

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899

STATE OF WEST VIRGINIA ex rel. ALLEN H. LOUGHRY II,  
candidate for the Supreme Court of Appeals of West Virginia,

*Petitioner,*

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State;  
NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT  
RUPP, in their official capacities as members of the West Virginia State Election Commission;  
GLENN B. GAINER III, in his official capacity as the West Virginia State Auditor;  
and JOHN PERDUE, in his official capacity as the West Virginia State Treasurer,

*Respondents,*

DARRELL V. McGRAW, Jr., West Virginia Attorney General,

*Intervenor-Respondent.*

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**PETITIONER ALLEN H. LOUGHRY'S RESPONSE TO  
BRIEFS OF *AMICUS CURIAE* MICHAEL CALLAGHAN AND  
DARRELL V. McGRAW, JR., WEST VIRGINIA ATTORNEY GENERAL**

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Marc E. Williams (WVBN 4062)  
Randall L. Saunders (WVBN 10162)  
Jenna E. Hess (WVBN 11416)  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
949 Third Avenue, Suite 200  
Huntington, WV 25701  
(304) 526-3500  
marc.williams@nelsonmullins.com

J. Adam Skaggs (Admitted *Pro Hac Vice*)  
Matthew Menendez (Admitted *Pro Hac Vice*)  
BRENNAN CENTER FOR JUSTICE  
AT N.Y.U. SCHOOL OF LAW  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013

(646) 292-8331  
adam.skaggs@nyu.edu  
matthew.menendez@nyu.edu

**COUNSEL FOR PETITIONER,  
ALLEN H. LOUGHRY II**

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## INTRODUCTION

Petitioner Loughry seeks a writ ordering the release of funds he is entitled to under a provision of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program (the “Pilot Program”) that provides funds based on the campaign expenditures of a nonparticipating candidate, W. Va. Code § 3-12-11(e). It is undisputed that the statutory conditions for a disbursement of funds have been met and that Petitioner lacks an adequate remedy other than a writ from this Court. Attorney General McGraw and *amicus* Callaghan contend, however, that Section 3-12-11(e) imposes unconstitutional burdens on the First Amendment rights of candidates who have chosen not to participate in the Pilot Program, and therefore that a writ should not issue. They are mistaken.

The argument against Section 3-12-11(e) rests on the contention that it is unconstitutional under the U.S. Supreme Court’s decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *Bennett*’s holding, however, was limited by the facts of that case to only *non-judicial* elections, and when the analysis called for in *Bennett* is applied to the very different context here—which involves exclusively *judicial* elections—it supports a conclusion that Section 3-12-11(e) is constitutional.

*Bennett*, like other Supreme Court precedent, mandates a two-stage analysis of a campaign finance rule challenged under the First Amendment. First, it is necessary to determine whether a given rule bans or burdens political speech. If it does, the second stage of the analysis requires assessing whether the rule is adequately justified. In *Bennett*, the Supreme Court concluded that Arizona’s matching funds provisions imposed burdens on the speech of non-participating candidates and independent spenders in Arizona’s elections. The Court then asked whether the statute advanced Arizona’s interest in combating *quid pro quo* corruption—the only

interest the Court has said is sufficient to justify regulation of political speech *outside the context of judicial elections*. Because the Court concluded the Arizona law did not further that narrow anti-corruption interest, it struck down the law.

Applying *Bennett's* analysis to the Pilot Program yields a different result. The law plainly does not ban anyone from speaking. As to whether Section 3-12-11(e) burdens the speech of nonparticipating candidates, it is telling that no nonparticipating candidate has complained of any injury. But even assuming for argument's sake that, under *Bennett*, the Pilot Program burdens nonparticipating candidates' speech, that does not end the analysis. Instead, the Court must evaluate whether any burdens are adequately justified. As explained in the Petition, they are: while the narrow interest in combating *quid pro quo* corruption may be the only adequate interest in the non-judicial election context, the Supreme Court has repeatedly made clear that there are compelling interests besides fighting *quid pro quo* corruption that may justify regulation of judicial elections. The Court has recognized that the Due Process guarantee of a fair trial before a fair tribunal and the related need to protect judicial impartiality, as well as the interest in preserving public confidence in the judiciary by avoiding even the perception of bias, are interests of the very highest order. These interests are distinct from the narrow anti-corruption interest implicated in non-judicial elections, and justify appropriate regulation of judicial election conduct.

The State of West Virginia expressly relied on these compelling interests in adopting the Pilot Program, which is an appropriately tailored response to the State's need to ensure its judiciary is impartial in fact and appearance. When any possible First Amendment injuries are balanced against the strong, countervailing constitutional interests that support the law, it is clear the Pilot Program is constitutional. This Court should grant the Petition.

## ARGUMENT

The Pilot Program was based on a proposal by an independent commission convened by Governor Joe Manchin to address the circumstances of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and the skyrocketing amounts of money that have poured into West Virginia Supreme Court elections in recent years. The proposal resulted from the recognition that “[a]s campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary’s role in our society.” W. Va. Indep. Comm’n on Judicial Reform, Final Report at 4 (hereinafter “Indep. Comm’n Final Report”) (Pet. for Mandamus App. 7). Because “campaigning for a judicial post today can require substantial funds[,] . . . relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.” *Republican Party of Minn. v. White*, 536 U.S. 765, 789-90 (2002) (O’Connor, J., concurring). Judicial impartiality may be threatened whenever a judicial candidate receives substantial financial support from a party or lawyer who may appear before the candidate if he or she is elected. As the West Virginia Legislature recognized, “The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because impartiality is uniquely important to the integrity and credibility of courts.” W. Va. Code § 3-12-2(8).

The Pilot Program is an appropriate, and constitutional, response to these concerns.<sup>1</sup> It does not prevent anyone from speaking in West Virginia’s judicial elections, and its

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<sup>1</sup> The U.S. Supreme Court has made clear in the campaign finance context that courts must assess the nature and magnitude of any alleged burdens on speech before determining the appropriate level of scrutiny. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 19-23, 25, 44-45, 64-66 (1976) (identifying different magnitudes of burden for contribution limits, expenditure limits, and disclosure requirements and applying different standards of review to each). Where, as here,

supplemental funds provisions are narrowly tailored to advance undoubtedly compelling state interests.

**I. West Virginia Has Compelling Interests in Combating Bias, Ensuring the Integrity of Its Judiciary, and Preserving Public Confidence in the Courts.**

**A. *Judicial elections implicate compelling interests that are distinct from the interest in avoiding quid pro quo corruption relevant in non-judicial elections.***

As noted, in non-judicial elections, recent Supreme Court decisions provide that the only interest sufficiently compelling to justify burdens on speech is the interest in combating *quid pro quo* corruption. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010) (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”) (citation omitted); *Bennett*, 131 S. Ct. at 2826-27 (describing “the sort of *quid pro quo* corruption with which [the Court’s non-judicial election] case law is concerned”). But there are additional compelling state interests implicated in judicial elections beyond the narrow anti-corruption interest, and these interests justify regulations in judicial elections that would be impermissible in legislative or executive contests. As Justice Kennedy, who authored the Court’s decisions in both *Caperton* and *Citizens United*, has explained, “[t]he differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of . . . the *legitimate restrictions that may be imposed upon them.*” *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) (emphasis added).

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no party whose speech could be burdened by the law at issue has asserted an injury, and where “constitutionally protected interests lie on both sides of the legal equation,” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring), a flexible standard of review is appropriate. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). But even viewed under the strictest scrutiny, the Pilot Program passes constitutional muster.

In *Caperton*, the Court expressly stated that there was “no allegation of a *quid pro quo* agreement.” 556 U.S. at 870. Had the case concerned executive or legislative elections, this would have been the end of the analysis, because no interest other than combating *quid pro quo* corruption would have had constitutional significance in the executive or legislative context. But because the facts of *Caperton* arose in a judicial election, the Court considered the additional compelling interests that are implicated in judicial elections—to wit: the need to ensure judicial integrity and protect against bias, as well as the need to combat perceptions of bias in the judiciary.

The interest in avoiding judicial bias is compelling because “[j]udicial integrity is . . . a state interest of the highest order.” *White*, 536 U.S. at 793 (Kennedy, J., concurring); *see also N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008) (“The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation’s founding . . .”).

This interest in impartiality is unique to the judiciary. “Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them.” *Siefert v. Alexander*, 608 F.3d 974, 989 n.6 (7th Cir. 2010); *see also* ABA Model Code of Judicial Conduct R. 4.1., cmt. 1 (2007) (“Even when subject to public election, a judge . . . must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.”). As a federal district court in Wisconsin recognized in upholding the supplemental funds provisions in that state’s judicial public financing law, “[m]embers of ‘political’ branches of government are expected to be representative of and responsive to the interests of their electoral constituencies, while judges—



even when popularly elected—are not representative officials, but rather are expected to be, and to appear to be, impartial and independent in applying the rule of law.” *Wis. Right to Life Political Action Comm. v. Brennan*, No. 3:09-cv-00764-wmc (W.D. Wis. Mar. 31, 2011), ECF No. 110, slip op. at 33-34, attached hereto as Exhibit A.<sup>2</sup>

In addition to its interest in promoting judicial integrity by preventing actual bias, West Virginia has a second compelling interest in promoting public confidence in the courts by avoiding even the appearance of bias. While the executive has the sword and the legislature has the purse, the judiciary has no independent ability to guard its judgments—public trust in the courts’ wisdom is the judiciary’s only source of power. *Cf.* The Federalist No. 78 (Alexander Hamilton). The U.S. Supreme Court has explained, therefore, that “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.” *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968); *see also Offut v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”).

More recently, *Caperton* affirmed that avoiding public perceptions of bias is a compelling interest by employing an objective test, holding that it was necessary to assess the “objective risk of actual bias.” 556 U.S. at 886. An objective test, by definition, depends on the perceptions of a reasonable observer. *See, e.g.,* Black’s Law Dictionary 144 (8th ed. 2004)

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<sup>2</sup> Although Attorney General McGraw “confidently” predicts a reversal of the *Brennan* decision by the Seventh Circuit, McGraw Br. at 12 n.6, in fact that appeal was dismissed as moot after Wisconsin’s legislature repealed the judicial public financing law. *See* Order Dismissing Appeal as Moot at 1, *Wis. Right to Life Political Action Comm. v. Brennan*, No. 11-1769 (7th Cir. Aug. 1, 2011), ECF No. 24.

(noting that in tort law, “objective” standard is “the reasonable-person standard”); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (explaining “‘objective’ reasonableness” involves “typical reasonable person”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (referring to “objective” test as “‘reasonable person’ oriented”); *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381, 385 (1985) (explaining an “objective test” asks “what a reasonable person . . . would have done”).

The *Caperton* Court explicitly found that there was no actual bias on the part of Justice Brent Benjamin. But the Court still required recusal because, it concluded, reasonable observers’ *perceptions of bias* rose to a constitutionally intolerable level under the facts of that case. See *Caperton*, 556 U.S. at 882, 886-87. *Amicus* Callaghan, therefore, is wrong to argue that avoiding the appearance of bias is not a compelling interest. See Callaghan Br. at 23.

