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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899

STATE OF WEST VIRGINIA ex rel. ALLEN H.  
LOUGHRY II, candidate for the Supreme Court  
of Appeals of West Virginia,

*Petitioner,*

v.

NATALIE E. TENNANT, in her official capacity  
as West Virginia Secretary of State; NATALIE E.  
TENNANT, GARY A. COLLIAS, WILLIAM N.  
RENZELLI, and ROBERT RUPP, in their official  
capacities as members of the West Virginia State  
Election Commission; GLEN B. GAINER III, in his  
official capacity as West Virginia State Auditor;  
and JOHN PERDUE, in his official capacity as  
West Virginia State Treasurer,

*Respondents.*

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REPLY OF THE RESPONDENTS TO THE AMICUS BRIEFS

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REPLY OF THE RESPONDENTS TO THE AMICUS BRIEFS

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The Secretary of State and the State Election Commission (hereafter “SEC Respondents”) here reply to the *amicus curiae* briefs filed by Michael Callaghan and the Attorney General. Said briefs argue that the Supreme Court has already rejected the central premises upon which Petitioner and the SEC Respondents rely in their defense of the “matching funds” provisions<sup>1</sup> of the West Virginia Supreme Court of Appeals Public Financing Pilot Program (hereafter “Pilot Program”).

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<sup>1</sup>West Virginia Code § 3-12-11, subsections (e), (f), and (g), require the SEC to release additional public funds to a “certified” (i.e., publicly funded) candidate for the Supreme Court of Appeals to match the funds expended by an opposing candidate plus any third parties supporting that candidate, up to a statutory maximum (\$700,000).

However, in so arguing, the *amicus* briefs either recharacterize those premises (setting up strawmen easily toppled) or wishfully expand the scope of the Supreme Court decisions upon which they rely.

There are three central premises that are relied upon in defense of the “matching funds” provisions:

1) Maintaining public respect for the impartiality and integrity of the judiciary is a compelling State interest<sup>2</sup> that can justify imposing burdens on campaign expenditures.

2) Consequently, whether the burdens imposed by “matching funds” on the expenditures of opposing candidates and third parties in a judicial campaign are justified by that State interest presents a balancing inquiry that is fundamentally distinct from that applied by the Supreme Court in its recent decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2806 (2011), which decision did *not* consider the State’s interest in ensuring the credibility of its judiciary.

3) The “matching funds” provisions are narrowly tailored to further that compelling State interest without imposing any ban or limitation on independent expenditures akin to those condemned in *Citizens United v. Federal Election Commission*, 558 U.S. 50, 130 S. Ct. 876 (2010).

**A. THE SUPREME COURT’S *CAPERTON* DECISION RECOGNIZED THE ANTAGONISM BETWEEN INDEPENDENT EXPENDITURES AND A “STATE INTEREST OF THE HIGHEST ORDER”–JUDICIAL INTEGRITY.**

The *amicus* briefs argue that Petitioner and the SEC Respondents relied upon *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009), for the legal proposition that campaign expenditures may be regulated to avoid the due process issue that arose in *Caperton*. Of

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<sup>2</sup>For purposes of this Reply Brief, Respondents assume that “strict scrutiny” is the applicable balancing test, and maintain that the “matching funds” provisions meet this test.

course, such reliance would be misplaced. As noted in *Citizens United*, 130 S. Ct. at 910, no First Amendment issue was before the Court in *Caperton* and the regulation of campaign expenditures was not addressed.

However, *Caperton* did recognize that third-party campaign expenditures *do* create an objectively reasonable perception of bias.<sup>3</sup> *Caperton* also recognized that public respect for the judiciary's impartiality is a "state interest of the highest order."<sup>4</sup> It was these latter two propositions for which *Caperton* was cited by Petitioner and the SEC Respondents.

That the State's interest in an impartial judiciary, perceived as such, is sufficiently compelling to justify narrowly tailored burdens on speech *is* addressed by the Supreme Court in entirely different decisions. For instance, the Supreme Court, applying strict scrutiny, rejected a facial challenge to Nevada's Disciplinary Rule that precluded attorneys from making public comments that created "a substantial likelihood of materially prejudicing" a pending case. The Rule survived "strict scrutiny" under the First Amendment because it served a compelling State

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<sup>3</sup> "We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." 556 U.S. at 883-884, 129 S. Ct. at 2263-64.

<sup>4</sup> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring).

556 U.S. at 889, 129 S. Ct. at 2266-67.

interest—“to protect the integrity and fairness of a state’s judicial system.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745 (1991). *Cf. In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959) (noting that lawyers in pending cases were subject to restrictions on speech); *Sheppard v. Maxwell*, 384 U.S. 333, 361-63, 86 S. Ct. 1507, 1521–22, 16 L. Ed. 2d 600 (1966) (summarizing restrictions that may be imposed on the speech of trial participants).

