No. 08-120

In The Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES,

Petitioners,

v.

LARRY LEAKE, Et Al.,

Respondents.

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

BRIEF OF DEAN MARTIN, THE ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*

Pursuant to Supreme Court Rule 37.2, the plaintiffs in *Martin v. Brewer*, an on-going federal court challenge to Arizona's scheme of publicly funding political campaigns, respectfully submit this *amicus curiae* brief in support of Petitioners.[1]

Dean Martin is a resident of the State of Arizona, the current Arizona State Treasurer, and a former member of the Arizona State Senate. In each of Martin's privately funded electoral bids, he has been subject to Arizona's so-called Citizens Clean Elections Act, Ariz. Rev. Stat. Ann. "A.R.S." § 16-940 *et seq*., a government program for fully funding statewide and legislative political campaigns with public money. Martin, along with several other candidates and an Arizona political committee, filed a First Amendment challenge to Arizona's public campaign finance scheme in January 2004, arguing that it penalized his nonparticipation by triggering additional government funds to his opponent, or opponents, based on his decision to robustly exercise his right to speak.[2]

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[1] The *Amici* have received consent from counsel of record pursuant to Sup. Ct. R. 37.2, as submitted with this brief. The *Amici* affirm, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] The other original plaintiffs were eventually dismissed by the Ninth Circuit on mootness grounds. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 486 F.3d 586 (9th Cir. 2007).

Like the Petitioners in the present case, Martin's case was originally dismissed pursuant to a Fed. R. Civ. P. 12(b)(6) motion, thus precluding him from fully litigating his free speech claims. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005). The Court of Appeals for the Ninth Circuit reversed the dismissal and remanded so that Martin may fully develop the fact record. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 494 F.3d 1145 (9th Cir. 2007), *and amending order*, 497 F.3d 1056 (9th Cir. 2007) ("Dean Martin's complaint 'seeking an injunction against the enforcement of *A.R.S. § 16-940 et. seq.* states a cause of action' ").

The Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is an independent group established as a Candidate Support or Opposition Committee under Arizona law. A.R.S. § 16-912. The Freedom Club PAC receives contributions for, and makes contributions to, independent expenditure campaigns in various state and legislative races. Similarly, the Arizona Taxpayers Action Committee ("Action Committee") is an Independent Expenditures Committee organized under Arizona law. A.R.S. § 16-912. The Action Committee receives contributions for and makes independent expenditures in state and legislative races as well as in ballot-measure campaigns. Both committees joined Martin's suit upon remand because their independent expenditures have triggered payment of government funds to candidates opposed by the committees and their donors.

While the Arizona plaintiffs agree entirely with the Petition filed in this case, they believe that their experience with taxpayer funded campaigns, and their familiarity with the federal courts' treatment of challenges to such programs, will provide additional insight useful to this Court's consideration of the Petition.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to resolve no less than three significant circuit splits and to clarify its precedents on the proper standards for motions to dismiss in First Amendment cases. *See* Sup. Ct. R. 10(a), (c). First, the Fourth Circuit's decision contradicts the decision of the Ninth Circuit in *Amici*'s case, which held that *Amici*'s similar challenge *did* state a cause of action. *See* Sup. Ct. R. 10(a). Second, the Fourth Circuit's dismissal of Petitioners' as-applied challenge conflicts with the First Circuit's instruction that future courts hold open the door to as-applied challenges to public campaign finance schemes. *Id.* Third, the First and Eighth Circuits are split on the constitutionality of public campaign finance schemes that utilize matching funds provisions. *Id.* Finally, the Fourth Circuit's decision is inconsistent with this Court's precedents on the evidentiary burden, and who bears that burden, in cases challenging campaign finance laws. *See* Sup. Ct. R. 10(c).

Like the Petitioners, the *Amici*'s initial foray into the federal courts saw their First Amendment claims dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197. Other federal courts have likewise dismissed challenges to public campaign finance programs based not on empirical evidence or concrete proof, but simply based on the governments' assertion that such programs are sufficiently tailored to serve a purported governmental interest. These cases have been dismissed even when the plaintiffs brought as-applied challenges to discrete provisions of the public campaign finance scheme. In so doing, the courts either disregarded, or refused to believe, plausible allegations by plaintiffs that public campaign finance schemes interfere with their First Amendment rights.

This method of constitutional adjudication is inconsistent with this Court's precedents and the requirements of both the First Amendment and the Federal Rules of Civil Procedure. As Petitioners correctly point out, this disconnect is even more pronounced in light of this Court's recent decisions regarding campaign finance laws. Once plaintiffs plead colorable harm to their right of free speech, this Court's precedents, the First Amendment, and the Federal Rules of Civil Procedure require *the government* to prove that its actions are sufficiently tailored to meet the government interest asserted. That proof cannot consist of simply *ipse dixit* assertions that the law in question does what the government wants it to do.