The Pilot Program was enacted in response to concerns that the legitimacy of this Court’s judgments could be undermined by the significantly increased spending in this state’s Supreme Court elections in recent years. “[F]undraising and campaign expenditures in elections for a seat on the Supreme Court of Appeals have dramatically increased in West Virginia,” with candidates raising \$1.4 million, \$2.8 million, and \$3.3 million in 2000, 2004, and 2008, respectively. W. Va. Code § 3-12-2(3)-(6). This mirrors national trends: between 2000 and 2009 state supreme court candidates raised and spent approximately \$206 million in judicial elections, more than twice what was raised and spent over the previous decade. James Sample et al., *The New Politics of Judicial Elections 2000-2009*, at 1 (Charles Hall ed., 2010).

“As campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary’s role in our society.” *Indep.*

Comm'n Final Report at 3-4 (Pet. for Mandamus App. 6-7). *See also White*, 536 U.S. at 779 (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."); *Brennan*, slip op. at 36, attached hereto as Exhibit A ("If third parties spend bundles of cash expressly advocating the election of a . . . Supreme Court Justice, the public, unsurprisingly, is likely to perceive the appearance of bias or even corruption *if*—and for the largest of contributors, what often turns out to be *when*—those third parties later appear before the . . . Supreme Court.").

Polling in West Virginia confirms the impact that runaway spending in judicial elections has had on public perceptions of judicial impartiality. In a 2010 poll of West Virginia voters conducted by Anzalone Liszt Research, Inc., 78% of respondents thought that campaign contributions had "some influence" or "a great deal of influence" on the Court's decision-making.<sup>3</sup> Sixty-eight percent believed that it is a "serious problem" if Supreme Court candidates receive contributions from entities whose cases the Court may hear. Polling nationally and in other states has confirmed the serious implications that spending in judicial campaigns can have on public perceptions of possible judicial bias.<sup>4</sup>

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<sup>3</sup> Justice at Stake, Poll on Public Financing in West Virginia 2 (2010), *available at* [http://www.justiceatstake.org/media/cms/West\\_Virginia\\_Poll\\_Results\\_674E634FDB13F.pdf](http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf).

<sup>4</sup> *See, e.g.,* The Harris Poll National Quorum Justice at Stake Campaign, June 9-13, 2010, at 6, 12, *available at* [http://www.justiceatstake.org/media/cms/The\\_Harris\\_Poll\\_National\\_Quorum\\_Jus\\_F847FF6BF6CD0.pdf](http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf) (71% of those surveyed thought campaign contributions had at least some influence on judges' decisions); Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA Today, Feb. 16, 2009, [http://www.usatoday.com/news/washington/2009-02-16-grisham-court\\_N.htm](http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm) (89% of those surveyed believed that the influence of campaign contributions is a problem, and 52% considered it a "major" problem); Committee for Economic Development, *Justice for Hire: Improving Judicial Selection 2* (2002), *available at* [http://www.ced.org/images/library/reports/justice\\_for\\_hire/report\\_judicialselection.pdf](http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf) (Business leaders and educators expressed that "[t]he need

The West Virginia Legislature specifically implemented the Pilot Program, in part, to “strengthen public confidence in the judiciary.” W. Va. Code § 3-12-2(9). That is unquestionably a compelling interest, as the Wisconsin district court recognized in holding that that state’s judicial public financing law furthered the compelling government interests of preventing bias and the appearance of bias. *See Brennan*, slip op. at 33, attached hereto as Exhibit A. The *Brennan* court correctly held that the Wisconsin legislature’s efforts to “protect the impartiality and independence of the Wisconsin Supreme Court by limiting even the appearance of impropriety in campaigns for a seat on that court” was “sufficiently compelling” to justify any burdens on speech that could result from the supplemental funds provisions. Slip op. at 34, attached hereto as Exhibit A. The court observed that “[a]s the United States Supreme Court recognized in *Caperton* . . . , the need to insure judicial elections are free from any appearance of bias or corruption is unquestionably stronger than the need in elections for legislative or executive offices.” Slip op. at 33.<sup>5</sup>

*Citizens United* is not to the contrary. Speaking through Justice Kennedy, the Supreme Court concluded that “independent expenditures . . . do not give rise to corruption or the appearance of corruption,” and therefore are not constitutionally problematic. 130 S. Ct. at 909. In *Caperton*, however—also authored by Justice Kennedy—the Court held that independent expenditures *do* give rise to constitutional concerns by creating “significant and disproportionate influence” which, “coupled with the temporal relationship between the election and the pending

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for judges to appeal to voters and seek campaign contributions to finance their quests for office is antithetical to the ideal of an independent and impartial judiciary.”).

<sup>5</sup> *North Carolina Right to Life Political Action Committee v. Leake*, No. 5:11-CV-472-FL, 2012 WL 1825829 (E.D.N.C. May 18, 2012) does nothing to contradict the idea that judicial elections implicate compelling interests absent from executive and legislative races. While the court struck down a similar North Carolina supplemental funds provision, the court failed to consider the constitutional merits of the matter because the state offered no defense of the law on the merits of its constitutionality. *Id.* at \*6.

case[,] offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.” *Caperton*, 556 U.S. at 886 (internal citations, punctuation, and ellipses omitted).

The intersection of these two cases makes clear that the constitutional calculus that applies in judicial elections is different. The Court determined that, while independent expenditures cannot corrupt legislative or executive officials (according to *Citizens United*), they *can* affect the impartiality and the appearance of partiality of judges (according to *Caperton*). Independent expenditures gave rise to a constitutional injury in the latter context, but not the former, because impartiality and the appearance of impartiality are concerns of compelling constitutional magnitude. If this were not the case, *Caperton* would not and could not have been decided as it was.

***B. In arguing that the Pilot Program serves no compelling interests, Attorney General McGraw and Callaghan profoundly misconstrue the relevant Supreme Court precedent.***

Attorney General McGraw and *amicus* Callaghan attempt to distinguish the binding precedent of the U.S. Supreme Court which holds that combating actual and perceived judicial bias are constitutionally compelling interests that may support various regulations of judicial election conduct. Indeed, McGraw and Callaghan maintain that the Supreme Court’s decisions in *Bennett*, *White*, *Citizens United*, and *Bullock* control here, and require Section 3-12-11(e) to be struck down. Because McGraw and Callaghan fundamentally mischaracterize these Supreme Court precedents, it is necessary to clarify the holdings of several key cases.

First, the suggestion by Attorney General McGraw that the Court has “held in no uncertain terms” that “combating corruption is not a compelling state interest” reveals a profound misunderstanding of the law. McGraw Br. at 15. The Court struck down laws in *Citizens United* and *Bennett* because the laws in question did not further the anti-corruption

interest, not because the interest was not compelling. In fact, “*Bennett* reaffirmed . . . that preventing corruption and its appearance is a compelling state interest.” *Ognibene v. Parkes*, 671 F.3d 174, 185 (2d Cir. 2011). The compelling anti-corruption interest has been relied on repeatedly to uphold the basic foundations of our campaign finance system, including contribution limits, pay-to-play laws, and bans on corporate donations to candidates, among other things. See, e.g., *Citizens United*, 130 S. Ct. at 909 (“[C]ontribution limits . . . have been an accepted means to prevent *quid pro quo* corruption.”); *Buckley*, 424 U.S. at 26 (contribution limits); *Ognibene*, 671 F.3d at 186-87 (2d Cir. 2011) (pay-to-play laws); *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (corporate contributions). Attorney General McGraw’s misapprehension of this bedrock principle of campaign finance law is consistent with the additional mischaracterizations of law that pervade the Attorney General’s and Callaghan’s submissions.

Both Callaghan and Attorney General McGraw argue unsuccessfully, for example, that *Citizens United* limited the holding of *Caperton*, and somehow overruled *Caperton*’s determination that ensuring actual and perceived impartiality is a compelling interest. See Callaghan Br. at 12; McGraw Br. at 17. But the quotation from *Citizens United* selected by the Attorney General demonstrates the flaw in this argument. The quote, in relevant part, provides that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech *could be banned*.” *Id.* (quoting *Citizens United*, 130 S. Ct. at 910) (emphasis added). Here, the Pilot Program does not restrict, much less purport to ban, any speech whatsoever. The Attorney General attacks a straw man; Petitioner does not argue that *Caperton* stands for the proposition that political speech can be *prohibited* in judicial elections or anywhere else. Rather, *Caperton* demonstrates that there is a state interest of the highest order in maintaining a judiciary that is and appears to be impartial.

Attorney General McGraw's characterization of *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012), if anything, is even more misleading. McGraw states that *Bullock* addressed "matching fund, or 'trigger,' provisions . . . applying to judicial offices." McGraw Br. at 10-11. This is simply false. Montana does not have any public financing program for judicial elections (or any other elections). *Bullock* says nothing whatsoever about public financing in general or "trigger" provisions in particular.

Callaghan, too, distorts *Bullock*, suggesting that in the case, the "Supreme Court of the United States summarily rejected the same arguments raised by [Petitioner] here." Callaghan Br. at 12. But Callaghan immediately undercuts this argument by admitting that "At issue in *Bullock*, was Montana's *ban* on corporate campaign expenditures." *Id.* (emphasis added). Like *Citizens United*, the holding of *Bullock* is limited to statutes purporting to entirely prohibit certain types of political speech; it offered no opinion on any aspect of public financing. This Court need not consider whether the compelling interests in preventing real and perceived bias in the judiciary would be sufficient to uphold a categorical ban on speech in judicial elections, because the West Virginia Legislature has not banned any speech.

Callaghan also cites *White* to misleadingly assert that the Supreme Court "has consistently rejected the claim that First Amendment rights apply differently in the context of judicial elections." Callaghan Br. at 11 (citing *White*, 536 U.S. at 784). Similarly, Attorney General McGraw falsely claims that *White* "completely dismissed the . . . argument that judicial elections are different from executive or legislative elections vis-à-vis First Amendment concerns." McGraw Br. at 16. To the contrary, the Court in *White* explicitly held that it would "neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. McGraw further quotes *White*

for the proposition that the Pilot Program is unconstitutional because the “State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compel the abridgement of speech.” *Id.* at 20 (quoting *White*, 536 U.S. at 795 (Kennedy, J., concurring)). Here again, as with *Citizens United* and *Bullock*, Attorney General McGraw elides the fact that *White* dealt with a categorical ban on certain political speech. That is not the case with the Pilot Program, and *White* is inapposite.

In sum, the Supreme Court cases on which McGraw and Callaghan rely do not support their arguments that Section 3-12-11(e) is unconstitutional. *Bennett* dealt only with executive and legislative elections. *White*, *Citizens United*, and *Bullock* all involved constitutional challenges to statutes that entirely prohibited certain political speech. These cases do not control the very different circumstances presented here.

