No. 12-0899 – State of West Virginia, ex rel, Allen H. Loughry, II v. Natalie E. Tennant, et al.

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Rory L. Perry, II, Clerk
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of West Virginia

WILKES, Judge (sitting by temporary assignment), concurring,

I concur in the majority's conclusion that the matching funds provision is unconstitutional, and therefore concur with the denial of mandamus. However, I only reluctantly agree with the use of strict scrutiny in the context of judicial elections, where First Amendment free speech will often necessarily be opposed to maintenance of an independent, unbiased judiciary.[1] Therefore, I write separately only to note two points: first, to explain how judicial elections are notably different than other, policy-based elections; and second, to briefly expand upon how this law fails to be narrowly tailored.

The majority notes that it is sympathetic with and agrees that judicial elections raise a number of compelling interests. *See* Opinion page 17. I agree with this view, and believe it needs further elaboration – judicial elections, as opposed to elections for legislative or executive offices, are notably different.

An independent, impartial, and unbiased judiciary is inherent to the provisions of Article III of the United States Constitution and Article VIII of the West Virginia Constitution. The Due Process requirements of the respective Constitutions, even more so, inherently require an independent, unbiased judiciary. *See, e.g.*, U.S. Constitution, Art. 5 and Amend. 14; W.Va. Constitution Art. 3, Sect. 10. As noted by the majority, the very legitimacy of the judicial branch of government "ultimately depends on its

[1] "Whether we agree with the Supreme Court's interpretation of the First Amendment is irrelevant. In accordance with our federal system of government, our obligations here are to acknowledge that the Supreme Court's interpretation of the United States Constitution is, for better or for worse, binding on this Court and on the officers of this state, and to apply the law faithful to the Supreme Court's ruling." *Western Tradition Partnership v. Attorney General of the State of Montana*, 363 Mont. 220, 271 P.3d 1 (2011) (Nelson, J., dissenting).

reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 448 U.S. 361, 407 (1989). Truly, an independent, unbiased judiciary is part of, and paramount to the success of, our general system of government. [2]

The Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252 (2009), recognized the inescapable truth that elections of judicial officers present a different set of competing important interests than elections of executives or legislators. The Supreme Court even noted, that "[a]lmost every State—West Virginia included—has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety,'" and that these "codes of conduct serve to maintain the integrity of the judiciary and the rule of law." *Id*. at 887. The Supreme Court recognized that these codes, ***which often represent restriction upon speech,*** "serve to maintain the integrity of the judiciary and the rule of law" and further that they are "the principal safeguard against judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." *Id*. at 889 (internal quotations and citations omitted). In fact, even the dissent in *Caperton* (written by Chief Justice Roberts and joined in by Justices Scalia, Thomas, and Alito) shared "the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such."[3]

Also, the Supreme Court in *Republican Party of Minnesota v. White*, recognized these different interests and stated that the majority "neither assert[s] nor imply[s] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[4] 536 U.S. 765, 783 (2002).

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[2] Petitioner Loughery, persuasively cites a number of authorities supporting his position on the importance of an unbiased and independent judiciary.

[3] The dissent noted that they dissented due to a "fear that the Court's decision will undermine rather than promote these values." Justice Scalia also wrote a dissenting opinion.

[4] Yet, the Supreme Court in *White*, in a similar situation, applied strict scrutiny. 536 U.S. at 774-75; *see also*, discussion, *infra*.

Further, I find it clear that this constitutionally based interest is not present in legislative and executive elections, as those are policy-based elections. Most elections require a candidate to state what he or she will do while in office. In this way, a candidate is espousing his or her policy beliefs, and the electorate is choosing him or her based, at least in part, upon what policy they think is best. A candidate's conduct in a judicial election is, and must be, different. A judicial candidate is, in many ways, proscribed from stating what he will do when in office.[5] These proscriptions, in themselves are a recognition of the need for an independent, unbiased judiciary. Moreover, they display the quite different and important interests at play in a judicial election as opposed to policy elections for a legislative or executive office.

When there are judicial elections, it is unavoidable that First Amendment free speech will necessarily be opposed to at least the perception of independent, impartial, and unbiased judiciary. This truth is recognized by the Supreme Court in *Caperton* and *White*. 556 U.S. 868; 536 U.S. 765. With these underlying constitutional values at play as well as the other accepted speech restrictions in our system which protect the judiciary against partiality, bias, and corruption, it appears that the highest level of scrutiny (strict scrutiny) would act to invalidate several of these necessary restrictions. In this context, a slightly lower level of scrutiny would appropriately give deference to this other constitutionally-based interest.

