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

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

Plaintiffs,

v. Case No. 09-CV-764

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.

BRIEF OF COMMON CAUSE IN WISCONSIN, LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND, AND WISCONSIN DEMOCRACY CAMPAIGN AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is submitted by *amici curiae* Common Cause in Wisconsin, League of Women Voters of Wisconsin Education Fund, and Wisconsin Democracy Campaign ("Amici"), in opposition to the summary judgment motion of Wisconsin Right to Life PAC, George Mitchell and Wisconsin Center for Economic Prosperity PAC (collectively "Plaintiffs"). On February 8, 2010, Amici filed their first motion to intervene in this action. The Court denied this motion on March 10th but, "recogniz[ing] the experience that proposed intervenors have to offer and hav[ing] no doubt that it will be valuable in resolving this case," granted Amici leave to participate in the case as *amici curiae*. March 10, 2010 Opinion and Order at 8.

On June 23rd, when it became clear that the State defendants did not intend to conduct discovery and develop a factual record, Amici renewed their motion for intervention. Explaining that factual development is an essential component of the defense of the challenged statutes' constitutional validity, Amici argued that they needed to intervene in order to protect their interests. *See generally* Memorandum in Support of Renewed Motion to Intervene (Doc. 51-2) ("Int. Memo."). This motion is currently pending.

INTRODUCTION

On December 1, 2009, the State of Wisconsin enacted the Impartial Justice Act, establishing a voluntary public funding program for state supreme court elections. Under the Act, eligible candidates can receive the benefit of public funds in exchange for accepting certain countervailing burdens, including forgoing all potentially corrupting private contributions and abiding by spending limits. The Act also contains disclosure provisions that are geared to allow

proper administration of the program. Finally, the Act imposes a $1,000 limit on campaign contributions received from any single source.[1]

Plaintiffs have launched a broad attack against Wisconsin's new campaign finance scheme. The crux of their challenge centers upon provisions that provide supplemental grants to publicly-funded candidates when they are targeted by high-spending, hostile third parties. Plaintiffs allege that they will curtail their political activities as a result of these provisions. Plaintiffs also challenge the Act's contribution limits as unconstitutionally low and the disclosure requirements as unduly burdensome. Although essentially no discovery has been conducted in this litigation to date, Plaintiffs seek to foreclose Defendants' and Amici's opportunity to test their factual claims by seeking the extreme remedy of summary judgment.

Plaintiffs' bare allegations cannot support their burden of establishing constitutional injury, either as a matter of law or as a matter of fact. First, Plaintiffs fundamentally mischaracterize the state of the law controlling public financing systems in general, and triggered supplemental grant provisions in particular. Plaintiffs' bold assertion that all trigger provisions are unconstitutional as a matter of law is simply wrong. Indeed, most federal courts to review trigger provisions have found them to be constitutionally sound. Since the Supreme Court's 2008 decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008) – a case that did not involve public financing – three circuit courts have reviewed the constitutionality of triggers and have reached varying conclusions. While the validity of these provisions may be a question of first impression in this circuit, the bulk of the relevant authority *supports* the constitutionality of Wisconsin's supplemental fund provisions.

[1] For a thorough explanation of the Act, see Defendants' Brief in Support of Motion for Judgment on the Pleadings at 4-7 (Doc. 58) ("Def. 12(c) Mot.").

Second, and perhaps more importantly for the purposes of this motion, even if this Court determines that the triggered supplemental grant provisions create a burden on Plaintiffs' First Amendment rights – which we dispute – two mixed questions of law and fact would then emerge. In order to assess the constitutionality of these provisions, the Court must first ascertain the existence and the severity of an actual burden on Plaintiffs' rights. Then, if the Court agrees that these provisions impose some burden, the Court must next assess whether any sufficiently important and properly tailored governmental interests justify that burden. These questions require factual showings that Plaintiffs' conclusory allegations fail to satisfy. Moreover, Plaintiffs can offer no reason why Defendants and Amici should not have the opportunity to test their factual allegations through the normal processes of factual discovery. Indeed, federal courts assessing the constitutionality of trigger provisions have repeatedly relied upon extensive factual records in determining the severity of any burden imposed by such provisions, the sufficiency of the state's interest in such provisions, and the tailoring of such provisions to the state's interests. Plaintiffs can offer no reason why this Court should decide this important constitutional question solely on the basis of untested allegations.