**II. The Pilot Program’s Supplemental Funds Provisions Are Narrowly Tailored To Further West Virginia’s Compelling Interests in Ensuring Courts Are Impartial in Fact and Appearance.**

The West Virginia Legislature enacted the Pilot Program to create “an alternative public campaign financing option for candidates running for a seat on the Supreme Court of Appeals [that] will . . . protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.” W. Va. Code § 3-12-2(9). As demonstrated, these are constitutionally compelling interests. Under strict scrutiny analysis, for the Pilot Program to survive constitutional scrutiny, its provisions must also be narrowly tailored to further these compelling state interests. *See, e.g., Citizens United*, 130 S. Ct. at 898. Because the West Virginia Legislature had no other viable, less restrictive alternatives than the structure it chose for the Pilot Program, this Court should affirm its constitutionality.



By accepting public funds, a candidate who participates in the Pilot Program can eliminate any risk of the perception of partiality that can accompany large private contributions. In designing the Pilot Program to advance this salutary purpose, the Legislature confronted a challenge: ensuring that the program provided campaign funds to participating candidates sufficient to let them communicate their message to voters, while not draining the public fisc unnecessarily with an unacceptably expensive program. Public resources are finite, of course, and precious state funds must be preserved whenever possible. But if the Legislature had made the public funds available through the Pilot Program too paltry, no candidates would participate in the program because it would provide insufficient funds to wage a viable campaign. Such a result would have rendered the Pilot Program completely ineffective in achieving its constitutionally vital goals. For this reason, the Legislature carefully calibrated the amount of public funds available to participating candidates, and the mechanism for the funds' disbursement, by including the law's supplemental funds provisions—including that at issue in this proceeding, W. Va. Code § 3-12-11(e).

The Legislature's solution thus carefully balanced concerns for fiscal responsibility with the need to incentivize participation in the program. The supplemental funds provisions protect the state treasury from unnecessary disbursements to candidates who are able to campaign effectively without receipt of the maximum funds available under the program, but also assuage the concerns of candidates that participating in the program could result in being completely outgunned by deep-pocketed opposition—and thereby encourage participation in the program. The supplemental funds provisions therefore “certainly serve[] as an incentive for candidates for . . . Supreme Court Justice to choose to participate in public financing.” *Brennan*, slip op. at 32, attached hereto as Exhibit A.

The U.S. Supreme Court has made clear that the public financing of elections is constitutional and furthers important government interests. In *Buckley v. Valeo*, the Court noted that the use of public campaign funds does not constitute an attempt “to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” 424 U.S. at 92-93. In *Bennett*, the Court again affirmed the constitutionality of public financing as a whole, making clear that it did not “call into question the wisdom of public financing as a means of funding political candidacy.” 131 S. Ct. at 2828; *see also Ognibene*, 671 F.3d at 185 (“*Bennett* reaffirmed . . . that public financing is still a valid means of funding political candidacy.”). Public financing of elections, as a general matter, is indisputably constitutional.

Accordingly, the West Virginia Legislature can constitutionally provide the Pilot Program’s current lump sum payment for the general election of \$350,000. W. Va. Code § 3-12-11(b)(1). The West Virginia Legislature could also constitutionally provide for a lump sum payment of \$1,050,000, an amount equal to the current general election lump sum grant amount (\$350,000) plus the maximum supplemental funds amount (\$700,000), W. Va. Code § 3-12-11(h). Both of these payment structures are unquestionably constitutional. The only question presented here is whether the State’s use of a sliding scale—rather than a prohibitively expensive lump sum or a sum too small to attract candidates’ participation—is a narrowly tailored means of structuring the Pilot Program.

It is crucial to note that *Bennett* did not opine on the question of whether the use of a supplemental funds mechanism is narrowly tailored. As noted above, the *Bennett* Court found Arizona’s matching funds provisions did not advance the only compelling interest in a non-judicial election—the interest in fighting *quid pro quo* corruption. Because the Arizona law did

not further this interest, the Court had no occasion to assess whether the mechanism Arizona employed was appropriately tailored. Here, by contrast, because the Pilot Program does advance the constitutionally compelling interests that obtain in the context of judicial elections, this Court must assess whether the use of supplemental matching funds is narrowly tailored.

The only court that has assessed whether supplemental funds in a judicial public financing program were narrowly tailored is the federal district court in Wisconsin, which held that they were. In *Brennan*, the court explained,

Without the matching funds and triggering provisions, candidates for a seat on the Wisconsin Supreme Court may not choose public financing under the Act for fear of being easily outspent by a privately-funded opponent and his or her supporters. Thus, encouraging participation in the public financing of supreme court candidate's campaigns undoubtedly bears a substantial relation to the sufficiently compelling governmental interest in maintaining an impartial court untainted by an appearance of bias.

Slip op. at 35, attached hereto as Exhibit A. The court concluded that hypothetically "less restrictive ways to accomplish the same goal"—like simply giving the maximum lump sum grant—were not "sufficiently realistic" because of "budget pressures." Slip op. at 35 & n.21. The *Brennan* court therefore concluded that the law satisfied the narrow tailoring requirement and upheld the law as satisfying strict scrutiny. Slip op. at 14, 35-36, attached hereto as Exhibit A.

This Court should reach the same conclusion here. The reason the West Virginia Legislature chose to use the sliding scale approach rather than a larger lump sum is clear: to protect scarce state resources from unnecessary distribution while ensuring that candidates would not avoid the Pilot Program for fear that they would have insufficient funds to wage an adequate campaign.

Neither the State nor would-be publicly financed candidates could know in advance whether a \$350,000 grant, a \$1,050,000 grant, or some value in between, would be sufficient to allow participating candidates to adequately communicate their messages to voters. Campaigns for public office are dynamic affairs that can change dramatically in a very short period of time. Non-participating candidates can raise funds in unlimited amounts in response to new circumstances, W. Va. Code § 3-12-2(1), but publicly financed candidates are prohibited from raising even one dollar from private sources once they are certified, W. Va. Code § 3-12-12(a)-(b). Avoiding the necessity of significant private fundraising by Supreme Court candidates—and the negative perceptions that may accompany such fundraising—is, of course, the very purpose of the Pilot Program. Rather than incentivizing candidates to spurn the Pilot Program because of possibly insufficient grants—effectively nullifying the program’s purpose—or promising too much money to candidates—needlessly depleting precious state funds—the State of West Virginia narrowly tailored the program to address both of these concerns through its supplemental funds provisions.

*Amicus* Callaghan’s suggestion that the Pilot Program is not narrowly tailored because recusal is a less burdensome option is unavailing. Callaghan argues that *Caperton* stands for the proposition that mandatory “recusal creates the solution to the appearances [of judicial impartiality] problem [Petitioner] advances.” Callaghan Br. at 24. This argument rests on a basic misreading of the case. *Caperton* did not hold that recusal is the only constitutionally sound method to advance the critical state interest in a judiciary that is, and appears to be, impartial and free of bias. Indeed, the *Caperton* decision itself makes clear that neither the majority nor the dissenters believed that recusal alone is sufficient to protect the judiciary’s reputation as independent and impartial. Rather, the Court’s decision “addresses an

extraordinary situation where the Constitution *requires* recusal.” 556 U.S. at 887. The *Caperton* Court in no way suggested that recusal alone vitiates the need for other “judicial reforms the States have implemented to eliminate even the appearance of partiality.” *Id.* at 888.

Like the *Caperton* majority, Chief Justice Roberts, in dissent, recognized the critical importance of judicial integrity: “I, of course, share the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such.” *Id.* at 890 (Roberts, C.J., dissenting). Chief Justice Roberts questioned the adequacy of the *Caperton* recusal rule to address those compelling concerns, however, criticizing the majority for crafting a vague recusal rule that, in practice, would “bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.” *Id.* There is no support in *Caperton*—from either the majority or the dissent—for the proposition that recusal is the singular means for safeguarding the vital state interest in fair and impartial courts. Public financing laws like the Pilot Program are a valuable means of advancing these interests, and West Virginia’s law is a model that other states facing runaway spending in judicial elections would be well served to emulate.


In short, the Pilot Program’s supplemental funds provisions further the state’s strong interests in safeguarding the actual and apparent impartiality of the Supreme Court of Appeals. They are narrowly tailored by achieving a necessary harmony between the competing goals of encouraging candidates to participate in the program and protecting state funds. There are no viable less burdensome alternatives that the State could have employed to accomplish these constitutionally vital goals.

## CONCLUSION

By enacting the Pilot Program, the West Virginia Legislature acted on the state's interests in guarding judicial integrity by ensuring that courts are impartial in reality and appearance. The Legislature carefully crafted the Pilot Program's supplemental funds provisions to ensure that they were narrowly tailored to further these state interests of the highest order. The Pilot Program's supplemental funds provisions therefore pass constitutional muster.

This Court should affirm the constitutionality of the Pilot Program and grant the relief sought in the Petition.

**ALLEN H. LOUGHRY II,**



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Marc E. Williams (WVBN 4062)  
Randall L. Saunders (WVBN 10162)  
Jenna E. Hess (WVBN 11416)  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
949 Third Avenue, Suite 200  
Huntington, WV 25701  
(304) 526-3500  
marc.williams@nelsonmullins.com

J. Adam Skaggs (Admitted *Pro Hac Vice*)  
Matthew Menendez (Admitted *Pro Hac Vice*)  
BRENNAN CENTER FOR JUSTICE  
AT N.Y.U. SCHOOL OF LAW  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013  
(646) 292-8331  
adam.skaggs@nyu.edu  
matthew.menendez@nyu.edu

**COUNSEL FOR PETITIONER,  
ALLEN H. LOUGHRY II**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RIGHT TO LIFE  
POLITICAL ACTION COMMITTEE,  
GEORGE MITCHELL, and WISCONSIN  
CENTER FOR ECONOMIC PROSPERITY,

Plaintiffs,

v.

OPINION AND ORDER

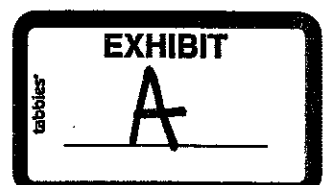
09-cv-764-wmc

MICHAEL BRENNAN in his official capacity  
as a member of the Government Accountability  
Board, WILLIAM EICH in his official capacity  
as a member of the Government Accountability  
Board, GERALD NICHOL in his official capacity  
as a member of the Government Accountability  
Board, THOMAS CANE in his official capacity  
as a member of the Government Accountability  
Board, THOMAS BARLAND in his official capacity  
as a member of the Government Accountability  
Board, GORDON MYSE in his official capacity  
as a member of the Government Accountability  
Board, DAWN MARIE SASS in her official capacity  
as Wisconsin State Treasurer, JOHN T. CHISHOLM  
in his official capacity as Milwaukee County District  
Attorney and BRAD SCHIMEL in his official capacity  
as Waukesha County District Attorney,

Defendants.

