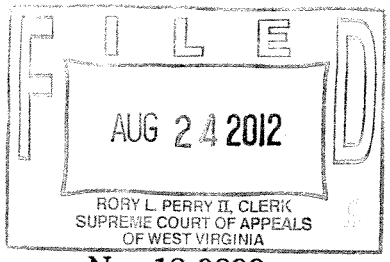
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

vs.)



No. 12-0899

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

Respondents.

BRIEF OF AMICUS CURIAE MICHAEL CALLAGHAN IN OPPOSITION TO THE PETITION

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August 24, 2012

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QUESTIONS PRESENTED

1. Whether public officials have a legal duty to implement a statutory provision when a similar provision has been declared unconstitutional by the United States Supreme Court and the West Virginia Attorney General has opined that the West Virginia provision is unconstitutional.

2. Whether the provisions in the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program allowing a candidate participating in the program to receive additional taxpayer funds based on the campaign spending of opponents or third parties imposes a substantial burden on the right to free speech protected by the First Amendment and are therefore subject to review under the strict scrutiny test.

3. Whether the additional funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program serve any compelling state interest and are narrowly tailored to any state interest.

IDENTITY OF AMICUS

Amicus Michael Callaghan is a practicing attorney and small business owner.[1] Amicus App. at 4. On July 18, 2012, Michael Callaghan filed a lawsuit in the United States District Court for the Southern District of West Virginia challenging the constitutionality of the additional funds provisions of the Act. Amicus App. at 1. Callaghan makes contributions to candidates for elected office in West Virginia and wishes to make contributions to the two non-participating candidates nominated by the Democratic Party for the 2012 election to the Supreme Court of Appeals of West Virginia. Amicus App. at 4. Because the contributions would trigger matching funds to one of the opposing candidates, Callaghan will not do so. *Id.* Callaghan, together and in combination with others, also wishes to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns. *Id.* Because the expenditures would trigger additional funds to one of the opposing candidates, Callaghan will not do so which chills his rights to unencumbered speech protected by the First Amendment. *Id.*

Callaghan files this Brief of Amicus Curiae pursuant to this Court's Order of August 15, 2012. Callaghan objects and excepts to the denial of his Motion to Intervene. Callaghan remains concerned that no *party* in this action intends to

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[1]No party or any other person provided any monetary contribution specifically intended to fund the preparation or submission of the brief nor did any party or counsel for any party serve as an author this brief in whole or in part.

defend against the Petition. The result of the Court denying Callaghan's motion to intervene is that there is currently no *party* with the ability to seek further review in the Supreme Court of the United States of the substantial federal constitutional issues raised herein. Likewise, there is currently no *party* with the ability to defend against an attempt by Petitioner or Respondents to seek review in the Supreme Court of the United States if this Court denies the Petitioner relief. Callaghan specifically reserves the right to seek relief in the civil action he filed in the United States District Court. Amicus App. at 16.

STATEMENT OF THE CASE

The West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program ("the Act") was established in 2010 as a pilot program for the 2012 primary election and the 2012 general election for the office of Justice of the Supreme Court of Appeals. W.Va. Code § 3-12-1. In 2012, the voters will elect two of the five Justices to twelve-year terms. The Act sunsets following this election. W.Va. Code § 3-12-17.

Eight candidates sought nomination in the May 8, 2012, West Virginia primary. Only one candidate, Petitioner Allan Loughry, qualified to participate in the pilot project. Amicus App. at 24-25.

In the primary, Loughry and John Yoder received the Republican Party nominations in an uncontested primary. Current Justice Robin Jean Davis and candidate Letitia "Tish" Chafin received the Democratic Party's nominations after receiving the two highest vote totals of the six candidates seeking the nomination.