For all of these reasons Plaintiffs' summary judgment motion must be denied.[2]

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only if there is no reasonably contestable issue of fact that is potentially outcome-determinative. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 436 (7th

[2] Plaintiffs also fail to recognize that contribution limits and disclosure requirements are presumptively constitutional – both have been consistently upheld against facial challenges in a variety of contexts. Under well-established law, contribution limits are only unconstitutional where there is factual evidence that the limits are so low that they prevent candidates from running effective campaigns. *Randall v. Sorrell*, 548 U.S. 230, 253-62 (2006). Plaintiffs have not even attempted to make such a showing. Similarly, plaintiffs must make an affirmative showing that disclosure hinders their speech rights before such requirements will be deemed invalid. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). Both of these standards pose evidentiary burdens that Plaintiffs cannot meet. Amici endorse Defendants' arguments on both of these issues. *See* Def. 12(c) Mot. at 23-34 (disclosure) & 35-49 (contribution limits).

Cir. 2000) (paraphrasing *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997)). To wit, summary judgment is inappropriate when there is a genuine issue of fact that crucially informs a question of law or unresolved mixed questions of law and fact. *See, e.g, Ovadal v. City of Madison*, 416 F.3d 531, 537-38 (7th Cir. 2005) (reversing summary judgment when "[t]here remain genuine issues of material fact" regarding state interests and narrow tailoring of ban on protests); *Gillis v. Litscher*, 468 F.3d 488, 492 (7th Cir. 2006) (reversing summary judgment because "[d]etermining whether [the Plaintiff's] constitutional rights have been violated requires a 'fact-intensive inquiry under constitutional standards'" (quoting *Chandler v. Baird*, 926 F.2d 1057, 1064 (11th Cir. 1991)). The court must review the motion for summary judgment in the light most favorable to the nonmoving party. *See, e.g., Grayson v. Chicago*, 317 F.3d 745, 749 (7th Cir. 2003).

ARGUMENT

I. Plaintiffs' Claim of Injury Should be Assessed in the Context of Public Financing, Not in the Context of Private Fundraising

A. Provision of Benefits to Participating Candidates in a Voluntary Public Funding Program Does Not Result in Constitutional Injury to Nonparticipants

Plaintiffs fundamentally err in failing to recognize that the gravamen of their claim of injury – the grant of funds to a publicly-financed candidate – cannot be reconciled with settled law establishing that the provision of benefits to participating candidates in the context of a public financing system does not result in constitutional injury to nonparticipants. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Green Party of Connecticut v. Garfield*, No. 09-3941-cv, 2010 WL 2737153 (2d. Cir. July 13, 2010) (upholding majority of Connecticut's Clean Election Program); *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010) (upholding Arizona's Clean Elections Act); *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008) (affirming

denial of preliminary injunction against public financing system for appellate judicial elections), *cert. denied sub nom. Duke v. Leake* 129 S. Ct. 490 (2008); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552-53 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public funding system).

