IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MICHAEL CALLAGHAN,

Plaintiff,

v. **CIVIL ACTION NO. 2:12-cv-03419**

NATALIE E. TENNANT, et al.,

Defendants,

ALLEN H. LOUGHRY II,

Intervenor-Defendant.

INTERVENOR-DEFENDANT'S RESPONSE
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Intervenor-defendant Allen Loughry respectfully submits this memorandum in opposition to Plaintiff's motion for a preliminary injunction. Plaintiff's argument against the Pilot Program rests on the contention that it is unconstitutional under the U.S. Supreme Court's decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *Bennett*'s holding, however, was limited by the facts of that case to only *non-judicial* elections, and when the analysis called for in *Bennett* is applied to the very different context here—which involves exclusively *judicial* elections—it supports a conclusion that Section 3-12-11(f) is constitutional.

Bennett, like other Supreme Court precedent, mandates a two-stage analysis of a campaign finance rule challenged under the First Amendment. First, it is necessary to determine whether a given rule bans or burdens political speech. If it does, the second stage of the analysis requires assessing whether the rule is adequately justified. In *Bennett*, the Supreme Court

concluded that Arizona's matching funds provisions imposed burdens on the speech of non-participating candidates and independent spenders in Arizona's elections. The Court then asked whether the statute advanced Arizona's interest in combating *quid pro quo* corruption—the only interest the Court has said is sufficient to justify regulation of political speech *outside the context of judicial elections*. Because the Court concluded the Arizona law did not further that narrow anti-corruption interest, it struck down the law.

Applying *Bennett*'s analysis to the Pilot Program yields a different result. The law plainly does not ban anyone from speaking, but even assuming that, under *Bennett*, the Pilot Program burdens Plaintiff's speech does not end the analysis. Instead, the Court must evaluate whether any burdens are adequately justified. While the narrow interest in combating *quid pro quo* corruption may be the only adequate interest in the context of non-judicial elections, the Supreme Court has repeatedly made clear that there are compelling interests besides fighting *quid pro quo* corruption that may justify regulation of judicial elections. The Court has recognized that the Due Process guarantee of a fair trial before a fair tribunal and the related need to protect judicial impartiality, as well as the interest in preserving public confidence in the judiciary by avoiding even the perception of bias, are interests of the very highest order. These interests are distinct from the narrow anti-corruption interest implicated in non-judicial elections, and justify appropriate regulation of judicial election conduct.

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

LEGAL STANDARD

The U.S. Supreme Court has emphasized that a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). *See also Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) [hereinafter "*RTAO I*"], *vacated on other grounds*, 130 S. Ct. 2371 (2010) (per curiam), *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010) (per curiam). A preliminary injunction is "rightly reserved for only the most compelling of cases." *Dewhurst v. Century Aluminum Co.*, 731 F. Supp. 2d 506, 514 (S.D. W. Va. 2010) (citing *RTAO I*, 575 F.3d at 346).

While this circuit previously evaluated preliminary injunction motions under the more lenient standard established in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit explained in *RTAO I* that the *Blackwelder* standard is in "fatal tension" with *Winter* and that *Winter* controls:

> In . . . *Winter*, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction, stating that the plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." And all four requirements must be satisfied. Indeed, the Court in *Winter* rejected a standard that allowed the plaintiff to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."

RTAO I, 575 F.3d at 346 (quoting *Winter*, 555 U.S. at 22).

Each prong must be independently satisfied and *cannot* be "conditionally redefined as other requirements are more fully satisfied so that granting or denying a preliminary injunction depends upon a flexible interplay among all the factors considered." *Id.* at 347 (quoting *Blackwelder*, 550 F.2d at 196). The Supreme Court emphasized that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

injunction." *Winter*, 555 U.S. at 24 (internal quotation marks and citation omitted). Under *Blackwelder*, the public interest was not always sufficiently considered. *RTAO I*, 575 F.3d at 347. Finally, "the party seeking the preliminary injunction must demonstrate by '*a clear showing*' that, among other things, it is likely to succeed on the merits at trial." *Dewhurst*, 731 F. Supp. 2d at 515 (emphasis added by district court) (quoting *Winter*, 555 U.S. at 24).