Yet, the Supreme Court in *White* did apply strict scrutiny and noted that the dissent "greatly exaggerates the difference between judicial and legislative elections." 536 U.S. at 784. In light of all the other relevant authorities cited by the parties and *amici*, especially including *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), and *Arizona Free Enterprise Club's PAC v. Bennett*, 131 S.Ct. 2806 (2011), I cannot find that

[5] Cannon 4 of the ABA Model code of Judicial Conduct provides, "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the, integrity, or impartiality of the judiciary." There are various other restrictions which could act to abridge the speech of judicial candidates and others surrounding the election of judges found in these types of Codes. *See, e.g.,* ABA Model Code of Judicial Conduct, Cannons 1, 3; and W.Va. Code of Judicial Conduct, Cannons 1, 2, 4, 5.

the Supreme Court intends anything but strict scrutiny to apply to this type of law (as opposed to this situation). [6] Because my interpretation is not controlling when the Supreme Court has made its intentions clear, I must faithfully apply the Supreme Court's interpretation. *Western Tradition Partnership*, 363 Mont. at 248. Therefore, I must concur with the majority's application of strict scrutiny. [7]

Nonetheless, the matching funds provision fails to pass any of the First Amendment free speech scrutiny. I reach this conclusion for the same reasons that the majority finds it not to be narrowly tailored, but again find further explanation appropriate. *See*, Opinion page 23.

While the stated interest of this law is clearly compelling, I find it impossible for the matching funds provision to be narrowly tailored. For example, the prejudice which a self-financed judicial candidate faces under this provision displays this provision's over-inclusiveness and demonstrates lack of tailoring. This provision prejudices self-financed judicial candidates by directly restricting expenditures regardless of whether any contributions are made.[8] Yet, self-financed judicial candidates do not cause concern for

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[6] As opposed to other slightly lower levels of scrutiny such as "exacting scrutiny," *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), or "closely drawn" scrutiny, *McConnell v. Federal Election Com'n*, 540 U.S. 93, 124 S.Ct. 619 (2003) (overruled by *Citizens United*, 130 S.Ct. 876), which the Court has applied to First Amendment free speech issues in a "less onerous" situation. *Bennett*, 131 S.Ct. at 2817.

[7] I do note that the majority's reliance upon that *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (2012), (and its underlying case, *Western Tradition Partnership v. Attorney General of the State of Montana*, 363 Mont. 220, 271 P.3d 1 (2011)), to support the conclusion that the Supreme Court would apply reject a different approach in judicial elections is misplaced. *Bullock* was a case about a law generally prohibiting a corporation from making any expenditures or contributions that supported or opposed a candidate in any type of election which applied criminal penalties, and about how *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010) invalidated the law. I find that situation notably different to this matter, even if the Supreme Court of Montana briefly discussed its application in the context of judicial elections.

[8] In *Buckley v. Valeo*, the Supreme Court also found expenditure limitations, as opposed to contribution limitations, generally more directly abridging to the freedom speech, and therefore did warrant strict scrutiny. 424 U.S. 1, 96 S.Ct. 612 (1976). *See also, Citizens*

their bias like those funded by third parties, who are possibly future litigants. A self-financed candidate would appear equally as independent and unbiased as a publicly financed or wholly unfinanced candidate. Nevertheless, this law would abridge the speech of a self-financed candidate because his or her speech-related expenditures would trigger a publicly financed candidate's matching funds for speech. *See, Bennett*, 131 S.Ct. 2806. A self-financed candidate must bear that his or her speech, by way of campaign expenditures, triggers his or her opponent's receipt of public monies, possibly giving the opponent the last word. This significant example displays how the matching funds provision is too broad. As noted by the majority, this matching funds provision does nothing more than level the playing field between publicly funded candidates and privately funded ones. *See*, Opinion at page 22. As much as some may find this leveling appealing, it is too broadly drawn, having too much of an effect upon free speech to be considered narrowly tailored, or closely drawn, or not unfairly burdensome. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976) ("exacting scrutiny"); *McConnell v. Federal Election Com'n*, 540 U.S. 93, 124 S.Ct. 619 (2003) ("closely drawn" scrutiny) (overruled by *Citizens United*, 130 S.Ct. 876). Therefore, I opine that the provision, while recognizing the compelling government interests of an unbiased and independent judiciary, creates an unnecessary and impermissible abridgment of free speech. Thus, this matching funds provision violates the free speech clause of the First Amendment of the United States Constitution.

By this conclusion, I find that the elements for mandamus cannot be met, Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). I also find the majority's conclusions regarding severability and that Petitioner Loughry may now solicit campaign contributions correct. Therefore, I respectfully concur with the majority's opinion in this case.

United v. Federal Election Comm'n, 130 S.Ct. 876 (2010). Yet, again, these were not in the context of judicial elections. See discussion *supra*.