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Plaintiffs challenge the constitutionality of several provisions in Wisconsin's Impartial Justice Act -- enacted in December 2009 -- which governs campaigns for election to a seat on the Wisconsin Supreme Court, the first of which is scheduled for the April 5, 2011. Generally, plaintiffs contend that the Act impermissibly burdens their



First Amendment rights of free speech and association on its face.<sup>1</sup> Specifically, plaintiffs challenge (1) the reporting requirements for third-party, independent disbursements for “express advocacy,” Wis. Stat. § 11.513(1); (2) the possible triggering of supplemental grants to candidates who elect to participate in public financing based on plaintiffs’ disbursements, Wis. Stat. § 11.513(2); and (3) the \$1000 limit on contributions made by individuals and committees to privately-funded candidates, Wis. Stat. §§ 11.26(1)(am), (2)(an). Plaintiffs maintain that each of these provisions constitute unconstitutional impingement on their speech during campaigns for a seat on the Wisconsin Supreme Court.

The possibility of an asymmetrical grant of supplemental funds to a candidate triggered by independent expenditures expressly for an opponent or against the candidate makes this a close question in light of the Supreme Court’s decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 2768 (2008). Nevertheless, the likelihood of a triggering of supplemental funds by plaintiffs is remote and any arguable, limited impingement on plaintiffs’ First Amendment rights outweighed by Wisconsin’s compelling interest in the election of justices to its highest court free from an appearance of bias.

Here, the only speech even arguably impinged are independent expenditures expressly advocating the election or defeat of a clearly-identified candidate, which both historical and current records tell us is highly unlikely to reach the \$360,000 trigger for

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<sup>1</sup> The First Amendment’s protections apply to the states through the Fourteenth Amendment’s due process clause. *Ben’s Bar, Inc. v. Vill. of Summerset*, 316 F.3d 702, 707 (7th Cir. 2003) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)).



the grant of matching funds under the Act -- not only accounting for plaintiffs' limited expenditures, but even if all other third-party expenditures of this kind are included. Ultimately, the relationship between *plaintiffs'* speech and the award of supplemental funding is too speculative, indirect and watered down to warrant the entry of an injunction, particularly with less than a week remaining before the election of a Wisconsin Supreme Court Justice in which both of the remaining candidates have elected public financing. In light of the State's undeniable, compelling interest in avoiding a growing perception that the financing of elections of Wisconsin Supreme Court Justices is irreparably tainting them with an appearance of bias, this court will grant summary judgment to defendants and deny any injunctive relief.

## FACTS<sup>2</sup>

### A. Parties

Plaintiff Wisconsin Right to Life Political Action Committee ("WRTL") is a non-profit political action committee organized in Wisconsin with its headquarters in Milwaukee. Plaintiff Wisconsin Center for Economic Prosperity PAC ("Prosperity") is a non-profit political action committee organized in Wisconsin with its headquarters in New Berlin. Plaintiff George Mitchell is an individual living in Whitefish Bay, Wisconsin.

As for defendants, Judges Michael Brennan, William Eich, Gerald Nichol, Thomas Cane, Thomas Barland and Gordon Myse are all being sued in their official capacities as

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<sup>2</sup> The following facts are taken from undisputed findings of fact in the parties' motion papers and the public record.

members of the Government Accountability Board ("GAB"), which under Wis. Stat. § 5.05, is responsible for the administration of Chapter 11 of the Wisconsin Statutes. Dawn Marie Sass, John T. Chisholm and Brad Schimel are being sued in their official capacities as Wisconsin State Treasurer, Milwaukee County and Waukesha County district attorneys, respectively.

**B. Growing Perception of Bias**

In 1999, the Wisconsin Supreme Court Commission on Judicial Elections and Ethics (the "Commission") issued a report. Among its finding was that there had been a dramatic escalation in the cost of statewide judicial races over the previous several elections. For example, in 1965, the highest expenditure by a candidate was approximately \$50,000 on his campaign; in 1989, the *average* amount of money raised by a candidate for a seat on the Wisconsin Supreme Court was \$194,643; and in 1999, the average had more than tripled to \$656,202, with a high of \$1.2 million. During that same ten year period (from '89 to '99): 75 percent of the cases heard by the Wisconsin Supreme Court involved a party, law firm, business or other organization that had made a financial contribution to the campaign of a sitting Wisconsin Supreme Court Justice; 45 percent of all the lawyers appearing before the court, had made a financial contribution to an elected justice; every elected justice had received money from an attorney or party who later appeared before the court; and a litigant appearing before the court had on average made a contribution 48 percent higher than other contributors to a Wisconsin Supreme Court campaign.

The Commission found “that the associated fundraising inevitably raises questions of bias and partiality and judicial independence which tend to undermine public confidence in the integrity of judicial officers and judicial process.” (Defs.’ PFOF (dkt. #64) ¶13.) A majority of the Commission concluded that there was an immediate and urgent need for the public financing of statewide judicial races. (*Id.*)

In 2002, the American Bar Association’s Standing Committee on Judicial Independence recognized a similar, dramatic increase across the country. While cases of outright bribery were rare, the Committee noted greater attention was being paid by the press and public to suspicious correlations between the campaign contributions received by a judge and favorable treatment in court for the contributors. In particular, the Committee found a pervasive public perception that campaign contributions influenced judicial decisionmaking. As the ABA’s Commission on Public Financing of Judicial Campaigns put it at the time:

The net effect is to create the impression that judges are no different from other elected officials: that in judicial elections, as elsewhere, money talks; that judicial findings of fact and interpretations of law are subject to the vagaries of contributor and constituent influence and that judges are no more impartial than their counterparts in the political branches; and that politics rather than law therefore dominates the decision-making process.

(Defs.’ PFOF (dkt. #64) ¶15.)

Perceptions have only worsened since those words were written in 2002. In particular, the combined fundraising of the two leading candidates running for a seat on the Wisconsin Supreme Court in 2007 exceeded \$2.6 million, nearly doubling the previous state record. During that same campaign, the three highest spending independent interest groups alone spent around three million dollars on additional

television advertising, raising the total cost of the campaign to approximately six million dollars. Following that election, all seven members of the Wisconsin Supreme Court issued an open letter asking that future elections be publicly funded. The letter included the following statement:

The risk inherent in any non-publicly funded judicial elections for this court is that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign. Judges must not only be fair, neutral, impartial and non-partisan but also should be so perceived by the public.

(Defs.' PFOF (dkt. #64) ¶19.)

In January of the following year, the results of a poll found that 78 percent of Wisconsin's voters believed that campaign contributions to judges either have some or a great deal of influence on judges' decisions. The results also showed that 77 percent of Wisconsin's voters felt that the Legislature and the Governor needed to take action on judicial campaign reform before the next Supreme Court election and that 65 percent of Wisconsin's voters supported the public financing of judicial campaigns.<sup>3</sup>

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<sup>3</sup> One can argue about how closely they are linked, but the explosion of campaign expenditures has coincided with a marked decline in the Wisconsin Supreme Court's perceived ability to function collegially. During the 2008 election, television advertising hit a new low. Then candidate, now Justice Gableman ran an ad that falsely suggested then Justice Butler had in his capacity as defense counsel obtained the release of an individual who went on to molest again, and whose underlying premise was that anyone who would vigorously defend someone accused of a serious crime is unqualified to serve on the Wisconsin Supreme Court, a theme that independent groups ran with in their own ads falsely suggesting that during Butler's earlier career as a public defender, a similar event occurred involving a repeat murderer. The ad motivated the Wisconsin Judicial Commission to sanction Justice Gableman, ultimately resulting in the unprecedented situation where an equally-split Wisconsin Supreme Court purported to issue two, opposing "per curiam" opinions, one striking down the sanction, *In re Judicial Disciplinary Proceedings Against Gableman*, 2010 WI 61, and the other upholding it, 2010 WI 62. Justice Gableman did not go unscathed during the campaign either, confronted

**C. Impartial Justice Act**

On December 1, 2009, Governor Jim Doyle signed the Impartial Justice Act into law.<sup>4</sup> The Act creates a “Democracy Trust Fund” (“the Fund”) for publicly financing campaigns for a seat on the Wisconsin Supreme Court. The Fund is financed by two sources: (1) voluntary taxpayer contributions and (2) if this does not generate sufficient funds, appropriations from the state’s general fund. Wis. Stat. § 20.855(4)(bb). Candidates are free to choose whether to participate in the Fund or to conduct privately financed campaigns.

To be eligible to participate in the Fund, the candidate must satisfy certain prerequisites under the Act. During an initial period, the participating candidate must collect qualifying contributions of \$5 to \$100 from at least 1,000 separate contributors. Wis. Stat. §§ 11.501(16), 11.502(2). Cumulatively, the candidate must collect at least \$5,000, but no more than \$15,000. Wis. Stat. § 11.502(2). Additionally, during an initial exploratory period and the qualifying period, participating candidates also may

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as he was with independent “issue ads” describing him as soft on sex offenders. *See Reality Check: Ad Attacking Gableman On Sex Offenders Makes Misleading Claims*, Channel 3000, Mar. 28, 2008, available at <http://www.channel3000.com/politics/15728488/detail.html> (last visited Mar. 7, 2011). While independent expenditures abated in the 2010 Wisconsin Supreme Court election, the public fissure in the court continues unabated, resulting in additional unseemly, public disputes, all of which have severely harmed the reputation of a court once considered among the best in the country. *See* N. Heffernan, (quoting Roger Traynor, then Chief Justice of the California Supreme Court, as saying in 1964 that Justice Heffernan had joined “the best court in the country . . . All are excellent judges, and two, George Currie and Tom Fairchild, are the best appellate judges in the country.”). Tom Fairchild Remembered, 2007 Wisconsin Law Review 34.

<sup>4</sup> The Act was originally set to take effect on December 1, 2010, but was amended five months later to become effective on May 1, 2010.

accept up to \$5,000 in "seed money contributions," which is defined as contributions under \$100 or money from a candidate's personal funds. Wis. Stat. § 11.508(1).

Upon certification, a participating candidate (1) becomes eligible to receive public grants from the Fund *and* (2) may not accept any further private contributions. Wis. Stat. § 11.506(1). A non-participating candidate may continue to accept private contributions throughout his or her campaign, but not more than \$1000 from a single campaign contributor, whether an individual or a committee. Wis. Stat. §§ 11.26(1)(am) and (2)(an).

### **I. Public Funding**

The amount a participating candidate receives depends on the stage and competitiveness of the campaign. If there are no challengers, the participating candidate receives no public funds. Wis. Stat. § 11.511(4). A participating candidate facing opposition receives \$100,000 for the primary election and \$300,000 for the general election. Wis. Stat. §§ 11.511(2), (3).

Under the Act, a participating candidate is also eligible to receive a "supplemental grant" if the disbursements by a non-participating candidate or by independent, third-parties exceed a statutory threshold. These supplemental, matching grants are triggered: (1) when a non-participating candidate "receives contributions or makes or obligates to make disbursements in an amount that is more than 5 percent greater than the public financing benefit" originally provided a participating candidate, Wis. Stat. § 11.512(1); and (2) "[w]hen the aggregate independent disbursements made or obligated to be made by a [third-party] against an eligible candidate for office or for the opponents of that

candidate exceed 120 percent of the public financing benefit for that office.” Wis. Stat. § 11.513(2).<sup>5</sup> Once the money spent or obligated to be spent exceeds one of these two “trigger” amounts, the participating candidate receives periodic, supplemental grants equal to the amount in excess of that trigger. The supplemental grants are, however, capped once they total three times the initial grant -- that is, capped at an additional \$300,000 in the primary election and \$900,000 in the general election. Wis. Stat. §§ 11.512(2), 11.513(2). If expenditures do not exceed either trigger amount, the participating candidate receives no supplemental matching funds.