ARGUMENT

The Pilot Program was based on a proposal by an independent commission convened by then-Governor Joe Manchin to address the circumstances of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and the skyrocketing amounts of money that have poured into West Virginia Supreme Court elections in recent years. The proposal resulted from the recognition that "[a]s campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary's role in our society." W. Va. Indep. Comm'n on Judicial Reform, Final Report at 4 ("Indep. Comm'n Final Report").

Because "campaigning for a judicial post today can require substantial funds[,] . . . relying on campaign donations may leave judges feeling indebted to certain parties or interest groups." *Republican Party of Minn. v. White*, 536 U.S. 765, 789-90 (2002) (O'Connor, J., concurring). Judicial impartiality may be threatened whenever a judicial candidate receives substantial financial support from a party or lawyer who may appear before the candidate if he or she is elected. As the West Virginia Legislature recognized, "The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because impartiality is uniquely important to the integrity and credibility of

courts." W. Va. Code § 3-12-2(8). The Pilot Program is an appropriate, and constitutional, response to these concerns.[1]

I. Plaintiff Cannot Make "a Clear Showing" That He is Likely to Succeed on the Merits and Cannot Demonstrate Irreparable Harm.

Plaintiff cannot show that he is likely to succeed on the merits and cannot demonstrate that he would be irreparably harmed if this Court denies his request for injunctive relief. The Pilot Program furthers West Virginia's compelling interests in ensuring the integrity of its judiciary by preserving the actual and perceived impartiality of the Supreme Court of Appeals. It is narrowly tailored to further those interests.

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

In non-judicial elections, recent Supreme Court decisions provide that the only interest sufficiently compelling to justify burdens on speech is the interest in combating *quid pro quo* corruption. *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.") (citation omitted); *Bennett*, 131 S. Ct. at 2826-27 (describing "the sort of *quid pro quo* corruption with which [the Court's non-judicial election] case law is concerned"). But there are additional compelling state interests implicated in judicial elections beyond the narrow anti-corruption interest, and these interests justify regulations in judicial elections that would be impermissible in legislative or executive contests. As Justice Kennedy, who authored the Court's decisions in both *Caperton* and *Citizens*

[1] The U.S. Supreme Court has made clear in the campaign finance context that courts must assess the nature and magnitude of any alleged burdens on speech before determining the appropriate level of scrutiny. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 19-23, 25, 44-45, 64-66 (1976) (identifying differing burdens from contribution limits, expenditure limits, and disclosure requirements and applying different standards of review to each). Where, as here, "constitutionally protected interests lie on both sides of the legal equation," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring), a standard less than strict scrutiny is appropriate, but even under strict scrutiny, the Pilot Program passes constitutional muster.

United, has explained, "[t]he differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of . . . the *legitimate restrictions that may be imposed upon them*." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) (emphasis added).

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

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

This interest in impartiality is unique to the judiciary. "Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them." *Siefert v. Alexander*, 608 F.3d 974, 989 n.6 (7th Cir. 2010); *see also* ABA Model Code of Judicial Conduct R. 4.1., cmt. 1 (2007) ("Even when

subject to public election, a judge . . . must, to the greatest extent possible, be free and appear to be free from political influence and political pressure."). As a federal district court in Wisconsin recognized in upholding the supplemental funds provisions in that state's judicial public financing law,

> [m]embers of 'political' branches of government are expected to be representative of and responsive to the interests of their electoral constituencies, while judges—even when popularly elected—are not representative officials, but rather are expected to be, and to appear to be, impartial and independent in applying the rule of law.

Wis. Right to Life Political Action Comm. v. Brennan, No. 3:09-cv-00764-wmc (W.D. Wis. Mar. 31, 2011), ECF No. 110, slip op. at 33-34.