The Fourth Circuit's decision, if allowed to stand, would reinforce precedent erroneously holding that when it comes to campaign finance laws, what the government asserts is a verity and what the plaintiffs say cannot be believed. The Fourth Circuit's decision conflicts with relevant decisions of this Court regarding the consideration of First Amendment claims. This Court should therefore accept review and reaffirm its clear guidelines for consideration of colorable claims alleging governmental interference with fundamental First Amendment rights.

REASONS FOR GRANTING REVIEW

I. THE FOURTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CONTRADICTS THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

This case will affect the ability of future litigants who claim that their First Amendment rights are violated by public campaign finance schemes to have their full day in court. In terms of ensuring the vitality of free and robust political debate in this country, the optimal result here would be for this Court to grant the Petition and invalidate these schemes altogether. At the very least, however, this Court should provide guidance to district courts when considering claims challenging these unproven laws, an action of urgent public import given that these laws – which fundamentally restructure campaigns to

allow the government to decide how much speech is too much in a campaign – are becoming increasingly common nationwide.

A. Public Campaign Finance Schemes Are Increasing In Number.

Numerous states and municipalities have adopted, or are considering adopting, programs to fund political campaigns with public moneys, in stark contrast to our national tradition of candidates raising funds from people who support their message. Increasingly, these systems feature so-called "matching funds" provisions. Typically, the receipt of government funding is first conditioned on a candidate's agreement to cap campaign expenditures to a set amount of money. However, if a publicly financed candidate faces a privately financed opponent, the government will provide extra funds to the publicly financed candidate when some combination of the privately financed candidate's expenditures, or expenditures by independent groups that either (1) support the privately financed candidate or (2) oppose the publicly financed candidate, exceeds the publicly financed candidate's agreed-to expenditure limit.

Jurisdictions that have already adopted public campaign finance statutes include statewide programs in North Carolina, N.C. Gen. Stat. § 163-278.61, *et seq.*, Arizona, A.R.S. § 16-940 *et seq*., Connecticut, Conn. Gen. Stat. § 9-700, *et seq.*, New Mexico, N.M. Stat. 1-19A-1, *et seq.*, and Maine, Me. Rev.

Stat. Ann. tit. 21-A, § 1121; and municipal campaigns in cities such as Albuquerque, New Mexico, Article XVI, Charter of the City of Albuquerque, Tucson, Arizona, Tucson City Code, Ch. XVI, Sub. B, and Portland, Oregon, Portland City Code, Ch. 2.10. Jurisdictions presently considering publicly funding political campaigns include New Jersey, Assem. B. 100, 213th Leg., First Ann. Sess. (2008), and Maryland, H.B. 971, 425th Sess., Gen. Assem. (2008); and municipalities such as Seattle, Resolution No. 31061, and King County, Washington, KC 2007-0430.2.[3]

The Petitioners in this case filed a complaint alleging that the matching funds provision of North Carolina's public campaign finance scheme for judicial races burdens the First Amendment rights of privately funded candidates and independent groups. *See* N.C. Gen. Stat. § 163-278.67(a). Petitioners also challenged the North Carolina law's lopsided reporting requirements that require privately financed candidates to file extra reports in order to provide the government with the information it needs to pay out the matching funds. *See* N.C. Gen. Stat. § 163.278.66(a). The Petitioners never got their day in court. Instead, the district court dismissed Petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6). *See Jackson v. Leake*, 476 F. Supp. 2d 515 (E.D.N.C. 2006).

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[3] New Jersey's Office of Legislative Services opined on July 21, 2008 that matching funds provisions similar to those challenged in this case are unconstitutional. *See* App. 1.

B. Litigants Challenging Public Campaign Finance Schemes Have Not Been Given Their Day In Court.

This result was, unfortunately, not unique. Increasingly, district courts are summarily disposing of First Amendment challenges to public campaign finance systems by granting Rule 12(b)(6) motions to dismiss. *See, e.g., Green Party of Connecticut v. Garfield,* 537 F. Supp. 2d 359 (D. Ct. 2008); *Ass'n of Am. Physicians v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005); *Wilkinson v. Jones,* 876 F. Supp. 916 (W.D. Ky. 1995). This is an alarming trend that contravenes well-established principles of law governing motions to dismiss, especially in cases where plaintiffs allege the government has interfered with their fundamental right to freely speak.

Included in this recent spate of dismissals is the Arizona district court in which Dean Martin filed his challenge to Arizona's public campaign finance scheme. *Brewer,* 363 F. Supp. 2d at 1198. In Martin's case, the Court of Appeals for the Ninth Circuit reversed the order of dismissal and remanded his case so that he may fully develop the fact record to prove that Arizona's public financing scheme unconstitutionally burdens his speech.[4] *Ass'n of Am.*

[4] The Ninth Circuit's decision accords with this Court's decision in *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___, 128 S. Ct. 1184, 1191 (2008), which held that courts should not " 'formulate a rule of constitutional law broader than is required by the precise facts to which

(Continued on following page)

Physicians & Surgeons v. Brewer, 494 F.3d 1145 (9th Cir. 2007), *and amending order*, 497 F.3d 1056 (9th Cir. 2007) ("Dean Martin's complaint 'seeking an injunction against the enforcement of *A.R.S. § 16-940 et. seq.* states a cause of action' ").