This long line of precedent highlights a fundamental error at the heart of Plaintiffs' case: Plaintiffs assume that more speech for one candidate necessarily results in less for the other. *See* Plaintiffs' Brief in Support of Summary Judgment at 8-10 (Doc. 57) ("Pls. S.J. Mot.") ("[B]y giving a matching fund to an opponent … the rescue funds provision is essentially muting the voice of the Plaintiff by neutralizing the financial benefit they intended to give."). As the Supreme Court has explained, public financing systems "facilitate and enlarge public discussion and participation in the electoral process." *Buckley*, 424 U.S. at 92-93. Courts have repeatedly found that, in an electoral context and particularly in the context of public financing, First Amendment interests are advanced, not abridged, when public funds enable responsive dialogue between political opponents. *See*, *e.g.*, *Buckley*, 424 U.S. at 92-93 ("us[ing] public money to … enlarge public discussion" . . . "furthers, not abridges pertinent First Amendment values"); *Leake*, 524 F.3d at 436 (citing *Buckley*); *see also Citizens United*, 130 S. Ct. at 911 ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). In the words of the First Circuit Court of Appeals, recently affirmed by the Ninth Circuit, the "First Amendment includes 'no right to speak free from response – the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources.'" *McComish v. Bennett*, 605 F.3d 720, 734 (9th Cir. 2010) (quoting *Daggett*, 205 F.3d at 464).

Under the constitutional logic of well-established public financing law, the provision of public grants to participating candidates in exchange for their agreement to forgo private fundraising simply does not injure nonparticipating candidates or third parties.

B. *Davis* Does Not Control the Law Applicable to Voluntary Public Funding Programs

Defendants have explained in detail why *Davis* does not apply and Amici endorse and adopt their arguments in full. *See* Def. 12(c) Mot. at 10-22. *Davis* did not concern a public funding program and thus did not address the law applicable in that context – instead, the *Davis* Court emphasized that public financing schemes are, as a matter of fact and law, "quite different." 128 S.Ct. at 2772. Unlike the situation in *Davis*, candidates who participate in Wisconsin's public funding program opt into a regulatory regime that is wholly different from the rules applicable to traditionally-funded candidates. Thus, as the Defendants aptly explain, publicly-funded candidates and traditionally-funded ones are not similarly situated and there can be no unlawful discrimination in their disparate treatment. More specifically, participating candidates who receive supplemental funds enjoy no competitive advantage relative to their traditionally-funded opponents. The reality under the Act is just the opposite: The traditionally-funded candidate, with an unfettered ability to amass private funds and make unlimited expenditures, ultimately enjoys a fundraising advantage over the publicly-funded candidate who operates under an expenditure cap.

Amici acknowledge that, since *Davis*, courts faced with trigger provisions in public financing systems have reached different conclusions in determining whether the type of injury found in the *Davis* case can arise from triggered supplemental grant provisions in public financing systems. Recently, the Second Circuit, *Green Party*, 2010 WL 2737153 at *25-28, and the Eleventh Circuit, *Scott v. Roberts*, No. 10-13211, 2010 WL 2977614 (11th Cir. July 30,

2010), extended the *Davis* rationale in order to strike down such provisions. But the Ninth Circuit found *Davis* to be inapplicable in the public financing context and upheld these provisions. *McComish*, 605 F.3d at 731 ("*Davis* says nothing about public 'funding schemes and therefore says nothing about their constitutionality'" (quoting *The Supreme Court, 2007 Term – Leading Cases*, 122 Harv. L. Rev. 375, 385 (2008)).[3] And, at least two district courts have refused to extend *Davis* to state statutes different from the "Millionaire's Amendment" struck down in *Davis*. *See Ognibene v. Parkes*, 599 F. Supp. 2d 434, 450 (S.D.N.Y. 2009) (holding that "[t]he standard applied by *Davis* to *expenditure* limits is inapplicable to the *contribution* limits that are at issue in the instant motion practice"); *Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n*, 2008 WL 4186312, *10 (S.D. Ohio 2008) (declining to extend *Davis* to Ohio's disclosure law). While Amici maintain that *Davis* should have no bearing on the instant litigation, at the very least, the Court should recognize this split in the law as another reason that summary judgment is inappropriate.

