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May 26, 2010

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Court House
40 Foley Square
New York, New York 10007

RE: *Green Party of Connecticut, et al. v. Jeffrey Garfield, et al.,* *Docket Nos. 09-3760-cv. (L), 09-3941-cv. (con.).*

Dear Ms. Wolfe:

I am writing on behalf of the *Green Party of Connecticut, et al.,* in response to the letter filed by the defendants on May 24, 2010, citing with approval the Ninth Circuit's decision in *McComish v. Bennett,* No. 10-15165 (5/21/2010). The decision holds that a candidate who *voluntarily* opts out of a public financing system is not harmed under the First Amendment by a funding mechanism that pays his opponent supplemental grants to match any expenditures made by the privately financed candidate in excess of the initial grant, or to match the value of any independent expenditures that either support the privately financed candidate or attack the publically financed candidate. The defendants maintain that the decision supports their position in this case and that the district court erred by invalidating the excess and independent expenditure provisions contained in §9-713 and §9-714. *See* SPA 314-317; 318.

We cannot agree with this assessment. The Arizona public financing system upheld in *McComish* (and similar "Clean Election" systems upheld by other federal courts referenced in the opinion) is party neutral and available to all ballot qualified candidates who raise a relatively *de minimis* amount of money in $5 qualifying contributions. SPA 111-114. A candidate who voluntarily opts out of the system is making a strategic decision tailored to his campaign's needs. He will presumably make his choice based on what is best for his campaign. If a candidate thinks

he can gain an advantage over his opponent by not accepting public financing he will undoubtedly choose that option -- despite the availability of matching funds. *McComish* simply holds that it is permissible under the First Amendment to use matching funds to neutralize the advantage a candidate hopes to gain by voluntarily opting out of public financing.

While we believe that *McComish* was wrongly decided and will eventually be reversed by the Supreme Court,[1] we urge this Court not to lose sight of the fact that the plaintiffs in this case stand in a very different position. The Connecticut public financing model is not party neutral. Independent and minor party candidates can only participate if they satisfy separate and exceedingly difficult qualifying criteria that most candidates cannot realistically expect to meet. The decision to participate in the public financing system is effectively not their own, but instead represents a legislative determination to deny public funding to all but a handful of minor party and independent candidates who can successfully navigate around the qualifying criteria.

The holding in *McComish* does not address the use of matching funds to neutralize the fundraising advantage -- theoretical as it may be – of independent and minor party candidates who are systematically denied the option of participating in the public financing system. The payment of matching funds to major party candidates under these circumstances only adds to the burden on minor party and independent candidates from being excluded from the public financing system in the first place. Major party candidates seek to have it both ways. By making it exceedingly difficult for independent and minor party candidates to qualify for public funding, major party candidates are virtually assured of a huge financial advantage -- especially in light of the district court's finding that the grant amounts greatly exceed the amount of money candidates have raised in the past. SPA 72-78. The excess and independent expenditure provisions lock in that advantage by removing any threat that they might theoretically be outspent by an insurgent third party or independent candidate or from any threat that they will be targeted by independent expenditures. The system for financing Presidential elections upheld in *Buckley v. Valeo*, 424 U.S.1 (1976), did not endorse this type of "heads we win, tails you lose" contrivance, but instead recognized that candidates denied public financing could at least theoretically gain the upper hand because they were not bound by expenditure limits. *Id* at 95, *n.129*, 99. The matching fund provisions thwart that possibility.[2]

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[1] The plaintiffs in *McComish* have filed an application in the Supreme Court to vacate the initial stay of the district court *Order* enjoining the enforcement of the statute and to stay the issuance of the mandate. Justice Kennedy has requested a response to the petitioner's application. It is due May 27, 2010. The application has been docketed under 09A1133.

[2] The independent expenditure provision contained in §9-714 widens the financial disparity between participating and non-participating candidates by providing matching funds equal to 100% of the base grant to respond to attack ads paid for by the supporters of his opponents.

Sincerely,

Mark J. Lopez

cc. All counsel of record

There is no similar penalty on the major party candidate's supporters if they run attack ads targeting a non-participating candidate.