In addition to its interest in promoting judicial integrity by preventing actual bias, West Virginia has a second compelling interest in promoting public confidence in the courts by avoiding even the appearance of bias. While the executive has the sword and the legislature has the purse, the judiciary has no independent ability to guard its judgments—public trust in the courts' wisdom is the judiciary's only source of power. *See Hensley v. Alcon Laboratories, Inc.*, 197 F. Supp. 2d 548, 549-51 (S.D.W. Va. 2002) (Goodwin, J.) ("The legitimacy of courts depends entirely upon the public perception that they are principled and neutral."); *cf.* The Federalist No. 78 (Alexander Hamilton). The U.S. Supreme Court has explained, therefore, that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968); *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Wersal v. Sexton*, 674 F.3d 1010, 1023 (8th Cir. 2012) (en banc) ("we easily

conclude [the State's] interest in preserving the appearance of impartiality is compelling"), *petition for cert. filed*, 2012 WL 2109665 (U.S. June 7, 2012) (No. 11-1492).

More recently, *Caperton* affirmed that avoiding public perceptions of bias is a compelling interest by employing an objective test, holding that it was necessary to assess the "objective risk of actual bias." 556 U.S. at 886.[2] An objective test, by definition, depends on the perceptions of a reasonable observer. *See, e.g.*, Black's Law Dictionary 144 (8th ed. 2004) (noting that in tort law, "objective" standard is "the reasonable-person standard"); *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (explaining "'objective' reasonableness" involves "typical reasonable person").

The Pilot Program was enacted in response to concerns that the legitimacy of West Virginia's high court could be undermined by the significantly increased spending in this state's judicial elections in recent years. "[F]undraising and campaign expenditures in elections for a seat on the Supreme Court of Appeals have dramatically increased in West Virginia," with candidates raising $1.4 million, $2.8 million, and $3.3 million in 2000, 2004, and 2008, respectively. W. Va. Code § 3-12-2(3)-(6). "As campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary's role in our society." Indep. Comm'n Final Report at 3-4. *See also White*, 536 U.S. at 779 (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."); *Brennan*, slip op.

[2] The *Caperton* Court explicitly did not find actual bias on the part of Justice Brent Benjamin. But the Court still required recusal because, it concluded, reasonable observers' *perceptions of bias* rose to a constitutionally intolerable level under the facts of that case. *See Caperton*, 556 U.S. at 882, 886-87.

at 36 ("If third parties spend bundles of cash expressly advocating the election of a . . . Supreme Court Justice, the public, unsurprisingly, is likely to perceive the appearance of bias or even corruption *if*—and for the largest of contributors, what often turns out to be *when*—those third parties later appear before the . . . Supreme Court.").

Polling in West Virginia confirms the impact that runaway spending in judicial elections has had on public perceptions of judicial impartiality. In a 2010 poll of West Virginia voters conducted by Anzalone Liszt Research, Inc., 78% of respondents thought that campaign contributions had "some influence" or "a great deal of influence" on the Court's decision-making.[3]

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

[3] Justice at Stake, Poll on Public Financing in West Virginia 2 (2010), *available at* http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf.

than the need in elections for legislative or executive offices." *Id.* at 33.[4]

Citizens United is not to the contrary. Speaking through Justice Kennedy, the Supreme Court concluded that "independent expenditures . . . do not give rise to corruption or the appearance of corruption," and therefore are not constitutionally problematic. 130 S. Ct. at 909. In *Caperton*, however—also authored by Justice Kennedy—the Court held that independent expenditures *do* give rise to constitutional concerns by creating "significant and disproportionate influence" which offers "a possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Caperton*, 556 U.S. at 886 (citations omitted).

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

B. In arguing that the Pilot Program serves no compelling interests, Plaintiff profoundly misconstrues the relevant Supreme Court precedent.

