

United States Court of Appeals
For the First Circuit

BEVERLY C. DAGGETT; ELAINE FULLER; CHRISTOPHER M. HARTE;
MARK T. CENCI; JEFFREY I. WEINSTEIN; SHAWN LEVASSEUR;
LIBERTARIAN PARTY OF MAINE; ROLLIN STEARNS; MAINE RIGHT TO
LIFE COMMITTEE POLITICAL ACTION COMMITTEE STATE CANDIDATE
FUND; NATIONAL RIGHT TO LIFE POLITICAL ACTION
COMMITTEE STATE FUND,

Plaintiff-Appellants,

v.

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES,
PETER B. WEBSTER, LINDA W. CRONKITE, HARRIETT P. HENRY, G.
CALVIN MACKENZIE, MERLE R. NELSON, IN THEIR OFFICIAL
CAPACITIES AS MEMBERS OF THE COMMISSION ON GOVERNMENTAL
ETHICS AND ELECTION PRACTICES OF THE STATE OF MAINE;
SECRETARY OF STATE OF MAINE; STATE OF MAINE ATTORNEY GENERAL,

Defendants-Appellees.

On Appeal From the United States District Court
for the District of Maine

**BRIEF OF AMICI CURIAE BETHEDA EDMONDS, KATHLEEN McGEE, LINDA
McKEE, PEGGY PENDLETON, AND ELIZABETH WATSON IN SUPPORT OF
DEFENDANTS-APPELLEES SEEKING AFFIRMANCE**

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INTERESTS OF AMICI CURIAE

Amici Curiae are a group of five officeholders and political candidates in Maine who intend to run for election in 2000 using public funds. Three of the amici currently hold elective office in Maine: Peggy Pendleton is a two-term state Senator representing District 31; Linda McKee is a two-term state Representative representing District 79; and Elizabeth Watson is a three-term state Representative representing District 82. A fourth, Betheda Edmonds, is the Democratic Committee chairperson for the town of Freeport, while a fifth, Kathleen McGee, is an experienced political consultant who intends to run for state legislative office in the year 2000. Given their intention to run for office and to seek public funding, this lawsuit has the potential to directly impact on amici. If plaintiffs are successful, amici will lose their access to public funds and be forced to run under the previously existing campaign finance system, which they believe worked to their disadvantage.

This Court granted amici permission to file a brief in support of appellees-defendants in its order dated December 16, 1999.

Summary of Argument

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court established the fundamental ground rules by which campaign finance reforms would thereafter be measured, upholding the Federal Election Campaign Act's (FECA) contribution limits and the presidential funding system, and striking down FECA's limits on expenditures. Ever since, states have endeavored to devise campaign finance systems that adhere to *Buckley*'s ban on expenditure limits while addressing the increasingly evident harms associated with private financing of political campaigns.

In 1996, the voters of Maine assumed a substantial new financial liability, offering to fully subsidize the political campaigns of candidates who voluntarily choose to accept public funding. Through the initiative process, Maine voters overwhelmingly adopted the Maine Clean Election Act (MCEA) — a voluntary public funding program modeled on the presidential public funding system upheld by the Supreme Court in *Buckley*. The MCEA is premised on *Buckley*'s teaching that a voluntary public funding system represents a constitutional means by which the state can address the dangers of corruption, exclusion, and inequality that can result from reliance on private financing of political campaigns.

As Chief Judge Hornby correctly found, the MCEA is a voluntary system. This Court has held that it is permissible for the government to provide generous incentives to encourage participation in a voluntary public funding system, as long as there are reasonable benefits and detriments that flow from the decision to participate. The record in this case demonstrates beyond any doubt that candidates in Maine face a real choice whether to participate in the public funding system, and that acceptance of public funds yields both benefits and burdens for candidates. Thus, contrary to what the Daggett appellants allege, candidates are not coerced to participate in the MCEA.

There is also no merit to the appellants' claim that the MCEA's matching funds provision, certification procedures, and independent expenditure reporting requirement are unconstitutional. Under the matching funds provision, a participating candidate becomes eligible to receive additional funding if the amount raised or spent by her opponents (who in this context include not only her opposing candidate but also those making independent expenditures above \$50 that benefit her opposing candidate) exceeds the initial amount distributed to the participating candidate in public funds. Chief Judge Hornby recognized that far from imposing any burden on the appellants' First Amendment rights, the matching funds provision advances core First Amendment values. Under the

matching funds provision, no speaker is prohibited from saying anything he or she desires to say, and the government subsidy ensures that both sides of the debate are heard.

Moreover, even if the matching funds provision did impose a burden on First Amendment rights, it would still be constitutional. The provision's function is to achieve high levels of participation in the public funding option by limiting a participating candidate's risk of being dramatically outspent, and to target public funds where most required so as to limit the demand on the public fisc. The MCEA serves compelling governmental interests, and the matching fund provision is narrowly tailored to ensure that these interests actually will be realized.

Chief Judge Hornby also properly rejected the appellants' contention that the MCEA's certification provision constitutes an unconstitutional endorsement of participating candidates. This provision requires the Commission on Governmental Ethics and Election Practices of the State of Maine ("Commission") to certify that a candidate who has complied with the MCEA's qualifying requirements is a Clean Election Act candidate. On its face, the provision contains no endorsement and the unrebutted evidence in the record demonstrates that State officials will engage in absolutely no action that could be construed as endorsing any candidate. No doubt individual candidates and their opponents will attempt to

gain political mileage from the fact that a particular person has chosen to participate or not participate in this public funding system. However, the government's simple act of determining eligibility, without any publicity attached to it, hardly constitutes unconstitutional endorsement.