In Petitioners' case, the district court's error was compounded by the Fourth Circuit's error. Other than noting the standard of review, the Fourth Circuit did not cite, discuss, or apply the legal standards that govern federal courts when deciding a motion to dismiss. *North Carolina Right to Life Comm. Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 431-441 (4th Cir. 2008), Pet. App. at 3a. When considering whether to grant a motion to dismiss, it is well settled that a district court must accept as true all factual allegations of the complaint. *Erickson v. Pardus*, 551 U.S. ___, ___, 127 S. Ct. 2197, 2200 (2007). Therefore, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S. Ct. 1955, 1965 (2007) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 1832 (1989)).

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it is to be applied' " (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936)); *see also Randall v. Sorrell*, 548 U.S. 230, 253, 126 S. Ct. 2479, 2494 (2006) ("examin[ing] the record independently and carefully to determine whether [the challenged] contribution limits [we]re 'closely drawn' to match the State's interests").

Unlike the Ninth Circuit, however, the Fourth Circuit affirmed the district court's order dismissing Petitioners' case. *Leake*, 524 F.3d at 432; Pet. App. at 1a. The Ninth and Fourth Circuits are thus split on the question of whether a plaintiff may state a claim for relief from a matching funds provision that discourages speech or penalizes the exercise of speech. In light of the many jurisdictions considering public financing schemes, this Court needs to resolve this circuit split and, at the very least, require that district courts considering challenges to such schemes do so in a manner consistent with well-settled principles governing First Amendment law and the Federal Rules of Civil Procedure.

C. Federal Courts Are Mis-Applying The Standard For Motions To Dismiss In Challenges To Public Campaign Finance Schemes.

The Petitioners alleged that "they would have made contributions and expenditures but for the challenged provisions." *Leake*, 524 F.3d at 435; Pet. App. at 9a. They should have been afforded an opportunity to introduce evidence to prove that North Carolina's matching funds provision was the cause of their self-censorship. But the district court simply did not believe Petitioners' factual allegations. In denying Petitioners' motion for preliminary injunction, the district court held: "The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in

political speech, nor does it threaten censure or penalty for such expenditures." *Jackson v. Leake*, 476 F. Supp. 2d 515, 529 (E.D.N.C. 2006), Pet. App. at 52a. After denying Petitioners' motion for preliminary injunction, the district court granted the government's motion to dismiss. *Leake*, 524 F.3d at 432; Pet. App. at 1a.

Petitioners, like the Arizona plaintiffs, should have had an opportunity to actually *prove* that what they alleged was true and the governmental officials being sued should have been required to demonstrate that their promises of the multitude of benefits provided by public financing schemes had some basis in reality, like the Ninth Circuit is requiring the State of Arizona to do in *Amici*'s case.

Whether or not North Carolina's public campaign finance scheme limits or penalizes speech are questions of fact that are readily susceptible of proof. For example, campaign finance reports filed before and after public funding was enacted could be analyzed to discern what affect the system has had on speech. Further, in order to determine if the scheme is narrowly tailored, data could be collected to determine to what extent the public campaign finance scheme advances its purported goals.

Because of the existence of these types of fact questions, which have so far gone unanswered in Petitioners' case, a district court must not ask, "whether a plaintiff will ultimately prevail." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686

(1974). Rather, the district court should ask, "whether the claimant is entitled to offer evidence to support the claims." *Id*. This Court summarized these two principles recently, saying: "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S. Ct. 1955, 1969, n.8 (2007).

In each of the public campaign finance challenges listed above, and in Petitioners' case before the Fourth Circuit, the district court turned these principles on their head. The district courts did not believe the plaintiffs when they said these schemes interfere with and burden their First Amendment rights. *See, e.g., Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 392 ("I hold that the triggers do not actually burden the exercise of political speech"). *Amici* therefore urge this Court to announce clear rules for evaluating motions to dismiss in the public campaign finance context, and to foreclose future district courts from dismissing colorable First Amendment challenges to such schemes.

D. Well-Established First Amendment Jurisprudence Places The Burden On The Government To Justify Infringing First Amendment Rights.

In the context of challenging a public campaign finance scheme's matching funds provision, and its accompanying reporting requirements, a plaintiff makes a colorable First Amendment claim if he or she alleges that the matching funds burden speech by either (1) discouraging constitutionally protected speech; or (2) penalizing the plaintiff for exercising free speech rights. *See Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2771 (2008).

Petitioners' complaint plausibly alleges that North Carolina's matching funds provision chills and penalizes the exercise of their free speech rights. The Petitioners have thus stated a colorable claim and they deserve an opportunity to present evidence to support their claims. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) ("The issue is not whether the Plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim") (citation omitted); *see also FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, ___, 127 S. Ct. 2652, 2659 (2007) (*WRTL II*) ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it").

