No. 08-120

In The
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES, *Petitioners,*

v.

LARRY LEAKE ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Reply To Respondents' Brief in Opposition

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I. A Circuit Split Exists Regarding Rescue Funds.

Respondents contend that a writ of certiorari is not appropriate in this case because no conflict has yet had an opportunity to present itself regarding the application of *Davis v. FEC,* 125 S. Ct. 2759 (2008) and public financing schemes such as the one at issue here. Br. in Opp. at 21. Respondents misconstrue the circuit split analysis.

Even if *Davis* were inapplicable as directly relevant precedent, a circuit split still remains on the constitutionality of rescue funds. The court below recognized this in its opinion:

> There is some conflict in the circuits as to whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment. The Eighth Circuit struck down a matching funds provision, reasoning that the potential 'self-censorship' created by the scheme 'is no less a burden on speech . . . than is direct government censorship.' *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). The First Circuit, on the other hand, explicitly rejected the 'logic of *Day*' by holding that the provision of matching funds 'does not create a burden' on the First Amendment rights of nonparticipating candidates or independent entities." *Daggett*, 205 F.3d at 464-65; *see also Gable*, 142 F.3d at 947-49 (Sixth Circuit upholding a matching funds scheme against a constitutional challenge

without addressing the *Day* analysis).

North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008). This split is made more poignant by this Court's recent *Davis* decision, which lends credibility to the *Day* analysis despite circuit court opinions to the contrary. *See Davis,* 128 S.Ct. at 2772. And it is in resolving this circuit split that *Davis* provides valuable guidance.

The *Davis* decision looks to *Day* favorably in its burden analysis. *Davis,* 128 S. Ct. at 2772. Given this, the circuit courts' decisions to dismiss the reasoning of *Day* need to be reconciled, if not vacated. In *Daggett*, the First Circuit stated, "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 465 (1st Cir. 2000). In *Gable*, the Sixth Circuit ignored the *Day* decision entirely in upholding Kentucky's rescue funds scheme. *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). Time and again, the circuit courts have either chosen not to follow *Day*, or have ignored the *Day* decision entirely. This, in conjunction with this Court's recognition of the legitimacy of *Day*'s rationale on burden analysis, warrants a closer look at this issue by this Court. Whether North Carolina's rescue funds are constitutional is an issue that exists with or without this Court's decision in *Davis*, and in either event justifies a grant of certiorari.

II. This Court Should Resolve *Davis*' Implications For Public Financing Schemes.

Respondents contend that *Davis* does not necessi-

tate a different result in this case because it is inapplicable. They present two reasons. First, they argue that the speech burdens recognized in *Davis* are not present in public financing schemes, contending that candidates in public financed races are not similarly situated, as they were in *Davis*. Nothing in *Davis* requires a candidate to be similarly situated as her opponents in order to assert a burden on her free speech rights. While the Court recognized that raised contribution limits for all candidates could not burden a candidate, *id.* at 2770, it found that a unilateral raised contribution level amounted to penalty upon a opponent candidate's expenditures by "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* at 2771. The capacities of the other candidates for office have no bearing upon the credibility of the burden placed upon a candidate seeking relief from it. It is the burden on the candidate, not the analogous posture of candidates that is relevant to First Amendment free speech challenges.

In as much as candidates in North Carolina are similarly situated, it is in this way: upon electing to run for judicial office, candidates must choose between exercising their right to speak subject to significant burdens should their spending exceed a set amount, or waiving their right to associate through contributions by participating in the public financing scheme. Notably, no option for "unfettered political speech" is available to candidates. In this way, it is not voluntary, as Respondents suggest—regardless of the choice made by the candidate, they forfeit or are penalized for

exercising their First Amendment rights.

Respondents then proceed to cite this Court's decision in *Buckley* to uphold the public funding scheme in that case. Br. in Opp. at 15. Respondents fail to recognize that significant distinctions exist between the type of public funding scheme at issue in *Buckley* and that employed by North Carolina. If the situation before this Court were one of candidates choosing between running for office with their First Amendment rights fully intact and ceding some of their rights for financial benefit, this matter would most likely fall under the purview of *Buckley*. However, as stated above, this case involves a circumstance where, regardless of which type of campaign judicial candidates such as Duke decided to run—publicly or privately financed—they forfeit, or at least risk forfeiting, some of their speech rights. Indeed, Respondents recognize that the nature of North Carolina's scheme is precisely this, noting that each candidate must weigh the burdens and benefits of each option before "voluntarily" choosing one or the other. Br. in Opp. at 14. In this context, the voluntary component of the scheme, present in *Buckley*, vanishes and makes its resemblance to *Davis* that much more acute:

> In *Buckley*, a candidate, by foregoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgement. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the

> activation of a scheme of discriminatory contribution limits. The choice imposed by § 319(a) is not remotely parallel to that in *Buckley*.

