

IN THE
Supreme Court of the United States

RESPECT MAINE PAC, HAROLD A. CLOUGH,
REP. ANDRE E. CUSHING, III,

Petitioners,

v.

WALTER F. MCKEE, *ET AL.*,

Respondents.

**Application of Andre E. Cushing III, Respect Maine PAC, and
Harold A. Clough for a Writ of Injunction Pending Appeal**

**AMICI CURIAE RESPONSE IN
OPPOSITION TO APPLICATION FOR
WRIT OF INJUNCTION**

MONICA YOUN*
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (646) 292-8310
Facsimile: (212) 463-7308
monica.youn@nyu.edu

BRENDA WRIGHT
LISA J. DANETZ
DEMOS
358 CHESTNUT HILL AVENUE
SUITE 303
Brighton, MA 02135
Telephone: (617) 232-5885
Facsimile: (617) 232-7251
bwright@demos.org

JOHN BRAUTIGAM
1 KNIGHT HILL ROAD
FALMOUTH, ME 04105
Telephone: (207) 671-6700
jblaw@maine.rr.com

Attorneys for Amici Curiae

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*Counsel of Record

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**MOTION FOR LEAVE TO FILE
BRIEF *AMICI CURIAE***

Pursuant to this Court's Rule 37, the Brennan Center for Justice at NYU School of Law, DEMOs, and John Brautigam respectfully request leave of the Court to file this brief *amici curiae* in support of Respondents.

Written consent to the filing of this brief has been granted by counsel for the Respondents and for the Applicants. Letters of consent are attached as Exhibits 3 and 4 to the Declaration of Monica Youn, October 21, 2010 (filed concurrently herewith).

DATED: October 21, 2001.

Respectfully submitted,

MONICA YOUN*
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the
Americas
New York, NY 10013
Telephone:(646) 292-
8310
Facsimile: (212) 463-
7308
monica.youn@nyu.edu

BRENDA WRIGHT
LISA J. DANETZ
DEMOS
358 Chestnut Hill
Avenue
Brighton, MA 02135
Telephone:(617) 232-
5885
Facsimile: (617) 232-
7251
bwright@demos.org

JOHN BRAUTIGAM
1 Knight Hill Road
Falmouth, ME 04105
Telephone:(207) 671-
6700
jblaw@maine.rr.com

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INTEREST OF AMICI CURIAE

Amici curiae include Maine Citizens for Clean Elections – a nonpartisan association of organizations and individuals with the common purpose of enacting, implementing and defending the Maine Clean Election Act (“MCEA”) and other campaign finance reforms. For its fifteen-year history, MCCE has been dedicated to ensuring the orderly and successful functioning of the election process and Maine’s campaign finance system. MCCE drafted the MCEA and successfully campaigned for its approval by popular vote in November 1996. Since then, MCCE has spearheaded significant efforts to educate the public and candidates about the law, ensured its full implementation by the Ethics Commission, defended the law against legal challenges, and fought for the law’s full financing.

Eight candidates running for legislative seats in Maine also appear as *amici curiae*, including four Senate candidates (Phil Bartlett, Justin Alford, Owen Pickus and Pam Trinward) and four House candidates (Sharon Treat, Jon Hinck, David Van Wie and Shelby Wright) (“the candidate-*Amici*”). Their campaigns are broadly representative of Maine’s legislative contests as a whole, including highly competitive races, races against traditionally funded opponents with the ability to exceed the trigger threshold, and races where independent expenditures are likely. Each candidate-*amici* has invested substantial resources qualifying for the public funding system and organizing his or her campaign according to its regulatory scheme. Moreover, through participating in the MCEA, each has relinquished the ability to raise private funds and has reasonably relied on supplemental funds from the MCEA as needed and would be unfairly disadvantaged by losing those funds now, in the eleventh hour. Finally, as candidates and Maine citizens, candidate-*amici* have a strong interest in the orderly functioning of the election process for the duration of this campaign.

SUMMARY OF ARGUMENT

Applicants Andre E. Cushing III, Respect Maine PAC, and Harold A. Clough ask this Court to exercise its power under the All Writs Act, 28 U.S.C. § 1651(a), to issue an extraordinary writ of injunction – a remedy so drastic that this Court does not appear to have granted such a request in over twenty years.¹ Unlike the grant of a stay,

¹ According to our research, the most recent case in which the Supreme Court granted a writ of injunction under the All Writs Act is *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J., in chambers). In that case, the applicant sought an injunction to require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization Tax would be placed, pending further proceedings on the constitutionality of the tax in the Arkansas courts. The Arkansas courts were in recess and would not be able to consider the merits of the applicant's claims for several months. *Id.* at 1307.

Indeed, our research uncovered only *seven* reported cases in which such an application had been granted. *American Trucking Associations*, 483 U.S. at 1306; *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers); *National League of Cities v. Brennan*, 419 U.S. 1321 (1974) (Burger, C.J., in chambers); *Fowler v. Adams*, 400 U.S. 1205 (1970) (Black, J., in chambers); *Matthews v. Little*, 396 U.S. 1223 (1969) (Black, J., in chambers); *Williams v. Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers); *Organized Village of Kake v. Egan*, 80 S. Ct. 33 (1959) (Brennan, J., in chambers). Additionally, in *Atiyeh v. Capps*, 449 U.S. 1312 (1981) (Rehnquist, J., in chambers), Chief Justice Rehnquist invoked the authority of the All Writs Act to stay an injunction issued by the District of Oregon pending either the decision of the Court of Appeals for the Ninth Circuit or the decision of the Supreme Court in *Rhodes v. Champan*, 452 U.S. 337 (1981).

which preserves the state of affairs as it existed prior to a court's intervention, a writ of injunction in the Supreme Court represents this Court's direct intrusion into the status quo. *See Turner Broadcasting Systems, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). To grant such relief on this renewed application would require this Court to override the decisions of Justice Stephen Breyer, of a unanimous panel of the First Circuit Court of Appeals, and of the Maine District Court, and to do so based on no more than Applicants' untested and highly dubious factual allegations of injury stemming from a novel theory of First Amendment harm.

In urging this extreme course of action, Applicants rely almost exclusively on this Court's stay of the Ninth Circuit's decision in *McComish v. Brewer*, 611 F.3d 510, 513 (9th Cir. 2010), *stayed by* 130 S. Ct. 3408 (U.S. June 8, 2010) (No. 09-A1163). Like the present case, *McComish* included a challenge to triggered supplemental grant provisions ("trigger provisions")² in a state public financing system, but the application to this Court arose in a markedly different procedural posture and did not include the broad challenges to

² Although Applicants refer to these provisions as "trigger funds," *Amici* prefer to avoid this term, since it has been known to cause confusion between public financing systems such as the presidential primary system, that "match" small contributions to publicly financed candidates and systems like the Maine Clean Election Act ("MCEA"), in which supplemental grant amounts may be "triggered" by hostile spending from an opponent or outside groups. Maine Rev. Stat. Ann. tit. 21A § 1125(9).

campaign finance disclosure laws and contribution limits that are at issue here. Applicants appear to assume that this Court's grant of a stay in *McComish* gives them a free pass to invoke this Court's extraordinary injunctive power to avoid supposed "inconsistency." Appl. Writ Inj. 1. This request is patently improper – Applicants cannot so easily evade the rigorous standards that govern their application for a writ of injunction, nor can Applicants dispense with their burden to prove their alleged injury. In their application, Applicants misstate both the applicable legal precedent and factual allegations regarding their own actions. This Court should not countenance Applicants' attempt to railroad their extremely questionable allegations past any and all requirements of jurisdiction, precedent, or proof.

This Court's grant of a stay in *McComish* cannot justify the relief sought here. First, the standard applicable in *McComish* – the four-prong standard governing a stay application³ – is far more lenient than the requirements for the

³ In assessing a stay request, the Circuit Justice considers whether there is (1) a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction;" (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous;" (3) a "demonstration that irreparable harm is likely to result from the denial of a stay," and (4) "in a close case it may be appropriate to 'balance the equities' to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted).

extraordinary writ sought here, as this Court has reiterated on numerous occasions. *See Lux v. Rodrigues*, No. 3:10CV482-HEH, 2010 WL 3818310, at *1 (August 26, 2010) (Roberts, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). In order for their writ of injunction to be granted, Applicants must demonstrate *both* that their legal rights are “indisputably clear” *and* that a writ of injunction is “necessary or appropriate in aid of this Court’s jurisdiction.” *Ohio Citizens*, 479 U.S. at 1313. Applicants cannot come close to making either showing.

First, a legal right cannot be “indisputably clear” where it is “novel or uncertain” – as is certainly true of Applicant’s effort to import the rationale of *Davis v. FEC*, 128 S. Ct. 2759 (2010), into the body of public financing case law governed by *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny. *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). Moreover, as Chief Justice Roberts ruled just a few weeks ago, a legal right cannot be deemed “indisputably clear” where, as here, multiple federal circuit courts of appeal have reached “divergent results” in considering the issue. *See Lux*, 2010 WL 3818310, at *1. Finally, this Court’s precedent utterly forecloses Applicants’ claims with regard to the disclosure laws and the gubernatorial contribution limits.

Second, Applicants entirely ignore the requirement that the writ of injunction must be

“necessary or appropriate in aid of this Court’s jurisdiction,” likely because they cannot demonstrate that the present circumstance presents any risk to the ultimate resolution of the merits of this case. In *McComish*, this Court granted a stay only after both the district court and the circuit court had had the opportunity to consider a fully developed factual record on a motion for summary judgment, following two years of intensive litigation. By contrast, the instant renewed application here amounts to no more than the Applicants’ effort to take multiple bites at the apple – appealing a denial of emergency relief while retaining their ability to continue litigating in the district court and to seek appellate review at a later date. Such “piecemeal” appeals are exactly what the final judgment rule instructs this Court to avoid. *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009).

Furthermore, this Court should not exercise its equitable jurisdiction to grant a writ of injunction where the balance of hardships tilts so one-sidedly against Applicants. Even without the benefit of extensive discovery, the most cursory investigation has already revealed Applicants’ claims of injury to be completely baseless. Most astonishingly, Applicants continue to repeat the fiction that the trigger provisions have caused Applicant Cushing to “curtail” his campaign spending, even after publicly filed campaign records have debunked this claim. In fact, Applicant Cushing has now raised and spent campaign funds well in excess of the triggering

threshold, triggering over \$2,800 in supplemental grants to his opponent. Affidavit of Jonathan Wayne, October 21, 2010, (“Wayne Aff.”) ¶¶ 4-7.⁴ Applicant Respect Maine PAC (“RMPAC”) has similarly offered no evidence of “chill” or other injury. Indeed, directly contrary to its allegations, it has used its funds for direct contributions to candidates, and some of those contributions have triggered supplemental funds. *Id.* at ¶¶ 9-10. Furthermore, Applicant Clough’s alleged desire to contribute money in excess of the gubernatorial contribution limits simply does not rise to the level of a constitutional injury, as this Court’s long-established precedents make clear.

Applicants’ manufactured and highly disputable claims of injury stand in stark contrast to the drastic and far-reaching consequences that would result were this Court to interfere directly in Maine’s ongoing election. Absentee voting in Maine has already started, and thousands of voters have cast their votes for their chosen candidates. *See* 21-A M.R.S.A. §751. For this Court to enjoin major portions of the campaign finance system less than two weeks before statewide elections would lead to judicially-created chaos, disrupting long-settled expectations and potentially altering electoral outcomes in races affecting 297 publicly financed candidates across the state. Such a result would be

⁴ Moreover, given previous distributions and expenditures, even if Applicant Cushing were to continue spending every penny of the \$6,000 of funds he has amassed as of October 15th, *no additional supplemental grants would be triggered for his opponent.* *Id.* at ¶8.

particularly unjust given that this disruption would be amplified by Applicants' own delay in filing suit. Equitable considerations should prevent this Court from allowing Applicants to derive strategic electoral advantage from their own delay.

ARGUMENT

I. Applicants Cannot Meet the Incredibly High Standard Necessary to Warrant the Extraordinary Remedy Requested under the All Writs Act.

A. The Standards for a Writ of Injunction Set an Extraordinarily High Bar for Applicants Seeking Such Relief From This Court.

Injunctive relief by the Supreme Court under the All Writs Act is indeed a judicial rarity – a writ of injunction in the Supreme Court does not appear to have been granted in the past twenty years, and has historically been granted in only a scant handful of reported cases.⁵ *See Turner Broadcasting*, 507 U.S. at 1303 (“Not surprisingly, [applicants] do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.”). It is well established, under this Act and the Court’s own rules, that a writ of injunction pursuant to the All Writs Act is to be used “sparingly and only in the most critical and exigent circumstances.”

⁵ See cases listed *supra* note 1.

Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (refusing to issue writ of injunction against requirement barring applicant from funding its electioneering communications with general treasury funds); accord *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); *Ohio Citizens*, 479 U.S. at 1313; *Fishman*, 429 U.S. at 1326; *Williams*, 89 S. Ct. at 2. Indeed, in five of the seven reported cases in which a writ of injunction has been granted, the Circuit Justice noted that special circumstances existed, preventing appropriate action from being taken either by the full Court or by the appropriate lower court.⁶ No such special circumstances exist in this case.⁷

⁶ *American Trucking Associations*, 483 U.S. at 1308-09 (requiring that Arkansas place tax revenues in escrow fund pending state court's determination of tax's constitutionality since state court was in recess); *National League of Cities*, 419 U.S. at 1322 (temporarily enjoining enforcement of amendments to Fair Labor Standards Act which were to take effect in five hours pending full Court's review of the case); *Matthews*, 396 U.S. at 1224 (1969) (temporarily placing candidates' names on ballot, pending either review by full Court or city's postponement of election); *Williams*, 89 S. Ct. at 2 (requiring that Ohio prepare to place candidates' names on presidential election ballot, pending full Court's decision on merits); *Organized Village of Kake*, 80 S. Ct. at 35 (enjoining prohibition on trap fishing in newly-formed state of Alaska where no state court or federal court of appeal had jurisdiction, Native Americans were dependent for survival on fishing, and limited fishing season of 30-40 days had already begun).

The other two cases in which this Court granted a writ of injunction under the All Writs Act both involved instances where applicants were candidates seeking to be

Unsurprisingly, the standard for granting such extraordinary relief displays unparalleled rigor. As Justice Scalia has articulated, such a writ of injunction is appropriate “only where the legal rights at issue are indisputably clear. Moreover, the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court’s jurisdiction.” *Ohio Citizens*, 479 U.S. at 1312 (citations and quotation marks omitted); *Turner Broadcasting*, 507 U.S. at 1303 (same). Accordingly, in order for such a request to be

placed on the ballot immediately prior to an election. *See McCarthy*, 429 U.S. at 1317-18; *Fowler*, 400 U.S. at 1205-06. In both of those cases, the factual records indicated that no damage to the states would result from these candidates’ placement on the ballot, whereas grave and irreparable damage could result from their exclusion from the ballot. *See McCarthy*, 429 U.S. at 1322-23; *Fowler*, 400 U.S. at 1206. Compare *Fishman*, 429 U.S. at 1330 (denying writ of injunction to add applicants’ names to ballot where plaintiffs “delayed unnecessarily” in bringing suit and such late action could “disrupt[] the election”).

⁷ Moreover, Applicants’ renewed request to this Court appears to be little more than an effort to evade the strictures of the final judgment rule. *See Mohawk Industries*, 130 S. Ct. at 605 (“[A] party is entitled to a single appeal, to be deferred until final judgment has been entered.”); *see also Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985) (“Although [the All Writs Act] empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”); *Will v. United States*, 389 U.S. 90, 97 (1967) (finding that regular appeals are much preferred to extraordinary writs); *United States Alkali Export Ass’n v. United States*, 325 U.S. 196, 203 (1945) (“[Extraordinary] writs may not be used as a substitute for an authorized appeal.”).

granted, Applicants must satisfy *both* the “indisputably clear” requirement *and* the “in aid of jurisdiction” requirement. Otherwise, the application must be denied.

Applicants attempt to escape this rigorous standard by suggesting that any case in which “free speech is at issue” should be deemed “extraordinary.” Appl. Writ Inj. 6. That argument is meritless – in numerous cases, the Court has denied a request for a writ of injunction even where plaintiffs have based their claims of relief on the First Amendment. *See, e.g., Lux*, 2010 WL 3818310, at *1 (declining to enjoin ballot regulation allegedly violating freedom of expression); *Wisconsin Right to Life*, 542 U.S. at 1305 (denying injunction against prohibition on financing electioneering communications with general treasury funds); *Turner Broadcasting*, 507 U.S. at 1304 (denying injunction for requirement that cable operators carry certain broadcast stations); *Fishman*, 429 U.S. at 1330 (denying injunction to add names to ballot).

This is true even where the plaintiffs ultimately prevailed upon the merits of their First Amendment claims. *See, e.g., Wisconsin Right to Life*, 542 U.S. at 1305; *Brown*, 533 U.S. at 1302; *Turner Broadcasting*, 507 U.S. at 1304. For example, the plaintiff in *Wisconsin Right to Life*, another campaign finance case, sought an emergency writ of injunction barring federal electioneering restrictions as applied to its activities in the upcoming election – which was

only two months away. 542 U.S. at 1305. Although this Court ultimately agreed with the plaintiff on the First Amendment merits of this case, *see FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 457 (2007), it refused to grant a writ of injunction, noting the high standard necessary to warrant such an “extraordinary remedy.” 542 U.S. at 1306.

Here, Applicants’ already considerable burden is further enhanced because they seek injunctive relief after it was previously denied by Justice Breyer in his authority as the Circuit Justice for the First Circuit. The Supreme Court’s Rules expressly note that renewed applications of this sort are disfavored, Sup. Ct. R. 22, and the Court has reaffirmed that this practice is highly discouraged. *See, e.g., New York Times Co. v. Jascalevich*, 99 S. Ct. 11, 15 (1978) (Marshall, J., in chambers) (explaining that Court “will seldom grant an order that has been denied by another Justice.”). Unsurprisingly, Applicants fail to cite *any* instance where a writ of injunction was granted by the Court on a renewed application, and our research has failed to uncover any reported case in which such a renewed application for a writ of injunction was granted.⁸

⁸ On rare occasions, the Court has granted a renewed application for a *stay*, where the Circuit Justice had previously denied such a stay. *See, e.g., Spenkelink v. Wainwright*, 442 U.S. 1308 (1979) (Marshall, J., in chambers) (granting stay of execution where full Court could consider case within thirty-six hours); *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973) (Marshall, J., in chambers) (staying district court stay which prohibited bombing of Cambodia); *Tierney v. United States*, 409 U.S. 1232 (1972) (Douglas, J., in chambers)

B. Since a Writ of Injunction Requires a “Substantially Higher Justification” Than a Stay Application, Applicants Cannot Rely Upon This Court’s Grant of a Stay in the *McComish* Case.

Although Applicants correctly identify the standard applicable to a writ of injunction, they then proceed to ignore it, pointing this Court to the much more lenient standard applicable to the grant of a stay of a lower court’s ruling. Appl. Writ Inj. 6. This attempt to elide the applicable standards is improper: The relief requested upon an application to stay a lower court’s decision is different in kind from the grant of a writ of injunction – the former preserves the status quo prior to judicial intervention, while the latter represents this Court’s direct interference with the status quo. “Unlike a stay, which temporarily suspends ‘judicial alteration of the status quo,’ a writ of injunction ‘grants judicial intervention that has been withheld by the lower courts.’” *Turner Broadcasting*, 507 U.S. at 1302 (quoting *Ohio Citizens*, 479 U.S. at 1313). Therefore, the two-pronged test applicable to a writ of injunction “demands a significantly higher justification” than

(granting application for bail); *Ex Parte Stickney*, 82 S. Ct. 465 (1962) (Douglas, J., in chambers) (staying execution due to “bothersome” question); *Bandy v. United States*, 81 S. Ct. 25 (1960) (Douglas, J., in chambers) (granting application for bail pending disposition of petition for certiorari). But, as explained below, a stay application is subject to a much more lenient standard than the writ of injunction requested here.

the traditional four-prong test used to evaluate a stay request.⁹ *Lux*, 2010 WL 3818310, at *1; *Ohio Citizens*, 479 U.S. at 1312.¹⁰

Given this divergence in standards between an application for a stay and an application for a writ of injunction, Applicants’ nearly exclusive reliance upon this Court’s grant of a stay in the *McComish v. Bennett* case is unavailing. In *McComish*, the district court had the opportunity to consider a full evidentiary record on a motion for summary judgment, and ultimately issued a permanent order enjoining the trigger provisions in Arizona’s public funding system. *See McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *1 (D. Ariz. Jan. 20, 2010). The Ninth Circuit stayed this order preliminarily, and then – after the case had been fully briefed and argued – issued a mandate upholding the trigger provisions and extending the stay while the case was remanded on other grounds. *McComish*, 611 F.3d at 513. Thus, the emergency request for relief in *McComish* asked this Court to vacate the Ninth Circuit’s stay and to stay the mandate pending a decision of certiorari. *See* 130 S. Ct. at 3408. Accordingly, in *McComish*, this Court applied the standards applicable to a stay pending certiorari pursuant to 28 U.S.C. § 2101(f). *See id.*¹¹ Moreover, the

⁹ *See supra* note 3 (reciting stay standard).

¹⁰ Concluding that they had failed to “address[] the peculiar requirements” to warrant relief under the All Writs Act, Justice Scalia denied the *Ohio Citizens* plaintiffs’ application. *Ohio Citizens*, 479 U.S. at 1312.

¹¹ Although in *McComish*, State Defendants and Intervenor-Defendants had argued, in the alternative, that

McComish case had been filed 26 months prior to the 2010 election, and the stay issued in June, nearly 6 months before the general election.¹²

By contrast, and as explored at greater length *infra*, Section II.B., Applicants here seek to base their application on highly questionable factual allegations, without the opportunity for factual discovery. The circuit court found that

the stay request should be evaluated under the All Writs Act, the Court apparently rejected that request, instead treating the request as one for a stay pending certiorari pursuant to 28 U.S.C. § 2101(f). *See* 130 S. Ct. at 3408.

¹² As explained below, like Applicants in the instant case, the *McComish* plaintiffs had initially filed their lawsuit in August of the 2008 election year – one full election cycle before this Court eventually granted its stay. *See McComish v. Brewer*, No. CV-08-1550, 2008 WL 4629337, at *1 (D. Ariz. Oct. 17, 2008) (denying preliminary injunction request). Soon thereafter, the plaintiffs moved for a temporary restraining order on August 29, 2008, and, after this request was denied, for a preliminary injunction on October 17, 2008. In its decision on the preliminary injunction, the district court found that “the plaintiffs were likely to succeed on the merits.” *Id.* at *9. However, “given the extraordinary balance of the harms required in the context of an ongoing election” the injunction was denied. *Id.* at *12. With early voting already in progress and some candidates having depended upon the triggered supplemental funds to run their campaign, the court found that the balancing of the harms favored the defendants. *Id.* at *10-*12. The court paid “special attention” to the plaintiffs’ delay in filing as they had waited almost two months after the *Davis* decision before filing their claim, in addition to the proximity of that filing to the election, in balancing the harms. *Id.* at *11. Here, the disruption resulting from the injunction of an ongoing election would be at least as great in *McComish*, and Applicants’ delay in filing suit is much more egregious.

Applicants had not presented any evidence of immediate injury sufficient to warrant injunctive relief. *See Respect Maine PAC v. McKee*, No. 10-2119, 2010 WL 3861051, at *2 (1st Cir. Oct. 5, 2010). Moreover, Applicants here did not initiate this litigation until August 5, 2010; now, less than two weeks remain until the general election. Indeed, recognizing that “intervention by the federal courts in state elections has always been serious business,” this Court has been particularly averse to granting a writ of injunction when a request comes on the eve of an election. *Oden v. Brittain*, 396 U.S. 1210, 1211 (1969) (noting great reluctance, five days from date of election, to disrupt election by granting writ of injunction); *see also Fishman*, 429 U.S. at 1325 (refusing writ of injunction approximately one month from election, in part because of potential “chaotic and disruptive effect upon the electoral process”). This unexplained delay further weakens Applicants’ already highly tenuous claim to relief.

C. Applicants Cannot Establish that the Merits of Their Claims Against Trigger Provisions Are “Indisputably Clear.”

The “indisputably clear” standard creates an exceptionally high bar for an applicant seeking a writ of injunction, and Applicants cannot come close to making this showing. *Lux*, 2010 WL 3818310, at *2; *Turner Broadcasting*, 507 U.S. at 1303; *Brown*, 533 U.S. at 1303; *Ohio Citizens*, 479 U.S. at 1313. Applicants, in essence, treat this

requirement as identical to the “likelihood of success on the merits” prong of the preliminary injunction standard, recycling the same arguments and allegations that the district court and First Circuit both rejected. In truth, the “indisputably clear” standard is far more exacting than mere likelihood of success – indeed, as noted above, in multiple instances, the Supreme Court has rejected applications for a writ of injunction even where applicants ultimately prevailed upon the merits.

Instead, this Court has ruled that legal rights will not be deemed “indisputably clear” where such claims are “novel and uncertain.” *Fishman*, 429 U.S. at 1325. Similarly, as Chief Justice Roberts emphasized just last month, legal rights are not “indisputably clear” where, as here, appellate courts considering the issue have reached “divergent results.” *Lux*, 2010 WL 3818310, at *1. Here, the novelty of the claim presented by Applicants as well as the divergence of circuit court authority on the issue doom Applicants’ request for relief.

First, Applicants’ alleged injury from the trigger provisions is a novel issue in this Court – one that this Court has never previously considered, much less recognized. *Davis*, the case upon which Applicants rely for their entitlement to relief, was not a public financing case, but instead provided one similarly-situated candidate a fundraising advantage over another as they competed for private campaign contributions.