## **2. Reporting Requirements**

The Act also imposes certain reporting obligations on non-participating candidates to facilitate the timely grant of matching funds. In addition to other reports required by law, a non-participating candidate is required to report to GAB all contributions or disbursements exceeding 105 percent of the initial public financing benefit. Wis. Stat. § 11.512(1). Once the 105 percent threshold has been surpassed, a non-participating candidate must report each additional \$1000 contributions received or disbursements made thereafter. *Id.* These reports are required by the 15<sup>th</sup> day of the month or the last day of the month that immediately follows receipt of the contribution or the making of

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<sup>5</sup> Under a straightforward reading of the statutory provisions, it would appear that spending by non-participating candidates and third-parties is not aggregated when determining the trigger point for supplemental funds. In other words, there are separate triggers for expenditures by non-participating candidates and third-parties. For purposes of the upcoming spring election, the distinction is of no moment because both of the candidates are participating, making the non-participating candidate provisions irrelevant. For purposes of future elections, the impact on plaintiffs is at best muddled, since an aggregation of both categories would make a trigger more likely, but also accelerate the period in which matching funds would be available before the hitting the maximum cap.

the disbursement, whichever comes first (except that during July, August and September reports are due the last day of the month). Wis. Stat. § 11.506(2). If contributions or disbursements are made within six weeks of the primary election date, however, the reports must be filed within 24 hours after the contribution is received or the disbursement is made. *Id.*

For independent entities, every disbursement in excess of \$1000 must be reported by the next regular period; if the disbursement is made within six weeks of the primary or general election, each additional \$1000 disbursement must be reported within 24 hours. Wis. Stat. § 11.513(1).<sup>6</sup>

### 3. Penalties

Under Wis. Stat. § 11.60(1), “any person, including any committee or group, who violates [Chapter 11] may be required to forfeit not more than \$500 for each violation.”

Furthermore,

any person, including any committee or group, who is delinquent in filing a report required by this chapter may be required to forfeit not more than \$50 or one percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency.

Wis. Stat. § 11.60(2). Both the GAB or the district attorney of the county in which a violation of the Act occurs may bring actions against those who violate the Act. Wis. Stat. § 11.60(4).

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<sup>6</sup> These additional reporting requirements are inapplicable to participating candidates because they forego all private funding after the qualifying period, but participating candidates are still bound by the general registration and reporting requirements governing the creation and use of a campaign committee, as well as reporting receipt of contributions by such a committee. See Wis. Stat. §§ 11.05, 11.06.



**D. Independent Expenditures**

While spending by independent third-parties has exploded in recent campaigns, independent disbursements for "express advocacy," -- those actually reported to GAB and having the potential to trigger supplemental funds -- make up a small piece of the pie. In the 2003 election for the Wisconsin Supreme Court, the total amount of independent disbursements for the support or opposition of a candidate reported to GAB was \$21,919.88. In the 2005 and 2006 elections, there were no reported independent disbursements. In the 2007 election, GAB received reports of independent disbursements for express advocacy totaling \$99,963.40. In the 2008 election, between candidates Michael J. Gableman and Louis Butler, GAB received reports of independent disbursements totaling \$467,335.56, which was more than quadruple any previously reported.<sup>7</sup> In the 2009 election, however, the reported independent disbursements fell back to zero.

In the past, plaintiff WRTL has spent approximately \$1000 on a Wisconsin Supreme Court election.<sup>8</sup> Though WRTL would like to spend as much or more in the

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<sup>7</sup> Although this number is much higher than the previously recorded independent disbursements, the amount is dwarfed by the estimated \$4 million spent on so-called "issue advocacy" by independent third-parties (advertising that links a candidate to a cause or issue without formally advocating a vote for or against them). *See* Wisconsin Democracy Campaign, *available at* <http://www.wisdc.org/hijackjustice08issueads.php>. (last visited Mar. 7, 2011).

<sup>8</sup> Plaintiffs provide no details about the aggregate amount of money they have spent in past supreme court elections, nor evidence showing a likelihood of spending a certain amount in the current election. In fact, it appears that since 2000, plaintiff WRTL has spent in total \$100,029 in independent disbursements, not just in supreme

2011 election, WRTL maintains that the reporting and matching funds provisions will keep it from making such disbursements out of fear that the matching funds provision will be triggered and a participating candidate whom it opposes will receive money equal to their disbursements. Also, plaintiffs Mitchell and Prosperity have previously contributed more than \$1000 to support candidates running for a seat on the Wisconsin Supreme Court. Under the Act, contributions can no longer exceed \$1000.

#### **E. Current Posture**

Plaintiffs have moved for summary judgment on their claims (dkt. #55) and defendants for judgment on the pleadings (dkt. #56).<sup>9</sup> Several days before the briefing on those motions were completed, however, the Wisconsin Supreme Court enjoined enforcement of a related campaign finance reporting requirement under Wis. Admin. Code GAB § 1.28(3)(b). *Wis. Prosperity Network v. Myse*, No. 2010AP001937, slip op. at 2 (Wis. Sup. Ct. Aug. 13, 2010). This injunction limits disclosure and reporting of independent disbursements to “express advocacy,” narrowly defined as explicit statements for or against the election of a specific candidate, as opposed to, for example, criticizing or lauding a candidate’s position on an issue and urging readers or listeners to

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court races but *all* elections of any kind. See Wisconsin Democracy Campaign, *available* at <http://www.wisdc.org/ind10-500640.php> (last visited Mar. 7, 2011).

<sup>9</sup> Because both parties submitted proposed undisputed facts not found in the pleadings, the court will treat defendants’ motion for judgment on the pleadings as a motion for summary judgment as well pursuant to Fed. R. Civ. P. 12(d). Because plaintiffs filed their own summary judgment motion and had an opportunity to respond to defendants’ proposed facts, they were given ample opportunity to present all material pertinent to defend against defendants’ motion as required by Rule 12(d).

contact that candidate -- so-called "issue advocacy." *See* GAB Statement Regarding Wisconsin Supreme Court Decision in Campaign Finance Case (Dec. 1, 2010) <http://gab.wi.gov/node/1474> (last visited Mar. 7, 2011).<sup>10</sup>

With the spring election fast approaching, plaintiffs filed a motion for a preliminary injunction last month to enjoin enforcement despite these changes. As of the March 2, 2010 hearing on plaintiffs' motion for preliminary injunction, reported independent disbursements for express advocacy in the current election for a seat on the Wisconsin Supreme Court totaled only \$440. Plaintiff WRTL was responsible for \$420 of that amount, which was made on February 9, 2011, the day after plaintiffs filed their preliminary injunction motion. As of March 28, 2010 (one week from the election), reported independent expenditures still total only about \$13,000, or some \$347,000 below the trigger amount of \$360,000.

#### OPINION

Plaintiffs contend that their obligations to report independent expenditures, and their potential to trigger supplemental matching funds to be used against their candidate or in support of an opponent, creates a substantial burden on their expression of political

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<sup>10</sup> Although the Wisconsin Supreme Court's short injunction order lacks any elaboration as to the plurality's reasoning, a concurring opinion relies on the State's representation to this court in another lawsuit that GAB would not enforce a requirement for reporting any independent expenditures except on express advocacy. An injunction was entered to ensure § 1.28(3)(b) would not be expanded to require disclosure and reporting under Chapter 11 of the Wisconsin Statutes beyond express advocacy.

speech. Plaintiffs also contend that the \$1000 limit on contributions to a non-participating candidate is so low that it unconstitutionally drives candidates running for a seat on the Wisconsin Supreme Court to choose public financing over private. Ultimately, plaintiffs argue that if the supplemental grant provision is invalid, not only are the other challenged provisions invalid, but so, too, is the Act itself, since they are all part and parcel of the same unconstitutional campaign finance scheme.

With one exception discussed below, the United States Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), serves as something of a dividing line in deciding the merits of plaintiffs' claims here, though that case did not address a matching fund provision. Before *Davis*, the prevailing view of courts was that matching funds would pass constitutional muster. Since *Davis*, the view is substantially different, particularly with respect to asymmetrical funding of candidates.

Though other circuits have weighed in on the constitutionality of triggering provisions similar to that at issue here, the Seventh Circuit has not. Nor has the United States Supreme Court, though it may soon do so in *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (2010). Even acknowledging a possible impingement on these plaintiffs' free speech rights by virtue of the Act's matching fund provision, however, this court is satisfied it is outweighed by Wisconsin's compelling interest in avoiding the appearance of bias in the election of justices to the Wisconsin Supreme Court.

#### A. Constitutionality of Matching Funds

I. Pre-Davis rulings

The public financing of elections is hardly new. Nor are the courts struggles to balance competing rights under the First Amendment. The United States Supreme Court first considered the constitutionality of the federal government's public financing of presidential election campaigns in *Buckley v. Valeo*, 424 U.S. 1 (1976). Among other issues, the appellants in *Buckley* argued that "any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Id.* at 90. The Supreme Court disagreed, reasoning that the public financing of elections "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the public financing scheme] furthers, not abridges, pertinent First Amendment values." *Id.* at 92-93.

After the *Buckley* Court rejected the argument that public financing of elections is *per se* unconstitutional, legal challenges to the public financing of elections became more focused. Beginning in the 1990's and spilling into the new millennium, candidates and political supporters began challenging public financing provisions that provided incentives for candidates to choose public over private funding, such as matching funds or trigger provisions that provided participating candidates with additional grants of money should an opponent or the opponent's supporters spend above a designated amount during the election campaign. Until 2010, however, only the Court of Appeals for the Eighth Circuit had ruled that such a triggering provision violated the First Amendment.

In *Day v. Minnesota Citizens Concerned for Life, Inc.*, 34 F.3d 1356 (8th Cir. 1994), the Eighth Circuit considered the constitutionality of the trigger provision in a Minnesota campaign reform statute. *Id.* at 1359-60. The Eighth Circuit found the provision infringed protected speech “because of the chilling effect [it] ha[d] on the political speech of the person or group making the independent expenditure.” *Id.* at 1360. The Eighth Circuit held:

The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of plaintiff’s independent expenditure, chills the free exercise of that protected speech.

*Id.* at 1360.