Loughry raised $36,395 in order to qualify for the taxpayer subsidies provided by the pilot project. Amicus App. at 24. The West Virginia State Election Commission ("Commission") thereupon certified Loughry to receive taxpayer funding. App. at 25. As a certified candidate in an uncontested primary, Loughry received $13,705 from the public fund to give him $50,000.00 to spend on an uncontested primary. Amicus App. at 25; *see* W.Va. Code § 3-12-11(a)(2).

Once Loughry was certified as the Republican nominee, the Commission authorized the distribution of $350,000.00 in public funds to Loughry, the amount available to a participating candidate in a contested election. App. at 27; *see also* W.Va. Code § 3-12-11(b)(1).

The Act contains several provisions that purport to provide matching funds to certified candidates participating in the pilot project:

> (e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.
>
> (f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating candidate, either alone or in combination with the nonparticipating candidate's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.

W.Va. Code § 3-12-11.

Under these additional funds provisions in the Act, a participating candidate in a contested general election can receive up to $700,000.00 in additional public funds triggered by expenditures by nonparticipating candidates or independent expenditures by third parties. W.Va. Code § 3-12-11(h). Once it has been determined by the Commission that the matching funds provisions have been triggered, the Act requires that the funds be issued to the participating candidate within two business days. W.Va. Code § 3-12-11(i).

While the Act is not clear on the question, the regulations enacted implementing the Act make it clear that an expenditure of one dollar in excess of the 20% threshold results in the participating candidate receiving contributions matching the nonparticipating candidate's expenditures in excess of $350,000.00 up to an additional $700,000.00 in public funds. W.V.C.S.R. § 146-5-8.8(d).

The regulations contain reporting requirements for nonparticipating candidates and persons conducting independent expenditures in the 2012 Supreme Court general election. W.V.C.S.R. § 146-5-12.2 (nonparticipating candidates); *id.* at § 146-5-13 (independent expenditures). Under these regulations, nonparticipating candidates were required to report to the Secretary of State "a listing of expenditures and obligations incurred since May 9, 2012 through July 1, 2012, if those expenditures and obligations, in the aggregate, exceed $350,000." *Id.* at § 12.2.a.

The West Virginia Act was based on Article 22D of North Carolina's "Elections and Election Laws," G.S. §§ 163-278.62 through 163-278.70, which became effective in 2002. Litigation challenging the constitutionality of the North Carolina law commenced in 2006. Ultimately, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the North Carolina statute. *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). The Supreme Court of the United States denied certiorari. 555 U.S. 994 (2008).

The West Virginia Act was enacted in 2010. A year after its enactment, the Supreme Court of the United States decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011). In *Bennett,* the Court applied strict scrutiny and struck down Arizona's matching funds provision which applied only to legislative and executive races. Notably, in striking down the Arizona statute, the Supreme Court in *Bennett* specifically characterized the North Carolina act as having "matching funds statutes that resemble Arizona's law." *Id.* at 2816 n.3.

Following the decision in *Bennett,* the Commission sought an opinion of the West Virginia Attorney General regarding the constitutionality of the matching funds provision of the West Virginia Act. Amicus App. at 21. The Attorney General responded on July 28, 2011, concluding that the Act's matching funds provision could not survive the strict scrutiny analysis mandated by *Bennett.* Pet. App. at 169-70.

Following the receipt of the Attorney General's opinion, the Secretary of State publicly announced that she intended to follow the Attorney General's opinion and not implement the matching funds provisions of the Act. *See* http://www.wvrecord.com/news/245447-former-w.va.-democratic-party-chairman-challenges-candidate-financing-program. The Commission was informed of this decision, and apparently agreed with it. Amicus App. at 23.

Loughry made the decision to participate in the pilot project after *Bennett* was decided and after the SEC Respondents indicated they would not implement the additional funds provisions of the Act. App. at 24; Pet. App. at 158.

On June 21, 2012, Loughry appeared at a regularly scheduled meeting of the Commission and requested that the Commission take a position on whether it would fully implement the matching funds provision. App. at 27-28. The Commission refused to take a position. App. at 28.

