No. 10-239

In The Supreme Court of the United States

JOHN MCCOMISH;
NANCY MCLAIN; and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of Arizona; and GARY SCARAMAZZO; ROYANN J. PARKER; JEFFREY L. FAIRMAN; LOUIS HOFFMAN; and LORI DANIELS, in their official capacities as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2.

Whether *Citizens United* and *Davis* require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

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AMICUS CURIAE BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY

The Yankee Institute for Public Policy ("Yankee Institute"), on behalf of itself and its members, submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by the Petitioners, John McComish, Nancy McLain and Tony Bouie, to review the judgment of the United States Court of Appeals for the Ninth Circuit. Pursuant to Supreme Court Rule 37.2(a), this *amicus curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Yankee Institute is a nonpartisan educational and research group organized in the 1980s under the laws of the State of Connecticut. The Yankee Institute's core mission is to "promote economic opportunity through lower taxes and new ideas for better government in Connecticut."

[1] Pursuant to Supreme Court Rule 37, letters indicating The Yankee Institute's intent to file this *amicus curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have issued blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party. Finally, The Yankee Institute affirms that no counsel for a party authored this brief in whole or in part and that no party, person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Yankee Institute has over 600 members most of whom reside in and are taxpayers of the State of Connecticut. If the Ninth Circuit's decision is affirmed and Arizona's excess and independent expenditure trigger provisions are upheld as constitutional, it is likely that such a decision will pave the way for the Connecticut legislature to reenact similar trigger provisions in Connecticut's campaign finance law thereby increasing the amount of taxpayer dollars that are used to fund the dissemination of hostile political speech. The Yankee Institute and its members fundamentally oppose such a law and have an interest in the outcome of this case. Therefore, The Yankee Institute respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION SO THAT IT MAY HARMONIZE THE CONFLICT AMONG THE CIRCUITS CONCERNING MATCHING FUND TRIGGER PROVISIONS CONSISTENT WITH *DAVIS*.

The United States Court of Appeals for the Ninth Circuit defied *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), when it upheld Arizona's matching fund trigger provisions as imposing only an insubstantial burden on the exercise of First Amendment rights. The Ninth Circuit's decision is inconsistent

with other Circuits that have followed *Davis*, including the Second Circuit which struck down Connecticut's matching fund trigger provisions as unconstitutionally infringing on candidates' protected campaign speech. Unless this Court grants the Petition, addresses the merits of the appeal and harmonizes the Circuits consistent with *Davis*, there will continue to be uncertainty as to the constitutionality of matching fund trigger provisions.

A. The Citizens' Election Program.

In 2005, Connecticut enacted its own so-called clean election law in an attempt to combat certain perceived political corruption and unfair influence in state elections. *Green Party of Conn. v. Garfield*, Nos. 09-3760-cv(L), 09-3941(CON), 2010 U.S. App. LEXIS 14286, **4-6 (2nd Cir. Jul. 13, 2010). The law became known as the Citizens' Election Program ("CEP"), CONN. GEN. STAT. §§ 9-700, *et seq*., and has provided public grants for candidates for state legislative and executive offices, including Governor. CONN. GEN. STAT. § 9-702 and § 9-703. Like the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq*., at issue in the Petition for Writ of Certiorari before this Court, when the CEP was enacted it contained matching fund trigger provisions known as (1) the Excess Expenditure Trigger Provision, CONN. GEN. STAT. § 9-713; and (2) the Independent Expenditure Trigger Provision, CONN. GEN. STAT. § 9-714.

Under the Excess Expenditure Trigger Provision, candidates who participated in the CEP

("participating candidates") received additional public subsidies in response to funds received or spent by their opponents who did not participate in the CEP ("non-participating candidates"). CONN. GEN. STAT. § 9-713. If a non-participating candidate received contributions or spent more than an amount equal to the participating candidate's initial grant, then the participating candidate would be eligible to receive up to four additional grants, each worth 25% of the initial grant amount. *Id*. The excess expenditure grants would be distributed whenever the non-participating candidate received contributions or made expenditures exceeding 100%, 125%, 150% and 175% of the initial grant amount. *Id*.