Thus, *Caperton* may properly be relied upon to establish the antagonism between third-party expenditures and the State’s compelling interest in an impartial judiciary.

**B. JUDICIAL CAMPAIGNS ARE DISTINCT FROM EXECUTIVE AND LEGISLATIVE RACES DUE TO THE STATE’S COMPELLING INTEREST IN PUBLIC RESPECT FOR AN IMPARTIAL JUDICIARY.**

The amicus briefs mistakenly assert that the majority opinion in *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002), rejected the premise that the State’s interest in the public financing of judicial elections is distinct from its interest in the financing of executive and legislative races. The *amici* quote the majority’s criticism of Justice Ginsberg’s dissent as “greatly exaggerating the difference between judicial and legislative elections.” 536 U.S. at 784, 122 S. Ct. at 2549. However, this discussion had nothing to do with campaign finance, much less public financing, nor did it concern the clearly distinct state interest in an impartial judiciary. Indeed, Justice Kennedy’s concurring opinion was careful to emphasize this point. “Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. *Nothing in the Court’s opinion should be read to cast doubt on the vital importance of this state interest.*” 536 U.S. at 793, 122 S. Ct. at 2544 (emphasis supplied).

Rather, the majority's discussion, and its disagreement with Justice Ginsberg, concerned the First Amendment right of a judicial candidate to "announce his or her views on disputed legal or political issues." Minnesota defended its right to prohibit such speech as furthering its interest in maintaining the impartiality of the judiciary. The majority did *not* reject the asserted state interest, as the amicus briefs imply. Rather, the "announce" rule was stricken because *it did not further that interest*.

The *White* Court was careful to point out that "impartiality," in the context of adjudicating, means lack of favoritism *towards a particular party*. "Impartiality" does *not* suggest that a judge (or judicial candidate) should have no preconceived views regarding the law, or should not publicly discuss those views.

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

536 U.S. at 776-77, 122 S. Ct. at 2535-36.

Thus, with respect to expressing their views on "disputed legal or political issues," the Supreme Court held that judicial candidates cannot be restrained by the State any more than a legislative candidate. This holding, and the majority's disagreement with Justice Ginsberg, did *not* concern whether judicial candidates were thereby free to favor their contributors or third-party supporters. By so clearly articulating this distinction, the opinion strongly suggests that the State *could* regulate speech that "announced" such favoritism. Thus, while the majority in *White*



perceived no meaningful difference between legislative and judicial campaigns regarding the right of candidates to speak on “disputed legal or political issues,” it would have found otherwise had the issue been one of favoritism towards the candidate’s supporters—the sort of bias that is intolerable in the judiciary, but not so in legislative races. *Cf. Nevada Com’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J. concurring) (“The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, . . . may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.”).

**C. NEITHER *CITIZENS UNITED* NOR *BENNETT* PRECLUDE MATCHING FUNDS IN A JUDICIAL CAMPAIGN.**

The amicus briefs claim that the Supreme Court rejected the above arguments when it held that Montana’s ban on corporate independent expenditures violated the Supreme Court’s holding in *Citizens United v. Federal Election Comm’n*, 558 U.S. 50, 130 S. Ct. 876 (2010). *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012). Not so. Montana’s ban on corporate expenditures applied to *all* campaigns, whether legislative, executive or judicial. The Montana Legislature made no distinction, either in its findings (or rather lack thereof) or its statutory language, between judicial and other campaigns. In upholding the ban, the Montana Supreme Court sought to distinguish *Citizens United*, in part because *Citizens United* was limited to executive and legislative campaigns. The State of Montana, before the Supreme Court of the United States, made the same argument. However, the Supreme Court of the United States did not discuss this purported “distinction,” lumping it in with all others pressed by Montana (such as its history of corruption in politics) and stating simply, “Montana’s arguments in support of the judgment below either were

already rejected in *Citizens United*, or fail to meaningfully distinguish that case.” 132 S. Ct. at 2491. No more was said. Judicial campaigns were not discussed at all.

Of course, the reason that Montana could not “meaningfully distinguish” its statutory ban from that at issue in *Citizens United* was that Montana’s ban applied to *all* campaigns, not just judicial campaigns. The state’s putative interest in public respect for the impartiality and credibility of its judiciary (an interest not expressed in Montana’s statutes) was neither credible nor meaningful—it was a post-hoc rationalization to avoid the application of *Citizens United* in Montana.

By contrast, West Virginia 1) does *not* ban independent corporate expenditures, 2) carefully researched judicial campaign spending, 3) made explicit legislative findings (based on evidence) that the Pilot Program would enhance the public’s perception of the integrity and credibility of the judiciary<sup>5</sup>, 4) limited the Pilot Program to the judiciary, and 5) did not attempt to justify it based on quid pro quo corruption or the appearance of corruption—the primary justifications asserted by Montana and rejected by the Supreme Court in both *Citizens United* and *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2806 (2011), as not implicated by independent or personal campaign expenditures.

