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;
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.

BRIEF AMICUS CURIAE OF DARRELL V. McGRAW, JR., WEST VIRGINIA ATTORNEY GENERAL

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Comes now Darrell V. McGraw, Jr., West Virginia Attorney General, by his Managing Deputy, Barbara H. Allen, and submits the within Brief Amicus Curiae in response to the Court's Order which invited him to file a brief and make oral argument in support of the views expressed in his Opinion of July 28, 2011.

The Attorney General does not support or oppose any party in this litigation. His sole purpose in filing this Brief Amicus Curiae is to present this Court with legal argument on the issue

presented in this case: Are the matching funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-11(e)- (i), unconstitutional in light of the United States Supreme Court's opinions in *Citizens United v. Federal Election Commission*, 558 U.S. __, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, 564 U.S. __, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011), and *American Tradition Partnership, Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al.*, __ U.S. __, 132 S. Ct. 2490, __ L. Ed. 2d __ (2012).

In this regard, the recent observation of the United States Court of Appeals for the Seventh Circuit provides an instructive overview: "Because '[p]olitical speech is indispensable to decisionmaking in a democracy' and '[a]ll speakers use money amassed from the economic marketplace to fund their speech,' government-imposed burdens on political expenditures suppress speech quite directly and raise core First Amendment concerns. Accordingly, laws that burden spending for political speech – whether candidate spending or independent spending – get strict scrutiny and usually flunk." *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (citations omitted).

I.

RELEVANT STATUTORY PROVISIONS AND THE OPERATIVE FACTS

West Virginia Code §§ 3-12-11(e)-(i) provide:

> (e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this

section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.

(f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating candidate, either alone or in combination with the nonparticipating candidates's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.

(g) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission shall authorize the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.

(h) Additional funds released under this section to a certified candidate may not exceed $400,000 in a primary election and $700,000 in a general election.

(i) In the event the commission determines that additional funds beyond the initial distribution are to be released to a participating candidate pursuant to the provisions of the section, the commission, acting in concert with the State Auditor's office and the State Treasurer's office, shall cause a check for any such funds to be issued to the candidate's campaign depository within two business day.

In their respective briefs, the parties have set forth the facts of this matter in detail. In the Memorandum of Law appended to the Petition for Writ of Mandamus, at pp. 8-9, the Petitioner informs this Court that on or about July 10, 2012, non-participating candidate Justice Robin Davis's campaign reported to the Secretary of State that her campaign had spent $494,471.46 during the

general election period.[1] Thereafter, pursuant to the provisions of West Virginia Code § 3-12-11(e), the Petitioner requested that the West Virginia State Election Commission issue a check to his campaign depository for matching funds in the amount of $144,471.46. The Commission formally determined by a 4-0 vote that Justice Davis's spending had exceeded the statutory $420,000.00 threshold, and that the statutory condition for the release of funds had therefore been satisfied; however, by a 2-2 vote, the Commission deadlocked on a motion to authorize the actual release of the funds.

This litigation followed.

II.

OVERVIEW OF THE LAW

In his Opinion of July 28, 2011, the Attorney General analyzed the statutes in question in light of the then-recently decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, 564 U.S. __, 131 S. Ct. 2806, 180 L. Ed.2d 664 (2011). In this *Amicus Curiae* Brief he will expand his analysis, discussing several cases decided prior to *Bennett* and several that have followed.

In cases dealing with a state's attempt to regulate the expenditure of funds in an election campaign, all roads lead back to the United States Supreme Court's landmark opinion in *Citizens United v. Federal Election Commission*, 558 U. S. __, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). In *Citizens United*, the Court held that any state-imposed regulatory requirement is subject to the strict

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[1]Significantly, for purposes of the legal analysis that follows, Justice Davis is one of three non-participating candidates. At least as of the time the Petitioner filed his petition for extraordinary relief, the other two non-participating candidates had not reported expenditures which would trigger the release of additional funding to the Petitioner.

scrutiny test, which ". . . requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.*, 558 U. S. __, 130 S. Ct. at 876, 898, 175 L. Ed.2d at 753. *See also Davis v. Fed. Election Comm'n*, 554 U. S. 724, 744 (2008) (to withstand strict scrutiny, ". . . the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights") (internal citation omitted).