There is a mistaken consensus developing in the federal district courts, now sanctioned by the Fourth Circuit, that absent a direct dollar limit on the

amount of money that privately financed candidates and independent groups can expend in a political campaign, no valid claim can be stated against matching funds provisions. But the First Amendment's reach goes beyond direct limits, to any law that curtails speech, even laws that limit speech indirectly. *See Smith v. Allwright*, 321 U.S. 649, 664, 64 S. Ct. 757, 765 (1944) (noting that "Constitutional rights would be of little value if they could be . . . indirectly denied") (citation omitted).

In that regard, taking a government's unrebutted assertions of the benefits of a campaign finance law, while disbelieving the allegations of plaintiffs asserting colorable First Amendment claims, and granting a motion to dismiss on this basis, flatly contradicts not only well-settled principles of civil procedure, but also this Court's decisions in *FEC v. Wisconsin Right to Life, Inc.,* ___ U.S. ___, 127 S. Ct. 2652 (2007), and *Randall v. Sorrell,* 548 U.S. 230, 126 S. Ct. 2497 (2006). In each of those cases, this Court took pains to stress that it is the *government's* burden to prove that campaign finance regulations are narrowly tailored. Thus, any analysis of a campaign finance law that a plaintiff alleges reduces, curtails, or diminishes the quantity of political speech in an election, whether by direct or indirect means, must be supported by proof provided by the government and, by its very nature, can almost never be the subject of a successful motion to dismiss.

II. THE FOURTH CIRCUIT'S DECISION AFFIRMING THE DISMISSAL OF PETITIONERS' AS-APPLIED CHALLENGE TO A PUBLIC CAMPAIGN FINANCE SCHEME CONTRADICTS THE FIRST CIRCUIT'S *DAGGETT* DECISION WHICH EXPLICITLY LEFT OPEN FUTURE AS-APPLIED CHALLENGES.

The Petitioners' complaint states both a facial and an as-applied challenge to North Carolina's public campaign finance scheme.

Two Circuit Courts of Appeal have considered pre-implementation facial challenges to matching funds provisions in public campaign finance schemes – and come to differing conclusions as to their constitutional validity. *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (striking down matching funds provision on its face); and *Daggett v. Comm'n on Governmental Ethics and Election Practices,* 205 F.3d 445, 472 (1st Cir. 2000) (upholding matching funds provision on its face).

Considering this unresolved circuit split, and this Court's adoption of *Day*'s logic in *Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2772, the state of the law concerning the facial validity of matching funds provisions is clearly "unsettled." *See infra,* Part III. "[W]here the substantive law is unsettled, it is advisable to hold that a complaint should not be held without merit unless it is absolutely clear that no cause of action could be stated given the actual facts[.]" *Builders Corp. of Am. v. U.S.*, 259 F.2d 766,

771 (9th Cir. 1958). The Petitioners' facial claim should have been allowed to proceed.

Of course, Petitioners' as-applied challenges would not be resolved even if the North Carolina scheme were to be upheld against a facial challenge. *FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, ___ 127 S. Ct. 2652, 2659 (2007) (*WRTL II*); *Citizens for Responsible Gov't State Political Action Comm. v. Buckley*, 60 F. Supp. 2d 1066, 1073 (D. Colo. 1999) (noting that "[a]n 'as applied' challenge . . . asserts that the statute is unconstitutional as applied to a particular plaintiff's speech activity, even though the statute may be valid as applied to other parties"); *Daggett*, 205 F.3d 445, 472 (noting that "[a]lthough we indicate no opinion as to the success that an as-applied challenge would meet in the future, that door remains open").

Yet, since *Daggett*, it appears that every court to consider a complaint alleging that a public campaign finance law's matching funds provision violates the First Amendment has dismissed the case without considering the facts as-applied to the challenged law. *Green Party of Connecticut v. Garfield,* 537 F. Supp. 2d at 392; *Jackson v. Leake*, 476 F. Supp. 2d at 530; *Ass'n of Am. Physicians & Surgeons v. Brewer,* 363 F. Supp. 2d at 1203. The First Circuit in *Daggett* did not purport to resolve future as-applied challenges to public campaign finance schemes. Instead, the First Circuit went out of its way to clarify that its decision

was based purely on the face of Maine's public campaign finance scheme. *Daggett,* 205 F.3d at 472.

The First Circuit emphasized that the door to future as-applied challenges "remains open" and then issued a "call for vigilant monitoring" emphasizing that experience "will be our best teacher." *Id.*

This Court generally disfavors facial challenges because "they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___, 128 S. Ct. 1184, 1191 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 1948 (2004)) (also noting that facial challenges are contrary to the principle that "courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936))). Thus, even if a campaign finance law, on its face, will inhibit some constitutionally protected speech, a plaintiff attempting to establish that "*all* enforcement of the law should therefore be prohibited" carries a "heavy burden." *FEC v. Wisconsin Right to Life, Inc.,* ___ U.S. ___, ___ 127 S. Ct. 2652, 2659 (2007); *see also Crawford v. Marion County Election Bd.*, ___ U.S. ___, ___, 128 S. Ct. 1610, 1621 (2008) (plurality opinion) (noting that plaintiffs who assert a facial claim "that would invalidate the statute in all its applications . . . bear a heavy burden of

persuasion"); *see also Washington State Grange*, ___ U.S. at ___, 128 S. Ct. at 1187 (noting that "factual assumptions . . . can be evaluated only in the context of an as-applied challenge").