Davis, 128 S. Ct. at 2772. This is precisely the dynamic created by North Carolina's rescue funds.

Respondents press the *Buckley* analogy further by contending that if one distribution of funds at the outset is constitutional, then incremental distributions of fund is constitutional. Br. in Opp. at 15. Respondents again miss the mark. North Carolina's public financing scheme does not merely disperse finances in predetermined amount within a predetermined time frame. Rather, after the initial distribution, the scheme makes subsequent financing solely and completely contingent upon a nonparticipating candidates' speech. Such contingencies were deemed by the *Davis* Court as penalties and burdens on speech.[1]

Ultimately, the relevance of *Davis* to this matter is in its assertion that imposing a "special and significant burden" on candidates for choosing to exercise their rights "result[s] in a drag on First Amendment rights," regardless of the statutory imposition of the choice. *Id.* at 2772. In advancing this larger principle, the Court cites *Day*. Both cases stand for the proposition that campaign regulations cannot create benefits to one

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[1]Respondents argue that such distributions are required to make public financing meaningful. But that merely suggests that public financing in its own right may not serve the interests it purports to serve. Imposing burdens upon nonparticipating candidates to make it meaningful does not negate the unconstitutionality of such burdens.

candidate contingent upon a burden placed upon the exercise of free speech rights of her opponent or, in the case of *Day*, independent expenditures. *Id.* at 2772 (*citing Day*, 34 F.3d at 1359-60).

This is precisely what is occurring here: Duke and IEPAC's speech would cause his opponent to receive a benefit, effectively penalizing their speech. This is only exacerbated by reporting requirements designed to notify the State when this penalty is to take effect. This penalty burdens core political speech.

Because of the gravity of the burden upon both candidate and independent spenders' speech—the rescue funds punitive structure effectively chills speech from the outset—regulations creating this burden are subject to strict scrutiny, as Respondents note. *Davis*, 128 S. Ct. at 2775; Br. in Opp. at 17. Just like the reporting requirements for the asymmetrical contributions limits in *Davis*, North Carolina's disclosure requirements were designed to implement the rescue funds. The Board is free to determine at its discretion how many reports must be filed by nonparticipating candidates, and at what time. G.S. § 163-278.66(a). Because the scheme itself is unconstitutional, so too is the reporting requirement. *See id.* at 2775. And, as demonstrated in Petitioners' opening brief, no other interest is served by the disclosure requirements.[2]

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[2]Respondents contend that a more developed factual record would demonstrate that the necessary compelling interests exist. Br. in Opp. at 19. However, because the regulation involves expenditures of candidates and independent spenders of their own finances and not contribution sources, further factual analysis

Second, Respondents contend that lower courts have not had adequate opportunity to determine Davis' applicability to public financing schemes. Br. in Opp. at 21. Yet, lower courts have already begun to recognize its significance in the public financing context. For example, in *McComish v. Brewer*, No. 2:08-cv-01550 (D. Ariz., filed Aug. 21, 2008), the court, though denying a request for a temporary restraining order against public financing provisions of Arizona's Clean Election Act, recognized the merits of Plaintiffs' claims under *Davis*. *See id.* (Doc. 30 at 6-8). Moreover, *Davis* articulated support for *Day*'s rationale, rationale that the Fourth Circuit and other circuit courts have had adequate time to consider and declined to follow. *See supra* Part I.

That *Davis* is not relevant in this case and that it was not intending to support *Day*'s rationale that public financing schemes impose unconstitutional burdens on nonparticipating candidates and independent spenders is far from obvious, and appears to be quite the opposite. Clarification on this point alone warrants a grant of certiorari.

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will not bear out a legitimate anti-corruption interest, as such expenditures are not corruptive. *See Davis*, 128 S. Ct. at 2773.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits. In the alternative, this Court should grant the writ, vacate and remand this matter to the Fourth Circuit for reconsideration in light of this Court's decision in *Davis v. FEC,* 128 S. Ct. 2759 (2008).

Respectfully submitted,

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