The Petitioner concedes that at least with respect to non-judicial elections, *Citizens United* stands for the proposition that ". . . nothing short of *actual quid pro quo corruption* is sufficient to justify burdening First Amendment rights." (Memorandum of Law appended to the Petition for Writ of Mandamus, at p. 23, emphasis in original.)[2]

Citizens United was a logical progression from the Court's opinion in *Davis v. Federal Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed.2d 737 (2008), which struck down 2 U.S.C. § 441a-1 of the Bipartisan Campaign Reform Act of 2002. The statute provided, in relevant part, that the limit on individual contributions which non-self-financing candidates could receive would be raised if their opponents' expenditure of personal funds exceeded a certain amount.

The Court struck down § 441a-1, specifically rejecting ". . . the argument that the expenditure cap could be justified on the ground that it served '[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office.' This putative interest, we noted was 'clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights.'" *Davis v. Federal Election Comm'n, supra*, 554 U.S. at 738, quoting *Buckley v. Valeo*, 424 U. S. 1,

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[2]In light of *American Tradition Partnership, Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al.*, __ U. S. __, 132 S. Ct. 2490, __ L. Ed. 2d __ (2012), it appears that even a state's well-documented history of actual quid pro quo corruption is an insufficient justification for restricting First Amendment rights in the election process. *See* p. 9-10, *infra*.

53. The Court went on to hold that the burden on First Amendment rights was not justified "... by *any* governmental interest in eliminating corruption or the perception of corruption." *Id.*, 554 U. S. at 740 (emphasis supplied). Neither was a burden on those rights justified by any governmental interest in leveling the playing field between wealthy candidates and their less wealthy opponents, as "'... the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" *Id.*, 554 U. S. at 741-42, quoting *Buckley v. Valeo, supra*, 424 U. S. at 48-49.

Thereafter, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, 564 U.S. __, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011), the Court examined the Arizona Citizens Clean Elections Act, which created a public financing system to fund the primary and general election campaigns of candidates for executive and legislative state offices. Speaking for a majority of the Court, Chief Justice Roberts summed up the case as follows:

> Under Arizona law, candidates for state office who accept public financing can receive additional money from the State in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.

Arizona Free Enterprise Club, supra, 564 U.S. __, 131 S. Ct. at 2813, 180 L. Ed.2d at 671-72.

The Court specifically rejected Arizona's arguments that the matching funds provisions served two compelling purposes: "leveling the playing field" and combating corruption. "We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the

playing field' that can justify undue burdens on political speech." *Id.*, 564 U.S. __, 131 S. Ct. at 2825, 180 L. Ed. 2d at 685. "Even if the ultimate objective of the matching funds is to combat corruption – and not "level the playing field" – the burdens that the matching funds provision imposes on protected political speech are not justified." *Id.*, 564 U.S. __, 131 S. Ct. at 2826, 180 L. Ed. 2d at 686.

As set forth in the July 28, 2011 Opinion of the Attorney General, the Court proceeded to reject every argument – save one, discussed at page 9-10, 15-18, *infra* – made by Arizona in support of its matching funds law.

The Court first held, as a threshold matter, that "the matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s] . . .,'" and that "'the vigorous exercise of the right to use personal funds to finance campaign speech' leads to 'advantages for opponents in the competitive context of electoral politics.'" *Id.*, 564 U.S. __, 131 S. Ct. at 2818, 180 L. Ed. 2d at 677, quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2008).

