Commission's actions. Because this area of the law requires "fairness," *Ierardi*, 15 Conn. App. at 576, this Court should hold that the

Commission's final decision was tolled until March 23, 2018, and, therefore, that Plaintiffs' appeal was timely.

B. Connecticut's Restrictions on Candidate Speech Are Unconstitutional

General Statutes §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), 9-706, as well Regs. Conn. State Agencies §§ 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. They violate a candidate's right to advocate her own views by limiting one of the most effective ways of doing so, by contrasting her views with those of other candidates. Furthermore, ignoring the expanded rights of Plaintiffs Markley and Sampson as political candidates, the Statutes fail strict scrutiny as content-based burdens on political speech in general. And, because they are restrictions on the candidates themselves and not on program funds, the state cannot save the restrictions as voluntary under the Citizens Election Program.

1. The First Amendment prohibits limits on candidate speech

The state cannot limit a candidate's advocacy, especially highly effective advocacy, merely because a communication *might* have an effect on another 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 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 candidates' speech mentioning non-opposing candidates go beyond a mere unconstitutional cap on candidate expenditures. Despite candidates' right "vigorously and tirelessly to advocate . . . the election of other candidates," General Statutes §§ 9-601a(a), 9-601b(a)(1), 9-607(g)(1)(A)(i), and 9-616(a) prohibit candidates from speaking at all about non-opposing candidates.[2] *Buckley*, 424 U.S. at 52. Because Connecticut's statutes prohibit candidates entirely from exercising the right to speak

[2] Under the Statutes, the only "lawful purpose[]" for candidate committee expenditures is promoting "the nomination or election of the candidate who established the committee," General Statutes § 9-607(g)(1)(A)(i), where the term "expenditure" encompasses "[a]ny purchase, payment, . . . or anything of value, when made to promote the success or defeat of any candidate," § 9-601b(a)(1). 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). The Statutes thus prohibit any candidate communications that advocate for or against a non-opponent. *See* Declaratory Ruling 2011-03 at 3 (App. A52) (holding that "a communication which benefits another candidate . . . results in an impermissible in-kind contribution"); Advisory Op. 2014-04 at 1 (App. A59) (noting that "[t]he answer . . . is, essentially, the same" when a communication opposes rather than supports a candidate).

about non-opposing candidates, much less "without abridgement," they fail constitutional scrutiny. *Davis*, 554 U.S. at 740.

2. The Statutes' burdens on speech fail strict scrutiny

Even if candidates' speech were not specially protected, Connecticut's statutes fail under the scrutiny applied to campaign speech in general. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley*, 424 U.S. at 14. 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 prohibit a candidate from making a statement about a non-opposing candidate unless the speaker coordinates the communication with the candidate's opponents.[3] That is, the Statutes unconstitutionally ban both independent expenditures about non-opponents and communications with little or no express advocacy about those candidates.[4] Such a prohibition on speech about candidates cannot pass the strict scrutiny to which it is necessarily subject.

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[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 (App. A60). But that means that the message no longer belongs to the candidate speaker, as the other parties must approve and pay for the communication at issue. And, in any case, it must be coordinated with a party that will directly benefit from the communication.

[4] "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010). Connecticut's statutes ban 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.

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

Limits or prohibitions on expenditures are "burden[s on] political speech" that are subject to strict scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *see Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); *see also McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1444 (2014) (noting that limits "necessarily reduce[] the quantity of expression" (quoting *Buckley*, 424 U.S. at 19)).[5]

First, Connecticut limits speech by explicitly prohibiting expenditures for communications about a non-opposing candidate, even when such communications aid a candidate's campaign by explaining her positions. Under § 9-607, an expenditure is for a "lawful purpose[]" only when it "promot[es] the nomination or election of the candidate" making it. § 9-607(g)(1)(A)(i). Even though the "unfettered" advocacy protected by the First Amendment includes "vigorously and tirelessly [advocating for or against] the election of other candidates," *Buckley*, 424 U.S. at 52, Connecticut narrowly circumscribes a candidate's advocacy. Mentioning a non-opponent may be highly beneficial to a speaker's campaign, but Connecticut has decided that any communication that mentions a non-opposing candidate must benefit or oppose her, and that any "communication which benefits [or opposes] another candidate" in any way "results in an impermissible in-kind contribution." Declaratory Ruling.

[5] Limits on contributions are subject to "a lesser but still 'rigorous standard of review'": the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon,* 134 S. Ct. at 1444.

2011-03 at 3 (App. A52); Advisory Op. 2014-04 (App. A59-61) (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—and again broadly construing any mention of a non-opposing candidate as benefitting her (or her 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. Regs. Conn. State Agencies § 9-706-2(b)(8) and (b)(13); *see also* General Statutes § 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); Regs. Conn. State Agencies § 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").