Second, as Applicants acknowledge, four circuits have recently reached varying conclusions about the constitutionality of particular trigger provisions within four states' public funding programs. By definition, these varying results belie Applicants' assertion that this legal issue is "indisputably clear." *Lux*, 2010 WL 3818310, at *1. Instead, the different outcome of recent cases underscores that no two public funding programs are alike. Accordingly, the range of burdens and interests presented by each scheme must be closely analyzed and balanced.

Finally, the challenged disclosure requirements and contribution limits are, under well established jurisprudence, presumptively valid. Applicants have failed to advance any reason why the constitutionality of these provisions should be seriously doubted; they certainly have not shown any "indisputably clear" facts or law in their favor.

- a. *Applicants' Alleged Injury from Trigger Provisions Presents a Novel and Uncertain Legal Issue, Not an "Indisputably Clear" Question of Law.*

The subject area of this lawsuit – public financing of campaigns – is one on which this Court has not opined since its landmark decision in *Buckley v. Valeo*. This Court's decision in *Davis v. FEC* – a decision that concerned the regulation of private campaign fundraising – did not alter public

financing doctrine because it simply did not concern public financing.¹³ Indeed, this Court in *Davis* took care to distinguish that the constitutional analysis of public funding programs is “quite different” from the First Amendment questions that arise from the regulation of private fundraising. 128 S. Ct. at 2772. Accordingly, the constitutionality of trigger provisions within public financing systems – an innovation that did not exist at the time *Buckley* was decided – will be an issue of first impression for this Court if and when this Court decides to hear such a case. Such a “novel and uncertain” legal claim cannot establish an “indisputably clear” entitlement to relief as is required for a grant of a writ of injunction. *Lux*, 2010 WL 3818310, at *1; *Fishman*, 429 U.S. at 1329.

Although Applicants argue, based on the *Green Party* and *Roberts* decisions, that the

¹³ Applicants’ claim that the *Davis* Court’s passing citation to the Eighth Circuit’s decision in *Day*, 34 F.3d 1356 (8th Cir. 1994), “expressly equat[ed] the [supplemental] fund[s] in *Day* with the Millionaire’s Amendment” is utterly meritless. This Court cited *Day* – in dicta – for nothing more than the uncontroversial proposition that, under the Millionaire’s Amendment, a candidate who makes large personal expenditures in support of his campaign must shoulder a “potentially significant burden.” 128 S. Ct. at 2772. There is no reason to believe that a “see” citation was intended to signal, *sub silentio*, the Court’s invalidation of a significant body of appellate case law upholding the constitutionality of trigger provisions in public financing systems, particularly when that issue was simply not before the Court. Contrary to Applicants’ suggestion, this Court does not “hide elephants in mouseholes.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

reasoning in *Davis* should be inserted into the case law on public financing, this argument for an extension of the *Davis* rationale falls short of demonstrating the indisputable clarity required by the governing standard. Indeed, as recently as September of this year, Chief Justice Roberts, sitting as Circuit Justice, denied an application for a writ of injunction, even though the Chief Justice conceded that the “[c]ircuit precedent relied upon by the District Court...has been undermined by our more recent decisions....” *Lux*, 2010 WL 3818310, at *2. Similarly, in *Brown v. Gilmore*, Chief Justice Rehnquist denied a writ of injunction in a First Amendment case, despite the applicants’ assertion that their case was “virtually a replay of [an earlier case], in which [the Supreme Court] struck down a similar Alabama statute.” 533 U.S. at 1303. In *Brown*, the merits of the applicant’s legal claim could not be deemed “indisputably clear” where the circuit court had distinguished the allegedly controlling decision. *Id.* Here, as in *Brown*, both the district court and the unanimous First Circuit panel found the *Davis* decision to be distinguishable – precluding any claim that *Davis*’ applicability is “indisputably clear.” See *Respect Maine PAC*, 2010 WL 3861051, at *2 (finding that, due to outstanding issues of fact and law, “we cannot forecast what our ultimate judgment on the merits will be”); *Cushing*, 2010 WL 3699504, at *7 (“The Court is not convinced that *Davis* and/or *Citizens United* cast *Daggett* into disrepute or otherwise reflect an overruling of *Daggett*.”).

Moreover, a legal right cannot be deemed “indisputably clear” where this Court’s precedents have created “two lines of authority.” *Turner Broadcasting*, 507 U.S. at 1304. In *Turner Broadcasting*, applicants sought a writ of injunction on First Amendment grounds against the “must-carry provisions” of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, *see* 47 U.S.C. § 534(a) (2010). The Chief Justice noted that two competing lines of authority potentially controlled the result and accordingly denied the application, explaining that “[i]n light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation.” *Turner Broadcasting*, 507 U.S. at 1304. Indeed, even though *Turner Broadcasting Systems* ultimately prevailed on the merits of its claim, its entitlement to relief could not be deemed “indisputably clear” at the time it sought a writ of injunction.

Similarly, the *Davis* rationale and the *Buckley* decision currently occupy separate spheres of campaign finance doctrine – one regarding the regulation of private campaign fundraising and one regarding the constitutionality of public financing. To import the *Davis* rationale into the arena of public financing would create insuperable tensions within the case law, as explained below. Given the difficulties involved in reconciling these two competing strands of doctrine, as Applicants’ theory of injury would require, Applicants’ legal rights

cannot be deemed “indisputably clear,” but instead must be deemed both “novel and uncertain.”

In *Buckley*, the Court squarely rejected the notion that granting public funds to participating candidates posed any burden upon nonparticipants. *See, e.g.*, 424 U.S. at 94 n.128. Instead, this Court expressly approved “the enhancement of opportunity to communicate with the electorate” that public financing offers participating candidates, since participating candidates suffer a “countervailing denial” – namely, accepting an expenditure ceiling and agreeing to forgo private fundraising. *Id.* at 94-95. The Court reasoned that this public subsidy of participating candidates creates no constitutional injury to nonparticipants since they “are free to raise money from private sources” and are “free from any expenditure limits.” *Id.* at 99.

By contrast, this Court’s holding in *Davis*, that the so-called “Millionaire’s Amendment” burdened the speech of high-spending candidates, was predicated on the differential fundraising rules applied to otherwise similarly-situated privately financed candidates. The Millionaire’s Amendment represented a drastic departure from the normal rule in congressional elections (namely, that all candidates in privately-funded congressional elections are subject to the same contribution limits) with “a new, asymmetrical regulatory scheme.” *Davis*, 128 S. Ct. at 2766. Under this scheme, if one candidate spent over \$350,000 of his personal money to fund his own campaign, the

initial contribution limits were tripled and the limits on coordinated party-candidate expenditures were eliminated – but *only* for that privately funded candidate’s privately funded opponent. It was this disparate treatment of otherwise similarly-situated candidates that the Court ultimately rejected, deeming it an “unprecedented penalty.” *Id.* at 2771. *Davis* did not address public financing systems, and, indeed, noted that such schemes are, as a matter of fact and law, “quite different” from the provision at issue there. *Id.* at 2772.

This critical difference between a system of purely private financing and a system with optional public funding is essential. Under *Buckley*’s rationale, since publicly funded candidates can constitutionally be awarded benefits not afforded to privately funded ones, the award of triggered supplemental funds to participating candidates cannot be “discriminatory” or “asymmetrical.” See *Buckley*, 424 U.S. at 94. Unlike in *Davis*, where the Millionaire’s Amendment imposed differential contribution limits, under the MCEA, publicly financed and traditionally funded candidates cannot be deemed similarly situated. Instead, the MCEA’s provisions providing supplemental funds in high-spending races – like all discrete parts of a public funding program – are part of the package of incentives that participating candidates accept in exchange for “a countervailing denial.” *Id.* at 95. Like the lump-sum grants approved in *Buckley*, the system of triggered incremental grants does no more than “substitute[] public funding for what the

parties would raise privately,” thereby permitting responsive speech in highly competitive races. *Id.* at 96, n.129. Nothing in this Court’s precedents suggests that the First Amendment requires that a publicly financed candidate be unable to engage in the type of speech that a privately financed candidate would undertake as a matter of course.

In short, the *Davis* rationale cannot be imported into the public financing context without substantial revision of *Buckley*’s core reasoning. Whether or not this Court decides to review a case involving the constitutionality of triggered supplemental grant provisions in a public financing system, no current authority can be deemed to provide an “indisputably clear” entitlement to relief on the merits.

- b. *Different Circuits have Rendered Different Decisions on the Constitutionality of Trigger Provisions, Precluding Applicants’ Assertion that this Legal Issue is “Indisputably Clear.”*

In the last six months, four Courts of Appeal have rendered decisions involving particular trigger provisions in the public funding programs of four different states.¹⁴ Two Circuits, the First and

¹⁴ Prior to *Davis*, three federal circuit courts had ruled that public financing trigger provisions pass constitutional muster. See *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, 129 S.

the Ninth, have rejected Applicants' claim of unconstitutional injury. *Respect Maine PAC*, 2010 WL 3861051, at *1-*2; *McComish*, 611 F.3d at 513-14. The Second and Eleventh Circuits, on the other hand, have concluded that, given the particular structures of the public financing systems at issue, the operation of the trigger provisions burdened plaintiffs' First Amendment rights. *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 249 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279, 1291 (11th Cir. 2010). The existence of these differing outcomes, by definition, precludes Applicants' assertion that this legal issue is "indisputably clear." *Lux*, 2010 WL 3818310, at *1. Or, in the words of Chief Justice Roberts, since "the courts of appeals appear to be reaching divergent results in this area....Accordingly,...it cannot be said that [applicant's] right to relief is 'indisputably clear.'" *Id.* at *3.

In fact, far from creating any sort of "indisputably clear" jurisprudence, these mixed decisions confirm that "no two public funding schemes are identical, and thus no two evaluations of such systems are alike." *Daggett*, 205 F.3d at 464. Instead, the constitutionality of any discrete provision turns on an examination of the entire public financing scheme, considering the totality of the program and the underlying state interests. *See, e.g., Buckley*, 424 U.S. at 97-98 (finding that Congress could treat minor-party candidates

Ct. 490 (2008); *Daggett v. Comm'n on Gov't Ethics*, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel*, 101 F.3d at 1552.

differently for purposes of public funding eligibility because of historical differences between minor and major party candidates, lack of injury from denial of public funds, and Congress' interest in protecting public fisc); *cf. Burdick v. Takushi*, 504 U.S. 428, 435-37 (1992) (evaluating Hawaii's prohibition of write-in voting in light of other provisions permitting easy access to ballot). In short, as the First Circuit noted and as is illustrated by the divergent results within the Circuits, the legal issues raised by trigger provisions "require careful analysis, on a fully developed record." *Respect Maine PAC*, 2010 WL 3861051, at *2. The answers to these complex constitutional and factual questions are not "indisputably clear."

D. Far From Being an "Indisputably Clear" Violation of Applicants' First Amendment Rights, The Challenged Disclosure Provisions are Presumptively Constitutional Under This Court's Precedents.

Applicants do not seriously attempt to argue that Maine's reporting requirements for independent expenditures are clearly and indisputably invalid. Appl. Writ Inj. 19-22. Instead, they advance a series of unsupported claims – that the requirements are unduly burdensome, cannot be justified by any sufficiently important state interests, and are overly broad. In doing so, Applicants wholly ignore decades of case law approving of campaign finance disclosure requirements similar to Maine's. *See, e.g., Citizens*

United, 130 S. Ct. 876, 913-16 (2010); *McConnell*, 540 U.S. at 194-202; *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203-04 (1999); *First National Bank of Boston v Bellotti*, 435 U.S. 765 (1978); *Buckley*, 424 U.S. at 60-82.

Maine's disclosure requirements are run-of-the-mill. For those who make (a) independent expenditures that expressly advocate for a candidate, or (b) independent expenditures that clearly name a publicly funded candidate right before an election, Maine requires that basic information be reported. *See* Maine Rev. Stat. Ann. tit. 21A § 1019. Specifically, the spender must identify the candidate involved, whether the expenditure was in support of or in opposition to candidate, and the amount. *Id.* This information must be reported at periodic intervals throughout the year unless an election is near – then, the information must be reported on an expedited basis. *Id.*

This scheme is modeled on current federal disclosure laws, which have been upheld by this Court in *Citizens United*, 130 S. Ct. at 913-16 and in *McConnell*, 540 U.S. at 194-202.¹⁵ While

¹⁵ The analogous federal disclosure requirements for electioneering communications, 2 U.S.C. § 434(f)(2), require any person or entity that makes electioneering communications that aggregate more than \$10,000 during the year to report, among other things, the elections and the name of candidates to be identified if known, as well as the identity of donors who have contributed at least \$1,000. The independent expenditure disclosure requirements, 2 U.S.C. § 434(c), require any person or entity that makes independent

upholding federal disclosure laws in *Citizens United*, the Court reiterated that disclosure requirements “impose no ceiling on campaign-related activities” and “do not prevent anyone from speaking.” 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64 and *McConnell*, 540 U.S. at 201). And, this Court reaffirmed the informational and anti-corruption interests that, since *Buckley*, have consistently justified any minimal burden imposed by disclosure – specifically, “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.” *McConnell*, 540 U.S. at 196; accord *Citizens United*, 130 S. Ct. at 914; *Buckley*, 424 U.S. at 66-68. Indeed, the *Citizens United* Court found that informational interests alone were sufficient to justify federal laws requiring disclosure of “electioneering communications” – communications clearly identifying a candidate made shortly before election, but not expressly advocating support or opposition to the candidate. *Citizens United*, 130 S. Ct. at 914.