Second, the Court held that each dollar spent by a privately funded candidate in excess of the initial public financing cap "can create a multiplier effect . . . [because] each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate's publicly financed opponents." *Id.*, 564 U.S. __, 131 S. Ct. at 2819, 180 L. Ed. 2d at 677-78.

Third, the Court held that the privately funded candidate is at a severe disadvantage in terms of strategy and coordination of expenditures, because "[e]ven if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote

the privately financed candidate's election – regardless whether such support was welcome or helpful – could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit." *Id.*, 564 U.S. __, 131 S. Ct. at 2819, 180 L. Ed. 2d at 678.

Fourth, the Court held that the burden on independent expenditure groups was potentially greater than the burden on the privately funded candidate, because it could only avoid triggering matching funds by "chang[ing] its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether." *Id.*, 564 U.S. __, 131 S. Ct. at 2819-20, 180 L. Ed. 2d at 679. This, the Court concluded, burdened the fundamental right of a speaker (the independent expenditure group) "to choose the content of [its] own message." *Id.*

Fifth, the Court held that Arizona's avowed intent to foster free, open and robust debate was not a compelling state interest, because "even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups." *Id.*, 564 U.S. __, 131 S. Ct. at 2821, 180 L. Ed. 2d at 680.

Sixth, the Court was unpersuaded by Arizona's argument that if providing all the available money to publicly funded candidates up front does not burden speech, then providing it incrementally would not do so either and serves the purpose of ensuring that public funding is not under- or over-distributed. The Court held that "[t]hese arguments miss the point. It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided – in direct response to the political speech of privately financed candidates and independent expenditure groups." *Id.*, 564 U.S. __, 131 S. Ct. at 2824, 180 L. Ed. 2d at 683.

Seventh, the Court gave short shrift to the argument made by the United States as *amicus curiae* that providing funds to a publicly funded candidate does not make a privately funded candidate's speech any less effective, and thus does not substantially burden speech. "Of course it does. One does not have to subscribe to the view that electoral debate is zero sum . . . to see the flaws in the United States' perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted." *Id.*, 564 U.S. __, 131 S. Ct. at 2824, 180 L. Ed. 2d at 684.

In the recent case of *American Tradition Partnership, Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al.*, __ U. S. __, 132 S. Ct. 2490, __ L. Ed. 2d __ (2012), the Court reviewed the Montana Supreme Court's attempt to distinguish *Citizens United* on the ground that Montana's history of "rough contests for political and economic domination" gave the State a "unique and compelling interest[] in limiting corporate influence on elections."[3] In the underlying case, *Western Tradition Partnership, Inc. v. Attorney General*, 363 Mont. 220, 271 P.3d 1 (2011), the Montana court had reviewed an extensive evidentiary record detailing 100 years of corruption, influence-peddling and the outright 'purchase' of legislators, governors and judges in the state. Significantly, pages of the decision were devoted to what the court considered to be ". . . a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in

[3]The 1912 Montana law at issue barred direct corporate contributions to political parties and candidates, a legislative response to the election tactics of so-called "copper kings." One commentator has recalled the comment of Mark Twain that "[a particular copper baron] is said to have bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana it no longer has an offensive smell." Rachel Weiner, "Supreme Court's Montana Decision Strengthens Citizens United," *The Fix* (June 25, 2012).

preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence." *Western Tradition Partnership*, 363 Mont. at __, 271 P.3d at 12.

The United States Supreme Court granted certiorari and summarily reversed, holding that "[t]he question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. *See* U. S. Const., Art. VI, cl. 2. Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *American Tradition Partnership*, __ U. S. __, 132 S. Ct. at 2491, __ L. Ed. 2d __.

Prior to *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2008), the majority of courts considering the issue had held that matching fund provisions were constitutional. *See, e.g., Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551-53 (8th Cir. 1996); *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000); *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 437-39 (4th Cir. 2008). *But see Day v. Minnesota Citizens Concerned for Life, Inc.*, 34 F.3d 1356 (8th Cir. 1994) (increase in public subsidy as a direct result of an independent expenditure chills the free exercise of protected speech).