This Court should grant review to clarify that in the context of an as-applied challenge to a public campaign finance scheme, it is inappropriate to dismiss the case before a plaintiff is permitted to develop the facts and certainly not before the government has offered something more than naked assertions without any proof of its own.

III. THERE IS A CIRCUIT SPLIT ON WHETHER MATCHING FUNDS PROVISIONS UNCONSTITUTIONALLY BURDEN FIRST AMENDMENT RIGHTS BY SUBSIDIZING THE OPPONENTS OF PRIVATELY FINANCED CANDIDATES AND INDEPENDENT POLITICAL GROUPS BASED ON THEIR DECISION TO EXERCISE THEIR FREE SPEECH RIGHTS.

There is no question that the First Amendment protects the Petitioners' speech. The Petitioners are a judicial candidate and an independent-expenditure committee. Their speech involves the "qualifications of candidates" and is at the core "of the First Amendment freedoms." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233, 109 S. Ct. 1013, 1020 (1989). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id.* (quoting

Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S. Ct. 621, 625 (1971)).

Public campaign finance schemes pay matching funds so that publicly financed candidates can counter speech intended to defeat them. Matching funds provisions thus require privately financed candidates and independent groups to either agree to limit their expenditures or risk triggering the disbursement of public funds to the candidate they oppose. In this way, matching funds provisions impose a penalty on any privately funded candidate or independent group who robustly exercise their First Amendment rights. Many candidates and groups may choose to speak despite the matching funds, but when they speak they "shoulder a special and potentially significant burden." *Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2772 (citing *Day v. Holahan*, 34 F.3d 1356, 1359-1360).

In *Day v. Holahan*, the Eighth Circuit struck down the matching funds provision in Minnesota's public campaign finance scheme. 34 F.3d at 1366. Minnesota's independent expenditure matching law was less burdensome than North Carolina's matching funds provision. Minnesota's law only matched independent expenditures by one-half the amount spent to advocate the publicly financed candidate's defeat (while also increasing that candidate's spending limits). *Id*. at 1359. North Carolina's scheme matches the independent expenditure dollar-for-dollar and increases the government funded candidate's expenditure limit by

the amount of matching funds issued. N.C. Gen. Stat. § 163-278.67(a).

In *Day*, the Eighth Circuit examined the effect on independent expenditures when the government pays matching funds to the political candidates whose election the independent expenditure is designed to defeat. 34 F.3d at 1359. Not surprisingly, the court found that the threat of triggering payments to government funded candidates caused independent groups to self-censor. *Day*, 34 F.3d at 1360. This is because

> [t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. *Id.*

The First Circuit confronted a similar challenge to Maine's matching funds provision, but declined to adopt *Day*'s sound logic. The First Circuit in *Daggett,* 205 F.3d at 472, upheld a matching funds provision nearly identical to the North Carolina provision that Petitioners challenge in this case.

The First Circuit's rejection of *Day* is premised on the oft-quoted proposition that under the First Amendment, individuals "have no right to speak free from response." *Daggett*, 205 F.3d at 464. *Amici* agree that the First Amendment does not protect a right to

speak free from response. But objecting to being "directly responsible for adding to" the campaign coffers of a candidate the speaker opposes is a far cry from asserting a right to speak free from response. *Day*, 34 F.3d at 1360.

The First Circuit failed to account for the true cost to candidates and independent groups of triggering matching funds when they speak out against a government funded candidate: namely, there is a chilling effect on the exercise of constitutionally protected speech when the direct result of that speech is to provide one's opponent with a large cash subsidy.

The governmental purpose justifying matching funds provisions is to equalize the relative financial resources of publicly and privately funded candidates. Public campaign finance schemes intend to level the playing field so that privately financed candidates do not outspend their government funded opponents.[5] But leveling the resources of competing speakers is not a legitimate governmental purpose. Indeed, as this Court recently recognized in *Davis v. FEC*, it is a concept "'wholly foreign to the First Amendment.'"

[5] One candid proponent of King County, Washington's proposed public campaign finance scheme said that matching funds will have "the benefit of discouraging me from raising a whole bunch of money because I know you're going to get the same amount and so it's a level playing field at whatever that amount is." Transcript of Interview with K.C. Councilman Bob Ferguson, http://www.kingcounty.gov/Ferguson/Multimedia/transcript/ComcastNewsmakers.aspx?print=1.

Davis, ___ U.S. at ___, 128 S. Ct. at 2773 (quoting *Buckley v. Valeo,* 424 U.S. 1, 48-49, 96 S. Ct. 612, 649 (1976)).

While *Davis* did not deal with a public campaign finance system, it nonetheless has significant implications for public campaign finance systems. In particular, this Court found that:

> The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices. *Id.* at 2773-2774.