In the face of this case law, Applicants cannot seriously claim that the challenged reporting requirements serve no sufficiently

expenditure over \$250 during the year to report the identity of donors who have contributed at least \$200 for the purpose of furthering the independent expenditure and identify the candidate target by the spending. Spenders must also certify that the expenditure was truly independent.

important governmental interests.¹⁶ As explored in greater detail below, Maine voters have substantial interests in robust disclosure, particularly in these final weeks before Election Day. Accordingly, Applicants' claims that the disclosure requirements violate their First Amendment rights appear to be entirely devoid of merit, and certainly do not come close to satisfying the "indisputably clear" standard that governs their request for relief.

E. Existing Precedent Forecloses Applicant Clough's Claim That the Gubernatorial Contribution Limits Violate His First Amendment Rights.

Similarly, there is no authority whatsoever, much less any "indisputably clear" law, which would support Applicant Harold Clough's assertion that the \$750 limit on campaign contributions to gubernatorial candidates is unconstitutional. In fact, his claim is almost completely foreclosed by *Buckley*. As *Buckley* held, and more recent case law has reinforced, for a campaign contributor such

¹⁶ Moreover, Applicants' claim that the law is overly broad because it requires disclosure of executory contracts for independent expenditures is directly foreclosed by *McConnell*. There, the Court expressly upheld a similar requirement under federal law, noting that it was necessary to prevent circumvention of the reporting requirements. 450 U.S. at 200. Applicants' claim of undue burden – which not a scrap of evidence supports – is also not meritorious, given that federal law imposes reporting requirements that are analogous to Maine's. See, e.g., 2 U.S.C.A. § 43(g) (imposing 24 hour disclosure requirements on independent expenditures of \$1,000 or more made within 20 days of election).

as Applicant Clough, a contribution limit “entails only a marginal restriction” upon speech because contributions serve “as a general expression of support” where the “expression rests solely on the undifferentiated act of contributing.” *Buckley*, 424 U.S. at 20-21. Because greater contributions do not equate to greater symbolic support, a limit on the amount of money one can give places only the most minimal burden on First Amendment rights. *Id.* at 21. Similarly, while making a contribution allows one to associate with a candidate, many other actions serve the same purpose – so, that right is not materially diminished by a contribution limit. *Id.*¹⁷

Contribution limits are thus not evaluated under a strict scrutiny standard. Instead, a more lenient standard applies – such limits are deemed permissible when they “are closely drawn to match a sufficiently important interest.” *Randall*, 548 U.S. at 247 (internal quotations omitted). In determining whether a contribution limit is “closely drawn,” a court has “no scalpel to probe” the

¹⁷ Nor are *candidates*’ free speech rights unduly burdened by contribution ceilings: These limits are constitutional unless they prevent candidates from “amassing the resources necessary for effective advocacy.” *Randall v. Sorrell*, 548 U.S. 230, 249-50 (2006); *Buckley*, 424 U.S. at 21. Limits on the amount any one contributor can give simply force candidates to find more supporters; the limits do not prevent candidates from effectively advocating the issues of concern to their contributors. *Buckley*, 424 U.S. at 21-22. Here, of course, none of the Applicants is or plans to be a gubernatorial candidate, so none has standing to challenge the contribution limits on these grounds.

appropriateness of a particular dollar limit, especially where, as here, there has been no opportunity for factual discovery regarding the justifications for particular contribution ceilings. Moreover, this Court has recognized that “the legislature is better equipped to make such empirical judgments, as legislators have ‘particular expertise’ in matters related to the costs and nature of running for office.” *Randall*, 548 U.S. at 248.

Instead, a court will examine the amount of a contribution limit only in the extreme case where the factual record demonstrates “strong indication[s] . . . , *i.e.* danger signs” that the limit is so low that it will “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” *Randall*, 548 U.S. at 249 (including as “danger signs” contribution limits set on an election-cycle basis and \$200 limits that were lowest in nation and well below lowest limit previously upheld). Maine’s contribution limits exhibit no such “danger signs,” and the available evidence demonstrates that privately-financed candidates are able to raise significant funds and to run highly competitive campaigns. Affidavit of Jonathan Wayne, September 10, 2010 ¶¶ 51-52.¹⁸ Applicants fail to

¹⁸ Indeed, the concerns regarding incumbent entrenchment that underlay the *Randall* Court’s decision are entirely absent in the present case, since there is no incumbent in Maine’s gubernatorial race. Furthermore, Maine’s governors are term limited to two consecutive four-

offer a single scrap of evidence to support their claim that Maine's \$750 contribution limit have caused or will cause Maine's elections to become uncompetitive, or will prevent challengers from amassing the resources to run effective campaigns.

Moreover, as the Supreme Court recently reiterated in *Citizens United*, limits on direct contributions to candidates, "have been an accepted means to prevent quid pro quo corruption" for decades. *Citizens United*, 130 S. Ct. at 909 (citing *McConnell*, 540 U.S. at 136-38 & n. 40). Accordingly, this Court and lower federal courts have repeatedly upheld contribution limits in recognition of compelling governmental anti-corruption interests,¹⁹ *Citizens United*, 130 S. Ct. at 909; *McConnell*, 540 U.S. at 136 (contribution limits prevent "actual corruption" and "appearance of corruption"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (2000) (preventing "corruption and the appearance of corruption" is "constitutionally sufficient justification"), *Buckley*, 424 U.S. at 29 (upholding \$1,000 contribution limit to federal candidates), *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1097 (9th Cir. 2003) (upholding state \$100 to \$400 limit), *Daggett v. Comm'n on Gov'tal Ethics and Election Practices*,

year terms, Me. Const. art. 5, § 2, and no governor has ever served for more than eight years in Maine.

¹⁹ In fact, since this Court's decision in *Randall*, no court has struck down a uniformly applicable contribution limits as too low. See, e.g., *Thalheimer v. City of San Diego* 706 F.Supp.2d 1065 (S.D. Cal 2010). (noting *Randall* as only case to strike down contribution limits).

205 F.3d 445, 459 (1st Cir. 2000) (upholding state \$250 limit), *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORK-19A, 2000 WL 33733256, at *4 (M.D. Fla. March 20, 2000) (upholding state \$500 limit). As Maine’s contribution limits are supported by these same interests, *see Daggett*, 205 F.3d at 456-458, and there are no “danger signs” present, these limits are presumptively constitutionally valid. Accordingly, far from being “indisputably clear,” Applicant Clough’s claim appears to be entirely unsupported, either by current precedent or by any competent evidence.

F. Applicants Fail to Show That an Injunction is Necessary or Appropriate in Aid of This Court’s Jurisdiction.

To establish an entitlement to a writ of injunction, Applicants must first demonstrate that the requested relief is “necessary or appropriate in aid of the Court’s jurisdiction.” 28 U.S.C. § 1651. Applicants do not, however, even attempt to make such a showing. Indeed, as noted *supra*, Section I.A., in nearly every instance in which the Court has granted a writ of injunction under the All Writs Act, it has done so only where circumstances indicated that such extraordinary relief was necessary to preserve the ability of the appropriate state or federal court to reach an ultimate resolution of the merits of the case.²⁰

²⁰ See cases cited *supra* note 5. In the two ballot access cases that appear to be the only reported exceptions to this rule, the factual record showed that the requested interim placement of candidates’ names on the ballot would result in

Applicants' heavy reliance on the *McComish* decision merely serves to demonstrate the relative weakness of their application for extraordinary relief. In the *McComish* case, despite the denial of the plaintiffs' request for injunctive relief prior to the 2008 election, the case proceeded past that election through the normal processes of factual and legal development in the lower courts. After over a year of hard-fought litigation, the district court considered a developed factual record comprising of documentary evidence, declarations, deposition and hearing testimony from more than a dozen fact and expert witnesses. *McComish*, 2010 WL 2292213, at *1-*6. Only then did the district court enter an injunction against the challenged trigger provisions, *see id.* at *1, and this Court acted to reinstate that injunction in staying the mandate of the Ninth Circuit. Applicants here can make no argument that their dilatory lawsuit and untested and highly questionable factual allegations are entitled to short-circuit this process. *See Pennsylvania Bureau of Correction*, 474 U.S. at 43 (1985) (the All Writs Act does not excuse the issuance of ad hoc writs to evade statutory requirements of jurisdiction); *Will*, 389 U.S. at 97 (preferring normal appeals process to extraordinary); *United States Alkali Export Ass'n*, 325 U.S. at 203 (extraordinary writs are no substitute for normal appeal).

no injury to the state and would stave off grave damage to the candidates' political opportunity. *See McCarthy*, 429 U.S. at 1320-21; *Fowler*, 400 U.S. at 1206.

In short, Applicants have no basis to argue that a writ of injunction is necessary to preserve the litigants' ability to achieve an ultimate resolution on the merits. Applicants fail even to try to satisfy this clear requirement, and their application should be denied on this ground alone. *See Turner Broadcasting*, 507 U.S. at 1303 (denying application because implementation of challenged provisions would not strip Supreme Court of its jurisdiction to decide merits of any appeal).

II. Equitable Considerations Render a Writ of Injunction Inappropriate.

A. Determination of this Writ of Injunction Requires this Court to Fully Assess the Equitable Considerations Raised by the Instant Application.

A writ of injunction is an equitable remedy, derived from common law. *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). Accordingly, this Court must undertake a “consideration of the competing equities” posed by each request. *Socialist Labor Party*, 80 S. Ct. at 4; *see also Fowler*, 91 S. Ct. at 3.²¹ Here, the balance of hardships tilts sharply in

²¹ Specifically, this Court's case law makes clear that equitable issues such as undue delay, individual reliance interests, and the broader public good must factor into an evaluation of whether this extraordinary remedy is appropriate. *See, e.g., Fishman*, 429 U.S. at 1330 (denying application, after noting equitable considerations like undue

Defendant and *Amici*'s favor. At best, Applicants' allegations of injury are conclusory and unsupported; at worst, they are directly contradicted by publicly-available evidence. Indeed, while Applicants claim an entitlement to emergency relief, they inexplicitly waited until the eve of the election to file this suit – the outcome of which would grant them profound competitive advantages.

On the other hand, enjoining key provisions of Maine's election law at this late hour would cause countless publicly-funded candidates true irreparable harm, disrupting long-settled expectations and potentially altering their electoral outcomes. Even worse, perhaps, an injunction would directly thwart the state's ability to run a fair, orderly, and corruption-free election process. Such a result would undoubtedly undermine voters' trust in Maine's democratic processes and the representative government it produces. In short, myriad equitable considerations should prevent

delay and "chaotic and disruptive effect upon electoral process"); *Organized Village of Kake*, 80 S. Ct. at 35, 37 (granting application when equities "so plainly support[ed]" application, including reliance interests of affected persons); *Socialist Labor Party*, 80 S. Ct. at 4 (denying application, after balancing equities, in part for undue delay); *Scaggs*, 90 S. Ct. at 5 (denying injunction to halt election after considering equities, noting "considerable expense" already incurred by city); *Westermann*, 409 U.S. at 1236-37 (denying application filed two and a half weeks before election because "orderly election processes would likely be disrupted by so late an action").

this Court from reaching into Maine's electoral process at this late hour.

B. Recent Factual Developments Underscore Lack of Actual Harm to Applicants.

a. *Applicant Cushing has Failed to Establish Any "Chill."*

At each stage of Applicants' lawsuit thus far, Applicant Cushing's actions have directly contradicted his claim that his campaign spending would be chilled in the absence of an injunction. Indeed, right after the District Court denied Applicant Cushing's initial request for a temporary restraining order and injunction, Applicant Cushing filed a report showing he had cast aside his alleged reservations and continued to collect and spend campaign contributions, ultimately triggering \$883 for his opponent, Shelby Wright.²² Subsequently, despite averments in Applicant Cushing's September 30, 2010 affidavit that he would surely be "chilled" from additional spending

²² Andre E. Cushing, 42-Day Pre-General 2010 Campaign Finance Report for the Comm'n on Governmental Ethics & Election Practices (Sept. 21, 2010), *available at* <http://www.mainecampaignfinance.com/netCrystalReports/CandidateCombinedReport.aspx?Params=82765;42-Day+Pre-General;YNYNNY&GUID=public&Year=2010&MCEA=0>.

in the absence of an injunction pending appeal, Applicant Cushing again overcame his supposed reservations once the First Circuit denied injunctive relief, and proceeded to spend an additional \$2,073 beyond the trigger amount, according to a publicly available filing dated October 15, 2010.²³ Moreover, based on recent developments since the First Circuit's order, Applicant Cushing could now spend all of the \$6,000 he had on hand as of October 15, 2010, without triggering any additional supplemental funds to his opponent. Wayne Aff. at ¶8,

The facts can no longer be ignored: Applicant Cushing's claim of "chill" has been proven false by his own actions. At each stage, the denial of injunctive relief has spurred more political activity by Applicant Cushing, not less. The allegation that Applicant Cushing's First Amendment rights "will continue to [be] . . . adversely impacted" without injunctive relief, Affidavit of Andre E. Cushing dated Sept. 30, 2010 ("Cushing Aff."), ¶ 4, has been exposed as an utter fiction.²⁴ Indeed, the

²³ Andre E. Cushing, 2010 Accelerated Report for the Comm'n on Governmental Ethics & Election Practices (Oct. 15, 2010), *available at* http://www.state.me.us/ethics/pdf/2010accel/general/Cushing_18-Day.pdf; *see also* Wayne Aff., ¶¶ 4-7.