Subsequent to *Davis* and *Citizens United*, however, everything changed. Four appellate-level cases were decided. Two courts struck down matching fund, or "trigger," provisions: *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (provisions imposed a potentially significant burden or penalty on a non-participating candidate); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010) (it is "obvious that the subsidy imposes a burden on nonparticipating candidates . . . who spend large sums of money in support of their candidacies"). Two courts upheld matching fund, or trigger,

provisions, the Ninth Circuit in *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010) (provisions applying to executive and legislative offices) and the Montana Supreme Court in *Western Tradition Partnership, Inc. v. Attorney General*, *supra* (provisions applying to judicial offices). The decisions of these latter two courts were stayed by the United States Supreme Court and then resoundingly (and in the case of Montana, summarily) reversed. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, *supra*; *American Tradition Partnership, Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al.*, *supra*.

Finally, in *North Carolina Right to Life Political Action Committee, et al. v. Larry Leake, et al.*, No. 5:11-CV-472-FL (E.D.N.C. 2012), the United States District Court for the Eastern District of North Carolina, Western Division examined North Carolina General Statutes §§ 163-278.66 and 163-278.67, which regulate judicial elections and election campaigns in North Carolina through matching funds provisions materially indistinguishable from West Virginia Code §§ 3-12-11(e)-(i). The court granted summary judgment for the plaintiffs, finding that the defendants had presented no argument that the provisions promoted a compelling state interest not already rejected by *Citizens United* and *Bennett*. *North Carolina Right to Life Political Action Committee, et al. v. Larry Leake, et al.*, *supra*, Slip Opinion at 12-13.[4]

What is fascinating about *North Carolina Right to Life Political Action Committee* is that it is flatly inconsistent with *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, *supra*; the district court apparently concluded *sub silentio* that after the

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[4]It is telling that North Carolina apparently could not articulate any credible defense to the constitutionality of its matching funds provisions.

United States Supreme Court's decision in *Bennett*, the Fourth Circuit case was no longer good law.[5] Putting aside the question of whether the district court had the authority to make such a determination, its conclusion is correct. The Fourth Circuit's decision rested on its determination that a matching funds scheme does not create an impermissible chilling effect on speech because it ". . . result[s] in more, not less, speech." *North Carolina,* 524 F.3d at 437-38. "To the extent that the plaintiffs (or those similarly situated) are in fact deterred by § 163-278.67 from spending in excess of the trigger amounts, the deterrence results from a strategic, political choice, not from a threat of government censure or prosecution." *Id.*, 524 F.3d at 438. That determination is squarely at odds with *Bennett*, where the United States Supreme Court held that ". . . even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups." *Id.*, 564 U.S. __, 131 S. Ct. at 2821, 180 L. Ed. 2d at 680.[6]

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[5]In that regard, it will be recalled that the Court in *Bennett* characterized North Carolina's public funding act as one having ". . . matching funds statutes that resemble Arizona's law." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona, supra*, 564 U.S. __, 131 S. Ct. at 2816 n.3, 180 L. Ed. 2d at 2816 n. 3.

[6]The Petitioner cites not only the Fourth Circuit's opinion in *North Carolina Right to Life Committee Fund* but also on *Wisconsin Right to Life Political Action Committee v. Brennan*, No. 09-cv-764-wmc (W. D. Wis., March 31, 2011). Whatever else might be said about *Brennan*, it has been appealed to the United States Court of Appeals for the Seventh Circuit, No. 11-1769, and it can be confidently predicted on the basis of the Seventh Circuit's subsequent decision in *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (2011), that it will have a short shelf life. Significantly, the district judge who decided *Brennan* predicted that if the United States Supreme Court reversed the Ninth Circuit in the then-pending *Bennett* case – which of course it did – then "[my] decision may merely be contributing to public financing's 'death by a thousand cuts . . . .'" *Brennan, supra*, Slip Opinion at 25 n.15.