Because the Statutes burden political speech—in three separate ways, no less—the First Amendment requires that the Statutes meet strict scrutiny.

ii. Strict scrutiny required for content-based restrictions

Even if this case did not involve political speech, Connecticut's speech restrictions would trigger strict scrutiny as content-based regulations of speech. A law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The Statutes restrict speech both based on its "particular subject matter" and "by its function or purpose." *Id*. They do so by prohibiting speech about non-opponent candidates, a restriction on a particular subject matter. And they do so purposefully, by prohibiting speech that might benefit 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. General Statutes § 9-607(g).

Thus, the Statutes must also meet strict scrutiny because they are content-based restrictions on speech.

b. The state cannot demonstrate a compelling interest

Under strict scrutiny, the Statutes "cannot stand unless . . . 'justified by a compelling state interest.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011) (quoting *Davis*, 554 U.S. at 740). And the Statutes' requirements must be "the least restrictive means to further" the required compelling interest. *McCutcheon*, 134 S. Ct. at 1444.

The state cannot demonstrate a compelling interest: "No governmental interest . . . is sufficient to justify . . . campaign expenditure limitations." *Buckley*, 424 U.S. at 55. But even if the Statutes involved some burden on political speech other than expenditure limits, they would fail to meet scrutiny. The Supreme Court has recognized only one interest compelling

enough to burden political speech—"preventing corruption or the appearance of corruption"—and that interest is inapplicable here. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985).

i. The anti-corruption interest is inapplicable

The interest in preventing actual or apparent corruption is entirely absent here. The state's interest must target *quid pro quo* corruption, and such corruption cannot be hypothetical. *See McCutcheon*, 134 S. Ct. at 1441 (requiring the real or apparent risk "of a direct exchange of an official act for money"); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 644-645 (1996) (requiring "substantial threat"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (holding that "mere conjecture" is inadequate).[6]

Even assuming that the communications at issue here had enough express advocacy against Governor Malloy to be independent expenditures, any assertion of the anti-corruption interest would be hypothetical and fall far short of actual or apparent *quid pro quo* corruption. There can be no risk of actual or apparent *quid pro quo* corruption with communications made independently from—not coordinated with—the candidate mentioned in the ad (or that candidate's opponents, for an attack ad). The "absence of prearrangement and coordination" for such communications "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

[6] *See also 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").

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 state has never demonstrated any coordination between Plaintiffs and Governor Malloy's opponents. The state 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*. It has not shown that Plaintiffs' planned their communications with Governor Malloy or any of his opponents. And, while Plaintiffs' communications were a highly effective way for Plaintiffs to explain their positions, the state 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 state has demonstrated that it has no concern about actual or apparent corruption with regard to such candidate expenditures: The State's contention is that Plaintiffs Markley and Sampson violated the statutes because they *failed to coordinate* with the governor's opponents. That is, the state wants the candidates to perform the prerequisites for *quid pro quo* corruption, not avoid them.

Since there is no anticorruption interest present, and that is the only sufficiently compelling interest to sustain campaign speech restrictions, 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).

ii. No other interest can justify limits on campaign speech

The Statutes also fail strict scrutiny under any other interest argued by the state. "Campaign finance restrictions that pursue" objectives other than fighting actual or apparent

corruption "impermissibly inject the Government 'into the debate over who should govern.'" *McCutcheon*, 134 S. Ct. at 1441-42 (quoting *Ariz. Free Enter.*, 564 U.S. at 750)).

For example, in rejecting candidate expenditure limits, the Supreme Court rejected any asserted interest in curbing "rapidly increasing campaign expenditures." *Buckley*, 424 U.S. at 55. Rising costs raise issues only because of the potential for corruption caused by reliance on large contributions. And that risk must be "served by . . . contribution limitations and disclosure provisions," not by expenditure limits. *Id*.

Similarly, the Supreme Court has three times—clearly and categorically—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 Club's Freedom PAC* 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 . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54.

As they lack any compelling interest, the Statutes fail strict scrutiny.

3. The CEP's Requirements are Unconstitutional Conditions

The state cannot justify the restrictions on candidate communications as voluntary conditions accepted when using CEP funding. The government cannot violate "constitutional guaranties, so carefully safeguarded against direct assault," by requiring that individuals

"surrender" a privilege or benefit. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926); *see also United States v. Butler*, 297 U.S. 1, 70-71 (1936) (holding that the government "may not indirectly accomplish . . . by taxing and spending" what it "has no power to enforce [by] commands"). It is irrelevant that "a person has no 'right' to a valuable governmental benefit" or that "the government may deny him the benefit for any number of reasons." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The government may not "penalize[] and inhibit[]" the exercise of freedoms by denying a benefit for exercising those freedoms. *Id*.