Plaintiff attempts to distinguish the binding precedent of the U.S. Supreme Court which holds that combating actual and perceived judicial bias are constitutionally compelling interests

[4] *North Carolina Right to Life Political Action Committee v. Leake*, No. 5:11–CV–472–FL, 2012 WL 1825829 (E.D.N.C. May 18, 2012) does nothing to contradict the principle that judicial elections implicate compelling interests absent from executive and legislative races. While the court struck down a similar North Carolina supplemental funds provision, the court did not consider the constitutional merits of the matter because the state offered no defense of the law on the merits of its constitutionality. *Id.* at *6.

that may support various regulations of judicial election conduct. Because Plaintiff fundamentally mischaracterizes numerous Supreme Court precedents, it is necessary to clarify the holdings of several key cases.

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

Plaintiff also distorts *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012), suggesting that in the case, the "Supreme Court of the United States summarily rejected the same arguments raised by [Intervenor-Defendant] here." Pl. Br. at 12. But Plaintiff immediately undercuts this argument by admitting that "At issue in *Bullock*, was Montana's *ban* on corporate campaign expenditures." *Id*. (emphasis added). Like *Citizens United*, the holding of *Bullock* is limited to statutes purporting to entirely prohibit certain types of political speech; it offered no opinion on any aspect of public financing. This Court need not consider whether the compelling interests in preventing real and perceived bias in the judiciary would be sufficient to uphold a categorical ban on speech in judicial elections, because the West Virginia Legislature

has not banned any speech. *Cf. Wersal*, 674 F.3d at 1019, 1031 (upholding content based bans on judicial election speech under strict scrutiny).

Plaintiff also cites *White* to misleadingly assert that the Supreme Court "has consistently rejected any judicial election distinction in its First Amendment jurisprudence." Pl. Br. at 11 (citing *White*, 536 U.S. at 784). To the contrary, the Court in *White* explicitly held that it would "neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783. Here again, as with *Citizens United* and *Bullock*, Plaintiff elides the fact that *White* dealt with a categorical ban on certain political speech. That is not the case with the Pilot Program, and *White* is inapposite.

In sum, the cases on which Plaintiff relies do not support his arguments that the Pilot Program is unconstitutional. *Bennett* dealt only with executive and legislative elections. *White*, *Citizens United*, and *Bullock* all involved constitutional challenges to statues that prohibited certain political speech. These cases do not control the different circumstances presented here.

C. The Pilot Program's supplemental funds provisions are narrowly tailored to further the compelling interests in courts are impartial in fact and appearance.

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

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

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

The U.S. Supreme Court has made clear that the public financing of elections is constitutional and furthers important government interests. In *Buckley v. Valeo,* the Court noted

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

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

It is crucial to note that *Bennett* did not opine on the question of whether the use of a supplemental funds mechanism is narrowly tailored. As noted above, the *Bennett* Court found Arizona's matching funds provisions did not advance the only compelling interest in a non-judicial election—the interest in fighting *quid pro quo* corruption. Because the Arizona law did not further this interest, the Court had no occasion to assess whether the mechanism Arizona employed was appropriately tailored. Here, by contrast, because the Pilot Program does advance

the constitutionally compelling interests that obtain in the context of judicial elections, this Court must assess whether the use of supplemental matching funds is narrowly tailored.

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

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

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

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

Neither the State nor would-be publicly financed candidates could know in advance whether a $350,000 grant, a $1,050,000 grant, or some value in between, would be sufficient to allow participating candidates to adequately communicate their messages to voters. Campaigns for public office are dynamic affairs that can change dramatically in a very short period of time. Non-participating candidates can raise funds in unlimited amounts in response to new

circumstances, W. Va. Code § 3-12-2(1), but publicly financed candidates are prohibited from raising even one dollar from private sources once they are certified, W. Va. Code § 3-12-12(a)-(b). Avoiding the necessity of significant private fundraising by Supreme Court candidates—and the negative perceptions that may accompany such fundraising—is, of course, the very purpose of the Pilot Program. Rather than incentivizing candidates to spurn the Pilot Program because of possibly insufficient grants—effectively nullifying the program's purpose—or promising too much money to candidates—needlessly depleting precious state funds—West Virginia narrowly tailored the program to address both of these concerns through its supplemental funds provisions.