Finally, both the Supreme Court and this Court have emphasized that plausible legislative judgments regarding reporting and disclosure thresholds deserve deference. The requirement that independent expenditures above \$50 be disclosed plays a central role in implementing the MCEA's matching funds provision, and also directly serves critical state interests in deterring corruption and ensuring that the electorate is well informed. Chief Judge Hornby correctly ruled that the \$50 independent expenditure reporting requirement was constitutional because it did not differ significantly from the \$100 independent expenditure reporting requirement upheld in *Buckley*.

POINT I

Chief Judge Hornby's conclusion that the MCEA does not unconstitutionally coerce candidates to participate in the Act's public funding system is plainly correct and well-supported by the record.

Chief Judge Hornby appropriately began his assessment of the MCEA's constitutionality with a recognition of the fundamental proposition established in *Buckley*, that "public financing of electoral campaigns is constitutional. . . . Far

from being a threat to First Amendment values, such measures are an ‘effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the electoral process, goals vital to a self-governing people.’” Mem. Op. at 4 (quoting *Buckley*, 424 U.S. at 92-93).

Public funding advances other core state interests as well. Perhaps the most well-established interest that underlies public funding is eliminating the appearance or actuality of corruption in the selection of elected representatives and their performance in office. The public’s belief that a campaign finance system offers “opportunities for abuse” and “improper influence” can erode its “confidence in the system of representative [g]overnment . . . to a disastrous extent.” *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)). “Preservation of the individual citizen’s confidence in government is equally important” as “[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.” *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 765, 788-89 (1978). As *Buckley* recognized, by offering candidates a means of running for office without having to rely on private money, public funding substantially reduces the chances that corruption

will occur, and correspondingly increases the public's confidence that their representatives have not been "bought" by private interests. *See* 424 U.S. at 66.

In addition to facilitating communication and combating corruption, public funding also frees candidates from the burdens of private fundraising. *See Vote Choice v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996). Public funding also expands the candidate pool for elected office by guaranteeing that no citizen, regardless of personal financial circumstances, will be precluded from running due to funding concerns.

After *Buckley*, the importance of public funding as a means of achieving these critical government interests "cannot be gainsaid." 424 U.S. at 96; *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980). Indeed, public funding of political campaigns is critical to preserving our system of democratic government. Our system depends not only on the public's confidence in the integrity of its representatives, but also on the equal opportunity of citizens to participate in politics and weigh in on legislative matters, regardless of their resources. *Cf. Harper v. Virginia Bd. of Elec.*, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)

("[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.").

Given the significant benefits to the state from public funding, this Court has made it clear that a "state need not be completely neutral on the matter of public financing of elections." *Vote Choice*, 4 F.3d at 39-40. Although a state may not "eliminate altogether a candidate's voluntary choice in deciding whether to fund his/her election with private contributions or with public funding," Mem. Op. at 5, "perfect equipoise" between the benefits participating candidates receive and the burdens they bear is neither realistically possible nor required. *Id.* Indeed, "a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice." *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 1112 (1999). Thus, at most a public funding system need only "achieve[] a rough proportionality between the advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive these advantages." *Vote Choice*, 4 F.3d at 39; *Rosenstiel*, 101 F.3d at 1550-51 (public funding option need offer only a "relative balance between the benefits

provided to the publicly financed candidates and the restrictions the candidates must accept”); *see also Republican Nat’l Comm.*, 487 F. Supp. at 285 (“Even if we accepted [plaintiffs’] claim that they are in practice compelled to opt for public funding [because they receive more money than they can raise privately], its effect would be to facilitate and enlarge their exercise of free speech over what it would otherwise be rather than to inhibit their speaking power.”).

Chief Judge Hornby’s conclusion that the MCEA is a voluntary public funding system which leaves candidates with a real choice about whether to participate is plainly correct. Participation in Maine’s public funding option offers a balanced package of advantages and disadvantages. The primary advantage consists of a pre-determined and limited initial distribution of money along with the conditional availability of matching funds. In exchange, a participating candidate must: (1) demonstrate public support by gathering signatures and qualifying contributions; (2) obtain qualifying contributions only from registered voters in her district and only in the form of a check or money order; (3) finance her qualifying effort with only a limited amount of “seed money”; (4) give up her right to raise and spend unlimited amounts from private sources, including her own money; and (5) agree to limit her spending to the relatively modest amount allocated to her in public funds.

Significantly, the participating candidate cannot spend more than she receives in public funds, even if she faces an opponent who raises and spends in excess of both the initial distribution and the matching funds provided.¹ In addition, whether and when a participating candidate will receive additional funds beyond the initial distribution is determined entirely by her opponents. This is no minor concession, as the initial amounts that the MCEA provides to participating candidates and allows them to spend are relatively low: between \$3,763 and \$5,916 for House races, depending on whether the primary is contested, and between \$14,694 and \$17,244 for Senate races.² Those candidates who believe

¹ Under the MCEA, “[a]fter certification, a candidate must limit the candidates’s campaign expenditures and obligations . . . to the revenues distributed to the candidate from the [Clean Election] fund.” 21-A M.R.S.A. §1125(6). Thus, even a participating candidate who receives the maximum allotment of matching funds is strictly barred from spending more than 300% of the initial distribution amount. When a participating candidate is not eligible for the maximum matching fund allotment, she must restrict her spending to the initial distribution or to the amount spent or raised by her opponents. The appellants are simply mistaken when they claim that the burden assumed by a participating candidate “is wholly illusory” as a result of the matching funds provision. Daggett Br. at 33.