Until the Supreme Court’s decision in *Davis*, 128 S. Ct. 2759, the Eighth Circuit’s decision in *Day* stood alone. See *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551-53 (8th Cir. 1996) (upholding a different trigger provision removing expenditure limitations on candidates participating in Minnesota’s public funding program when non-participating candidates received contributions or made expenditures equaling 50 percent of the expenditure limit); *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998) (to conclude that Kentucky’s public financing trigger provision is unconstitutional, “would be making a distinction based on degree” and “[f]aced with a difference only in degree, we will not second guess the Kentucky legislature by applying a ‘scalpel’ and declaring that Kentucky’s scheme goes one step over the line of unconstitutional coercion, especially

where, as here, the line is not a clear one" (citing *Buckley*, 424 U.S. at 30))<sup>11</sup>; *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (holding that the state's trigger provision merely provided candidates who chose public financing with the ability to disseminate speech responsive to speech disseminated by non-participating candidates or their supporters and because the First Amendment does not protect "[a] right to speak free from response," the court concluded the provision did not burden anyone's First Amendment rights); *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 437-39 (4th Cir. 2008) (siding with the First Circuit's *Daggett* decision in concluding that North Carolina's "provision of matching funds does not burden the First Amendment rights of nonparticipating candidates or independent entities that seek to make expenditures on behalf of nonparticipating candidates" because "[t]he only (arguably) adverse consequence" was distribution of matching funds, which "further[s], not abridges, pertinent First Amendment

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<sup>11</sup> In 1995, the District Court for the Western District of Kentucky upheld the same trigger provision in *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995). Based on specific facts, the court in *Wilkinson* distinguished Kentucky's provision from the trigger found unconstitutional in *Day*. *Id.* at 927-28. Among other distinctions, the district court noted that in *Day* the triggering action was independent expenditures, which were outside the control of non-participating candidates, whereas activation of the Kentucky trigger was "a calculated strategic decision" made solely by non-participating candidate. *Wilkinson*, 876 F. Supp. at 927. The district court was "not convinced that [the Kentucky trigger] impermissibly chill[ed] the speech of privately-financed candidates simply because it enable[d] the speakers' adversaries to respond." *Id.* at 928. Instead, the court found in an oft-repeated phrase "that the trigger provision promotes *more* speech, not less." *Id.* (emphasis added).

values by ensuring that the participating candidate will have an opportunity to engage in responsive speech.” (internal quotation omitted)).<sup>12</sup>

## 2. Davis v. FEC

Given the trend in case law up until the Supreme Court’s 2008 decision, it is hardly surprising that challengers to the constitutionality of matching funds provisions in state’s public financing schemes, including plaintiffs here, tout the *Davis* decision as a “game changer,” despite the decision not concerning the public financing of campaigns, nor even mentioning matching funds provisions. Rather, the Supreme Court considered the constitutionality of section 319(a) of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a-1(a), the so-called “Millionaire’s Amendment,” which “under certain circumstances, impose[d] different campaign contribution limits on candidates competing for the same congressional seat.” *Id.*, 128 S. Ct. at 2765.

Under previous federal law, all candidates for the House of Representatives, and their authorized committees, were limited in the amount of contributions they could receive and spend from others, but not in the amount they wished to spend out of their own, sometimes deep pockets. *Id.* at 2765. The Supreme Court found the Millionaire’s Amendment “fundamentally alter[ed] this scheme when, as a result of a candidate’s

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<sup>12</sup> Like the First Circuit before it, the Fourth Circuit explicitly rejected the logic of *Day*, considering it an “anomaly” in the light of the Eighth Circuit’s later decision in *Rosenstiel*. *Leake*, 524 F.3d at 437-38. The court found that “*Day*’s key flaw” was equating the potential for self-censorship created by a matching funds scheme with direct government censorship.” *Leake*, 524 F.3d at 438 (internal quotation omitted). Thus, the so-called “chilling effect” complained of was “not from any fear of direct government censorship but rather from the realization that one group’s speech will enable another to speak in response.” *Id.*



expenditure of personal funds, the ‘opposition personal funds amount’ (OPFA) exceed[ed] \$350,000.” *Id.* at 2766. Simply put, when a candidate’s “expenditure of personal funds” passed a \$350,000 threshold, that candidate’s opponent, but not the candidate, was no longer subject to normal contribution limits. *Id.* Instead, the opponent had the right to receive contributions from individuals at three times the normal limit *and* to receive unlimited coordinated party expenditures. *Id.*

Davis, a candidate for the House of Representatives when he filed the lawsuit, challenged the constitutionality of this “new, asymmetrical regulatory scheme,” arguing that “the First Amendment is violated by the contribution limits that apply when § 319(a) comes into play.” *Id.* at 2770. In particular, the appellant reasoned that “exercise of his First Amendment right to make unlimited expenditures of his personal funds” was being unconstitutionally burdened “because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech.” *Id.*

The Court recognized that had § 319(a) raised the contribution limits for *all* candidates, the appellant’s argument would fail. *Id.* Instead, asymmetrical contribution limits were triggered by the candidate’s exceeding a personal expenditure threshold. *Id.* at 2771. Explaining that it had “never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other,” the Court held the Millionaire’s Amendment “impermissibly burden[ed] a candidate’s First Amendment right to spend his own money for campaign speech.” *Id.*

The Supreme Court emphasized that placing a cap on a candidate's expenditure of personal funds to finance campaign speech had been "soundly rejected" in *Buckley* and, although § 319(a) did not impose a cap, it did impose "an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right [to spend personal funds for campaign speech]." *Id.* In this way, the Court explained, § 319(a) provided candidates with a stark choice "between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations," the latter option resulting in a "special and potentially significant burden." *Id.* at 2771-2772. In noting this burden on political speech, the Supreme Court referred the reader to the Eighth Circuit's decision in *Day* and specifically to its conclusion that increasing "a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures." *Davis*, 128 S. Ct. at 2772 (citing *Day*, 34 F.3d at 1359-60).

The *Davis* Court went on to explain that the choice about whether to expend a certain amount of personal funds that a self-financing candidate faces under § 319(a) was not comparable to the voluntary choice about whether to accept or forgo public financing that a presidential candidate faced in *Buckley*. 128 S. Ct. at 2772. In *Buckley*, the choice was between voluntary acceptance of public funds, and the concurrent, voluntary limiting of one's personal expenditures, or exercising one's "unfettered right to make unlimited personal expenditures." *Id.* Under § 319(a), in contrast, the *Davis* Court found a candidate could either "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.” *Id.* Accordingly, the Court found that § 319(a) imposed “a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech.” *Id.*

Finally, because it imposed a substantial burden on a First Amendment right, § 319(a) could not survive unless it was justified by a compelling state interest. *Id.* The Supreme Court found in *Davis* no such interest existed: the government’s interest in “level[ing] electoral opportunities for candidates of different personal wealth” was simply not compelling; in fact, leveling electoral opportunities had “ominous implications because it would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office.” *Id.* at 2773. In the end, the Court held that “the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.” *Id.* at 2774.

### 3. Post-Davis rulings

After *Davis*, the Ninth Circuit was the first to address a matching funds provision within a state’s public financing scheme. See *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010). In the wake of several large, ugly political scandals, Arizona voters passed an initiative entitled the Citizens Clean Elections Act. *Id.* at 514. Under the CCEA, candidates choosing to participate in the public financing system must agree to forfeit their right to fund their campaigns with private contributions. *Id.* at 516. Once qualified for public financing, participating candidates receive a lump-sum grant of public funds;

however, the participating candidate may receive additional matching funds if (1) a nonparticipating candidate spends more than the initial grant; or (2) the nonparticipating candidate's expenditures *plus* independent expenditures (in opposition to the participating candidate or in support of the nonparticipating candidate) exceeds the amount of the initial grant. *Id.* at 516-17. Matching funds are capped under the Act at three times the amount of the initial grant to the participating candidate. *Id.* at 517.

The *McComish* plaintiffs -- candidates for the Arizona House of Representatives and Senate, as well as several political action committees -- challenged the constitutionality of the matching funds provision because they claimed it deterred them from engaging in political speech in the form of money expenditures. *McComish*, 611 F.3d at 517. Relying on the Supreme Court's *Davis* decision, the plaintiffs argued CCEA's matching fund provision placed a severe burden on their speech. *Id.* 521.

The Ninth Circuit disagreed, finding that "*Davis* says nothing about public 'funding schemes and therefore says nothing about their constitutionality.'" *McComish*, at 521 (quoting Comment, 122 Harv. L. Rev. 375, 383 (Nov. 2008)). In distinguishing *Davis* from the case before it, the Ninth Circuit explained that "[t]he law in *Davis* was problematic because it singled out the speakers to whom it applied based on their identity. The [CCEA]'s matching funds provision makes no such identity-based distinctions." *Id.* at 523. The Ninth Circuit further explained that "[b]ased on the

record before us, we conclude that any burden the Act imposes on [appellants'] speech is indirect or minimal.”<sup>13</sup> *Id.*

Having found plaintiff's free speech rights only minimally burdened, the Ninth Circuit applied what it described as “intermediate scrutiny” to the CCEA's matching fund provision. Ultimately, the court found the government's interest in preventing corruption, and the appearance of corruption as well as its interest in encouraging participation in its public financing scheme, were sufficiently important and substantially related to the matching funds provision to survive intermediate scrutiny and, thus, did not violate the First Amendment. *Id.* at 525.

In a little over a month, however, two other circuit courts issued decisions finding matching funds provisions unconstitutional. In *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010), the Second Circuit considered a challenge to “non-participating candidate” and “non-candidate” trigger provisions in the Citizens Election Program (CEP) portion of Connecticut's Campaign Finance Reform Act. *Id.* at 218. That court concluded both trigger provisions imposed a potentially significant burden or penalty on a non-participating candidate. *Id.* at 244. Writing for the court, Judge Cabranes actually found this burden exceeded the one struck down in *Davis*, because there was no doubt that the opponent of a self-financed candidate “will receive additional money.” *Id.* The only difference -- that non-candidates as opposed to candidates were being burdened -- was insignificant to the Second Circuit. *Id.* The court further found that both provisions

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<sup>13</sup> This latter finding was based on the *McComish* plaintiffs failure to demonstrate their speech had actually been burdened by Arizona's matching funds provision.

failed to pass strict security, because the state's interest in promoting participation in CEP was not compelling. *Id.* at 246.

In *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010), the Eleventh Circuit considered a provision under the Florida Election Campaign Financing Act that provided an additional public subsidy to candidates participating in Florida's public financing system, triggered by a non-participating opponent spending in excess of \$2 for each registered Florida voter. 612 F.3d at 1281. The Eleventh Circuit found it "obvious that the subsidy imposes a burden on nonparticipating candidates, like plaintiffs, who spend large sums of money in support of their candidacies." *Id.* at 1290. Like the Second Circuit, the court also found that "the burden that an excess spending subsidy imposes on nonparticipating candidates 'is harsher than the penalty in *Davis*, as it leaves no doubt' that the nonparticipants' opponents 'will receive additional money.'" *Id.* at 1291 (quoting *Green Party*, 616 F.3d at 244). According to the Eleventh Circuit, what triggered strict scrutiny in *Davis* was "the grant of a competitive advantage." *Id.* Finally, the excess spending subsidy failed strict scrutiny as it was unclear how Florida's public financing system furthered the anticorruption interest and, even if it did, the excess spending subsidy was not the least restrictive means to reach that purpose. *Id.* 1293-94.