²⁴ Notably, at multiple stages of this litigation, Applicants have failed to reveal the full facts of Applicant Cushing's fundraising and spending, leaving that task to Defendants and *Amici*. Indeed, in their 21-page brief to the First Circuit, Applicants failed to acknowledge that Rep. Cushing had already triggered supplemental funds to his opponent; Defendants and *Amici* had to bring this material

absence of injury on this record is so clear it brings into serious question Applicant Cushing's standing to invoke the jurisdiction of this Court. *See O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (noting "threshold requirement by Article III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy").

b. *Applicant Respect Maine PAC
Has Suffered No Irreparable
Harm.*

Like Applicant Cushing, Applicant Respect Maine PAC ("RMPAC") also has entirely failed to demonstrate irreparable harm or even likely injury adequate to support standing. The sole evidence offered to show harm to RMPAC is the conclusory affidavit of Applicant Cushing that Applicants submitted to this Court. Although Applicant Cushing alleged that RMPAC was chilled from making expenditures, he failed to identify any specific candidates RMPAC intended to support or oppose, much less that RMPAC had plans to target any contests between participating and non-participating candidates. *See Cushing Aff.* ¶ 6.

fact to the First Circuit's attention. (Applicant Cushing's affidavit dated September 30 was never, in fact, filed with the First Circuit, despite its misleading First Circuit caption). Similarly, before this Court, Applicants' papers ignored that, since the First Circuit's order, Applicant Cushing has spent an additional \$2,073. Instead, they have chosen to rely on an outdated affidavit.

Moreover, developments since the execution of Applicant Cushing's affidavit further undercut RMPAC's allegations and show that RMPAC simply has no coherent claim of injury. Although RMPAC alleges that the trigger provisions "chill" it from making independent expenditures, it has now used \$2,500 of the \$6,900 it has raised to make direct contributions to candidates. Significantly, some of those contributions have triggered supplemental grants, debunking RMPAC's assertions of "chill."

Further, as of October 15, RMPAC has made only one independent expenditure – on behalf of gubernatorial candidate Mr. LePage – and it was for only \$220.²⁵ RMPAC's interest in Mr. LePage's campaign cannot establish injury, given that his publicly funded opponent, Libby Mitchell, has already been authorized to spend the maximum amount of supplemental funds permissible under Maine's system.²⁶ That RMPAC can make a much

²⁵ See Respect Maine PAC, Independent Expenditure Report – 2010 General Election for the Comm'n on Governmental Ethics & Election Practices (Oct. 16, 2010), *available at* <http://www.maine.gov/tools/whatsnew/attach.php?id=144911&an=1>.

²⁶ As shown by a report filed by an opposing candidate, the full match had been reached by June 2010. See Eliot R. Cutler, 2010 General Election Trigger Report for the Comm'n on Governmental Ethics & Election Practices (June 24, 2010), *available at* http://www.state.me.us/ethics/pdf/2010accel/general/Cutler_trigger.pdf. RMPAC made its independent expenditure on October 14. Respect Maine PAC Independent Expenditure Report – 2010 General Election, for the Comm'n on Governmental Ethics & Election Practices

higher expenditure in support of the LePage campaign, but has opted not to do so, belies any contention that RMPAC ever suffered chill. In sum, RMPAC has not demonstrated any injury adequate to show a case or controversy for purposes of standing, *see O'Shea*, 414 U.S. 488 at 493, much less to establish any irreparable harm.

Accepting a claim of injury by RMPAC here requires pure speculation about its plans and about how hypothetical spending might affect trigger funds for unidentified candidates. For all that this record reveals, all of the candidates RMPAC wishes to support may have opponents who, like Mr. LePage's, have already received the maximum possible grant; or they may not have publicly financed opponents at all. Again, such speculative claims of hypothetical injury call cast doubt on RMPAC's standing to participate in this litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

c. *Applicant Clough Has Suffered No Irreparable Harm.*

Applicant Clough, a contributor who challenges the gubernatorial contribution limits, lacks any colorable claim of irreparable harm from continuation of the contribution limits, as

(Oct. 16, 2010), *available at* <http://www.maine.gov/tools/whatsnew/attach.php?id=144911&an=1>.

explained *supra*, Section I.E.²⁷ Applicant Clough has exercised his associational and speech rights by making a \$750 contribution to Mr. LePage during this election and contributions totaling \$200 in the primary. Wayne Aff. ¶ 50. Notably, Clough could have contributed \$550 more in the primary but failed to do so. As *Buckley* establishes, once a contribution of some size has been made, larger contributions do not translate into greater association. 424 U.S. at 20-22. Any associational interests can be fully met through a variety of other means, such as volunteering for the LePage campaign. *Id.* at 22. No finding of irreparable harm to Mr. Clough is possible on this record.

C. Granting An Injunction on the Eve of the Election Would Substantially Injure Participating Candidates, Including Amici.

That an applicant has “delayed unnecessarily” in bringing suit “militat[es] against the extraordinary relief” of an injunction by an individual circuit justice. *Fishman*, 429 U.S. at 1330; *see also Westermann*, 409 U.S. 1236, 1236-37 (1976) (denying application for injunction filed with

²⁷ While there is absolutely no evidence that the contribution limit has prevented LePage from amassing sufficient funds for his campaign, such a hypothetical injury would not be Mr. Clough’s to assert in any event. He is a donor, not a candidate. Although Mr. Clough may have an “interest in the problem,” he lacks the “direct stake in the outcome” of this litigation that is necessary for him to assert a claim such as that asserted in *Randall*. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

Supreme Court two and a half weeks before election because “orderly election processes would likely be disrupted by so late an action”).

Here, Applicants’ legal theory is predicated on the argument that *Davis* renders triggered supplemental funds unconstitutional, yet Applicants waited until the eve of the election – more than two years after *Davis* was decided and sixty-two weeks after this campaign began – to seek relief.²⁸ Applicants have proffered no excuse for delaying the filing of their complaint until August 6 of this year, long after candidates were required to decide on participation in the program and just weeks before Maine’s general election (for which early voting began on Monday, September 27th).²⁹

²⁸ As the Court below aptly summarized:
In determining the weight to be accorded to the appellants' claims, we also note that this "emergency" is largely one of their own making. The appellants, well aware of the requirements of the election laws, chose not to bring this suit until August 5, 2010, shortly before the November 2 elections. Appellant Cushing, an incumbent running for reelection, declared his candidacy before March 15, 2010. Appellants did not file their case until at least six months after roughly 280 candidates had declared their intention to rely on MCEA public funding, and two months after the primary election. Further, the case law on which they rely is not new.

See Respect Maine PAC, 2010 WL 3861051, at *2.

²⁹ Applicants assert, without support, that it is somehow impossible to challenge election laws except on the eve of an

Here, the requested last-minute judicial intervention requested by Applicants would severely disadvantage candidates who have relied on the availability of supplemental funds. This Court should decline to exercise its equitable powers to accomplish such an unjust result. *See, e.g.,* Affidavit of Deborah L. Simpson, September 9, 2010, ¶¶ 4-12. As the First Circuit found, for the candidate *amici*, and for other candidates in Maine, eliminating supplemental funds in the critical closing week of the campaign would disrupt months of strategic planning in justified reliance on the established rules. *See Respect Maine PAC*, 2010 WL 3861051, at *2-*3 (noting “the considerable harm that an emergency injunction would cause the many candidates, both MCEA participants and not, who have relied on the challenged provisions”). Candidates who opted to participate in the Clean

election. That assertion is flatly contradicted by numerous cases, including *McComish*, and also including the litigation that originally challenged Maine’s public financing system in 1998. The plaintiffs in that case, *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), filed suit two years before the first election was to be held under the Clean Elections law – represented by the same counsel who represents Applicants before this Court.

Applicants’ novel argument that the balance of harms is not applicable where constitutional harms are alleged is similarly unavailing. *See, e.g., Brown*, 533 U.S. at 1301 (citing delay in seeking relief as “inconsistent with the urgency [applicants] now assert” in First Amendment case); *O’Brien v. Skinner*, 409 U.S. 1240 (Marshall, J., in chambers) (despite importance of constitutional right to vote, “compelling practical considerations” – including plaintiffs’ delay in seeking relief – required denial of stay).

Elections system as early as August of 2009 gave up their legal right to raise contributions from private donors as a condition for receiving public funds, including the triggered supplemental funds, and would be unable to raise additional funds outside the system at this point. They gave up this right knowing that Maine's Clean Elections system provides triggered supplemental funds (subject to a cap) as a substitute for such private fundraising.

Moreover, an injunction at this late date would make the Court party to manipulation of the electoral process, giving privately funded candidates a marked competitive advantage. Nothing prevented Applicants from seeking an injunction months ago. If they had, other candidates could have adjusted their plans accordingly based on the outcome of the challenge. A court of equity should not allow Applicants to benefit from their own delay.

D. Granting an Injunction on the Eve of the Election Would Reduce the Total Spending in Maine's Election, Cause Severe Disruption to Orderly Elections, and Undermine the State's Strong Interest in Deterring Corruption, to the Detriment of the Public Interest.

- a. *A Last-Minute Injunction Would Result in Less, Not More, Political Speech, Undermining the Ability of Maine's Electorate*

to Engage in Democratic Deliberation.

As the Supreme Court has repeatedly recognized, the ultimate goal of First Amendment protection is to enable the process of democratic deliberation that is the foundation of this republic:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.

Citizens United, 130 S. Ct. at 898 (citations omitted); *see also Buckley*, 424 U.S. at 14-15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”). Thus, the asserted constitutional rights of political spenders like Applicants are not the only constitutional interests implicated by the instant litigation. In fact, like all cases concerning the regulation of political spending, “constitutionally protected interests lie on both sides of the legal equation.” *Nixon*, 528 U.S. at 400. Accordingly, this Court must consider how the requested injunction would affect not just *Amici*, but the broader Maine public.

Enjoining the trigger provisions would threaten the First Amendment benefit Maine's citizens derive from the political dialogue that the supplemental funds facilitate. As *Buckley* noted:

[T]he central purpose of the Speech and Press Clauses was to assure a society in which “uninhibited, robust, and wide-open” public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception.

Id. at 93 n.127 (citations omitted); *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.”). Like the presidential public financing system praised by the *Buckley* Court, the MCEA is an effort “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.” *Buckley*, 424 U.S. at 92-93. The “more speech” approach exemplified by public financing and facilitated by trigger funds furthers the primary First Amendment goal of democratic deliberation.

Indeed, examination of the spending record of privately financed candidates in Maine's 2008 general elections shows that an injunction now

would result in less speech, not more, in the final days of Maine's elections. Despite Maine's ten-year history of elections under the provisions challenged here, Applicants have adduced no evidence that any candidate or PAC ever previously has curtailed its spending because of Maine's trigger provisions. The record of campaign spending in Maine in fact shows the opposite. If the prospect of triggering supplemental grants to publicly financed opponents indeed "chilled" the spending of privately funded candidates, one would expect to see such spending stop just short of these thresholds.³⁰ But the actual spending patterns of non-participating (privately funded) Maine candidates shows no such "clustering" below the threshold. Instead, privately funded candidates seem to spend as much as they can raise – presumably constrained not by the triggering threshold, but by their own fundraising ability.

This means that an injunction against trigger funds can only reduce, not increase, the amount of spending in Maine's elections in these final days: Privately financed candidates would spend all available funds regardless of an injunction, but an injunction will leave participating candidates unable to spend beyond

³⁰ For the Court's convenience, this information is portrayed graphically in two charts, attached as Exhibit 1 to the Declaration of Monica Youn, October 21, 2010 (filed concurrently herewith). Candidate spending data is publicly available on the Maine Commission on Governmental Ethics and Election Practices website at www.mainecampaignfinance.com.

the original base amounts. The clear net reduction in political speech that would result from an injunction under the facts of this particular case weighs heavily against granting such extraordinary relief.