The CEP denies candidates the use of CEP funds if they exercise their "unfettered" right "to make their views known . . . on vital public issues," here by making known their views on "the election of other candidates." *Buckley*, 424 U.S. at 52-53. Plaintiffs here merely discussed their efforts to fight a non-opposing candidate's agenda. But, even if they had advocated against his election, advocating against other, well-known candidates is a protected right because it is a highly effective way to make known one's own views.

And because the CEP prohibits grantees from using *any* funds in their campaign accounts for communications mentioning another candidate, as a purported "benefit" to her, Regs. Conn. State Agencies § 9-706-2(b),[7] the state cannot argue that it is "simply insisting that public funds be spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). That exception to the unconstitutional conditions doctrine cannot apply when a program limits the recipient and not just the use of program funds: The grantee must be free to "conduct those activities through programs [or funding sources] that are

[7] *See also* Advisory Op. 2014-04 at 2 (App. A60) (stating that "a CEP participant may not attack candidates opposing other members of such candidate's party").

separate and independent from" the public funding. *Id*. Otherwise, if the use of public funding "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the . . . program," the government has exceeded its authority and the restrictions are unconstitutional. *Id*. at 197.

Likewise, the state cannot avail itself of the affiliate exception—requiring that affiliates make the prohibited speech. *See id.* at 197-98; *see also Fed. Commc'n Comm'n v. League of Women Voters*, 468 U.S. 364, 400-01 (1984) (noting in dicta possible constitutionality if statute permitted affiliate editorials). Affiliates are 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 federal program." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013). Attempts to use the affiliate exception fail scrutiny when program restrictions require the use of a separate entity over which a speaker has no control: "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express its beliefs." *Id*. (emphasis added).

The CEP does not allow a candidate to make communications mentioning non-opponents from a separate candidate account. Rather, when a candidate's ad attacks a non-opponent, the portion of the ad opposing the non-opponent must be paid for by a 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 (App. A60-61); *see also* Declaratory Ruling 2011-03 at 1, 3-4 (App. A50, A52-53) (stating that candidates must allocate expenses of a communication with committees permitted to speak about a non-opponent).

In that case, the message will no longer be the candidate's. The organizations "bear[ing] the portion of the cost allocated to the negative advertising," Advisory Op. 2014-04 at 2 (App. A60), will demand control over the content of that advertising, as well as a voice in the content of the ad overall. Thus, allocation under the CEP "does not afford a means for the [CEP] *recipient* to express its beliefs." *Agency for Int'l Dev.*, 570 U.S. at 219 (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-opponents, the CEP "tell[s] candidates . . . how much money they can spend to convey their message, when they can spend it, [and] what they can spend it on." *Id*. at 764. And it does so in a way that "place[s] a condition on the *recipient* of the subsidy rather than on a particular program or service." *Rust*, 500 U.S. at 197. Because Connecticut has not left a CEP "grantee unfettered in its other activities," *id*. at 196, the restrictions on communications about non-opponents are unconstitutional conditions.

CONCLUSION

For the reasons stated above, the trial court improperly ignored the Commission's authority to determine whether to reconsider a decision regardless of a constructive denial, and it therefore erred in running the statute of limitations from the Commission's constructive denial. Moreover, because of the Commission's misleading actions, equity demands that the appellate period run from the actual denial on March 23, 2018. Accordingly, this Court should rule that Plaintiffs' appeal was timely.

Furthermore, given their restrictions on candidate advocacy and their content-based burdens on political speech in general, the Statutes must meet strict scrutiny. But, because

the interest in combatting actual and apparent corruption is inapplicable here, and no other compelling interest exists for direct restrictions on speech, the Statutes fail that scrutiny. And because the Statutes restrict the candidates themselves rather than the candidates' use of CEP funds, the state cannot preserve the Statutes' restrictions as voluntary under the CEP.

Consequently, Plaintiffs Markley and Sampson ask the Court to reverse the trial court's order dismissing their appeal. They further ask the Court to hold unconstitutional General Statutes §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), 9-706, as well Regs. Conn. State Agencies §§ 9-706-1 and 9-706-2, or remand and direct the trial court to hold them unconstitutional.

Dated February 28, 2019

Plaintiffs-Appellants Joe Markley and Rob Sampson

By /s/

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CERTIFICATION

Pursuant to the Connecticut Practice Book Rules of Appellate Procedure § 67-2, I hereby certify the following:

1) Copies of the foregoing brief and appendix were sent via first-class mail to counsel of record and to the trial judge who rendered a decision that is the subject matter of the appeal, in compliance with § 62-7, as listed;
2) The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically pursuant to § 67-2(g);
3) The brief and appendix do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;
4) The brief complies with all provisions of § 67-2; and
5) The electronically submitted brief and appendix were transmitted electronically to counsel of record and the trial court, for whom an e-mail address has been provided, as listed below:

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