Under the Independent Expenditure Trigger Provision, a participating candidate receives matching funds when there were independent expenditures "with the intent to promote the defeat" of that participating candidate. CONN. GEN. STAT. § 9-714. The amount of matching funds available to the participating candidate was equal to the amount of the independent expenditure on a dollar for dollar basis, up to 100% of the initial grant amount under the Independent Expenditure Trigger Provision. *Id*. at § 9-714(a) and (c).

B. The *Green Party* Litigation.

In 2006, the Green Party of Connecticut commenced a lawsuit against the Connecticut State Elections Enforcement Commission ("SEEC") in the

United States District Court for the District of Connecticut challenging the constitutionality of the CEP based on the First and Fourteenth Amendments to the United States Constitution. *Green Party*, U.S. App. LEXIS 14286 at *15. The lawsuit challenged, *inter alia*, the CEP's Excess and Independent Expenditure Trigger Provisions. *Id*. at **16-17. On August 27, 2009, the District Court struck down the entire CEP and entered a declaratory judgment that the CEP unconstitutionally burdened political opportunity and, most relevant to the Petition for Writ of Certiorari before this Court, that the CEP's Excess Expenditure and Independent Trigger Provisions unconstitutionally burdened First Amendment speech rights. *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009).

On July 13, 2010, the United States Circuit Court of Appeals for the Second Circuit affirmed, in part, the judgment declaring unconstitutional the Excess and Independent Expenditure Trigger Provisions and reversed, in part, other portions of the judgment not relevant to the Petition before this Court. The Second Circuit held that the CEP's trigger provisions "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and that "the state had not asserted a compelling state interest in burdening such speech." *Green Party,* 2010 U.S. App. LEXIS 14286 at *74. The Second Circuit agreed "with the District Court that the CEP's trigger provisions violate the First Amendment because they operate in

a manner similar to the law that the Supreme Court struck down in *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)." *Id*. at *77.

Recently, the Connecticut legislature amended the CEP by, *inter alia*, repealing the Excess and Independent Expenditure Trigger Provisions to bring the CEP in compliance with the Second Circuit's decision in *Green Party*. *See* 2010 CONN. ACTS 10-2 (REG. SESS.). However, by that time, the damage had already been done, *i.e*., matching funds for the Connecticut primary had already been distributed to participating candidates thereby burdening non-participating candidates' First Amendment speech rights contrary to *Davis*. Making matters worse, the legislature performed an end-around the *Green Party* decision by simply doubling the general election grant amount for participating gubernatorial candidates to $6 million (2010 CONN. ACTS 10-2 (REG. SESS.), sec. 3), which is the total amount a participating candidate would have received under the CEP's trigger provisions if her non-participating opponent spent more than 100% of the initial grant amount. This Court should clarify the law on trigger provisions consistent with *Davis* to ensure that the harm to candidates' sacred First Amendment speech rights are not compromised in future elections.

C. Comparing *Green Party* to *Davis*.

In striking down the CEP's trigger provisions in *Green Party*, the Second Circuit compared those

provisions to the "Millionaire Amendment" that this Court struck down in *Davis*. The Second Circuit concluded that the CEP's Excess and Independent Expenditure Trigger Provisions, like *Davis'* "Millionaire Amendment," caused a non-participating candidate to "shoulder a special and significant burden" if the candidate chose to exercise her First Amendment speech rights because the more campaign dollars the non-participating candidate spent above the initial grant amount, the more matching funds her participating opponent would receive. *Green Party,* 2010 U.S. App. LEXIS 14286 at **80-81. The Second Circuit further held that the "penalty" imposed by the CEP's trigger provisions is "harsher" and, therefore, more constitutionally objectionable than *Davis'* "Millionaire Amendment." *Id*. at **82-83.[2]

The CEP's Excess and Independent Expenditure Trigger Provisions are substantially similar to the trigger provisions set forth in the Arizona Citizens Clean Elections Act. Both provide matching funds to participating candidates as a result of fair non-participating opponents (or third parties) raising or spending more than the initial public grant amount. Accordingly, and in harmony with *Davis*, the Court