Given that public financing efforts have been presented repeatedly and clearly as a means to "level the playing field" in elections, it is clear that such systems must face significant constitutional scrutiny in light of this Court's explicit language in *Davis.*

The Petitioners have spent, or intend to spend, money on speech advocating the defeat of a government funded candidate, or the election of a privately

financed candidate facing a government funded opponent. The result of those expenditures has been or will be the disbursement of public funds by a government agency directly to the candidate those expenditures were designed to help defeat. Thus, the burden on political speech is even more readily apparent in the Petitioners' case than in *Davis* because there is an immediate and automatic disbursement of funds to the candidate the speaker opposes.

The burden on speech that this Court struck down in *Davis* was the mere opportunity to raise more money under increased contribution limits (and the suspension of the party coordinated expenditure limits). *Davis*, ___ U.S. at ___, 128 S. Ct. at 2765. Unequal contribution limits are certainly a benefit, but not nearly the same benefit as a check cut by the government directly to your opponent's campaign.

This Court, in *Buckley*, held that involuntary limits on a candidate's campaign expenditures are unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 58, 96 S. Ct. 612, 653. "This holding would be rendered meaningless if the government could effectively force a candidate into accepting expenditure limits by providing overwhelming benefits to participating candidates." *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (citing *Buckley*, 424 U.S. at 58, 96 S. Ct. at 653). *Buckley*'s holding is also rendered meaningless if the government can coerce privately funded candidates to abide by expenditure limits by punishing those who refuse to participate in public campaign finance schemes. *Id.* at 948.

Under matching funds provisions, the harder a privately financed candidate works at fundraising, the more his government funded opponent benefits. Matching funds give government funded candidates a free ride on their privately financed opponents' coattails. The result is that privately funded candidates face two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.[6]

Any limitation upon private expenditures for political speech, whether direct or indirect, is not compatible with the First Amendment's free speech guarantee. Matching funds are designed to limit both candidate speech and independent expenditures. Matching funds thus compel privately financed candidates to abide by the same expenditure limits as government funded candidates and punish those candidates or independent groups who dare to robustly exercise their free speech rights.

[6] North Carolina's increased reporting requirements tie up privately financed candidates' time and resources without making the political process more transparent. The only purpose of the reporting requirements is to facilitate equalization payments to government-subsidized candidates.

CONCLUSION

The Petitioners have stated a colorable First Amendment claim that North Carolina's public campaign finance scheme's matching funds provision discourages and penalizes their free speech rights. In light of this Court's recent and repeated emphasis on the importance of developing a factual record in election law cases, it was wholly inappropriate for the district court to dismiss Petitioners' as-applied challenge without requiring the government to prove its assertions as to the compelling need for the law or allowing Petitioners the opportunity to conduct discovery and build their fact record. This Court should grant the Petition and strike down the North Carolina law as inconsistent with fundamental First Amendment rights. If this Court declines to go that far, however, the Fourth Circuit's decision should be vacated and the case remanded for further proceedings consistent with the basic requirements of the First Amendment and the Federal Rules of Civil Procedure.

Respectfully submitted,

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[Names Omitted In Printing]

July 21, 2008

Mr. William Castner, Executive Director
Assembly Democratic Office
P.O. Box 098
Trenton, New Jersey 08625

Dear Mr. Castner:

You have asked for a legal opinion as to the implications of the recent decision of the United States Supreme Court in *Davis* v. *Federal Election Commission*, 554 *U.S.* ___ (June 26, 2008)[1], for certain provisions of Assembly Bill No. 100[2] that would provide a General Assembly candidate who participates in a

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[1] 2008 *U.S. Lexis* 5267.

[2] A-100 was reported from the Assembly State Government Committee on June 12, 2008 and referred to the Assembly Budget Committee.

public financing pilot program with additional public funds ("rescue money") when a nonparticipating opponent receives contributions that are greater than the maximum amount of public funds the participating candidate may receive or when certain independent expenditures benefit the nonparticipating candidate or unfavorably affect the participating candidate.

For the reasons set forth below, it is our opinion that, if Assembly Bill No. 100 is enacted into law in its current form, a reviewing court, relying on the Supreme Court's *Davis* decision, would likely find the rescue money provisions to violate the First Amendment.

A-100 would enact "The 2009 New Jersey Fair and Clean Elections Pilot Project Act" to establish a temporary program for the public financing of candidates seeking nomination and election to the General Assembly from eight legislative districts in 2009. The bill provides financing for all certified candidates at various rates depending on political party affiliation or non-affiliation, and whether a candidate is running unopposed. Under the bill, a political party candidate will receive $37,500 to run in the primary election if the candidate raises at least 400 qualifying contributions of $10 each before May 15, 2009 and an additional $37,500 if the candidate raises a total of 800 such contributions before that date. In the general election, a political party candidate who was nominated at the primary and received at least 400 qualifying contributions before August 14, 2009 will

receive $37,500 to run in the general election and an additional $37,500 if the candidate raises a total of 800 such contributions before that date. A candidate who raises between 400 and 800 contributions will receive a proportional share of such funding. An unopposed party candidate will receive half of these amounts. The same or lesser amounts are available under similar circumstances to certified candidates who are members of political groups permitted to register their members by use of a voter registration form or that are named on a political party declaration form and to other candidates. Section 12.