On June 22, 2012, the Secretary of State promulgated a reporting form. The nonparticipating candidates were notified by e-mail of the new form and the requirement that it be filed by July 6, 2012. On July 6, 2012, Justice Davis, a nonparticipating candidate, filed the discourse form provided to the nonparticipating candidates. Her filing showed expenditures of $494,471.00. *See* Pet. App. at 161.

On July 17, 2012, an emergency meeting of the Commission was held in Charleston, West Virginia. Amicus App. at 30-31. The Commission voted to acknowledge that Justice Davis had expended sufficient sums to trigger the

matching funds provisions under the Act. *Id.* The Commission then proceeded to vote on a motion to authorize the release of matching funds to Loughry. *Id.* The motion failed on a tie vote of the four members. The debate against the motions centered on the constitutionality of the matching provisions. Amicus App. at 31.

On July 30, 2012, Loughry filed the instant Petition joining as respondents the Secretary of State, the members of the Commission, the State Auditor, and the State Treasurer. The Auditor and Treasurer have filed responses that do not take a position on the constitutionality of the Act. The Secretary of State and the Commission (collectively "the SEC Respondents") have filed a response supporting the constitutionality of the Act.

After this Court denied Callaghan's Motion to Intervene, Callaghan filed a motion for a Preliminary Injunction in his action in federal court. Amicus App. at 35. He has also filed a motion to expedite briefing in that action. Amicus App. at 101.

SUMMARY OF ARGUMENT

A writ of mandamus is an extraordinary form of relief designed to remedy miscarriages of justice. Mandamus is appropriate only if the Petitioner can establish: (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Under both the United States Constitution and the West Virginia Constitution, state statutes are subservient to constitutional dictates. Respondents

are required to take oaths of office by both the United States and West Virginia constitutions to support the United States Constitutions. U.S. Const., art. VI, cl. 3; W.Va. Const., art. 4, sec. 5.

Because of this constitutional supremacy, this Court has long recognized that state officials need not follow unconstitutional statutes and a mandamus petitioner fails to show a clear legal right to the remedy when he seeks enforcement of a statute that is unconstitutional. *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W.Va. 479, 494, 153 S.E.2d 284, 292 (W.Va. 1967).

Respondents, who have taken an oath to support the United States Constitution, are bound to avoid acts that violate the United States Constitution. They correctly refrained from implementing statutory provisions the Supreme Court of the United States has declared unconstitutional. Because of this duty Petitioner must establish the constitutionality of each of the disputed provisions of the Act without regard to whether anyone objects.

The additional funds provisions in the Act violate the First Amendment's protections from laws "abridging the freedom of speech." U.S. Const., Amend. 1. In *Bennett,* the Court emphasized that these protections hold special importance in the context of a campaign. *Bennett,* 131 S.Ct. at 2817. The *Bennett* Court concluded that the provision of additional funds to a publicly financed candidate based on the spending of privately financed candidates and/or third parties "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]." 131 S.Ct. at 2812 (quoting *Arizona Free Enterprise*

Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011). *Davis v. Federal Election Com'n,* 554 U.S. 724, 739 (2008)). The *Bennett* Court also concluded that the burden on third-party expenditures was even greater than the burden imposed on privately financed candidates. 131 S.Ct. at 2819. Because the additional funds provision "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups" strict scrutiny applies. *Bennett,* 131 S.Ct. at 2824. This means that the Petitioner must prove that the additional funds provision furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United v. F.E.C.,* 130 S.Ct. 876, 898 (2010). Moreover, when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.*Bennett* rejected the claim that providing a publicly financed candidate with additional funds to match the spending of privately financed candidates and independent persons or groups served any compelling state interest. 131 S.Ct. at 2826-27.