- b. *The Requested Injunction Would Also Result in Extensive Disruption, Causing Unwarranted Damage to the State's Interests in Deterring Corruption and Informing the Electorate.*

As noted above, Maine's election season is in full swing, and early voting commenced over three weeks ago. A last-minute injunction would cause unnecessary chaos, throwing doubt on the entirety of the MCEA, even though only discrete provisions of the system are challenged here. The citizens of Maine have a strong First Amendment interest in a system of campaign finance that facilitates representative and accountable government and, to that end, an interest in orderly elections. The turmoil resulting from a mid-election injunction would undermine voters' confidence in a system they have depended upon to keep their elections

orderly and corruption-free.³¹ In this case, the public has an overwhelming interest in avoiding the “chaotic and disruptive effect upon the electoral process” of a last-minute injunction. *Fishman*, 429 U.S. at 1330; *see also Westermann*, 409 U.S. at 1236-37 (denying application for injunction filed with Supreme Court two and a half weeks before election because “orderly election processes would likely be disrupted by so late an action”); *Brown*, 533 U.S. at 1302 (failure to make “immediate application” to individual justice in months past “is somewhat inconsistent with the urgency [Applicants] now assert”). The goal of robust public debate over the substantive issues would be poorly served by the distraction of candidates scrambling to adapt to new rules and arguing over the impact of court decisions just days before the election, when thousands of votes already have been cast under Maine’s early voting system.

Moreover, as noted *supra*, Section I.D., this Court has long recognized that the public has considerable informational and anti-corruption interests in the disclosure of money in politics.

³¹ For example, public polling has consistently shown strong support for the public financing program across Maine’s electorate. In recent surveys, two-thirds of Maine voters agreed that the MCEA is needed because, prior to the enactment of the law, large donors wielded disproportionate influence, and two-thirds expressed overall approval for the law. Seventy percent expressed support for the public financing provisions specifically. *See Critical Insights on Maine Tracking Survey: Summary Report of Finding from Proprietary Items 5, 7, 10* (Critical Insights ed., May 2010), attached as Exhibit 2 to Youn Decl..

These interests are perhaps never as acute as they are now – just days from Election Day. Information about who is funding political advertisements is necessary “so that the people will be able to evaluate the arguments to which they are being subjected.” *Citizens United*, 130 S. Ct. at 915 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); *Buckley*, 424 U.S. at 67 (disclosure “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches”). Moreover, as the *Buckley* Court first articulated, political expenditure disclosure “deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” 424 U.S. at 67; accord *McConnell*, 540 U.S. at 196.³² Thus, in numerous cases over the decades, the Supreme Court has echoed Justice Louis Brandeis’ insight that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933), quoted in *Buckley*, 424 U.S. at 67; accord *Buckley II*, 525 U.S. at 223. A last-minute injunction against disclosure requirements would subject Maine’s electorate to an information blackout, just when at the point

³² In addition, “recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations” of other campaign finance laws – like contribution limits and prohibitions against foreign spending. *Id.* at 67-68; accord *McConnell*, 540 U.S. at 196.

when such information is crucially needed to assist the deliberative process.

Finally, in light of the well-established compelling state interest in deterring the corrupting effect of large contributions, *see Buckley*, 424 U.S. at 36, the harm to the public interest from enjoining Maine’s \$750 limit on contributions to gubernatorial candidates during the final week of the election is equally clear. An injunction against the current contribution limit would leave Maine with no limits at all on individual contributions to candidates, because such unexpected Court action would leave the Maine legislature no opportunity adopt a new, higher limit prior to the election. A donor could suddenly bestow a gift of any size on a Maine gubernatorial candidate in the final days of the campaign, creating precisely the risk of actual and apparent corruption that *Buckley* and its progeny have repeatedly found to justify contribution limits. *Buckley*, 424 U.S. at 28 (finding contribution ceilings “a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions”). No justification has been offered, and none exists, to force Maine to join the dwindling minority of states that still have no limits at all on individual contributions to candidates.³³

³³ Only fourteen states still allow unlimited individual contributions to candidates. *See Nat’l Conference of State Legislatures, State Limits on Contributions to Candidates* (2010), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_cand

CONCLUSION

For these reasons, this Court should deny the Renewed Emergency Application of Appellants for a Writ of Injunction Pending Appeal.

Dated: October 21, 2010

Respectfully submitted,

MONICA YOUN*
MIMI MARZIANI
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the
Americas
New York, NY 10013
Telephone:(646) 292-
8310
Facsimile: (212) 463-
7308
monica.youn@nyu.edu

BRENDA WRIGHT
LISA J. DANETZ
DEMOS
358 Chestnut Hill
Avenue
Brighton, MA 02135
Telephone:(617) 232-
5885
Facsimile: (617) 232-
7251
bwright@demos.org

JOHN BRAUTIGAM
1 Knight Hill Road
Falmouth, ME 04105
Telephone:(207) 671-
6700
jblaw@maine.rr.com

Counsel of Record for Amici Curiae

October 21, 2010

idates.pdf. Of these, two – Illinois and New Mexico – have recently adopted contribution limits that will take effect in the next election cycle. See 10 Ill. Comp. Stat. 5/9-8.5(a) (2010); N.M. Stat. Ann. § 1-19-34.7A(1)(a) (2010).

IN THE
Supreme Court of the United States

RESPECT MAINE PAC, HAROLD A. CLOUGH,
REP. ANDRE E. CUSHING, III,
Petitioners,

v.

WALTER F. MCKEE, *ET AL.*,
Respondents.

DECLARATION OF MONICA YOUN

Monica Youn declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney at the Brennan Center for Justice, co-counsel for *amici* Maine Citizens for Clean Elections, Phil Bartlett, Justin Alford, Owen Pickus, Pam Trinward, Sharon Treat, Jon Hinck, David Van Wie, and Shelby Wright. I am admitted to practice in this Court, as well as before several other federal courts.

2. Attached as Exhibit 1 are tables prepared by counsel for *amici* showing candidate spending data for the state of Maine in the 2008 general election. This information is publicly available on the Maine Commission on Governmental Ethics and Election Practices website, available at www.mainecampaignfinance.com.

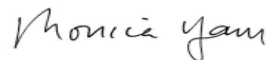
3. Attached as Exhibit 2 is *Critical Insights on Maine Tracking Survey: Summary Report on Finding from Proprietary Items* (Critical Insights ed., May 2010).

4. Attached as Exhibit 3 is a true and correct copy of the letter of consent to the filing of a brief *amici curiae* from James Bopp, Jr., counsel for Applicants.

5. Attached as Exhibit 4 is a true and correct copy of the letter of consent to the filing of a brief *amici curiae* from Phyllis Gardiner, Assistant Attorney General of Maine and counsel for Respondents.

I declare under penalty of perjury that the foregoing is true and correct.

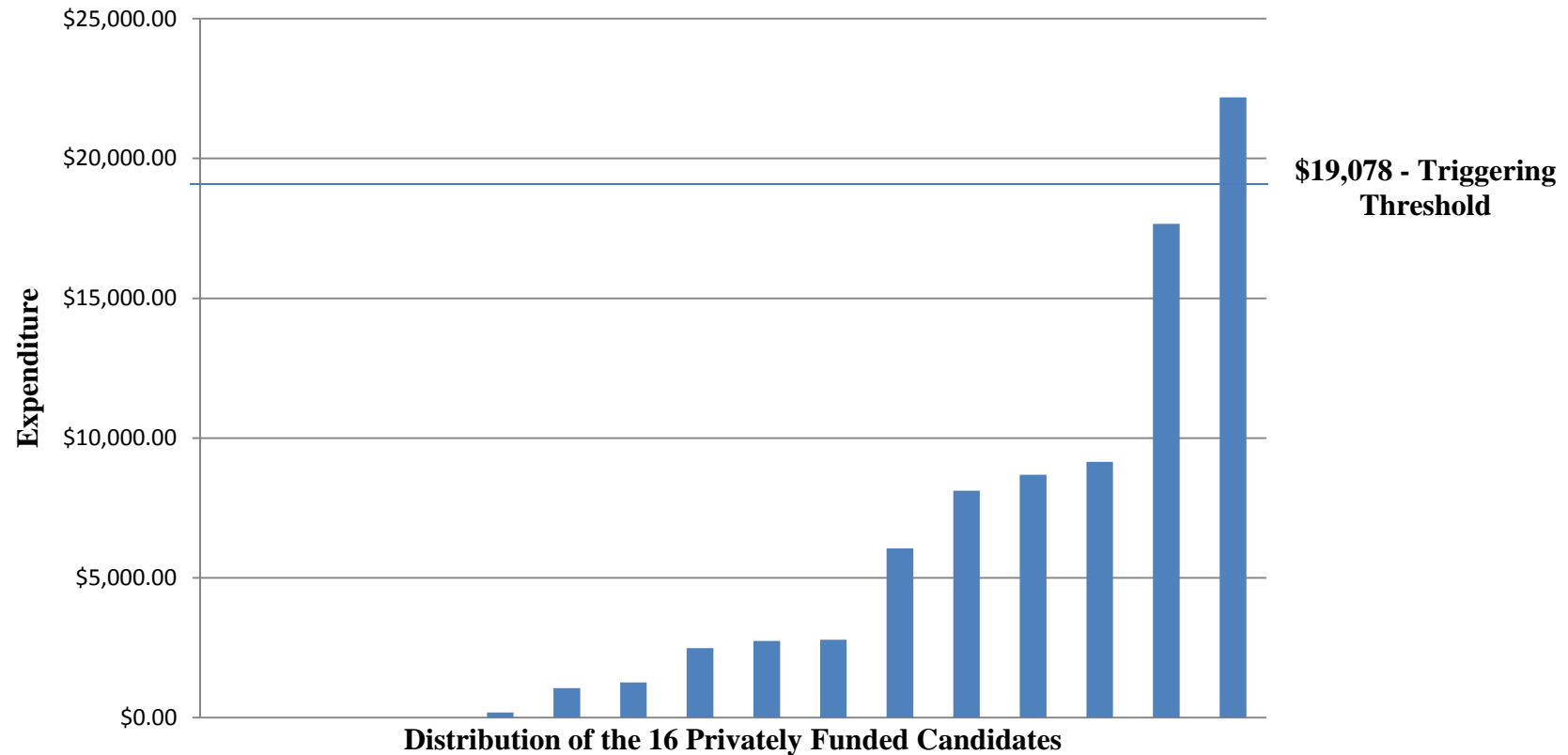
Executed on October 21, 2010.



MONICA YOUN
THE BRENNAN CENTER
FOR JUSTICE AT NYU
SCHOOL OF LAW
161 Avenue of the
Americas
New York, NY 10013
Telephone: (646) 292-8310
Facsimile: (212) 463-7308
monica.youn@nyu.edu

Exhibit 1

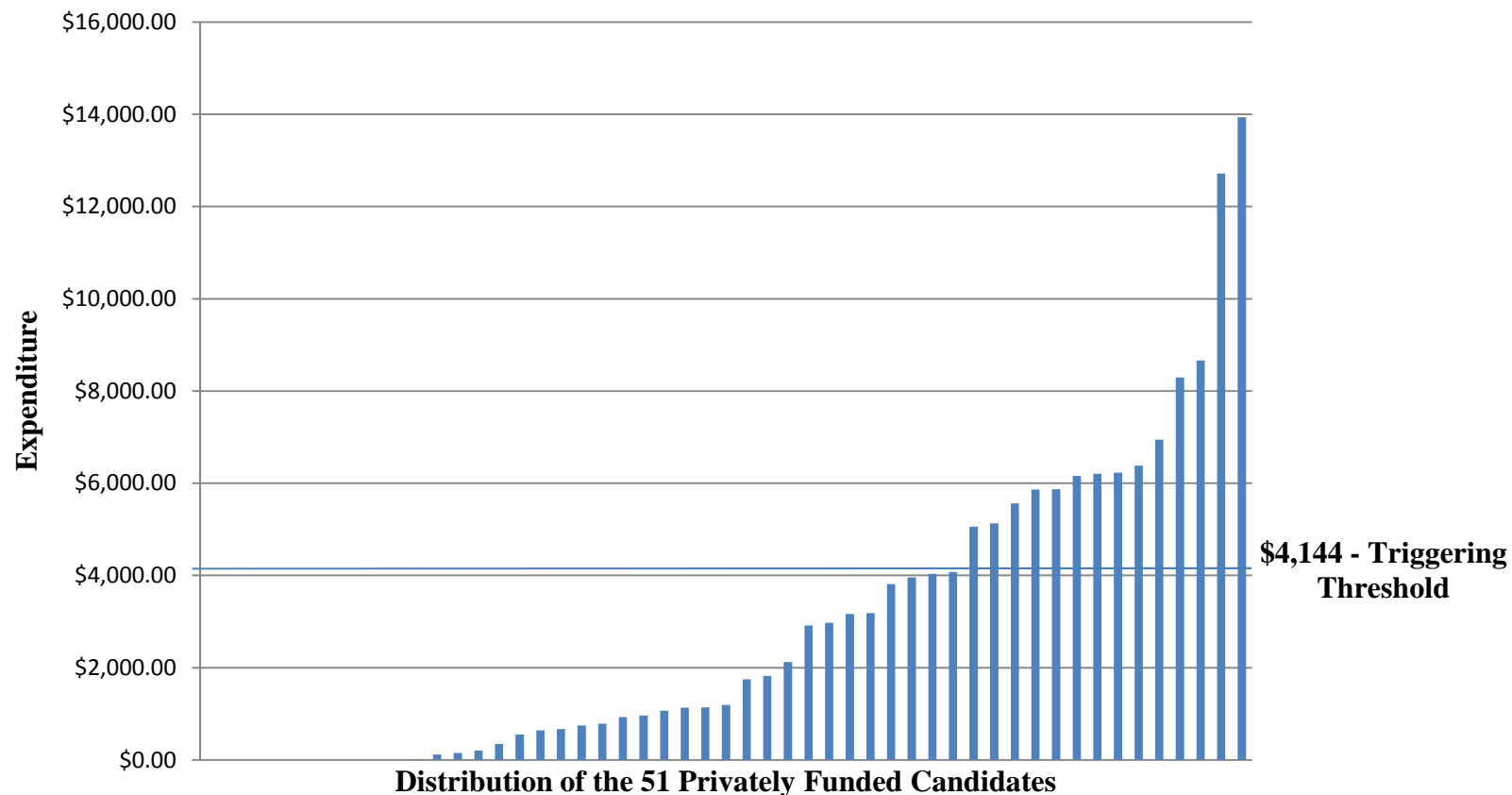
**GRAPH 1: DISTRIBUTION OF THE PRIVATELY FUNDED CANDIDATES
IN THE MAINE SENATE 2008 GENERAL ELECTION**



Distribution of privately funded Senate candidates' total fundraising for the 2008 general election shows no evidence of clustering at or near threshold at which supplementary funds are triggered.