The bill provides "rescue money" to a certified candidate, pursuant to a determination by ELEC, who is running against a candidate who does not accept public financing, when the opposing candidate has received contributions greater than the maximum amount that the certified candidate can receive in the primary election or the general election. The rescue money will be provided to a certified candidate in increments of at least $1,000, and will not exceed $75,000 per election for a major party candidate or a member of a political group that is permitted to register its members by use of a voter registration form or that is named on a political party declaration form, and in $500 increments not to exceed $37,500 for other candidates. The bill provides similar amounts of rescue money to a certified candidate whose campaign is being negatively affected by independent expenditures, as determined by ELEC, in a primary election or general election. Section 13.

In *Buckley* v. *Valeo*, 424 *U.S.* 1 (1975), the leading case in the area of the abridgment of freedom of speech and association by the regulation of campaign finance, the United States Supreme Court considered a constitutional challenge to the Federal Election Campaign Act (FECA) Amendments of 1974. The amendments strictly limited the amount of money individuals were permitted to contribute and spend upon campaigns for federal office. The court noted that limitations on the amount of campaign contributions restrict the contributor's freedom of political association. It declared that the right of association is a fundamental right and that any action which may have the effect of curtailing the freedom to associate is subject to heightened scrutiny. However, even a significant interference with protected rights of political association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. In *Buckley*, the court determined that the law's primary purpose of limiting the actuality or appearance of corruption resulting from large financial contributions was sufficiently strong to justify the infringement on individual rights resulting from the limits on the amount of campaign contributions. However, *Buckley* rejected limits on campaign expenditures because such limits infringed upon freedom of association but did not present the same risk of corruption. In addition, the *Buckley* decision rejected the argument that limits on the expenditure of a candidate's personal

funds could be justified on the grounds that these limits equalized candidates' financial resources.

In the campaign finance cases decided since *Buckley*, the United States Supreme Court has made it clear that statutory limitations on campaign finance infringe on fundamental First Amendment rights and must be subjected to close scrutiny, and that the only justification for infringement of First Amendment rights is the prevention of actual or perceived corruption.[3]

In *Davis*, the United States Supreme Court considered a First Amendment challenge to the so-called "Millionaire's Amendment", part of the Bipartisan Campaign Reform Act of 2002. Federal law limits the amount of a contribution that a candidate for the House of Representatives may accept from an individual donor to $2,300. It also provides that a contribution may not be accepted from an individual whose aggregate contributions to all candidates during an election cycle have reached the legal limit on such contributions of $42,700. In addition, a candidate may not accept general election coordinated expenditures by a national or state political party committee that exceed $40,900. However,

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[3] *First National Bank of Boston* v. *Bellotti*, 435 *U.S.* 765 (1978); *Citizens Against Rent Control* v. *Berkeley*, 454 *U.S.* 290 (1981); *California Medical Association* v. *Federal Election Commission*, 453 *U.S.* 182 (1981); *Nixon* v. *Shrink Missouri Government*, 528 *U.S.* 377 (2000); *McConnell* v. *Federal Election Commission*, 540 *U.S.* 93 (2003).

under the "Millionaire's Amendment", when as a result of a candidate's expenditure of personal funds, the "opposition personal funds amount" (OPFA – the amount determined by adding personal funds expended to 50% of the funds raised for the election measured at designated dates in the year preceding the election) exceeds a certain amount ($350,000), the limit on contributions to the "non-self-funding" candidate is increased from $2,300 to $6,900 and that candidate may accept coordinated party expenditures without limit.

Davis, a "self-funding" congressional candidate, asserted that by giving a fundraising advantage to his "non-self-financing" opponent when Davis' expenditure of personal funds exceeded the threshold amount, the Millionaire's Amendment burdened Davis' ability to expend personal funds in violation of the First Amendment. The court found that while the law did not expressly limit the expenditure of a candidate's personal funds, it imposed an "unprecedented penalty on any candidate who robustly exercises" the candidate's First Amendment right to expend his own funds by creating "fundraising advantages for opponents in the competitive context of electoral politics."[4] This burden on the expenditure of personal funds caused a candidate to "shoulder a special and potentially significant burden"[5] if he chose

[4] *Davis*, No.07-320, slip op. at 12-13

[5] *Id.* at 12

to spend personal funds above the threshold amount. Because the burden was substantial, the provision must be justified by a compelling state interest and narrowly tailored to further that interest. The court reaffirmed *Buckley's* finding that limits on the expenditure of personal funds do not reduce the risk of actual or perceived corruption. The only government interest promoted by the impairment of the ability to expend personal funds was in equalizing the relative financial resources of candidates, an interest that the court found insufficient to justify the infringement of First Amendment rights. Accordingly, the court held that the "Millionaire's Amendment" was unconstitutional.[6]