[3] As Plaintiffs note, the Supreme Court has issued a stay pending filing of a petition for certiorari in *McComish*, thereby enjoining the triggered supplemental funds in Arizona's public financing program. *See McComish v. Bennett*, --- S.Ct. ---, 2010 WL 2265319 (June 8, 2010); Pls. S.J. Mot. at 6. This has no precedential force and is of no legal significance to the present action. *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J. dissenting) ("Denials of certiorari never have precedential value … and the denial of a stay can have no precedential value either …."); *see also Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985) (explaining that denial of certiorari petition has no precedential effect); *Schwab v. Secretary, Dept. of Corrections*, 507 F.3d 1297, 1298-1299 (11th Cir. 2007) (explaining that grant of certiorari petition has no precedential effect and suggests no view on merits of underlying case). Indeed, a cautionary example about attempting to predict the direction of the Court based on a stay decision may be found in the recent *Doe v. Reed* decision, in which the Court granted a stay against the application of a state disclosure law at the plaintiffs' request but then ruled in favor of state defendants on the merits. *Compare Doe v. Reed*, 130 S.Ct. 486 (2009) (granting stay to prevent disclosure of signatories to ballet initiative) *with Doe v. Reed*, 130 S.Ct. 2811 (2010) (finding that state's disclosure requirements were sufficiently related to its interest in protecting integrity of electoral process and denying injunctive relief).

In a footnote, Plaintiffs also suggest that the Court should stay implementation of the Act until the Supreme Court acts on the *McComish* certiorari petition. This request is improper, and contravenes not only federal procedure but also important principles of federalism. If Plaintiffs wish to seek preliminary injunctive relief, they should so move pursuant to the Federal Rules. Indeed, if the mere filing of a petition for certiorari were grounds upon which to stay the implementation of a state statute, state governments would be thrown into chaos.

Importantly, robust factual development has been greatly important to the claims in the above-cited cases. In *McComish*, for instance, the parties engaged in extensive discovery at the district court level, conducting numerous depositions of the parties, state officials, and program participants and relying on empirical research from expert witnesses. It was only through this process that the court could decide certain claims – like Plaintiffs' allegation that the supplemental funds provisions had dampened overall campaign spending in Arizona. In fact, as the Ninth Circuit noted, overall campaign spending had *increased* since the state enacted public financing. *McComish*, 605 F.3d at 727.

II. If this Court Determines that the Triggered Supplemental Funds Impose a Burden on Plaintiffs' Constitutional Rights, Mixed Questions of Fact and Law Arise, Rendering Summary Judgment Inappropriate

A. The Flexible Standard of Scrutiny Applicable to Campaign Finance Regulations Requires Factual Development

Even if this Court believes that Wisconsin's grant distribution system may potentially burden speech, Plaintiffs' claims cannot be resolved based merely on the allegations and speculation that they have presented to this Court. In the campaign finance context, Supreme Court precedent requires courts to assess the nature and magnitude of the burden before determining the applicable level of scrutiny. To do so, this Court must critically evaluate Plaintiffs' allegations of injury; such an evaluation will be incomplete unless Defendants have the opportunity to test these claims through factual discovery.

In order for this Court to determine the appropriate level of scrutiny, it must apply the "flexible standard" used to review First Amendment or Equal Protection challenges to state election laws. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983). Under that standard, before deciding on the appropriate level of scrutiny,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (internal citations omitted).

The Supreme Court's review of campaign finance regulations traditionally reflects this flexible approach. *See McConnell*, 540 U.S. 93, 138-141 (2003) (assessing magnitude of burden and concluding that lesser scrutiny applied to soft money ban); *Buckley*, 424 U.S. at 19-23, 25, 44-45, 64-66 (identifying magnitude of burden for contribution limits, expenditure limits and disclosure requirements before applying different standards of review). Circuit courts have also repeatedly used this flexible standard to review campaign finance regulations, *see, e.g.*, *McComish*, 605 F.3d at 730-31; *Gable v. Patton*, 142 F.3d 940, 947-53 (6th Cir. 1998); *Am. Const. Law Found. v. Meyer*, 120 F.3d 1092, 1097-98, 1101-02, 1104-06 (10th Cir. 1997), including the Seventh Circuit, *see Libertarian Party of Indiana v. Packard*, 741 F.2d 981, 986-991 (7th Cir. 1984) (determining constitutionality of state program using public funds to finance political parties by identifying and weighing state's interests against defendant's burdens). Plaintiffs, too, recognize the flexible standard as the proper standard of review. *See* Pls. S.J. Motion at 7 ("To determine the constitutionality of [the supplemental funds provisions], this Court must determine three things: first, whether the provisions burden First Amendment rights; second, if the provisions do burden First Amendment rights, the proper level of scrutiny to apply; and third, whether the provisions meet the applicable level of scrutiny.").