[2] For purposes of rendering its decision, the Second Circuit found no significant difference between the CEP's Excess Expenditure Trigger Provision and the Independent Expenditure Trigger Provision because "nothing in *Davis* suggests that the 'right to spend personal funds for campaign speech' is limited to candidates only." *Id*. at *83-84.

should find that Arizona's trigger provisions, like the CEP's trigger provisions, impose an unconstitutional penalty on First Amendment political speech.[3]

D. CEP's Impact On This Year's Primary.

The Excess Expenditure Trigger Provision had a significant impact on Connecticut's August 10, 2010 primary election as participating candidates from both Republican and Democratic parties received and spent matching funds primarily on negative attack ads against their non-participating opponents. In the primary for the Democratic nomination for Governor – which featured a high-spending non-participating candidate, Ned Lamont – negative attack ads by his participating opponent, Dan Malloy, funded by $1.25 million in matching funds may have cost Lamont the nomination.

Similarly, in the primary for the Republican nomination, one of the non-participating candidates, Thomas C. Foley, made expenditures in excess of the initial grant amount of $1.25 million. *Foley v. State Elections Enforcement Commission*, No. 3:10cv1091, 2010 U.S. Dist. LEXIS 71744, *7 (D. Conn. Jul. 16, 2010). As a result, on July 8, 2010, the SEEC approved the application of his participating opponent, Michael C. Fedele, for the initial grant plus $937,500

[3] The Second Circuit found the Ninth Circuit's decision in *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010), unpersuasive. *Green Party,* 2010 U.S. App. LEXIS 14286 at *83, fn. 19.

in supplemental matching funds (an amount equal to 75% of the initial grant amount) pursuant to the Excess Expenditure Trigger Provision. *Id*.

On July 14, 2010, Fedele applied for the remaining supplemental matching funds in the amount of $312,500 triggered by Foley spending more than 175% of initial grant amount. *Id*. In response, Foley filed an application for a temporary restraining order and permanent injunction seeking to prevent the SEEC from issuing the remaining matching funds to Fedele pursuant to the Excess Expenditure Trigger Provision that the Second Circuit found unconstitutional just one day before in *Green Party*.[4] *Id*. at **7-8. Foley argued that he would be irreparably harmed in at least two ways if the matching funds were approved. First, Foley argued that the provision burdened his First Amendment rights because he was being penalized for engaging in political speech, *i.e*., spending more money on the primary campaign than his opponents. *Id*. at **13-14. Second, Foley argued that granting supplemental matching funds would force him to spend more on his campaign than he originally planned in order to outspend and "communicate more visibly and loudly than" his opponents. *Id*. at *14.

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[4] The district court could not simply enjoin the SEEC from approving matching funds pursuant to the Second Circuit's decision in *Green Party* because the Second Circuit had yet to issue a mandate thereby depriving the district court of jurisdiction. *Id*. at **8-9.

Although it denied the temporary restraining order, the district court nonetheless found that Foley would be irreparably harmed by the Excess Expenditure Trigger Provision in the same way that the *Davis* plaintiffs were harmed because "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id*. at **14-15 (citing *Davis*, 128 S. Ct. at 2772). The CEP's trigger provisions unconstitutionally burdened Foley's First Amendment right to "communicate more visibly and loudly than" his opponents by outspending them on the primary campaign. Foley ultimately won the August 10, 2010 primary, but a large, negative advertising campaign by Fedele – funded in large part by public funds received under the Excess Expenditure Trigger Provision – met their mark and shrunk Foley's wide-lead in the waning days of the primary campaign.

The distribution of supplemental matching funds to participating candidates in this year's primary election worked the precise evil anticipated by the district court in *Green Party*. Those same evils may soon befall other candidates in the same way unless the Court grants the Petition, addresses the merits of the appeal and harmonizes the Circuits consistent with *Davis*.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to restore and ensure uniformity in the law consistent with *Davis*.

Respectfully submitted
by counsel for the Yankee
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