It is noteworthy that, in *Davis*, the Supreme Court cited with approval *Day* v. *Holahan*, 34 *F.3d* 1356 (8th Cir. 1994) which held that a Minnesota law increasing a candidate's expenditure limits and eligibility for public funds based on independent expenditures against the candidate's candidacy impermissibly burdened the speech of those making independent expenditures.[7] The statute at issue in

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[6] A dissenting opinion by Justice Stevens, in which three other justices joined, argued that any infringement on First Amendment rights resulting from the Millionaire's Amendment was justified by Congress's desire to reduce the importance of wealth as a criterion for public office and to counter the perception that seats in Congress are available for purchase by the wealthiest bidder.

[7] It is also noteworthy that the Supreme Court did not discuss other decisions from various federal circuit courts of

(Continued on following page)

that case was similar to the rescue money provisions of A-100 that apply to independent expenditures.

In *Buckley*, the court had expressly upheld a voluntary program for the public financing of campaigns for elective office against a First Amendment challenge because the purpose of public funding is 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, goals vital to a self-governing people." *Buckley*, 424

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appeal that were relied upon in the decision of the federal district court in *Davis* v. *Federal Election Commission*, 501 *F.Supp.2d* 22 (D.D.C. 2007); *Daggett* v. *Comm'n on Gov't Ethics and Election Practices*, 205 *F.3d* 445 (1st Cir. (2000), upholding a provision of the Maine Clean Election Act providing public matching funds to a candidate participating in a public financing program when independent expenditures are made against him or on behalf of his nonparticipating opponent; *Gable* v. *Patton*, 142 *F.3d* 940 (6th Cir. 1998), upholding a waiver of voluntary expenditure limits for a candidate participating in public matching funds program when a nonparticipating candidate raised funds in excess of that expenditure cap; *Rosensteil* v. *Rodrieguez*, 101 *F.3d* 1544 (8th Cir. 1996), upholding a provision of a public financing program that raised the voluntary expenditure cap when a privately financed candidate exceeded that amount; and *Vote Choice, Inc.* v. *DiStefano*, 4 *F.3d* 26 (1st Cir.1993), upholding a statute allowing publicly-funded candidates who agreed to an expenditure limit to accept $2,000 contributions while limiting nonparticipating candidates to $1,000 contributions. See also *Green Party of Connecticut* v. *Garfield*, 537 *F.Supp.2d* 359 (D. Conn. 2008) upholding against First Amendment challenge a statute providing additional public funds to a candidate participating in a public financing program if outspent by a non-participating candidate or by any other non-candidate.

U.S. at 92-93. However, the only purpose served by providing additional public funds to a candidate participating in a public financing program in order to counter an opponent's expenditures above a threshold amount, or independent expenditures that have a negative effect, is to create a more level playing field by equalizing funding between candidates. Like the increased limits at issue in *Davis*, which discouraged a self-financing candidate's expenditure of personal funds, the rescue money provisions of A-100 would deter freedom of expression by a non-participating candidate or a group making an independent expenditure without sufficient justification because rescue money does not address the risk of actual or perceived corruption. The rescue money provisions of A-100 would not cap the nonparticipating candidate's expenditures, but these provisions would sufficiently burden a candidate's ability to spend his or her campaign funds[8] that they would likely be successfully challenged under the rationale of *Davis*. Thus, while under *Buckley* a voluntary public financing program is constitutional, it appears that under *Davis* providing additional public funds to a participating candidate in response to expenditures

[8] In New Jersey, a candidate's personal funds used on behalf of the candidate's campaign must be deposited into the campaign depository and reported as either contributions or loans in the same manner as other contributions or loans. *ELEC Compliance Manual for Candidates*. Thus, a candidate's campaign funds may include both personal funds and donor contributions.

by a non-publicly funded opponent or an independent group above a threshold amount is likely unconstitutional.

In conclusion, it is our opinion that if Assembly, No. 100 is enacted into law in its current form, a reviewing court would likely find the rescue money provisions to violate the First Amendment.[9]

Very truly yours,

Albert Porroni
Legislative Counsel

By: /s/ Peter J. Kelly
Peter J. Kelly
Principal Counsel

AP:K/jb

c. Assemblyman Greenwald, Assemblywoman Handlin, Assemblyman Johnson and Assemblywoman Vainieri Huttle pursuant to P.L.1999, c.244.

[9] It should be noted that when a court determines that a statutory provision is unconstitutional, the court will sever that provision and give effect to the remainder of the law to the extent that it can do so without impairing the principal legislative objective. N.J.S.A.1:1-10; *Trade Waste Management Ass'n, Inc.* v. *Hughey*, 780 *F.2d* 221 (3d Cir. 1985). The main purpose of A-100 is to establish a public financing pilot program for certain legislative candidates. Accordingly, it would appear likely that a reviewing court would sever the rescue money provisions of A-100 from the remainder of the legislation.