² The Daggett appellants go further, and maintain that the initial distribution amounts “are grossly inadequate to finance any serious gubernatorial campaign and at least those legislative campaigns where historical campaign costs exceed the state-wide average.” Daggett Br. at 26. The appellants appear to suggest that the low level of funding under the MCEA is a constitutional infirmity in its own right, but as Chief Judge Hornby recognized, the fact that some candidates may consider the MCEA’s level of funding inadequate is constitutionally irrelevant if the MCEA constitutes a voluntary system. *See* Mem. Op. at 4 n.3. Indeed, any inadequacy in the amounts provided under the MCEA only makes it easier to

that they can raise more than the MCEA amounts, or that they will need to spend more than these amounts to win, have a clear incentive to remain outside of the Act.

It is thus clear that the state will “exact[] a fair price,” *Vote Choice*, 4 F.3d at 39, from those candidates who participate. As Chief Judge Hornby concluded, while the MCEA “provides incentives to candidates to make the public financing route attractive, . . . the incentives hardly are overwhelming” and the MCEA “presents a real choice, not a preordained decision, for a candidate.” Mem. Op. at 6.

Other courts have found that public financing systems offering incentives similar to or greater than Maine’s were not coercive. For example, in *Gable* the Sixth Circuit concluded that Kentucky’s system, under which spending limits were lifted and contributions raised by participating candidates were matched on a two-for-one basis with public funds when their opponents raised or spent over \$1.8 million, did not “step over the line of unconstitutional coercion.” 142 F.2d at 948-49; *see also Vote Choice*, 4 F.3d at 38-39 (no coercion in public financing system that raised the contribution limit on participating gubernatorial candidates to \$2,000 while the contribution limit on nonparticipating candidates remained

reject the claim that candidates are coerced to participate.

\$1,000, provided \$750,000 in public funds and free air time, and allowed participating candidates to exceed spending limits to the extent their nonparticipating opponents did so); *Rosenstiel*, 101 F.2d at 1550-51 (no coercion where spending limits on participating candidates were entirely waived if nonparticipating opponent raised or spent more than a set percentage of the spending limit, participating candidates received substantial public funds, and contributors to participating candidates received a tax refund of up to \$50 per year).

The clearest proof that candidates in Maine are not forced to participate in the MCEA and to comply with its spending limits comes from the declarations and testimony of the candidate-appellants themselves. None of the candidate-appellants alleges that he or she will be coerced into participating in the MCEA in 2000. Three of the candidates-appellants — Mark Cenci, Jeffrey Weinstein and Shawn Levasseur — state that they will not participate in the MCEA on principle, apparently believing that funding political candidates represents an inappropriate role for government. *See* Cenci Decl. ¶7, Daggett App. at A177; Levasseur Decl. ¶5; Weinstein Decl. ¶5. Representative Elaine Fuller, a candidate and officeholder from the Democratic Party, also stated definitively that she did not intend to seek MCEA funding. *See* Fuller Decl. ¶6. The testimony of the one remaining

candidate, Senator Beverly Daggett, hardly supports a claim of coercion. Senator Daggett stated not that she would be compelled to participate, but only that she “certainly would not rule out running as a participating candidate.” Daggett Dep. II at 129:25-130:1. Senator Daggett recognized the sacrifice made by participating candidates when she expressed concern that “predetermin[ing] ahead of time what your maximum amount will be could be . . . limiting and damaging.” Daggett Dep. II. at 125:25 - 126:1. A recent newspaper article reporting that few candidates may end up participating in the MCEA further attests to the Act’s lack of a coercive impact.³

The Daggett appellants go to great lengths to convince this Court that the reduced contribution limits (which were enacted at the same time as the MCEA, but are not a part of the MCEA) are coercive. However, Chief Judge Hornby implicitly recognized that contribution limits which are themselves constitutional cannot serve to coerce participation in a public funding scheme and thus the constitutional validity of the reduced contribution limits should be determined separately. Chief Judge Hornby’s decision on voluntariness assumed, without

³ This article was published after the record in this case closed, but was brought to the District Court’s attention during oral argument on the merits of the case. The Court was properly entitled to consider this article as legislative facts. *See Daggett v. Commission*, 172 F.3d 104, 112 (1st Cir. 1999). The article is reproduced in the Addendum.

deciding, that the lower contribution limits were constitutional. *See* Mem. Op. at 21 n.15. As he noted, if the reduced contribution limits are later overturned, then the appellants’ argument that the MCEA is involuntary is even weaker. *Id.*⁴

Moreover, the conclusion that contribution limits which are constitutional in their own right cannot serve to unconstitutionally coerce participation in a public funding system is correct. As this Court noted in *Vote Choice*, it is “difficult [to] . . . believ[e] that a statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes any burden on first amendment rights.” 4 F.3d at 39. Perhaps for this reason, in *Buckley* the Supreme Court did not revisit the question of whether FECA’s contribution limits, although constitutional when considered alone, served to undermine the voluntary character of the presidential financing

⁴ This determination underlay Chief Judge Hornby’s certification of his judgment upholding the MCEA for immediate review under Fed. R. Civ. P. 54(b). Amici agree with all the parties that the Rule 54(b) certification was proper. If, however, this Court disagrees with Chief Judge Hornby’s legal determination that the MCEA can be upheld regardless of the validity of the change in contribution limits, then the Rule 54(b) certification was improper, and the case should be remanded so that Chief Judge Hornby can make the requisite findings on both issues together. *See Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43, 46 (1st Cir. 1988) (an appeals court has no jurisdiction to consider matters inappropriately certified under Rule 54(b)).

system. Nor have other courts felt it necessary to undertake such an inquiry into the effect of contribution limits in sustaining public funding systems.⁵

Hence, as Chief Judge Hornby found, the MCEA is a purely voluntary system that provides candidates with a real choice regarding whether or not to accept public funding. As a voluntary public funding system, the MCEA is clearly constitutional under *Buckley*.

POINT II

Chief Judge Hornby properly rejected the appellants' constitutional challenges to the MCEA's matching funds and certification provisions and the independent expenditure reporting requirement.