Robust factual analysis is particularly important when a court reviews a novel campaign finance regulation. For example, in *McConnell*, the Court assessed the constitutionality of a novel regulation prohibiting political parties from raising, soliciting or spending contributions in

excess of federal contribution limits on federal elections (the so-called "soft money" ban). *McConnell*, 540 U.S. at 138-39. Plaintiffs claimed that the soft money ban should be subject to strict scrutiny because it regulated solicitation and spending as well as contributions. The Court refused to automatically apply strict scrutiny, instead holding that "the relevant inquiry is whether the mechanism adopted to implement the contribution limit . . . burdens speech in a way" similar to contribution limits. *Id*. After examining the "percentage of contributions to parties and candidates" that would be affected by the regulation, the Court found that the provision would have only a "modest impact." *Id*. at 141. Thus, the "less rigorous scrutiny applicable to contribution limits" was warranted, not strict scrutiny. *Id*.

B. Development of a Factual Record is Necessary to Ascertain the Existence and Extent of the Alleged Burden

Like the plaintiffs' claim in *McConnell*, the Plaintiffs' challenge to the supplemental grant provisions do not fall squarely into *Buckley*'s framework. While the Plaintiff may claim that these provisions function like a *de facto* expenditure limit, this argument is merely rhetorical. In fact, the supplemental grants for participating candidates place no limit whatsoever on the amount that any independent party can spend. *See McComish*, 605 F.3d at 734 ("The essence of [plaintiffs'] claim is not that they have been silenced, but that the speech of their opponents has been enabled."). And, as the Supreme Court recently reaffirmed, when campaign finance regulations conceivably "burden the ability to speak, but…impose no ceiling on campaign-related activities," strict scrutiny is not appropriate. *Citizens United*, 130 S. Ct. at 914.

Here, if this Court agrees that the challenged provisions are capable of burdening Plaintiffs' speech rights, Amici contend that any such burden is closer to the minimal burden caused by disclosure provisions and is nothing like the severe burden found to be imposed by expenditure limits. *See, e.g.*, *Citizens United*, 130 S. Ct. at 915 (describing minimal burden of

disclosure requirements); *Buckley*, 424 U.S. at 58-59 (finding that expenditure limits pose severe burden); *McComish,* 605 F.3d at 735 ("We conclude that the burden created by the [trigger provisions] is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*."). Indeed, even Plaintiffs concede that they retain the ability to continue speaking; their complaint is that their speech *may* be less effective *if* they decide to spend over the threshold amount and enable their publicly-financed opponent to respond. Pls. S.J. Motion at 8-9. But Plaintiffs have no right to speak free from response – political dialogue, not monologue, is the ultimate goal of the First Amendment, and this Court's constitutional analysis should be informed by that objective. While Plaintiffs assert that they will engage in "self-censorship," Pls. S.J. Motion at 9, a different response is far more plausible: Plaintiffs could simply decide to continue fundraising and spending campaign dollars to communicate their message to the public, despite the fact that their opponent might disagree.

Indeed, this is precisely the response that has been documented in similar cases. After reviewing the extensive evidentiary record in *McComish*, for example, the Ninth Circuit found that the Plaintiffs – who could not "point[] to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds" – alleged only a "theoretical chilling effect." 605 F.3d at 733, 735. Thus, the intermediate scrutiny used to assess disclosure provisions applied.