4. Pending Appeal before United States Supreme Court

On November 29, 2010, the United States Supreme Court granted certiorari review from the Ninth Circuit's decision in *McComish*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No.10-239).<sup>14</sup> One of the questions certified for review is:

Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Elections Comm'n*, 128 S. Ct. 2759 (2008), require this Court to strike down Arizona's matching fund trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

*McComish v. Bennett*, No. 10-239, <http://www.supremecourt.gov/qp/10-00239qp.pdf>. Oral argument on this appeal was heard this past Monday, March 29, making a decision likely by the end of this term.<sup>15</sup>

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<sup>14</sup> The Supreme Court consolidated the *McComish* appeal with its companion case, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No.10-238).

<sup>15</sup> Obviously, even the narrow holding by this court today may be undermined by the Supreme Court's decision in *McComish*, and the court considered a decision on the merits here pending further guidance from the Supreme Court. There is, however, an important distinction between the trigger provisions in this case and those in *McComish* and other decisions to date. Here, the matching fund provision is *solely* applicable to elections of justices to the State of Wisconsin's highest court and unlikely to be triggered even then. If the interests of avoiding bias in judicial elections to a state's highest court are not sufficiently compelling to allow a public financing scheme which includes trigger provisions for matching funds, then no interest will be and trigger provisions must be unconstitutional in all circumstances. Since *McComish* is unlikely to decide definitively the level and likelihood of impingement or the unique interest of a state in judicial elections, the court will rule without further guidance to facilitate argument before a higher court well in advance of the *next* election to the Wisconsin Supreme Court in 2013. At the same time, the court is painfully aware that its decision may merely be contributing to public financing's "death by a thousand cuts," as Justice Breyer put it during oral argument earlier this week in *McComish*, recognizing that money, like water, seems to find its own level.

**B. Wisconsin's Impartial Justice Act's Matching Funds Provision**

**1. Burden on speech**

The starting point in evaluating plaintiffs' First Amendment claim is determining what, if any, burden the matching fund provision places on plaintiffs' speech. Since we await more definitive guidance from the Supreme Court, and the Seventh Circuit has not yet ruled or even been faced with determining whether matching funds provisions burden free speech, this court is left to look to *Davis* and the decisions of other circuits for guidance.

Similar to the self-funding candidate in *Davis*, Wisconsin's Impartial Justice Act certainly presents plaintiffs and other third-parties with a choice: spend money directly supporting your chosen candidate or against their opponent and risk triggering (or at least playing a role in triggering) the grant of public moneys to fund an opponent's response. As defendants point out, there are, of course, potentially important differences here. Although the choices appear similar to *Davis*, the actual penalty or burden is at least more muted under the Act at issue. In *Davis*, the self-funded candidate had spent up to the limit and faced an immediate, certain triggering of the "Millionaire Provision," which would free his opponent from private fundraising limitations to which he remained subject. Here, the possibility of plaintiffs, or any other third party for that matter, triggering the rescue funds provision appears remote.

The evidence submitted by defendants establishes that (1) only once in a previous Wisconsin Supreme Court election would the trigger amount have been reached and (2) the named plaintiffs' independent disbursements never reached a level that would even



approach a trigger amount.<sup>16</sup> In fact, they represent a tiny fraction (less than 1%) of the \$360,000 trigger. Therefore, plaintiffs' concern that their independent disbursements would result in directly funding a candidate they oppose is, at the most, speculative.

Even assuming that supplemental funds had a chance of being triggered in a Supreme Court race, the category of speech being impinged -- that is, the kind of speech plaintiffs would be motivated to self-censor -- is far more limited than that in *Davis*. Specifically, plaintiffs' triggering activities only apply to their narrowly-defined, express advocacy. As previously mentioned, the Wisconsin Supreme Court currently has before it a case in which it must decide if Wis. Admin. Code GAB § 1.28(3)(b), which expands disclosure and reporting requirements from independent disbursements for express advocacy to those for issue advocacy, violates third parties' First Amendment free speech rights. See *Wis. Prosperity Network v. Myse*, No. 2010AP001937 (Wis. Sup. Ct. Aug. 13, 2010). While that court considers the issue, however, GAB has voluntarily restricted the reach of its regulation to express advocacy, and the Wisconsin Supreme Court subsequently enjoined it from expanding the reporting requirements. Accordingly, the only speech by third parties, like plaintiffs here, that could trigger rescue funds is independent disbursements for express advocacy.<sup>17</sup>

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<sup>16</sup> Despite moving for summary judgment, plaintiffs have submitted nothing but vague assertions about the Act's supposed impact on their speech.

<sup>17</sup> Of course, the analysis may differ if all independent expenditures, or at least all expenditures on the "functional equivalent" of express advocacy, were subject to reporting and triggering of asymmetrical public funding of a participating candidate. This court will not, however, address a theoretical challenge to application of a wider reaching regulation, at least when such application is voluntarily restricted by the enforcing agency and wider enforcement is specifically enjoined by the state supreme

A look at the relevant statutory provisions and administrative rules governing regulated campaign activities establish just how limited is this category of speech. The challenged statutory provision requires third parties, like plaintiffs, to report to GAB “independent disbursements in excess of \$1000.” Wis. Stat. § 11.513(1). “Disbursements” are defined in relevant part as “[a] purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made for a political purpose.” Wis. Stat. § 11.01(7)(a)(1). The statute goes on to explain that “[a]n act is for ‘political purposes’ when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office.” *Id.* § 11.01(16). The statute further elaborates on “political purposes” by specifically listing “a communication which expressly advocates the election or defeat . . . of a clearly identified candidate.” *Id.* § 11.01(16)(a)(1).

GAB has since promulgated rules to provide additional guidance on what a communication for a “political purpose” is:

The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate: 1. “Vote for;” 2. “Elect;” 3. “Support;” 4. “Case your ballot for;” 5. “Smith for Assembly;” 6. “Vote against;” 7. “Defeat;” or 8. “Reject.”

Wis. Admin. Code GAB § 1.28(3)(a). Simply put, unless plaintiffs produce and disseminate communications that contain blatant terms such as “vote for,” “elect” or “support,” or conversely “vote against,” “reject” or “defeat,” a candidate, their political

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court. Moreover, to address such an application would require review of the state supreme court’s order, something this court has no power to do. *See Atl. Coast Line R. Co. v. Bhd. Of Locomotive Eng’rs*, 398 U.S. 281, 296 (1970) (“[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.”).

speech will not trigger supplemental funds, even in the now unlikely event the trigger amount is exceeded by other, independent disbursements.

Nor does the Act dictate the content of plaintiffs' message. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (corporations may not be ordered to change what they said to avoid regulations because "[s]uch notions run afoul of 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'")(quoting *Hurly v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)). Indeed, plaintiffs are able to engage in express advocacy, subject to reporting requirements and some risk, however remote, that this speech may contribute to triggering, or if triggered, will precipitate, up to a point the public funding of an opponent's speech.

Admittedly, the speech theoretically being impinged is still core, political speech. Indeed, expressly and directly urging a vote for or against a candidate must be at or near the fiery center of free speech. But it is also the most overt tie of the speaker to the candidate and, therefore, the most likely to create an appearance of bias should the speaker (or those of similar special interest) later appear before the court. Moreover, it is a type of speech that can, under the Act as applied, be easily avoided without meaningfully diluting the power of its message and is, therefore, unlikely to hit a trigger or chill speech. On the contrary, as previously discussed, recent elections have involved robust, even overwhelming, independent expenditures extolling both the virtues and (real or imagined) faults of candidates without the overt message to vote "for" or "against" ever being expressly stated and, therefore, ever becoming reportable. Further, plaintiffs

have never asserted that the political speech they intend to engage in, or are refraining from engaging in, is the narrow, express advocacy regulated under the Act. Therefore, on the record before the court, the actual burden placed on plaintiffs' free speech rights appears minimal.<sup>18</sup>

Moreover, plaintiffs have failed to establish their speech actually has been or will be meaningfully burdened by the Act's matching funds provision. Certainly plaintiffs' vague assertions of self-censorship appear suspect in light of the remote possibility that their speech will trigger a grant of supplemental, public funds to an opponent. This is in distinct contrast to facts in *Davis* and *Scott*, where the plaintiffs had both the ability and likelihood of hitting a trigger. The closer case would be *Green Party*, where plaintiffs, as here, offered no evidence that they or others had the means to trigger any supplemental grants, but even there the Second Circuit still found the Green Party's endorsement was enough to create a possibility that its members and other supporters could trigger the

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<sup>18</sup> For purposes of the upcoming spring election, the aspect of the Act that is most troublesome under *Davis* is the asymmetry between the two participating candidates, if supplemental funds were actually triggered by independent disbursements outside the control of either candidate. For example, if only one of the candidates confront independent groups who collectively spend over \$360,000 on express advocacy, then only that one will receive supplemental public funds, while the other would have to make do with the initial \$300,000 grant for the general election. Even so, this is a risk both candidates accepted when taking public funds. Plus, the additional funding in that scenario would likely be used to respond to asymmetrical, independent endorsements, which is not to minimize its possible deterrent effect on independent expenditures, though here the court finds it outweighed by the State's interest in avoiding an appearance of bias.

matching fund provision. 616 F.3d at 243. Here, the risk of the named plaintiffs triggering is sufficiently remote to make any alleged chilling of speech extremely remote.<sup>19</sup>

At most, plaintiffs' claim of possible "self-censorship" is a tactical decision, not unlike one faced by all contributors to a campaign regardless of the Act's matching funds provisions. Whenever one candidate or her supporters spend money to facilitate political speech, they must weigh the potential benefit of getting out their message against the opposing candidate's and his supporter's ability to respond, as well as the strength of that candidate's opposing argument.<sup>20</sup>

## 2. Passing strict scrutiny

The Impartial Justice Act's matching fund provision creates a minimal, and at least in the near term almost wholly theoretical, burden on plaintiffs' free speech, but the effect, however remote, could nevertheless be to deter or at least shape core political speech to avoid asymmetrical, public funding going to one's opponent. To the extent that burden is real, it requires application of strict scrutiny to the subject provision which must both further a compelling interest and be narrowly tailored to achieve that interest.

*Wis. Right to Life, Inc.*, 551 U.S. at 464.

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<sup>19</sup> This is especially true for the spring judicial election, where a \$360,000 trigger must be reached and less than \$14,000 of independent disbursements have been reported with less than a week to go.

<sup>20</sup> In fact, under the Act, independent entities have the advantage of knowing that the participating candidate will only have the ability to respond until he or she hits the \$300,000 primary cap or \$900,000 cap in the general election. While a similar cap existed in *Green Party*, the Act's matching funds provision is not like Florida's, which left "no doubt" that the candidate being opposed would receive substantial, additional money. *Scott*, 612 F.3d at 1291.

Defendants contend the governmental interest served by the Act's matching funds provision is to provide an incentive for candidates running for a seat on the Wisconsin Supreme Court to choose public financing, which in turn reduces bias or the appearance of bias, or worse corruption or the appearance of corruption, in state judicial races. Plaintiffs argue that burdening the speech of independent entities in no way serves this purpose.