There is similarly no merit to the appellants' attack on the MCEA's matching fund and certification provisions and on the requirement that independent expenditures above \$50 be reported. As Chief Judge Hornby held, the matching funds and certification provisions do not impose any First

⁵As *Shrink Missouri Government PAC v. Maupin* did not involve a public funding system, that decision is totally inapposite. In *Maupin*, the only statutory incentive to accept the spending limits was exemption from a ban on organizational contributions. Concluding that such a ban was unconstitutional and that the different parts of the challenged provisions were not severable, the Eighth Circuit struck down the limits as involuntary. 71 F.3d 1422, 1425-26 (8th Cir. 1992). Here, there is an independent incentive to adhere to the MCEA's spending limits, namely public funding, and the appellants do not argue lack of severability. Indeed, such an argument appears inconsistent with their claim that rule 54(b) certification was appropriate.

Amendment burden. In any event, whatever burden these provisions or the reporting requirement impose is minimal and clearly justified.

A. As Chief Judge Hornby held, the matching funds provision furthers First Amendment values and if the provision imposes any cognizable burden on First Amendment rights, this burden is clearly justified.

Under the MCEA, candidates who voluntarily choose to participate in the public funding option receive an initial distribution of public funds calibrated to the office sought and whether the race is contested. Candidates in contested races may receive additional funds if the amount raised or spent by opposing candidates — in combination with independent expenditures that benefit those opponents — exceeds the initial distribution amount.⁶

Chief Judge Hornby correctly rejected the appellants’ claim that the provision of additional matching funds to participating candidates impermissibly burdens the First Amendment rights of nonparticipating candidates and persons making independent expenditures. In the words of the decision below, there is a “profound disconnect” between the appellants’ desire to outspend their opponents and the First Amendment’s concern with fostering speech. Mem. Op. at 8. Any

⁶ Matching funds provisions like this are sometimes referred to as “triggers” because the distribution of funds is “triggered” by another person’s spending or fundraising. See generally, Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems that Include “Triggers” Are Constitutional*, 24 J. Leg. 223 (1998).

reluctance that the appellants may feel to raise or spend money for fear that by doing so they will enhance their opponents' ability to engage in political speech is simply not a cognizable injury under the First Amendment. Moreover, even if the matching funds provision were found to impose a burden under the First Amendment, that burden would survive constitutional scrutiny. Finally, contrary to the appellants' claims, the matching fund provision is similarly constitutional as applied to independent expenditures.

1. The matching funds provision furthers First Amendment values without restricting First Amendment rights.

The first step in any First Amendment challenge is to determine whether the challenged provision burdens any recognized rights. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (“To determine if Michigan’s restriction on corporate political expenditures may be constitutionally applied . . . we must ascertain whether it burdens the exercise of political speech”). It is incumbent upon the appellants to show a cognizable First Amendment injury.

As Chief Judge Hornby concluded, the appellants failed to satisfy this initial hurdle. Critically, the matching funds provision places absolutely no limit on the amount of money the appellants may raise and spend. Instead, like other subsidy programs that take protected First Amendment activity into account in making funding decisions, the matching funds provision “does not directly and

substantially interfere,” with the appellants’ ability to associate and speak as they please. See *Lyng v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 485 U.S. 360, 366-69 (1988) (internal quotations omitted) (rejecting claim that a statute precluding Food Stamps eligibility if a member of the household were on strike infringed union members’ rights to speak and associate); see also *NEA v. Finley*, 118 S. Ct. 2168, 2175-79 (1998) (concluding that NEA could take “general standards of decency and respect for the diverse beliefs and values of the American public” into account in making arts funding decisions without violating the First Amendment).

The appellants nevertheless contend that their First Amendment right of free expression is “chilled” because the amounts they raise or spend on their own speech may help determine the amount of money that the state provides to participating opponents for response and debate. But no one has a right to speak unanswered or “to be free from vigorous debate.” *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 14 (1986) (plurality opinion). Chief Judge Hornby put this point eloquently:

The general premise of the First Amendment as interpreted by the Supreme Court . . . is that it preserves and fosters a marketplace of *ideas*. The image is one of candidates voicing their positions and competing on the inherent worth of their character and positions. . . . In that view of the world, more speech is better. If a

privately funded candidate puts out his/her candidacy and ideas to the public, the public can only gain when the opposing candidate speaks in return. This ‘marketplace of ideas’ metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Mem. Op. at 8-9. In short, any claim to a First Amendment right to engage in unanswered speech is without merit.

Far from infringing on the First Amendment, the matching fund provision serves to advance First Amendment values by ensuring that candidates who agree to participate in the public funding system, and thereby submit to spending limits, have adequate resources to make their views known. “[T]he First Amendment . . . was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley*, 424 U.S. at 48-49 (internal quotations omitted). “[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). The MCEA’s matching funds provision advances the Amendment’s underlying purposes by fostering the “widest possible dissemination of information,” *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and “uninhibited, robust, and wide-open” debate on the

merits of political candidates and public issues, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation.” *Buckley*, 424 U.S. at 14-15.

Therefore, it is not surprising that almost all courts to consider the constitutionality of trigger provisions akin to the matching funds provision have found that the provisions do not burden First Amendment rights. *See, e.g., Gable*, 142 F.3d at 948-49 (rejecting claim that provision granting participating candidates additional benefits when nonparticipating opponents raised or spent above \$1.8 million forced a candidate to limit spending to this level); *Rosenstiel*, 101 F.3d at 1549-53 (finding no First Amendment burden where participating candidates were freed from spending limits when the amounts raised or spent by their nonparticipating opponents exceeded certain thresholds); *Wilkinson*, 876 F. Supp. at 927 (holding that Kentucky’s trigger provision “merely expands the breadth of the contest, permitting but not requiring the publicly-funded candidate to respond to the additional speech in which the privately-financed candidate has chosen to engage”).⁷

⁷ This Court rejected the claim that Rhode Island’s public funding system burdened the First Amendment rights of nonparticipants, even though that state’s

Indeed, the only decision to find that the use of a trigger provision imposes a First Amendment burden was the Eighth Circuit’s decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), which held that increasing subsidies and spending limits for participating candidates based on independent expenditures made against them impaired the speech of those making the independent expenditures. *See id.*, at 1360. The Court in *Day* erred when it simply assumed the existence of a First Amendment harm from the government subsidy. The *Day* court failed to recognize the difference – based in *Buckley* and in the First Amendment – between curtailing speech and promoting full and open-ended debate.