Without development of a factual record, the Court cannot ascertain the existence and extent of Plaintiffs' alleged burden. Without ascertaining the existence and extent of the alleged burden, the Court cannot determine the applicable scrutiny. At this stage of the litigation, summary judgment is thus wholly inappropriate.

C. Development of a Factual Record is Necessary to Determine if Any Established Burden is Justified by Sufficiently Important Governmental Interests

As explained above, once a plaintiff provides evidence that a campaign finance regulation burdens speech, the reviewing court must then determine if that burden is justified by sufficiently important governmental interests. No discovery has yet been conducted concerning the important state interests underlying the Impartial Justice Act. *See* Int. Memo. at 7-8 ("[T]he State Defendants have made clear that they do not . . . intend to develop or present to the Court any factual record in support of the validity of the Act."). For instance, no state official has provided testimony, no experts have been hired to discuss the similar experience of other states, and no empirical research has been conducted as to historical fundraising practices in Wisconsin.[4] Without factual development of the nature and weight of the governmental interests at stake, the applicable balancing test cannot be properly employed.

And, factual development is particularly important here given the new context of public financing for judicial elections. Twenty-four states provide public funding of some kind for elected officials. Jessica Levinson, Center for Governmental Studies, *State Public Financing Charts* 3 (2009). On the other hand, other than Wisconsin, only two states currently have public financing for judicial elections. Adam Skaggs, Brennan Center for Justice at New York University School of Law, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 12 (2010).[5] Indeed, there is only one federal case that is exactly one point – the Fourth Circuit's

[4] Needless to say, that Wisconsin's Government Accountability Board has not received any formal allegations of corruption in the judiciary tells us little about the state's interest in preventing corruption and its appearance. *See* Pls. S.J. Mot. at 12 (citing answers to two interrogatories as dispositive "proof" that Wisconsin has no interest in reducing potentially-corruption influence of large private campaign contributions and independent expenditures).

[5] Also, West Virginia just adopted a pilot program that will provide public financing for state supreme court races beginning in 2012. *Buying Justice* is available at http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1.

decision in *Leake*, 524 F.3d at 441 (upholding North Carolina's public financing program for appellate court candidates, including triggered supplemental funds provisions). Thus, the instant litigation presents a largely unexplored context for the myriad questions surrounding money and politics.

Moreover, while it is well established that states have a compelling interest in using public financing to prevent corruption and its appearance in the elections of public officials in the executive and legislative branches, *see, e.g.*, *Buckley*, 424 U.S. at 96 (finding that "public financing as a means of eliminating the improper influence of large private contributions" furthers the government's anti-corruption interest), *McComish*, 605 F.3d at 735, *Rosenstiel*, 101 F.3d at 1553, *Daggett*, 205 F.3d at 471, there is reason to believe that Wisconsin's interest in the Impartial Justice Act is even stronger. The Supreme Court has characterized the governmental interest in ensuring judicial integrity as "a state interest of the highest order." *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (internal quotations omitted)). So, for example, the Supreme Court has held that recusal is required when an elected judge benefits from large independent expenditures while campaigning and then finds his supporter before him in a lawsuit – otherwise, the principle of judicial impartiality would be undermined. *Caperton*, 129 S. Ct. at 2263-65. Similarly, in upholding North Carolina's judicial public financing scheme, the Fourth Circuit emphasized the state's "vital interest in an independent judiciary." *Leake*, 524 F.3d at 441. And, the Seventh Circuit just recognized that it is "beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop … independent-minded and faithful jurists" and that "state rules are the means of their development." *Siefert v. Alexander*, 608 F.3d 974, 979-80 (7th Cir. 2010)

(internal citations omitted). But to weigh Wisconsin's interests accurately, further factual development is undoubtedly needed.