Plaintiff's suggestion that the Pilot Program is not narrowly tailored because recusal is a less burdensome option is unavailing. Plaintiff argues that *Caperton* stands for the proposition that mandatory recusal "creates the solution to the appearances [of judicial impartiality] problem [Intervenor-Defendant] advances." Pl. Br. at 10. This argument rests on a basic misreading of the case. *Caperton* did not hold that recusal is the only constitutionally sound method to advance the critical state interest in a judiciary that is, and appears to be, impartial and free of bias. Indeed, the *Caperton* decision itself makes clear that neither the majority nor the dissenters believed that recusal alone is sufficient to protect the judiciary's reputation as independent and impartial. Rather, the Court's decision "addresses an extraordinary situation where the Constitution *requires* recusal." 556 U.S. at 887. The *Caperton* Court in no way suggested that recusal alone vitiates the need for other "judicial reforms the States have implemented to eliminate even the appearance of partiality." *Id*. at 888.[5]

[5] Like the *Caperton* majority, Chief Justice Roberts, in dissent, recognized the critical importance of judicial integrity: "I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such." *Id.* at 890 (Roberts, C.J., dissenting). Chief Justice Roberts questioned the adequacy of the *Caperton* recusal rule to address those compelling concerns, however, criticizing the majority for

In short, the Pilot Program's supplemental funds provisions further the state's strong interests in safeguarding the actual and apparent impartiality of the Supreme Court of Appeals. They are narrowly tailored by achieving a necessary harmony between the competing goals of encouraging candidates to participate in the program and protecting state funds. There are no viable less burdensome alternatives that the State could have employed to accomplish these constitutionally vital goals. Consequently, the supplemental funds provisions are constitutional and Plaintiff cannot make "a clear showing" that he is likely to succeed on the merits or that he will suffer irreparable harm.

II. Plaintiff Cannot Establish That The Balance Of Equities Tips In His Favor Or That An Injunction Will Serve The Public Interest

Even if Plaintiff could show a likelihood of success on the merits and that he will suffer irreparable harm—and he cannot—he must also establish that the balance of the equities tips in his favor. In this case, Plaintiff's interest must be weighed against (a) Intervenor-Defendant's interest in being able to wage a viable campaign; (b) the interests of the more than 700 West Virginia citizens who made qualifying contributions to Intervenor-Defendant's campaign have in him being able to robustly promote his candidacy; and (c) West Virginia's interest in allowing candidates to run for seats on the Supreme Court of Appeals without relying on favor-seeking private contributions.

Intervenor-Defendant relied upon the existence of the supplemental funds provisions in choosing to participate in the Pilot Program. If they were enjoined at this late hour, his campaign

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crafting a vague recusal rule that, in practice, would "bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts." *Id*. There is no support in *Caperton*—from either the majority or the dissent—for the proposition that recusal is the singular means for safeguarding the vital state interest in fair and impartial courts. Public financing laws like the Pilot Program are a valuable means of advancing these interests,

would be greatly hindered, if not destroyed, since he cannot privately fundraise. This harm must be weighed against any burden the supplemental funds provisions impose on the speech of those, like Plaintiff, who seek to make expenditures in the high court election. Given this, the equities tilt strongly in Intervenor-Defendant's favor and a preliminary injunction should not be issued.

Finally, the Supreme Court has emphasized that, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotation marks and citation omitted). Here, the public has a very strong interest in protecting the impartiality of the judiciary, particularly in the wake of *Caperton*. *See McMellon v. U.S.*, 528 F. Supp. 2d 611, 614 (S.D. W. Va. 2007) (Goodwin, J.) ("The public has an interest in the integrity of the judiciary."). Enjoining the supplemental funds provisions so close to the election would significantly harm, if not completely nullify, the efficacy of the Pilot Program, greatly undermining the public's vital interest in the integrity of the judiciary.

III. Even If An Injunction Of Section 3-12-11(f) Is Warranted, That Section Is Severable From The Remainder Of The Pilot Program

West Virginia's Supreme Court of Appeals has stated:

> A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained. With respect to the foregoing analysis, this Court has explained that the most critical aspect of severability analysis involves the degree of dependency of statutes. Thus, where the valid and the invalid provisions of a statute are so connected and interdependent in subject matter, meaning, or purpose as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other, the whole statute will be declared invalid.

