



June 25, 2010

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

Sent VIA email to Mr. Bartlett

Dear Mr. Bartlett:

Thank you for your letter dated June 22, 2010 in response to my request that the State Board of Elections (SBOE) decline to release matching funds in the upcoming appellate court races.

In your letter, you mischaracterize my request by writing that I want the SBOE to “ignore North Carolina statutory and case law.” Not once do I make such a request.

I want the SBOE to follow the law. Specifically, the matching fund provisions in the North Carolina statutes are likely unconstitutional. This does not mean the SBOE should ignore a state statute. Instead, it means looking to actions taken by the United States Supreme Court and federal courts to determine if the statute is likely to be constitutional—the United States Constitution preempts a state statute.

I certainly am not requesting that you ignore North Carolina case law because there is no case law to ignore. There is not a single state case involving matching funds, and regardless, the United States Constitution would preempt those cases.

You diminish the importance of the recent actions taken by the United States Supreme Court. The Court felt matching funds were so problematic that it took the very unusual step of issuing a stay to block matching funds in Arizona and reinstating an injunction issued by the Arizona district court.

The Court’s actions do not provide us a decision on the merits. However, the Court did believe that, for now, matching funds should not be released. If the Supreme Court today heard a case seeking an injunction to block North Carolina’s matching funds, there would be no question that it would block the disclosure of matching funds. This point alone provides the SBOE significant guidance on whether matching funds should be released.

If you were able to somehow distinguish the matching funds in Arizona from those in North Carolina, then this stay would have less of an impact. However, such a distinction does not exist.

You argue that the SBOE “must act according to the statutes adopted by that body [General Assembly].” That is correct except when federal law or the United States Constitution warrants that you act differently, as in this situation.

To support the constitutionality of matching funds in North Carolina, you cite to a case (*N.C. Right to Life, Inc. v. Leake*) that was decided *before* the United States Supreme Court decision in *Davis v. FEC*. The entire legal landscape changed since *Davis*, making this case outdated—one would have to assume that federal courts can simply ignore Supreme Court precedent in favor of an outdated Fourth Circuit case to conclude that *N.C. Right to Life* is dispositive on the matter.

In fact, the Connecticut district court that held that matching funds were unconstitutional had, prior to *Davis*, decided that such funds were constitutional. It was because of *Davis* that the court was compelled to change its opinion.¹

Your last argument is the most perplexing. You argue that since the United States Supreme Court declined to hear an appeal of *N.C. Right to Life*, this provides some type of guidance on whether matching funds are constitutional.

The United States Supreme Court is asked to hear thousands of cases every year, as much as 8,000 cases a year (or more). The Court decides to hear only about 80 cases a year. Therefore, there is nothing that can be ascertained from the Court declining to hear *N.C. Right to Life*.

This issue is very simple. The highest court of the land felt that matching funds were such a potential problem that they immediately had to be blocked in Arizona. North Carolina uses these same matching funds and there is no question that the Court would block them as well if given the chance. Further, the Court’s decision in *Davis* already has spelled the end to matching funds.

Harvard Law professor and public financing proponent Larry Lessig was just here in Raleigh. He stated in an interview “The Supreme Court is going to strike down any rescue fund [matching fund] system.” This point is so clear that even proponents of public financing recognize that matching funds are problematic.

¹ *Green Party of Connecticut v. Garfield*, August 27, 2009 (D. Conn.).

Once again, I urge you to not release matching funds in the upcoming appellate court races.

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