Spending data was obtained by aggregating three campaign finance reports filed by each privately funded candidate and available on the Maine Commission on Governmental Ethics and Election Practices website: (1) 42-Day Pre-General Election Report, (2) 11-Day Pre-General Election Report, and (3) 42-Day Post-General Election Report. Monies spent after the date of the election were not included in this data set. See www.mainecampaignfinance.com for more information.

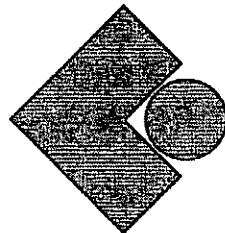
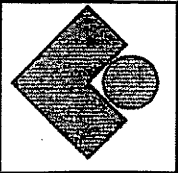
GRAPH 2: DISTRIBUTION OF THE PRIVATELY FUNDED CANDIDATES IN THE MAINE HOUSE OF REPRESENTATIVES 2008 GENERAL ELECTION



Distribution of privately funded House candidates' total fundraising for the 2008 general election shows no evidence of clustering at or near threshold at which supplementary funds are triggered.

Spending data was obtained by aggregating three campaign finance reports filed by each privately funded candidate and available on the Maine Commission on Governmental Ethics and Election Practices website: (1) 42-Day Pre-General Election Report, (2) 11-Day Pre-General Election Report, and (3) 42-Day Post-General Election Report. Monies spent after the date of the election were not included in this data set. See www.maine campaign finance.com for more information.

Exhibit 2



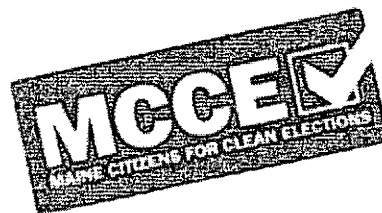
CRITICAL INSIGHTS
RESEARCH FOR PRECISE PRAGMATIC DIRECTION

Critical Insights on Maine™ Tracking Survey

~ Spring 2010 ~

Summary Report of Findings from Proprietary Items

Prepared for:



May 2010

Focus Groups • Surveys • Public Opinion Polling

120 Exchange Street, Portland, Maine 04101

Telephone: 207-772-4011 • Fax: 207-772-7027

www.criticalinsights.com



Introduction



Background & Methodology

- Each Spring and Fall, Critical Insights conducts the *Critical Insights on Maine™* Tracking Survey, a comprehensive, statewide public opinion survey of registered voters which covers a variety of topics of interest to business, government, and the general public.
 - In addition to general interest items (the results of which are released to the media as a public service), the survey also includes a number of proprietary items included on behalf of sponsoring entities, with results of those items released only to the sponsors.
- For the current wave of the study, Critical Insights completed a total of 600 random telephone interviews across the state between April 28, 2010 and May 7, 2010.
 - With a sample of 600 interviews, results presented here have an associated margin of error of ± 3.4 percentage points at the 90% confidence level, or ± 4.0 percentage points at the 95% confidence level.
 - All interviews were conducted with self-reported registered voters; final data was statistically weighted according to relevant demographics to reflect the voter base in Maine.
 - On average, the entire survey instrument – including general interest items and all subscriber questions – was 21 minutes in administrative length.
- This document presents results of questions proprietary to the Maine Citizens for Clean Elections.

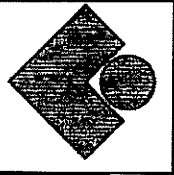


Proprietary Results



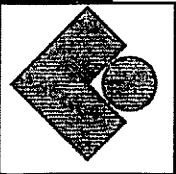
Views on Campaign Contributions and the Maine Clean Election Act

- A majority of registered voters (64%) polled for *Critical Insights on Maine™* believe that large campaign contributions from special interest groups have “a great deal” of influence on elected officials.
 - Another 1-in-5 (22%) voters feel there is “some” influence, while very few indicate that there is “not much” or “very little.”
 - Self-described Independents are significantly more likely to say that large contributions from special interest groups have “a great deal” of influence, while Democrats and Republicans are more likely indicate “some” influence.
- Not surprisingly then, overall approval for the Maine Clean Election Act is high among Maine voters (67%).
 - While very few (9%) say they disapprove, it is notable that about one-quarter (24%) claim they don’t know enough about the Maine Clean Election Act to offer an opinion.
 - Favorability is significantly higher among those from upper-income households (\$75k or more) and those who are well-educated (college degree or more); by contrast, voters from lower- and middle-income households and those with a high school diploma or less are more likely than others to state that they don’t know enough about the Act to approve or disapprove.



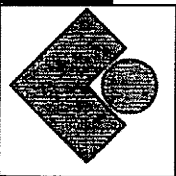
Views on the Maine Clean Election Act

- When informed that under the Maine Clean Election Act, once candidates qualify for a set amount of public funds, they must adhere to campaign spending limits and can no longer accept contributions, fully 7-in-10 Maine voters express favorability for the Act.
 - Favorability is again highest among college-educated voters and those in the upper-income bracket – as well as among declared Democrats; conversely, self-described Republicans and Independents are significantly more likely than Democrats to state opposition when presented with this additional information.
- Despite high favorability ratings and relatively low levels of disapproval/opposition, the gap closes a bit in terms of whether the Maine Clean Election Act should be eliminated.
 - Indeed, half (51%) of voters polled indicate that they are against eliminating the Maine Clean Election Act, while one-third (32%) favor elimination.
 - Consistent with patterns observed previously, those from upper-income households are more likely to say they are against eliminating the Act; additionally, self-described Democrats are more likely than those affiliated with other political parties to say they are “strongly against” eliminating the Act.



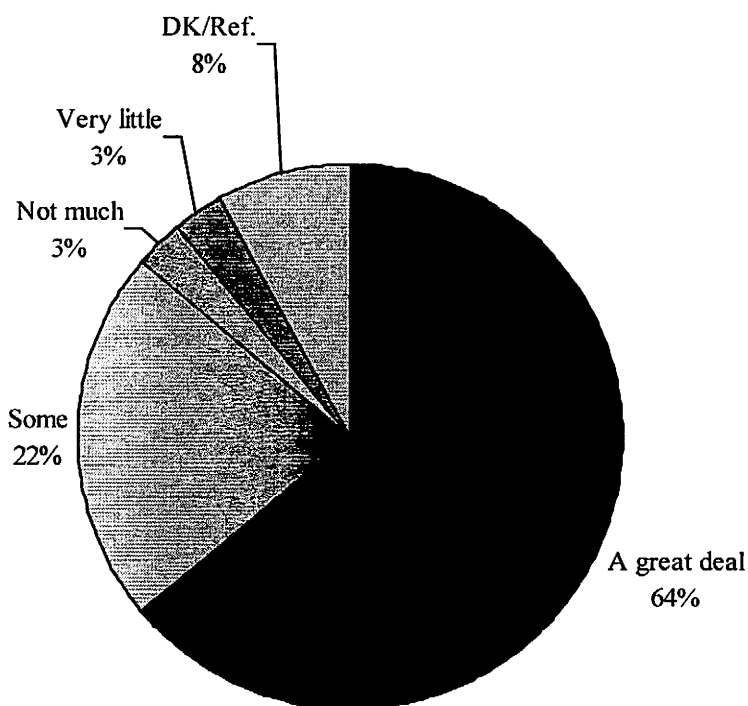
Views on the Maine Clean Election Act

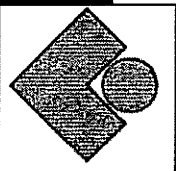
- Nevertheless, when asked which statement most closely represents their personal point of view, the majority (66%) of voters surveyed say that the Maine Clean Election Act is needed due to big donors wielding too much influence on elections in the past, while roughly 1-in-5 (19%) say that we just can't afford the Act in the current economy – perhaps a key reason among those who feel the Act should be eliminated.
 - Again, similar to results observed earlier, the Maine Clean Election Act holds significantly more importance for declared Democrats than for Republicans or Independents.



Perceived Influence of Campaign Contributors

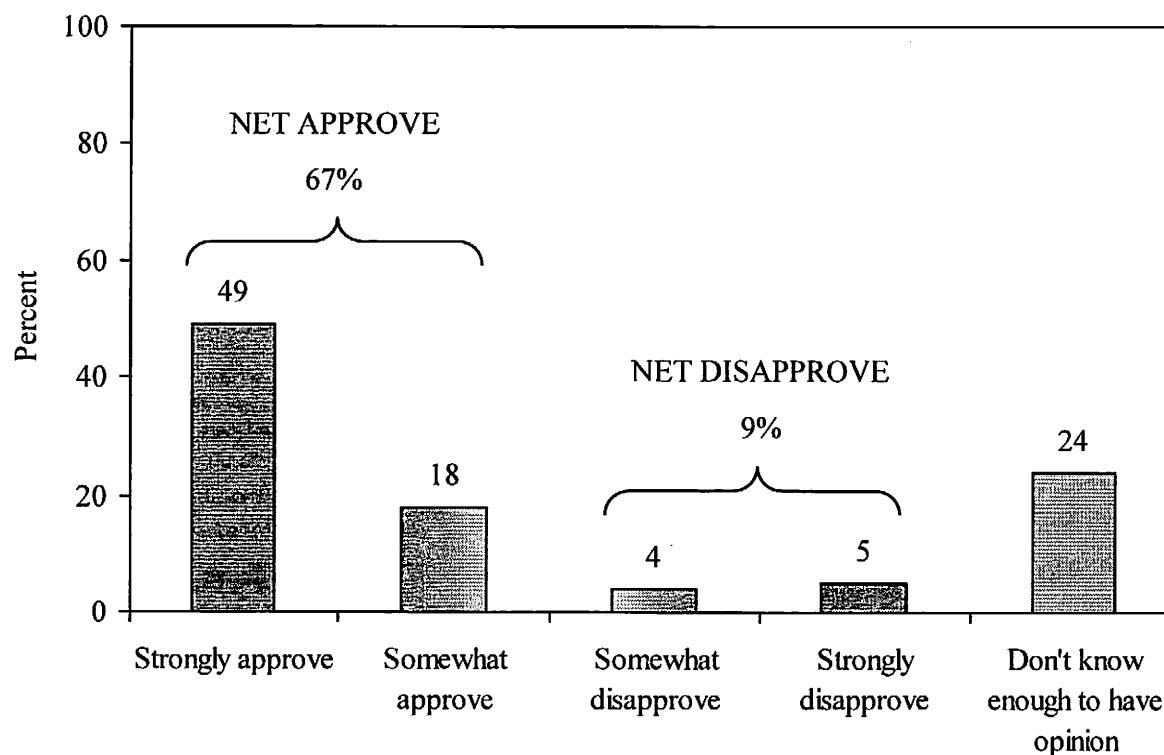
How much influence do you think large campaign contributions from special interest groups have on elected officials? Would you say...