Bennett rejected the idea that the additional funds provisions served a compelling interest in combating corruption and the appearance of corruption. *Id.* The Court found that with respect to candidate expenditures, reliance on personal funds *reduces* the threat of corruption because the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse of money in politics. *Id.* With respect to independent expenditures, the Court reaffirmed that independent

expenditures do not give rise to corruption or the appearance of corruption. *Bennett,* 131 S.Ct. at 2826-27.

The United States Supreme Court has consistently rejected the claim that First Amendment rights apply differently in the context of judicial elections. *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) (rejecting claim that the rationale underlying unconstrained speech in elections for political office does not carry over to campaigns for the bench).

Nothing in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), supports the claim for a less robust right to speech in the context of a judicial election. *Caperton* did not hold that avoiding the appearance of impropriety was a requirement of due process. Due process required recusal in *Caperton* not because of appearances; instead, due process required recusal because the extraordinary and unprecedented expenditures in that case created "a serious, objective risk of *actual bias*." 556 U.S. at 886 (emphasis added).

The Act in question cannot be justified as preventing the contributions at issue in *Caperton.* The Act's match of funds is capped at $700,000.00. W.Va. Code § 3-12-11(h). There are no findings or evidence to support the conclusion that providing limited matching funds will dissuade large independent expenditures like the one in *Caperton.* In addition here, the majority of the large expenditures have been candidate self-financing. The Petitioner's reasoning based on *Caperton* does not apply to self-funded candidates, as they cannot be perceived as beholden to their contributors. Finally, the recusal rule of *Caperton* will deter large expenditures by

litigants and provide a remedy by removing any judge that is the beneficiary of another *Caperton* sized expenditure. As stricter recusal rules can also serve as an available, effective alternative that does not trample on protected speech, the purported interest in avoiding appearances of conflict fails strict scrutiny review.

Furthermore, in *Citizens United,* the Court expressly rejected *Caperton's* application to campaign finance restrictions holding that "*Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Citizens United,* 130 S.Ct. at 910. Thus, *Citizens United* made it clear that the due process concerns in *Caperton* were not compelling interests that withstood a First Amendment challenge when the strict scrutiny standard governed.

Thereafter, in *American Tradition Partnership, Inc. v. Bullock,* 132 S.Ct. 2490 (per curium) (2012), the Supreme Court of the United States summarily rejected the same arguments raised by Loughry here. At issue in *Bullock,* was Montana's ban on corporate campaign expenditures. The Montana Supreme Court recognized that the Court in *Citizens United* applied strict scrutiny and invalidated a ban on electioneering communications in federal elections. *Western Tradition Partnership, Inc. v. Attorney General of State,* 363 Mont. 220, 226-228, 271 P.3d 1, 5-6 (2011). The Montana Court, however, attempted to distinguish *Citizens United* in part by relying on the *Caperton* and the fact that Montana elected its judiciary to support its holding that Montana had a compelling state interest sufficient to support the burdens on speech in the Montana laws. 363 Mont. at 236-239, 271 P.3d at 11-13.

Those arguments, however, were rejected in the Supreme Court of the United States which summarily reversed the Montana court in its entirety holding that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case. *Bullock*, 132 S.Ct. at 2491 (emphasis added).

In sum, five opinions of the Supreme Court of the United States -- *White, supra, Davis, supra, Bennett, supra, Citizens United, supra, and Bullock, supra* – all compel the conclusion that the additional funds provisions in the Act unconstitutionally burden speech notwithstanding the fact that the burdens are imposed in the context of a judicial election.

ARGUMENT

I. Loughry is not Entitled to a Writ of Mandamus unless he can Establish that the Act's Provisions for Additional Taxpayer Funds are Constitutional because Respondents have no Duty to Implement an Unconstitutional Statutory Provision.