Day’s finding of a First Amendment burden has been called into question by the Eighth Circuit’s subsequent determination that the trigger provision in *Rosenstiel* “do[es] not burden a candidate’s First Amendment rights.” 101 F.3d at 1553; *see also id.* at 1561-62 (Lay, J., dissenting and arguing that the majority’s finding of no First Amendment burden conflicted with *Day*). Although *Day* involved independent expenditures as opposed to candidate expenditures, this factor does not sufficiently distinguish *Rosenstiel*. If knowing that an expenditure

system also contained a trigger mechanism. *See Vote Choice*, 4 F.3d at 30 n.5. Although it appears that the trigger aspect of Rhode Island’s system was not specifically challenged by the appellants, this Court at no point suggested that it would have found a burden on First Amendment rights had the constitutionality of the trigger mechanism been directly at issue.

you make as a candidate will trigger matching funds does not result in a First Amendment harm, then knowing that an independent expenditure you make as a non-candidate will trigger matching funds likewise should not result in a First Amendment harm.⁸

In sum, the matching funds provision imposes no restrictions on nonparticipating candidates or their supporters. The provision does not threaten anyone with civil or criminal sanctions or any other consequences. Nonparticipating candidates and their supporters remain free to make as many expenditures as they desire without fear of restraint or censure by the government. They may disseminate whatever political messages they choose, in whatever amount their resources will allow. Under these circumstances, the appellants cannot state a claim that the matching funds provision infringes on their, or anyone else's, First Amendment rights. A speaker who claims that she is "chilled" because she has no guarantee of a lopsided debate is not raising a claim that the First Amendment protects.

⁸ Chief Judge Hornby chose to distinguish the Eighth Circuit's poorly-reasoned decision in *Day*, rather than reject it outright. *See* Mem. Op. at 15 n.8. As Chief Judge Hornby noted, in *Day* the Eighth Circuit rejected the justification proffered by the State for the trigger provision because, even absent the trigger provision, the State's candidate participation rate in the public funding regime already approached 100 percent. *See id.* That, of course, is a very different factual scenario from the instant case. *See* Point II(A)(2), *infra*.

2. Even if the matching funds provision did burden the appellants' First Amendment rights, any burden so imposed is clearly justified given the purposes the provision serves.

In any event, even if this Court were to conclude that the matching funds provision burdens the appellants' First Amendment rights, this burden is clearly justified. The matching funds provision is narrowly tailored to serve compelling governmental interests.⁹

a. The matching funds provision serves compelling governmental interests by encouraging participation in a public funding system.

The MCEA provides candidates with an alternative to private fundraising for their campaigns, and in so doing ameliorates the recognized serious harms associated with private financing of political campaigns. This Court and others have held that a public funding system serves compelling governmental interests in reducing corruption, freeing candidates from fundraising pressures, and facilitating communication. *See Vote Choice*, 4 F.3d at 39-40; *see also Rosenstiel*,

⁹ In *Buckley*, the Supreme Court repeatedly emphasized the minimal burden the presidential funding system imposed on First Amendment rights, and upheld the system after concluding simply that it “further[ed] . . . sufficiently important governmental interests and [did] not unfairly or unnecessarily burden[] the political opportunity of any party or candidate.” 424 U.S. at 95-96. As a result, it would appear under *Buckley* that the matching fund provision should be subjected to at most intermediate scrutiny. *See* Mem. Op. at 19 n.13. However, as Chief Judge Hornby found, the matching fund provision plainly satisfies even strict scrutiny. *See id.* at 19.

101 F.3d at 1553. The state’s interest in ensuring participation in the public funding system is similarly beyond dispute. As *Vote Choice* held, “the state possesses a valid interest in having candidates accept public financing” given the compelling interests that public funding serves. 4 F.3d at 39; *see also* Mem. Op. at 14 (describing the successful operation of the matching funds provision as a “compelling governmental interest”).

The matching funds provision is essential to convincing candidates to participate in the MCEA. Without the provision, candidates would fear becoming “sitting ducks,” outgunned by the unlimited resources that could be spent by nonparticipating candidates. Senate Majority Leader Rochelle Pingree declared that “matching funds are crucial if candidates are going to be encouraged to participate in the [MCEA]. Candidates who participate will be going out on a limb, because their spending is capped. They need some guarantee that they won’t be stranded there if their opponents spend a lot of money.” Pingree Aff. ¶ 34; *see also* Shiah Aff. ¶¶ 35-36, 38 (House Assistant Majority Leader David Shiah attesting to the same conclusion). In like vein, the Eighth Circuit acknowledged the importance of Minnesota’s expenditure limitation waiver as a means of securing participation in *Rosenstiel*:

[T]his provision removes the disincentive a candidate may have to participate in the public financing system

because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent. Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program.

101 F.3d at 1554; *see also Wilkinson*, 876 F. Supp. at 928 (“Without the trigger provision, the expenditure limitation would be absolute. Such a limitation may discourage candidates from accepting public financing in the face of expenditure-unlimited[,] privately-financed opponents.”).

b. The matching funds provision is narrowly tailored to encourage participation in the MCEA.