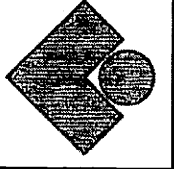




Approval of the Maine Clean Election Act

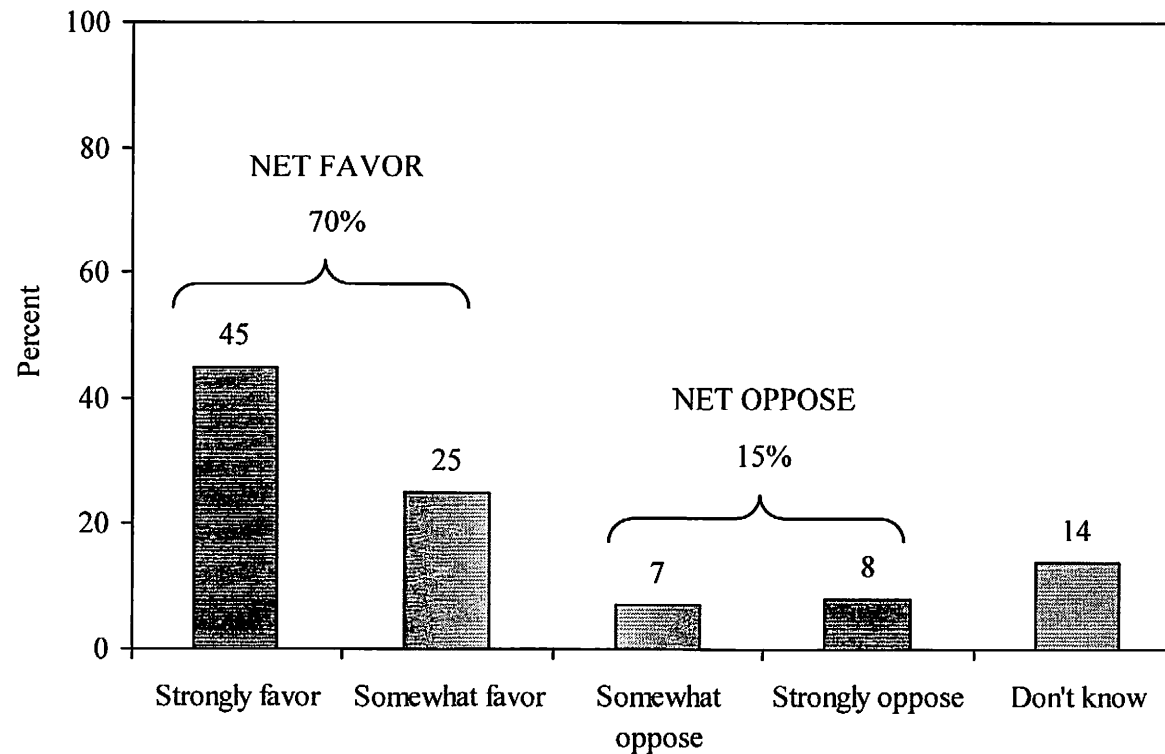
The Maine Clean Election Act was approved ten years ago by voters to allow candidates to run for office without relying on campaign contributions from lobbyists and other special interests. Do you strongly approve, somewhat approve, somewhat disapprove, or strongly disapprove of the Maine Clean Election Act, or do you not know enough to have an opinion?

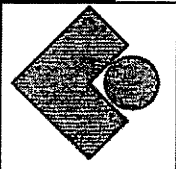




Favorability of the Maine Clean Election Act

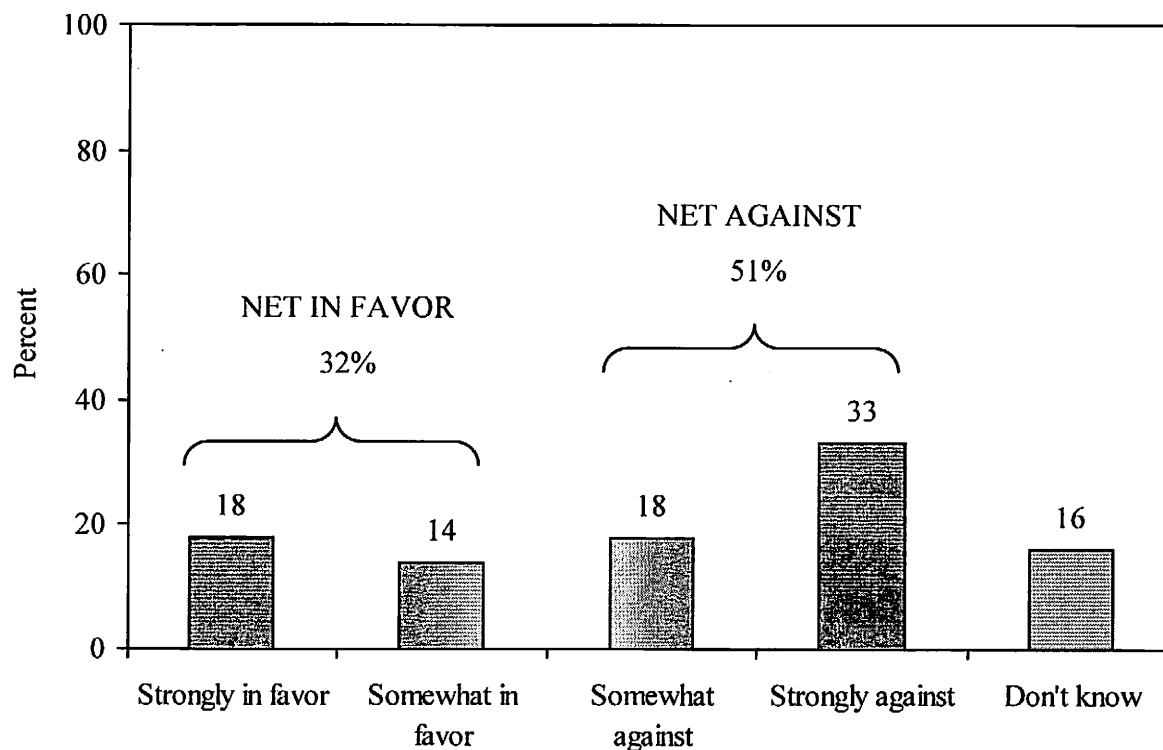
Under the Maine Clean Election Act, candidates collect a set amount of five-dollar contributions to qualify for a limited amount of public funds. Once qualified, they must adhere to campaign spending limits and can no longer accept campaign contributions. Knowing this, do you strongly favor, somewhat favor, somewhat oppose, or strongly oppose the Maine Clean Elections Program?

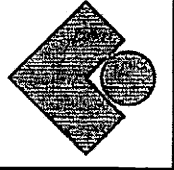




Views on Eliminating the Maine Clean Election Act

Some groups want to eliminate the Maine Clean Election Act. Based on what you now know, which of the following best matches your feelings: You are strongly in favor of eliminating the program, you are somewhat in favor of eliminating the program, you are somewhat against eliminating the program, or you are strongly against efforts to eliminate the Maine Clean Elections Program?





Overall Views on the Maine Clean Election Act

*I am now going to read you two statements about the Maine Clean Election Act.
Please tell me which ONE comes closest to your own personal point of view:*

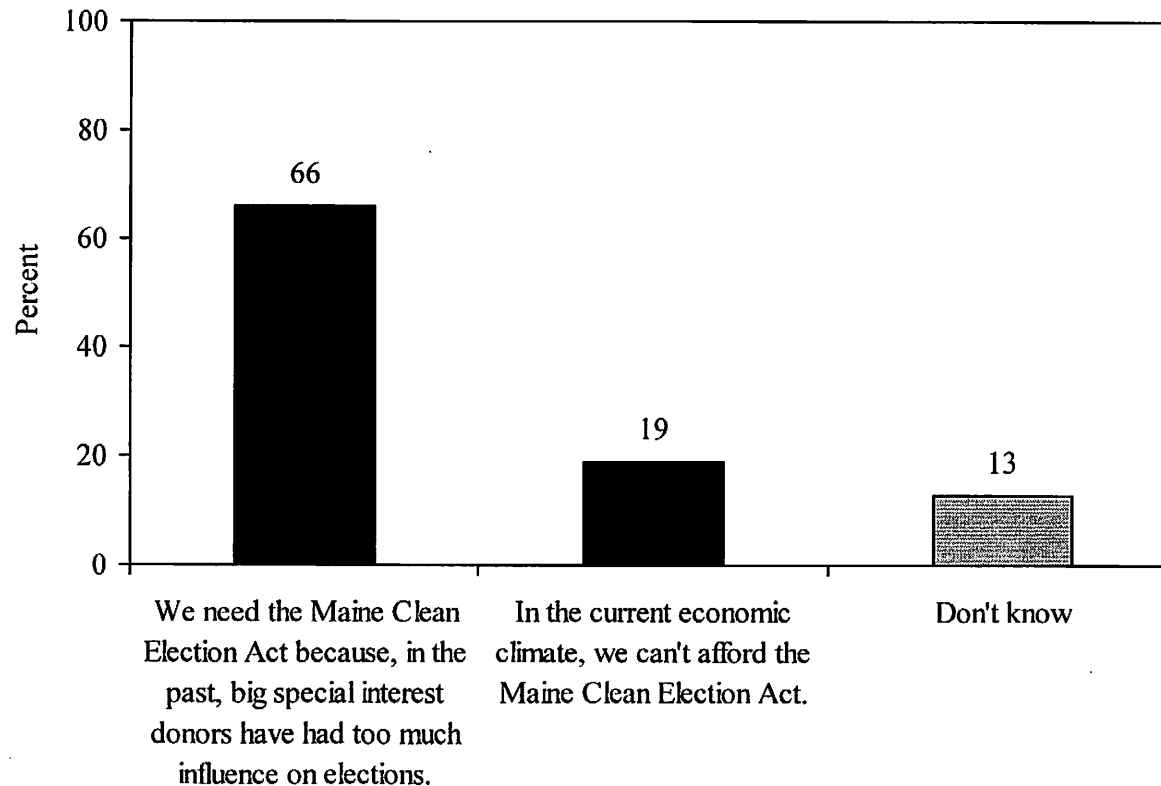
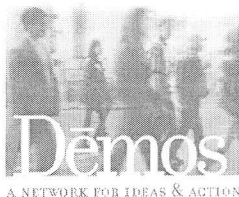


Exhibit 3



October 19, 2010

Via email

James Bopp, Jr.
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Ph.: 812/232-2434
Fax: 812/235-3685

Re: Respect Maine PAC v. McKee, No. 10-A362

Dear Mr. Bopp:

I would like to request your consent to the filing of a brief *amicus curiae* by Maine Citizens for Clean Elections, a non-partisan association of organizations and individuals with the common purpose of enacting, implementing and defending the Maine Clean Elections Act and other campaign finance reforms, as well as eight participating candidates (Justin Alford, Phil Bartlett, Pam Trinward, Owen Pickus, Sharon Treat, David Van Wie, Jon Hinck and Shelby Wright), in support of Appellees McKee et al. in the above-captioned case, addressing the application of Appellants Respect Maine PAC et al. to Justice Kennedy of October 14, 2010.

If you consent to the filing of this brief, kindly indicate your consent by signing below. Because of the filing deadline on October 21, 2010, I would greatly appreciate it if you could provide this by facsimile or by emailing a PDF. I apologize for any inconvenience.

Sincerely,

BRENDA WRIGHT

Brenda Wright
Demos: A Network for Ideas & Action
bwright@demos.org
facsimile: (617) 232-7251

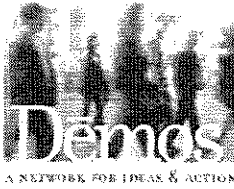
cc (via email): Josiah S. Neeley, Associate
jneeley@bopplaw.com

I hereby consent on behalf of Appellants Respect Maine PAC, et al. to the filing of a brief *amicus curiae* by the Maine Citizens for Clean Elections and eight participating candidates.

10/19/10
date

358 Chestnut Hill Avenue, #303 • Brighton, Massachusetts 02135 • (617) 232-5885
220 Fifth Avenue, Suite 500 • New York, NY 10001
www.demos.org

Exhibit 4



October 19, 2010

Via email

Phyllis Gardiner
Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006

Re: Respect Maine PAC v. McKee, No. 10-A362

Dear Ms. Gardiner:

I would like to request your consent to the filing of a brief *amicus curiae* by Maine Citizens for Clean Elections, a non-partisan association of organizations and individuals with the common purpose of enacting, implementing and defending the Maine Clean Elections Act and other campaign finance reforms, as well as eight participating candidates (Justin Alford, Phil Bartlett, Pam Trinward, Owen Pickus, Sharon Treat, David Van Wie, Jon Hinck and Shelby Wright), in support of your clients, Appellees McKee et al., in the above-captioned case, addressing the application of Appellants Respect Maine PAC et al. to Justice Kennedy of October 14, 2010.

If you consent to the filing of this brief, kindly indicate your consent by signing below. Because of the filing deadline on October 21, 2010, I would greatly appreciate it if you could provide this by facsimile or by emailing a PDF. I apologize for any inconvenience.

Sincerely,

BRENDA WRIGHT

Brenda Wright
Demos: A Network for Ideas & Action
bwright@demos.org
facsimile: (617) 232-7251

I hereby consent on behalf of Appellees McKee et al. to the filing of a brief *amicus curiae* by the Maine Citizens for Clean Elections and eight participating candidates.

Phyllis Gardiner 10/19/10
date