In his Petition, Loughry seeks a writ of mandamus, an "extraordinary form[] of relief . . . designed to remedy miscarriages of justice." *State ex rel. Cooper v. Tennant*, __ S.E.2d ___, ___. W.Va. ___, 2012 WL 517520, p*5-6 (2012). This Court's decisions have cautioned that the remedy has "consistently been used sparingly and under limited circumstances." *Id.* Entitlement to the extraordinary remedy of mandamus places the burden on the petitioner to establish that three fundamental elements coexist:

> (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. pt. 1, *State ex rel. Boley v. Tennant*, 724 S.E.2d 783 (W.Va. 2012); *see also State ex rel. West Virginia Citizen Action Group v. Tomblin*, 227 W.Va. 687, 692, 715 S.E.2d 36, 41 (2011) (same). In the context of an election mandamus case, this Court has focused on the first and second elements. *See, e.g., Boley,* 724 S.E.2d at 787.

In the Petition Loughry contends that he has a clear legal right to the release of up to $700,000.00 in additional taxpayer funding for his campaign and that the Respondents have a clear legal duty to release the funds. Petition at 12-14. His arguments focus solely on the statutory language in the Act. *Id.*

Of course, both the United States Constitution and the West Virginia Constitution contain Supremacy Clauses explicitly making state statutes subservient to constitutional dictates. U.S. Const., art. VI, cl. 2 ("[U.S.] Constitution . . . shall be the Supreme Law of the Land..."); W.Va. Const., art. 1, sec. 1 ("The constitution of the United States of America. . . shall be the supreme law of the land."). The Supremacy Clause of the United States Constitution also binds "the Judges in every State [to federal constitutional supremacy]. . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Loughry's suggestion, Petition at 14, that Respondents are free to "assert [their] own vision or state interest" and implement a statutory provision condemned by the United States Supreme Court is explicitly contrary to

the oath of office required by both the United States and West Virginia constitutions. U.S. Const., art. VI, cl. 3 ("all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); W.Va. Const., art. 4, sec. 5 ("Every person elected or appointed to any office. . . shall make oath or affirmation that he will support the constitution of the United States and the constitution of this state").

Because of this constitutional supremacy, this Court has long recognized that state officials need not follow unconstitutional statutes:

> Mandamus lies to require the discharge by a public officer of a nondiscretionary duty. . . ; and if the statute upon which the petitioner in mandamus relies for the relief which it seeks were valid the petitioner would be entitled to the relief which it seeks in that proceeding. But inasmuch as that statute is unconstitutional, null and void as violative of the applicable [constitutional] provision . . ., the petitioner has failed to show a clear legal right to the remedy which it seeks. For that reason the writ must be and it is denied and the proceeding in mandamus is dismissed.

State ex rel. Greenbrier County Airport Authority v. Hanna, 151 W.Va. 479, 494, 153 S.E.2d 284, 292 (W.Va. 1967); *compare State ex rel. Marockie v. Wagoner*, 190 W.Va. 467, 474, 438 S.E.2d 810, 817 (1993) ("Because we conclude that the SBA bonds at issue in this case violate Section 4 of Article X of our Constitution, we decline to issue the writ of mandamus.") *with State ex rel. Marockie v. Wagoner*, 191 W.Va. 458, 469-70, 446 S.E.2d 680, 691-92 (1994) (granting writ of mandamus after determining amended statute constitutional); *cf. State ex rel. West Virginia Citizen Action Group v. Tomblin,* 227 W.Va. at 697, 715 S.E.2d at 45-46 (granting writ of mandamus forcing Acting Governor to call special gubernatorial election

when statute allowing him to serve as Acting Governor through end of unexpired term was unconstitutional).

As set forth below, the provisions for additional funds and the regulations implementing them are unconstitutional. As such, Respondents have a duty under both the United States Constitution and West Virginia Constitution to refrain from implementing a provision that violates the First Amendment to the United States Constitution. Indeed, public officials who violate clearly established rights such as the First Amendment rights at issue here expose themselves to civil liability under the Civil Rights Act.[2] *See* 42 U.S.C. § 1983.