It is also clear that the matching funds provision is narrowly tailored to serve the state's goal of encouraging participation by ensuring that participating candidates have sufficient funds to avoid being drowned out by their opponents. Narrow tailoring in this context requires only an appropriate fit, not impossible degrees of precision. Legislatures are entitled to deference in “accomodat[ing] competing interests,” because “[w]ithout any doubt a range of formulations” are available. *Buckley*, 424 U.S. at 103; *see also id.* at 30 (“Congress’ failure to engage in . . . fine-tuning [regarding contribution limits] does not invalidate the legislation.”). As this Court has stated, “the legislature must have a certain amount of operating room in this sphere. The first amendment does not require

courts to choose sides, at this level of particularity, in the flux and reflux of policy considerations.” *Vote Choice*, 4 F.3d at 40 n.16.

Here, only those expenditures that push a non-participating opponent above the initial distribution amount trigger a match. The provision includes an offset for independent expenditures on behalf of participating candidates. The match is only dollar-for-dollar, and is capped at the point where candidates have adequate resources to get their message out and respond to criticism – the point at which the likelihood that the candidates will be dissuaded from participating dissipates. *Cf. Vote Choice*, 4 F.3d at 39-40 (concluding that applying a higher contribution limit to participating candidates than to nonparticipating candidates was narrowly tailored to encourage participation). “[T]he trigger provision [t]hus is a narrowly tailored provision which comes into play only to avoid a circumstance in which the publicly-financed candidates may be disadvantaged.” *Wilkinson*, 876 F. Supp. at 928; *see also Rosenstiel*, 101 F.3d at 1554 (holding that a similar threshold-based trigger “is narrowly tailored to serve the State’s interests”).

Conceivably, the state could achieve the same degree of participation by providing such high levels of public subsidy that candidates would not fear being outspent by their nonparticipating opponents. Indeed, as Chief Judge Hornby recognized, the implication of appellants’ challenge to the matching fund

provision is to force states to adopt “public funding systems . . . [with] a fixed amount of public subsidy and permitted expenditures set in advance.” Mem. Op. at 9 n.5. But such a system would be prohibitively expensive, even more advantageous to participants, and therefore arguably more “coercive.” The state has a compelling interest not only in providing benefits for publicly funded candidates that are adequate to ensure a high rate of participation, but in doing so without creating an inordinate drain on the public fisc. A flexible approach like the matching funds provision is more narrowly tailored to the state’s interests, because a fixed sum would be overly generous in a non-competitive race and insufficient in a hotly contested race. The matching funds provision gives additional, targeted funding to those races that appear to be most hotly contested, conserving resources in those races where all candidates are willing and able to spend less.¹⁰

3. Application of the matching funds provision to independent expenditures is constitutional.

Chief Judge Hornby also did not err in upholding the matching funds provision as applied to independent expenditures. Both sets of appellants make

¹⁰ *Buckley*’s willingness to allow Congress to prohibit all pre-election funding for minor-party candidates out of a desire to protect the public fisc, *see* 424 U.S. at 96, establishes the legitimacy of the indirect and more limited burdens that the matching funds provision imposes here.

much of the special solicitude shown independent expenditures, and it is certainly true that limits on independent expenditures are subject to more rigorous scrutiny than limits on contributions. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614-15 (1996) (plurality opinion). But again, the matching funds provision enacts *no limit* on the independent expenditures that the appellants can make.¹¹ More importantly, the inability to outspend their political opponents is no more a cognizable First Amendment injury in the context of independent expenditures than in the context of contributions. It is the nature of the appellants' alleged harm — not being able to monopolize the market of ideas — that defeats their challenge to the matching funds provision, not the particular type of speech at issue.¹²

¹¹ Thus, cases cited by the appellants such as *New Hampshire Right to Life v. Gardner*, 99 F.3d 8 (1st Cir. 1996), and *Republican Party v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999), are clearly distinguishable. *New Hampshire Right to Life* involved a \$1,000 cap on independent expenditures by a political committee, *see* 99 F.3d at 19, while the statute at issue in *Pauly* prohibited a party from making independent expenditures on behalf of a candidate it had endorsed, *see* 63 F. Supp. 2d at 1010-11.

¹² The Stearns appellants allege that “it is uncontroverted” they will be “chilled or discouraged from making independent expenditures” by the matching fund provision. Stearns’ Br. at 8. In reality, that factual allegation is vigorously contested. None of the independent expenditures revealed by the Stearns appellants in their declarations would have triggered matching funds had the MCEA been in effect at the time they were made, even if the opponents had been

On appeal, the Stearns appellants have raised a new argument not raised below — they contend that in addition to “chilling” their willingness to speak, the matching funds provision “diminishes the value of independent speech” by “treat[ing] every independent expenditure as if it were a direct monetary contribution to the candidate.” Stearns Br. at 21.¹³ The MCEA does not, however, attempt to devalue independent expenditures or recast them as contributions. Contributions are strictly limited under Maine law, and those limits *never* apply to independent expenditures. The MCEA does provide a participating candidate with matching funds as a result of some independent expenditures, just as it provides matching funds as a result of some candidate expenditures or contributions, but

participating candidates. The expenditures were either made on behalf of candidates who did not raise enough money to trigger matching funds, or they were made so late in the campaign – and in such small amounts – so as not to require reporting until after election day. *See* Coughlan Decl. ¶15; Coughlan Dep. Ex. 1; Tobias Decl. ¶15; Comm. Regulations Ch.1, § 7; 1994 Comm. Report at 31. As set forth fully in appellees’ brief, nearly all of the factual allegations permeating the appellants’ briefs were the subject of substantial dispute below.