Significantly, even the Petitioner herein does not argue, post-*Bennett*, that the Fourth Circuit's First Amendment analysis is correct. Clearly, it is not. Rather, the Petitioner argues that the Fourth Circuit's case is binding on this Court until such time as it is expressly overruled, a contention that has no support in the case law and makes no sense. In the judicial hierarchy, the United States Supreme Court is "king," and it has spoken.

III.

ARGUMENT

The Attorney General believes that the starting point for analysis is West Virginia Constitution, art. I, § 1:

> The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land.

Pursuant to this constitutional provision, this Court has deemed it ". . . unquestionable that if a provision of the Constitution of West Virginia is in conflict or inconsistent with one or more provisions of the Constitution of the United States, it is both the right and duty of this Court, when such a case is presented, to declare the provision of the state constitution to be invalid and unenforceable." *Lance v. The Board of Education of County of Roane, etc., et al.*, 153 W. Va. 559, 564, 170 S.E.2d 783, 786 (1969), *overruled on substantive issue, Gordon v. Lance*, 403 U. S. 1 (1971).

It is similarly unquestionable that a state statute that is in conflict or inconsistent with one or more provisions of the Constitution of the United States, must yield as well. "The legislature has no power to pass laws in conflict with either state or federal constitutions. As has been said 'the

constitution is law to the lawmakers.'" *Id.*, 153 W. Va. at 580, 170 S.E.2d at 794 (Haymond, J., dissenting).[7]

With this in mind, we turn to the matching funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-11(e)-(i), and note that they share the following characteristics with the Arizona law struck down in *Bennett*:

The matching funds are triggered by the expenditures of either a privately funded candidate or an independent expenditure group;

The matching funds have a multiplier effect, as matching funds that are triggered by expenditures made by one publicly funded candidate are available to "any certified [publicly funded] candidate who is an opponent for the same office";[8] and

Although the total amount of matching funds is capped, that would appear to be irrelevant in light of the Supreme Court's observation that "[i]t is not the *amount* of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the *manner* in which that funding is provided – in direct response to the political speech of privately financed candidates and independent expenditure groups." *Arizona Free Enterprise Club, supra*, 564 U.S. __, 131 S. Ct. at 2824, 180 L. Ed. 2d at 683.

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[7]Justice Haymond dissented only to that portion of the majority opinion that invalidated provisions of the West Virginia Constitution.

[8]The "multiplier effect" is magnified in a multiple seat race as we have here, where the matching funds provisions were triggered by the expenditures of one candidate, Justice Davis. This results in harm not only to those individuals and entities supporting Justice Davis, whose right to free speech is chilled by the possibility that their contributions will trigger additional funding to an adversary, the Petitioner, but also to the other two privately funded candidates, who are now the proverbial odd men out in the money race.

Indeed, the only way in which West Virginia Code §§ 3-12-11(e)-(i) are different from the matching funds provisions in *Bennett* is that our statutes apply to judicial offices, while the statutes at issue in *Bennett* applied to executive and legislative offices. And stripped down to its essence, that is the core of the Petitioner's argument: that judicial elections are different, because the interest at stake is the perception of judicial bias rather than the perception of executive or legislative corruption.

In that regard, the "Legislative Findings and Declarations," which are a part of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code § 3-12-2, the West Virginia Legislature note not only the "unlimited amounts of money raised from private sources" for judicial elections, and the public perception that "contributors and interested third parties hold too much influence over the judicial process," but also the "especially problematic" nature of judicial elections, where the perceived impartiality of candidates is uniquely important to voters.