Corollary to a state's anticorruption interest is its interest in insuring sufficient candidate participation. Courts have repeatedly found this interest to be of the utmost importance. *See, e.g., McComish,* 605 F.3d at 736 ("[I]t is clear that the Act's anticorruption interest is further promoted by high participation in the [public financing] program."); *Rosenstiel,* 101 F.3d at 1553 ("[T]he State has a compelling interest in stimulating candidate participation in its public financing scheme."); *Vote Choice,* 4 F.3d at 39 (explaining that "having candidates accept public financing" is "compelling" state interest because such programs "'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption" (citation omitted)).[6] And, on many occasions, courts have found this participation interest to be so intertwined with a state's anticorruption interest as to justify any burden potentially imposed by triggered supplemental funds provisions. *McComish,* 605 F.3d at 735-36; *Leake*, 524 F.3d at 437, *Vote Choice,* 4 F.3d at 39-40. Without further factual development, however, this Court cannot fully evaluate the degree to which supplemental grants in highly expensive races are necessary to encourage fulsome participation in Wisconsin's public funding program.

D. Development of a Factual Record is Necessary to Decide if the Challenged Portions are Properly Tailored

Finally, if the Court finds that a burden exists, the Court must decide if the challenged provisions are properly tailored to achieve the underlying governmental interests. This typically

[6] The case of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), a public funding case Plaintiffs characterize as "foundational," also recognizes that incentivizing participation in public funding programs could potentially justify any burden on speech. This governmental interest was not supported by that case's factual record, however, because nearly 100 percent of candidates were participating in the state's public funding program before the challenged provision had been passed. *Id* at 1361.

requires consideration of the practical effects of the challenged regulation. To gain this understanding when a regulation is novel – like the supplemental fund provisions challenged here – factual development is necessary.

The Supreme Court's assessment of the then-novel soft money bans in *McConnell v. FEC* exemplifies this point. 540 U.S. at 166-73, 177-78. In denying the plaintiffs' claim that the soft money bans were overly broad, for instance, the Court considered several types of "generic campaign" activities that would be subject to regulation. Based on the extensive factual record developed by the trial court, the Court found that a "campaign need not mention federal candidates to have a direct effect on voting for such a candidate"; instead, "voter registration, voter identification, ["Get Out the Vote"], and generic campaign activity all confer substantial benefits on federal candidates." *Id*. at 168 (quoting trial record, including expert testimony) (alterations omitted). Accordingly, "the funding of such activities creates a significant risk of actual and apparent corruption" and those activities were properly encompassed by the soft money ban. *Id*.

Here, the Plaintiffs' challenge against the triggered supplemental funds raises similar questions about tailoring. One question, for example, may be whether the threshold for triggering supplemental funds to participating candidates – currently set at 120% of the participants' initial public grant – is properly tailored. *See* Wis. Stat. § 11.513. Another tailoring question may be presented by the cap on total supplemental funds available in response to independent expenditures, currently set at three times the participating candidates' initial grant. *See id*. Indeed, resolution of these questions will involve a factual analysis of historical spending patterns, for which expert testimony may be helpful. *See, e.g.*, *Green Party*, 2010 WL 2737153

at *23 (finding that public grant amounts were not excessive in light of historical spending patterns).

In short, although Amici are confident that the supplemental grant provisions are indeed properly tailored, further information about the state's interests and background about Wisconsin Supreme Court elections is important to inform the Court' determination.[7]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be denied.

[7] In challenging the Act's contribution limits, Plaintiffs argue that the state's decision to lower limits only for supreme court justices undermines its goal of curbing corruption, attempting to raise an improper tailoring claim. *See* Pls. S.J. Mot. at 19. But that Wisconsin decided to focus on state supreme court elections should not constitute serious grounds for challenge. There is little doubt that the legislature can implement reform piecemeal. *McConnell v. FEC*, 540 U.S. at 207 ("As we held in *Buckley*, 'reform may take one step at a time'" (quoting 424 U.S. at 105)). Indeed, "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies … The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *see also Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 828 (2006).

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Respectfully submitted,

s/ Edwin J. Hughes _

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