¹³ Because the argument was not raised below, it should be deemed waived. *See, e.g., Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992) (“If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.”). We nevertheless address the issue on the merits for the convenience of the Court.

that choice of treatment neither devalues independent expenditures nor renders them contributions under Maine law.

Thus, there is no similarity between the MCEA and the statutory scheme challenged in *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999). In *Iowa Right to Life*, the challenged statutes provided that, unless a candidate specifically disavowed an independent expenditure, the independent expenditure would be deemed a coordinated expenditure. *See id.* at 966 n.3. Under the MCEA, an independent expenditure always remains an independent expenditure.¹⁴

Of course, it is not unusual for campaign finance laws to treat contributions, candidate expenditures, and independent expenditures similarly for some purposes. For example, in *Buckley* the Supreme Court upheld FECA's requirement that contributions and independent expenditures over \$100 be disclosed to the Federal Election Commission. *See* 424 U.S. at 63-64. The State's

¹⁴ Moreover, the Stearns appellants failed to introduce any evidence indicating why treating independent expenditures, candidate spending and contributions the same for purposes of the matching fund statute would in fact devalue their speech or alter either the content of their message or their identities as independent speakers. Unlike the statute at issue in *Iowa Right to Life*, which required a candidate to disavow independent expenditures and take corrective action or have the expenditures officially deemed action by the candidate, there is no similar mechanism under the MCEA that would denigrate independent expenditures or deny their independent nature.

decision to treat independent expenditures the same as contributions and candidate expenditures in the administrative process of calculating matching funds is likewise a permissible policy choice.

As already noted, whatever impact the matching funds provisions may have on independent expenditures is clearly justified. Chief Judge Hornby correctly found that “independent expenditures can in fact be of great assistance to a candidate and could furnish an easy loophole to avoid the parity of the matching fund scheme if they were not counted.” Mem. Op. at 16. Like the match for amounts raised and spent over the initial distribution level by a participating candidate’s non-participating opponent, the match for independent expenditures is essential to ensuring that candidates participate in the MCEA.¹⁵ This Court has clearly held that the state can encourage candidates to participate in public funding systems, given the compelling governmental interests in preventing corruption or the appearance of corruption, easing fundraising burdens and fostering communication that such systems serve. *See Vote Choice*, 4 F.3d at 39-40. These interests surely suffice to justify the minimal and indirect burdens on independent

¹⁵ Again, as Chief Judge Hornby recognized, the need to match independent expenditures to assure candidate participation serves to distinguish this case from *Day*, where there was nearly 100% candidate participation in the public funding system even before the challenged trigger was enacted. *See* Mem. Op. at 15 n.8; *Day*, 34 F.2d at 1361-62; *see also Rosenstiel*, 101 F.3d at 1555 (distinguishing *Day* on this basis).

expenditures alleged to exist here, even if they do not justify a statutorily-imposed ceiling on independent expenditures in the face of the “settled constitutional rule” of *Buckley* that independent expenditure limits are unconstitutional. *See New Hampshire Right to Life*, 99 F.3d at 19 n.8 (refusing to make an exception to rule prohibiting independent expenditure limits); *cf. Buckley*, 424 U.S. at 74-82 (upholding disclosure of independent expenditures, notwithstanding claim that disclosure would dissuade individuals from engaging in independent speech). Further, for the reasons discussed above, the matching funds provision is narrowly tailored to serve this goal of encouraging candidates to participate by ensuring that they will have sufficient funds to wage a viable race against a high-spending and well-supported nonparticipating opponent.

B. Chief Judge Hornby properly sustained the MCEA’s certification provision, because the provision is simply a device to assist the Commission in administering the Act and in no way constitutes government endorsement of participating candidates.

The appellants’ attack on the MCEA’s certification provision as representing unconstitutional governmental endorsement of candidates is also meritless. Under the Act, the Commission is required to certify “a candidate complying with [the Act’s qualifying and eligibility] requirements . . . as a Maine Clean Election Act candidate.” 21-A M.R.S.A. § 1125(5).

Far from constituting an unconstitutional endorsement of participating candidates, the Commission’s certification is simply an internal procedure intended to ensure that only those candidates who have complied with the MCEA qualifying procedure receive public funds. The certification provision requires the Commission to do nothing more than verify (or certify) which candidates are eligible for public funding under the statute; it does not authorize the Commission to publicize its “certification” in any way. The MCEA thus differs significantly from Maine Term Limits Act of 1996, which required that a candidate’s position on term limits be included on the ballot. *See League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 60 (D. Me. 1997) (striking down Maine law requiring the phrase “violated voter instruction on term limits” on the ballot next to the name of officeholders who failed to take actions in favor of terms limits). And

unlike Maine’s preexisting statutory provisions addressing voluntary spending limits — which are separate from the MCEA and not challenged in this case, *see* 21-A M.R.S.A. §1015(7)-(9) — the MCEA does not expressly authorize any agency to publish of a list of participating candidates.

The Commission’s planned implementation of the certification provision makes the complete lack of any endorsement in the provision even more clear. According to undisputed testimony from the Commission’s executive director, the Commission will simply determine that a candidate is a “certified candidate.” Hain Aff. I ¶ 6, Daggett App. at A240-A241; *see also* Hain Dep. II at 155:9-12, Daggett App. at 237. The Commission plans simply to put the certification in a file and notify the candidate that he or she is eligible for public funds. *See* Hain Dep. II at 160:1-17, Daggett App. at A238. In short, certification under the MCEA does not begin to approach the “point where government involvement in the operation of political campaigns . . . become[s] so pervasive as to imperil first amendment values.” *Vote Choice*, 4 F.3d at 42, and Chief Judge Hornby did not err in sustaining the statute.¹⁶

¹⁶ Nor, contrary to what the Daggett appellants now contend, should the Commission be enjoined to follow its interpretation of the certification provision. For a federal court to enjoin the Commission to adhere to an interpretation the Commission has already adopted, absent any serious suggestion that the Commission may change its view of the certification provision, would appear to be a wholly unwarranted intrusion into state affairs.