The amicus briefs also suggest that a recent district court decision rejected the arguments made here. *North Carolina Right to Life Political Action Committee v. Leake*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1825829, 6 (E.D. N.C. 2012). However, the arguments made here were *not* made by North Carolina. For reasons unique to North Carolina, it offered no defense on the merits. “In the instant case, defendants offer no argument that the North Carolina matching funds statute is distinguishable from the Arizona law struck down in *Bennett*; nor do defendants offer any argument

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<sup>5</sup> West Virginia Code § 3-12-2 at subsections (7), (8), and (9).

that the North Carolina matching funds statute does not impose a substantial burden on First Amendment speech.” 2012 WL 1825829 at 6. Consequently, the district court did *not* address the compelling state interest asserted here—public respect for the credibility, integrity and impartiality of the judiciary—but rather only those interests asserted by Arizona in *Bennett* (2012 WL 1825829 at 6-7), none of which are relied upon by West Virginia in this case.

Why didn’t North Carolina attempt a defense? Perhaps because, beginning with the 2008 elections, a statutory amendment expanded North Carolina’s public funding to include three executive offices. N.C. Gen. Stat. § 163–278.95 (2007). Thus, like Montana, North Carolina could not credibly maintain that its interest in public financing (including matching funds)<sup>6</sup> was for the purpose of enhancing public respect for the judiciary.

**D. WHETHER TO AWARD ATTORNEY FEES SHOULD BE DETERMINED AFTER SUCH A MOTION IS FILED.**

In a footnote at the end of his Petition, Mr. Loughry asks that this Court require Respondents to pay his attorney fees, citing *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W. Va. 650, 458 S.E.2d 88 (1995). As noted in that case, West Virginia does not award attorney fees simply because a party prevails in a mandamus action.

[T]he showing of a ‘clear right’ to a writ of mandamus ‘does not automatically shift a petitioner’s costs and attorneys’ fees onto the public officer involved. Although some disingenuous hindsight rule would be easy to apply, accurate predictions of court decisions are not a requirement for’ public officers. *State ex rel. McGraw v. Zakaib*, 192 W.Va. 195, 198, 451 S.E.2d 761, 764 (1994).

Highlands, 193 W. Va. at 653, 458 S.E.2d at 91.

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<sup>6</sup>North Carolina Gen. Stat. § 163–278.99B (2007).

Should Petitioner prevail, he may file a motion for fees, as did the petitioner in *Highlands*, that addresses the factors that govern whether fees should be awarded and their amount.<sup>7</sup>

**E. CONCLUSION.**

WHEREFORE, the Secretary of State and the State Election Commission pray that this Court determine that the matching funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Pilot Program are constitutional.

*Respectfully submitted,*

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capacity as West Virginia Secretary of State;  
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ROBERT RUPP, in their official capacities  
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Election Commission, *Respondents*,

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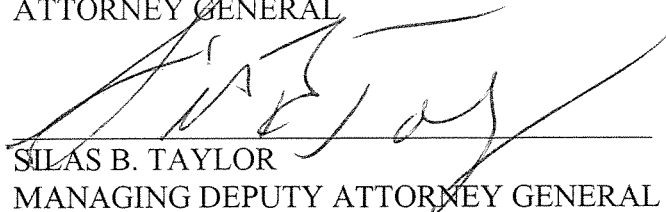
<sup>7</sup> As noted in *Highlands*, “attorney’s fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command.” *Highlands* at 650, 458 S.E.2d at 92 (citations omitted).

In the first context, a presumption exists in favor of an award of attorney’s fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney’s fees will be allowed. In the second context, there is no presumption in favor of an award of attorney’s fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner. This case clearly falls in the latter category, and we must now apply the factors listed above to determine the appropriateness of a fee award.

*Id.*

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**CERTIFICATE OF SERVICE**

I, Silas B. Taylor, counsel for the Respondents Secretary of State and the State Election Commission, do hereby certify that true copies of the “*Reply of the Respondents to the Amicus Briefs*” were served on all parties by depositing said copies in the United States mail, with first-class postage prepaid, on this 31st day of August, 2012, addressed as follows:

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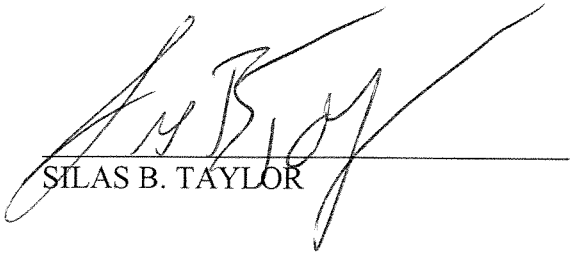
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