Nothing in the post-*Citizens United* jurisprudence of the United States Supreme Court supports the establishment of a "judicial exception" to the Court's political speech line of cases, and indeed, everything militates against such a finding. First, if combating corruption is not a compelling state interest – and the Court held in no uncertain terms in both *Citizens United* and *Bennett*, and by unmistakable inference in *American Tradition Partnership*, that it is not – we cannot envision it finding the perception of possible judicial partiality to be sufficient. Second, the remedy for judicial bias is recusal, not the abridgement of First Amendment rights. *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002), the United States Supreme Court held that ". . . the notion that the special context of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. '[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." (Emphasis in original; internal citation omitted.) Further, the majority opinion completely dismissed the dissent's argument that judicial elections are different from executive or legislative elections vis-a-vis First Amendment concerns:

> This complete separation [espoused by the dissent] of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.

Id., 536 U.S. at 784 (internal citation omitted.)

The Court concluded that: "'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *Id.*, 536 U.S. at 788, quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting).

Nothing in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), compels, suggests or permits a different conclusion. The issue in *Caperton* was whether under a set of circumstances termed "extreme" and "extraordinary," *id.*, 556 U.S. at 887, a Justice of this Honorable Court was required by the Due Process Clause of the United States Constitution to recuse himself from a

pending appeal.[9] Although acknowledging that the recusal issue ". . . arises in the context of judicial elections, a framework not presented in [our] precedents . . .," *id.*, 556 U.S. at 881-82, not a single Justice in *Caperton* expressed the view that equalizing judicial campaign funding among candidates would be a possible solution to due process and/or impartiality concerns going forward.

And in fact, the argument made by the Petitioner in this case about the effect of *Caperton* has already been addressed and specifically rejected in *Citizens United, supra*, 558 U.S. __, 130 S. Ct. at 910, 175 L. Ed. 2d at 795:

> *Caperton* . . . is not to the contrary. *Caperton* held that a judge was required to recuse himself '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.' The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s *holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.*

(Emphasis supplied and internal citations omitted.)

See also Stay the Course West Virginia v. Tennant, 2012 WL 3263623, 8 (S.D. W. Va. 2012) ("*Caperton* dealt with the Fourteenth Amendment and recusal rules, not the First Amendment's free speech guarantees").

Finally, any "daylight" the Petitioner might have found between the lines of text in either *Citizens United* or *Bennett*, with respect to an argument that judicial elections are different, disappeared with the United States Supreme Court's decision in *American Tradition Partnership,*

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[9] In this regard, the bias test established in *Caperton* bears not even a remote resemblance to the "perceived impartiality" concern expressed by the West Virginia Legislature in W. Va. Code § 3-12-2. The test is whether ". . . there is a *serious risk of actual bias* . . . and 't]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.*, 556 U.S. at 884 (emphasis supplied).

Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al., supra. In the underlying case, the Montana Supreme Court had accepted every single argument that this Petitioner makes with respect to judicial elections, including what appears to be his primary argument, that *Caperton* somehow changes the *Citizens United / Bennett* landscape where judicial elections are involved. Additionally, the Montana Supreme Court had before it a well-developed historical record of actual corruption (some of it appearing to be quid pro quo) spanning a period of 100 years. Notwithstanding all this, the United States Supreme Court said simply:

> Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.

Id., __ U. S. __, 132 S. Ct. at 2491, __ L. Ed. 2d __.[10]

The problem in the instant case is that the Petitioner is not writing on a clean slate; although he makes many good policy arguments,[11] they have all been squarely rejected by the United States

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[10]A review of the briefs filed in the *American Tradition Partnership* case reveals that the issue of whether a state's interest in the appearance of improper influence in judicial races is "compelling" was squarely presented to the United States Supreme Court, as it had been to the Montana Supreme Court. Respondent's Brief in Opposition, p. 25-26 (http://sblog.s3.amazonaws.com/wpcontent/uploads/2012/05/Montana_brief_to_SCO TUS-5-18-12.pdf); *see also* Amicus Curiae Brief of Retired Justices of The Montana Supreme Court and Justice at Stake in Support of Respondent (http://brennan.3cdn.net/282cf914919d7db474 _rom6bn321.pdf); Brief for the States of New York, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, Rhode Island, Utah, Vermont, Washington, West Virginia, and the District of Columbia, as Amici Curiae in Support of Respondents, p. 18 (http://www.ag.ny.gov/ sites/default/files/press-releases/2012/ATPvBullock-States-Brief-Supporting-Montana.pdf).