Of course, others may publicize whether a candidate is participating – or not participating – in the MCEA. Indeed, it appears that this is what the appellants really fear. *See* Daggett Br. at 40. But clearly, political candidates and their supporters are private individuals, not state actors, and thus their actions in publicizing who does or does not participate in the MCEA do not implicate the First Amendment. As Chief Judge Hornby commented, “[w]hat candidates choose to call themselves or their opponents is beyond state control; they can use pejorative and complimentary labels irrespective of the statute.” Mem. Op. at 7. Equally clearly, any harm that results to nonparticipating candidates from such private publicity efforts stems not from the fact that the Commission “certified” their opponents as participating candidates, but rather from the more basic fact that their opponents decided to accept public funding while they decided to raise and spend campaign funds privately.

C. Chief Judge Hornby correctly upheld the reporting requirement for independent expenditures above \$50.

Finally, Chief Judge Hornby correctly rejected the appellants’ challenge to the \$50 independent expenditure reporting requirement. Disclosure of election-related contributions and expenditures is one of the oldest forms of campaign finance regulation, and the Supreme Court has regularly upheld the constitutionality of such reporting requirements. *See, e.g., Buckley*, 424 U.S. at

60-84 (upholding FECA disclosure requirements, including requirement that independent expenditures above \$100 be reported); *United States v. Harriss*, 347 U.S. 612, 625-26 (1954) (upholding federal law requiring disclosure of lobbying activities); *see also Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 648 (1999) (*ACLF*), (emphasizing that “the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators, and how much,” while striking down a further requirement that sponsors reveal amounts paid to each circulator on a monthly basis).

The Supreme Court has also instructed that legislatures should not be held to impossibly rigorous standards in setting disclosure thresholds. In *Buckley*, for example, the Court acknowledged that FECA’s record and reporting thresholds, under which political action committees were required to keep records on contributions above \$10 and to report contributions and expenditures above \$100, “are indeed low.” 424 U.S. at 63. But it nonetheless sustained the requirements, concluding the limits were not “wholly without rationality” and stating “we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion.” 424 U.S. at 83; *see also Vote Choice*, 4 F.3d at 32-33 (rejecting a *per se* challenge to a disclosure statute that

contained no threshold and instead mandated reporting of every contributor's name and the amount given, concluding "the notion of first dollar disclosure is not entirely bereft of rationality").¹⁷

In *Vote Choice*, this Court set out a two-part test for judging the constitutional validity of a disclosure statute: "(1) the statute as a whole must serve a compelling governmental interest, and (2) a substantial nexus must exist between the served interest and the information to be revealed." 4 F.3d at 32.¹⁸ The \$50 independent expenditure reporting requirement easily satisfies this test.

The requirement that independent expenditures over \$50 be reported is the mechanism by which the match for independent expenditures is implemented. These reporting requirements thus "directly serve," *Buckley*, 424 U.S. at 68, the substantial and compelling interests that underlie the entire statutory scheme: encouraging candidates to accept public funding, facilitating communication

¹⁷ This Court nevertheless proceeded to invalidate the first-dollar disclosure statute at issue, holding that the statute did not serve any cognizable governmental interest because it applied only to PACs. *See Vote Choice*, 4 F.3d at 33-36.

¹⁸ The *Vote Choice* requirement that the governmental interest be compelling rather than just substantial appears to be an overstatement of the standard established in *Buckley*, as clarified by the Supreme Court's more recent *ACLF* decision. *See ACLF*, 119 S. Ct. at 647 (*Buckley* "upheld [these provisions] as substantially related to important governmental interests"). But since the government's interests in this case qualify as compelling, this Court need not resolve the apparent conflict between *ACLF* and *Vote Choice*.

between candidates and voters, freeing candidates from the pressures of fundraising, and combating corruption and the appearance of corruption. In addition, as Chief Judge Hornby emphasized, reporting of independent expenditures serves the government's recognized interests in "insur[ing] that the voters are fully informed" and "achiev[ing] through publicity the maximum deterrence to corruption and undue influence possible." Mem. Op. at 17 (quoting *Buckley*, 424 U.S. at 76.)

Moreover, the use of a \$50 threshold represents a plausible legislative judgment regarding when disclosure becomes appropriate, a judgment which deserves deference under *Buckley* and *Vote Choice*. The difference between FECA's \$100 independent expenditure reporting requirement upheld in *Buckley* and the \$50 reporting requirement at issue here is not significant, particularly given the substantially greater amounts spent in federal elections compared to state elections and the additional information that must be reported under FECA. See Mem. Op. at 17-18; see, e.g., 1998 Comm. Rep. at 13-13A, 21-29, 34 (listing total contributions, expenditures, or disbursements for candidates for State Senate, State Representative, and U.S. Congress). Significantly, nearly all of the independent expenditures identified by the appellants in their declarations were between \$50 and \$100. See Coughlin Decl. ¶15; Harte Decl. ¶4, Daggett App. at A142-A143.

It therefore was plausible for the state to conclude that \$50 is the point at which independent expenditures must be included in matching funds calculations to ensure that candidates are not dissuaded from participating in the MCEA.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated:

Respectfully submitted,

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Certificate of Compliance

The undersigned hereby certifies that the foregoing Brief for Amici Curiae in Support of Defendants complies with the length limitation of 40 pages specified in this Court's Order dated December 16, 1999.

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Certificate of Service

The undersigned hereby certifies that she served two copies of the foregoing Brief for Amici Curiae in Support of Defendants, one in paper format and one in electronic format, by pre-paid, overnight delivery for next business day, this 22th day of December, 1999, addressed to:

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