State v. Stamm, 664 S.E.2d 161, 167 (W. Va. 2008) (citations, internal quotation marks, and brackets omitted).

There is no question that W. Va. Code § 3-12-11(e)—which awards supplemental funds based on the spending of nonparticipating candidates—would be complete and could be independently executed even if § 3-12-11(f)—which awards supplemental funds based on the independent spending of third-party groups or individuals—were found to be unconstitutional. Consequently, there is no interdependency that would prevent severance.

Because Plaintiff is not a nonparticipating candidate, he could not be injured were § 3-12-11(e) to remain in force, and therefore lacks standing to challenge that provision. There is, therefore, no reason for this Court to consider its constitutionality in this proceeding. An individual can only challenge a statute that does not directly harm the individual when the basis for allowing such a challenge is that if the plaintiff is successful in having the whole struck down, the striking down of the relevant subsidiary part will provide plaintiff with a remedy. *See Local 514 Transp. Workers Union of Am. v. Keating*, 66 Fed. Appx. 768, 772-74 (10th Cir. 2003). Here, however, an order exclusively involving § 3-12-11(f) would provide the complete remedy for any constitutional injuries that Plaintiff could possibly suffer under the Pilot Program, were he able to demonstrate unconstitutional harm (which he cannot). Plaintiff's attempt to ensnare a related, but distinct, provision of the law—§ 3-12-11(e)—even though enjoining it will provide Plaintiff with no relief of any kind, is unavailing. Try as Plaintiff might, nothing he does, has done, or wants to do could be affected by the enforcement of 3-12-11(e). Plaintiff's suggestion that § 3-12-11(e) can be triggered solely by independent expenditures, Pl. Br. at 15, and his suggestion, that § 3-12-11(e) can be triggered by the sum of nonparticipating

candidate expenditures and independent expenditures, *id.* at 16, are inaccurate. These misleading interests do not give Plaintiff an interest in that provision sufficient to confer standing.

Plaintiff's suggestion that "it is doubtful that the Legislature, whose members are required to take an oath to support the United States Constitution would have intended to leave one of two unconstitutional provisions in the Act," Pl. Br. at 19, merely presumes that both § 3-12-11(e) and § 3-12-11(f) are unconstitutional on their own, begging the severability question. The proper inquiry is whether the legislature would have passed the law in the absence of the purportedly unconstitutional provision. Given the immense amount of concern and resources poured into the issue of addressing perceived problems with the Supreme Court's impartiality, including constituting an independent commission to study judicial elections in the state, it beggars belief that the legislature would have been unwilling to pass the law in the absence of § 3-12-11(f).

Even if this Court were to find unconstitutional § 3-12-11(f), the only provision Plaintiff has standing to challenge, § 3-12-11(e) would stand because it is severable. This Court should deny Plaintiff's request for injunctive relief with respect to § 3-12-11(e).

CONCLUSION

The West Virginia Legislature acted on the state's interests in guarding judicial integrity by ensuring that courts are impartial in reality and appearance when it adopted the Pilot Program. It narrowly tailored the Pilot Program's supplemental funds provisions. Plaintiff cannot demonstrate a likelihood of success on the merits, or that he would be irreparably harmed absent an injunction. Nor can Plaintiff satisfy the burden to demonstrate that the balance of the equities and the public interest favor the drastic remedy of a preliminary injunction. This Court should deny Plaintiff's motion for a preliminary injunction.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MICHAEL CALLAGHAN,

Plaintiff,

v. **CIVIL ACTION NO. 2:12-cv-03419**

NATALIE E. TENNANT in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission,

Defendants,

ALLEN H. LOUGHRY II,

Intervenor-Defendant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Intervenor-Defendant's Response To Plaintiff's Motion For Preliminary Injunction** was filed with the Court through the ECF system on the 5th day of September, 2012.

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