[11]In his Opinion of July 28, 2011, the Attorney General noted his disagreement with the United States Supreme Court's decision in *Bennett*, but *Bennett*, and now *American Tradition Partnership* as well, are ". . . the supreme law of the land." W. Va. Const., art. I, § 1.

Supreme Court, first in *Citizens United*, then in *Bennett*, and finally in *American Tradition Partnership*. Further, although there can be little doubt as to the good intentions of the West Virginia Legislature, and the concerns it sought to address, that is irrelevant; the Montana Legislature had similar good intentions (and a mountain of historical evidence of actual corruption), all to no avail. In short, the Petitioner has failed to put forth any compelling interest supporting the matching funds provisions of West Virginia Code §§ 3-12-11(e)-(i) that could possibly withstand United States Supreme Court review.

Finally, the Petitioner has failed to make any meaningful argument with respect to the second prong of the strict scrutiny test set forth in *Citizens United, supra,* specifically, that the statute under review ". . . furthers a compelling interest *and is narrowly tailored to achieve that interest.*" *Id.*, 558 U. S. __, 130 S. Ct. at 876, 898, 175 L. Ed. 2d at 753 (emphasis supplied). Narrowly tailored remedies are in fact available to address the concerns set forth by the Legislature in its "Legislative Findings and Declarations," W. Va. Code § 3-12-2. First, the Legislature could increase the amount of money available to publicly financed candidates, thereby obviating the need for additional funding triggered by privately financed opponents' spending. Second, this Court could determine whether its existing recusal rules for judges should be expanded. As the United States Supreme Court noted in *Caperton v. A. T. Massey Coal Company, supra*, 556 U. S. at 889, quoting *Republican Party of Minnesota v. White, supra*, 520 U. S. at 794 (Kennedy, J., concurring), "'states may choose to 'adopt recusal standards more rigorous than due process requires.'"

Unfortunately, by enacting the matching funds provisions in its West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-(e)-(i), the Legislature

chose the one remedy that cannot stand: an infringement of privately funded candidates' and independent expenditure groups' First Amendment rights.

> The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

Republican Party of Minnesota v. White, supra, 536 U. S. at 795 (Kennedy, J., concurring).

IV.

CONCLUSION

For all of the reasons set forth in the Attorney General's Opinion of July 28, 2011, and in this Amicus Curiae Brief, the Petition for Writ of Mandamus should be denied, as the Petitioner has no "clear legal right" to the relief he seeks. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Following the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*, 558 U. S. __, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, supra*, and *American Tradition Partnership, Inc., FKA Western Tradition Partnership, Inc., et al. v. Steve Bullock, Attorney General of Montana, et al.*, there is simply no doubt that the matching funds provisions of West Virginia Code §§ 3-12-11(e)-(i) violate the First Amendment to the United States Constitution. The matching fund provisions fail the strict scrutiny test, as the Petitioner has failed to present any

compelling interest not already rejected by the Supreme Court and has also failed to demonstrate the absence of another narrowly tailored remedy for the problem sought to be addressed.

Respectfully submitted,

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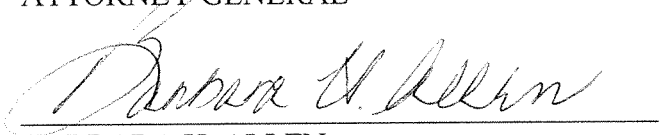

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