Whatever its other purposes or effects, the matching funds provision, certainly serves as an *incentive* for candidates for Wisconsin Supreme Court Justice to choose to participate in public financing. Once a candidate limits their receipt of private contributions, the *appearance* of bias or corruption for that candidate is also unquestionably reduced because the participating candidate's ability to raise money from private donors is severely limited. Because a participating candidate receives the vast majority of his or her campaign monies unfettered from the state, any chance of the candidates obtaining large, corrupting private contributions from members of a single interest group is all but eliminated.

Of course, the Act does nothing about independent expenditures by third-parties on "issue advocacy," but at least the judicial candidates or their proxies are not engaged in the unseemly process of raising and spending large sums of money directly, nor in regularly having those same contributors appearing before them as counsel or parties. So, too, providing a participating candidate with supplemental funds when independent disbursements for express advocacy surpass \$360,000 reduces the incentive to forego public finances altogether.

Preventing corruption, and its appearance, through public financing has long been found to be a significant governmental interest. *See Buckley*, 424 U.S. at 96 (“It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.”). In fact, some courts have found that creating an incentive for candidates to choose public financing in an effort to prevent and reduce the appearance of corruption is so compelling it would survive strict scrutiny. *See McComish*, 611 F.3d at 526 (citing *Rosenstiel*, 101 F.3d at 1553); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993)).

Wisconsin’s interest in safeguarding even an appearance of bias is stronger than any of the public financing statutes considered by courts to date. The Act covers *only* campaigns for a seat on the state’s highest court. As the United States Supreme Court recognized in *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), the need to insure judicial elections are free from any appearance of bias or corruption is unquestionably stronger than the need in elections for legislative or executive offices. *Id.* at 2266. (“The Conference of the Chief Justices has underscored that the codes [of judicial conduct] 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.” (Internal quotation omitted)). *See also Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (“Judicial integrity is . . . a state interest of the highest order.”) (Kennedy, J., concurring).

Members of “political” branches of government are expected to be representative of and responsive to the interests of their electoral constituencies, while judges -- even

when popularly elected -- are *not* representative officials, but rather are expected to be, and to appear to be, impartial and independent in applying the rule of law. The Fourth Circuit recently provided a succinct explanation for the long-standing, fundamental importance of an impartial and independent judiciary:

The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that 'the complete independence of the courts of justice is peculiarly essential' to our form of government.

*Leake*, 524 F.3d at 441 (quoting *The Federalist No. 78*, at 426 (E.H. Scott ed., 1898)).

The Wisconsin Legislature passed the Impartial Justice Act in an effort to protect the impartiality and independence of the Wisconsin Supreme Court by limiting even the appearance of impropriety in campaigns for a seat on that court, including a public financing option and matching funds provisions. At minimum, on the record before the court, Wisconsin's efforts through the Act's public financing incentives are sufficiently compelling to allow for some potential, and still mainly theoretical, impingement on speech, even, perhaps especially, political speech.

Plaintiffs stand on stronger footing in challenging whether the triggering provision is narrowly tailored to achieve the state's interest. Undoubtedly, in an election for a seat on the Wisconsin Supreme Court, the matching funds provision has a *substantial* relation to protecting the impartiality and independence of the judiciary by fighting against bias and corruption, as well as the appearance of each. In finding that Arizona's matching funds provision was substantially related to the state's anticorruption interest, the Ninth Circuit explained that "[i]n order to promote participation in the [public financing]



program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns . . . [because] [a] public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption." *McComish*, 611 F.3d at 526-27.

Without the matching funds and triggering provisions, candidates for a seat on the Wisconsin Supreme Court may not choose public financing under the Act for fear of being easily outspent by a privately-funded opponent and his or her supporters. Thus, encouraging participation in the public financing of supreme court candidate's campaigns undoubtedly bears a substantial relation to the sufficiently compelling governmental interest in maintaining an impartial court untainted by an appearance of bias.

Of course, there may be less restrictive ways to accomplish the same goal. One would be to make the initial, public grant so large as to make participation too attractive to decline regardless of the private resources available to the candidate's opposition. If this were ever a realistic alternative for the State of Wisconsin, it is no longer.<sup>21</sup> Similarly, Wisconsin could adopt a practice of appointing members to its highest court. Not only would this require a constitutional amendment, however, it would ultimately deny voters a direct voice in choosing the court's members. Neither of these alternatives is sufficiently realistic to render the State's use of matching funds unconstitutional. *See, e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1040 (7th Cir. 2002) ("To satisfy the

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<sup>21</sup> Indeed, even the current public financing provided may give way to current budget pressures. Larry Sandler, *Budget Defunds Elections*, Milwaukee Journal Sentinel, Mar. 27, 2011, [www.jsonline.com/news/statepolitics/118749889.html](http://www.jsonline.com/news/statepolitics/118749889.html).

narrowly tailored test, an ordinance need not be the least restrictive method for achieving the government's goal.").

Of course, the asymmetrical grant of supplemental funds to one's opponent may arguably deter otherwise legitimate political speech. Further, because the provision accounts for only express advocacy, it is not preventing the appearance of bias or corruption created through independent issue advocacy, which in recent years has become a huge portion of spending on Wisconsin Supreme Court elections. Nevertheless, the State of Wisconsin has taken a step to limit an appearance of bias and corruption on its highest court. If third parties spend bundles of cash expressly advocating the election of a Wisconsin Supreme Court Justice, the public, unsurprisingly, is likely to perceive the appearance of bias or even corruption *if -- and* for the largest of contributors, what often turns out to be *when --* those third parties later appear before the Wisconsin Supreme Court. *See, e.g., Caperton, Id.* at 2263-64 ("We conclude that there is a serious risk of actual bias--based on objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."). In the end, a matching funds provision is a reasonable and feasible method to achieve the state's compelling interest.

**C. Reporting And Direct Contribution Limits**

Plaintiffs also challenge the Act's reporting requirements, as well as its limits on private contributions. Their success in challenging the reporting requirements rises and falls with their success on the challenge to the matching fund provision. If the reporting requirements' sole function was to enforce an unconstitutional provision, it would be unconstitutional as well. *See Buckley*, 424 U.S. at 75-76. Since the court has found the matching fund provision constitutional, the only remaining, arguably valid challenge is to the acceleration in reporting requirements to 24 hours during the last six weeks before an election. Again, however, in light of the limited category of disbursements that must be reported and Wisconsin's interest in encouraging candidates to choose public financing of supreme court campaigns, this court is not prepared to find it an undue burden for expenditures of more than \$1000.<sup>22</sup>

Plaintiffs' challenge to contribution limits meets a similar fate. Contribution limits become unconstitutional when they "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Plaintiffs fail to offer any evidence that the \$1000 limits would have such an effect. Moreover, the amount in itself -- \$1000 -- does not appear so low as to even raise suspicion about candidates being unable to mount effective campaigns. *Cf. Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (\$200 limit on contributions to candidates for state wide office --

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<sup>22</sup> Plaintiffs also complain that the language of the Act and GAB regulation is not sufficiently clear as to what must be reported. Given the likelihood that GAB will accept any good faith reporting of actual or committed disbursements for express advocacy exceeding \$1000, this complaint does not give rise to a cognizable constitutional violation absent contrary proof in practice -- especially in light of the minor, monetary fines imposed for a violation.

governor -- was too low in light of fact that limit was twice as low as other states' lowest contribution limits on state wide offices -- \$500).

Plaintiffs, nonetheless, point to higher contribution limits for those contributing to the campaigns of appellate and some circuit judges as evidence that the contribution limits here are too low or at least designed to deter candidates from declining to participate in public financing. This court will not second guess the Wisconsin Legislature's decision to be more concerned with the appearance of bias and corruption in regard to the state's highest court, resulting in lower contribution limits, nor will it impute an unconstitutional motive when other explanations are reasonable. Courts have "no scalpel to probe' each possible contribution level" and, therefore, ordinarily "defer[] to the legislature's determination of such matters." *Randall*, 548 U.S. at 248 (quoting *Buckley*; 424 U.S. at 30). In the end, without any evidence from plaintiffs that the \$1000 limits prevents effective, private campaigning, this court will defer to the legislature's determination.

#### ORDER

IT IS ORDERED that:

- (1) The Kloppenburg for Justice Committee's unopposed motion for leave to file an *amicus* brief (dkt. #100) is GRANTED;
- (2) Plaintiffs' motion to strike exhibit #2 to the *amicus* brief (dkt. #102) is DENIED;
- (3) Plaintiffs' motion for summary judgment (dkt. #55) is DENIED;
- (4) Defendants' motion for judgment on the pleadings (dkt. #56) is deemed a cross-motion for summary judgment and GRANTED; and

- (5) Plaintiffs' motion for a temporary restraining order and preliminary injunction (dkt. #84) is DENIED.

Entered this 31st day of March, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 12-0899

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ALLEN H. LOUGHRY II, candidate for West Virginia Supreme Court of Appeals,  
Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State;  
NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and  
ROBERT RUPP, in their official capacities as members of the West Virginia State  
Election Commission; GLENN B. GAINER III, in his official capacity as West Virginia  
State Auditor; and JOHN PERDUE, in his official capacity as West Virginia State  
Treasurer,  
Respondents.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served the foregoing **Petitioner**  
**Allen H. Loughry's Response to Briefs of *Amicus Curiae* Michael Callaghan and Darrell V.**  
**McGraw, Jr., West Virginia Attorney General** upon the following individuals via electronic  
mail, on the 31<sup>st</sup> day of August, 2012 to:

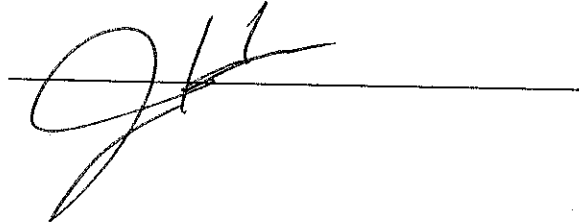
The Honorable Darrell McGraw  
Silas Taylor, Esquire  
State Capitol, Bldg. 1, Room E 26  
1900 Kanawha Blvd. East  
Charleston, WV 25305  
*Counsel for Natalie Tennant, Gary Collias, William Renzelli,  
and Robert Rupp*

Lisa A. Hopkins, Esq.  
General Counsel  
West Virginia State Auditor's Office  
Capitol Complex, Bldg. 1, Room W-100  
Charleston, WV 25305  
*Counsel for Glen B. Gainer, West Virginia State Auditor*

Diana Stout, Esq.  
Special Assistant Attorney General  
West Virginia State Treasurer's Office  
Capitol Complex, Building 1, Room E-149  
1900 Kanawha Boulevard, East  
Charleston, WV 25305  
*Counsel for John Perdue, West Virginia State Treasurer*

Anthony J. Majestro, Esq.  
Powell & Majestro, PLLC  
405 Capitol Street, Suite P-1200  
Charleston, WV 25301  
*Counsel for Michael Callaghan*

Anthony J. Delligatti (*via U.S. Mail*)  
1619 Westbrook Dr.  
Fairmont, WV 26554  
*Pro Se*

A handwritten signature in black ink, appearing to be 'AJD', is written over a horizontal line.