June 22, 2010

Mr. Gary O. Bartlett
Executive Director
North Carolina State Board of Elections
506 North Harrington St.
Raleigh, NC 27603

Sent VIA email and postal mail to Mr. Bartlett

Dear Mr. Bartlett,

I am writing to request that the North Carolina State Board of Elections decline to release matching funds in the upcoming appellate court races.

As you know, on June 8, 2010, the United States Supreme Court issued an order blocking the distribution of matching funds in Arizona's "clean election" public financing system.

The Court was so concerned about the constitutional problems with matching funds that it blocked matching funds in Arizona until it either declines to hear the case (very unlikely) or until the Court issues an opinion on the case sometime in 2011.

North Carolina's matching fund system is the same as the Arizona system. The Supreme Court would view our state's matching funds in the same way and would block them in the same manner if requested to do so.

While technically the Supreme Court's order applies only to Arizona, it is unambiguous that the Court believes matching funds pose serious constitutional problems regardless of the state.

This order also is just one of many reasons to block matching funds. In the 2008 Supreme Court case *Davis v. FEC*, the Court held that punishing self-financed candidates for exceeding threshold levels of spending was unconstitutional. In that case, the self-financed candidate triggered fundraising advantages to the competition.

Much like *Davis*, "clean election systems" punish candidate for spending beyond a threshold amount of money. The penalties are the matching funds, which are far worse than fundraising advantages because the competing candidate automatically receives funds. In *Davis*, the competing candidate still had to raise money.

After Davis, two district courts[1] held that in light of *Davis*, matching funds are unconstitutional. The Connecticut district court in discussing matching funds wrote:

> …the holding [in *Davis*] was founded on the same principle advanced by the plaintiffs in this case: that it is a substantial burden on the exercise of First Amendment rights to force a candidate to choose between engaging in his or her right to make personal campaign expenditures, which then confers a benefit on an opponent, or adhering to a self-imposed limit on campaign expenditures.

While a three-judge panel of the Ninth Circuit held that matching funds were constitutional, this is not particularly compelling given the Supreme Court issued its order in response to the Ninth Circuit decision.

The Court took the rare and unusual step of staying the Ninth Circuit decision and enforcing the district court's injunction blocking matching funds. Further, the Court was not swayed by concerns that blocking matching funds would somehow be unfair to the participating candidates.

Unless the State Board of Elections believes that North Carolinians have fewer First Amendment rights than Arizonians, which I hope is not the case, there should be an immediate moratorium on matching funds until the United States Supreme Court provides guidance on this matter.

I look forward to receiving your response on this time-sensitive matter.

Sincerely,

Daren Bakst
Director of Legal and Regulatory Studies

cc:

The Honorable Paul Stam
The Honorable Phil Berger
The Honorable Joe Hackney
The Honorable Marc Basnight
Ms. Kim Westbrook Strach
The Honorable Roy Cooper

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[1] *Green Party of Connecticut v. Garfield*, August 27, 2009 (D. Conn.) and *McComish v. Brewer*, January 20, 2010 (D. Ariz).