Similarly, because Respondents, who have taken an oath to support the United States Constitution, are bound to avoid acts that violate the United States Constitution, they have an independent duty to act in conformance with United States Constitution. Respondents correctly refrained from implementing statutory

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[2]Loughry's citation to *State v. Conley*, 190 S.E. 908, 918-19 (W.Va. 1937) is curious. In *Conley,* school board members were *held personally liable* for investment losses which occurred after the board members improperly invested school board funds in investment vehicles prohibited by the West Virginia Constitution. The *Conley* Court concluded that an Attorney General opinion "on the power of the board of the school fund to invest the school fund, *while entitled to weight*, does not relieve the members of the board from personal liability for losses to the fund, resulting from investments which they were not legally authorized to make." *Id.* at syl. pt. 4 (emphasis added). If a public official is personally liable for expending public funds in violation of the Constitution when the Attorney General has approved of the expenditure in a formal opinion, Callaghan is at a loss to understand why public officials should be required to expose themselves to possible financial loss and authorize an expenditure that the Attorney General has expressly opined is unconstitutional based on an opinion of the United States Supreme Court.

provisions the Supreme Court of the United States has declared unconstitutional in spite of the fact that no one challenged the their constitutionality. *Cf.* Petition at 19-20. Because Respondents have a duty not to take actions in violation of the United States Constitution, Petitioner must establish the constitutionality of each of the disputed provisions of the Act without regard to whether anyone objects.

II. The Additional Funds Provisions in the Act are a Substantial Burden on the Right to Free Speech Protected by the First Amendment and are therefore Subject to Review under the Strict Scrutiny Test.

The First Amendment protects citizens from laws "abridging the freedom of speech." U.S. Const., Amend. 1. In *Bennett,* the Court emphasized the special importance that these protections hold in the context of a campaign:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley v. Valeo,* 424 U.S. 1, 14, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). *As a result, the First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)).

Bennett, 131 S.Ct. at 2817 (emphasis added).

In *Bennett,* the Court considered the constitutionality of Arizona's public finance statute which, like the Act here, provided an initial award of public funds to a participating candidate and additional sums to the publicly funded candidate if the privately financed candidate or a third-party expended funds in excess of the initial grant. 131 S.Ct. at 2815-16. The Supreme Court concluded that the provision "imposes an unprecedented penalty on any candidate who robustly exercises [his]

First Amendment right[s]." 131 S.Ct. at 2812 (quoting *Davis,* 554 U.S. at 739). With respect to independent expenditure groups, the *Bennett* Court concluded that the burden was even greater than the burden imposed on privately financed candidates because, while candidates have the choice of accepting public funds if they decides that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, individuals or organizations desiring to support or oppose a candidate do not. 131 S.Ct. at 2819.

The Court explained that the additional funds provisions burden speech in several ways. First, the threat of additional funds chills candidates from speaking by threatening speech with the "direct an automatic release of public money." *Id.* The Act here causes even a greater chill due to the implementation of the trigger. A nonparticipating candidate can spend up to $420,000.00 before triggering additional funds; however, if one dollar more is spent by the non-participating candidate, the participating candidate receives taxpayer funds matching the nonparticipating candidate's entire expenditures in excess of $350,000.00. W.V.C.S.R. § 146-5-8.8(d). Thus, a one-dollar expenditure could be matched seventy times with public funds. *Bennett* characterized a much smaller multiplier effect as a "significant burden." 131 S.Ct. at 2819.

The *Bennett* Court found a final burden due to the disparity of control inherent in the additional funds provision:

> Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was

> welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds.

131 S.Ct. at 2819. This lack of control is even more pronounced in the Act here as the multiple seat race results in the participating candidate receiving taxpayer funds if one of the nonparticipating candidates opts to exceed the trigger even if the other two privately financed candidates do not.

Because the additional funds provision "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups" strict scrutiny applies. *Bennett,* 131 S.Ct. at 2824. As the Supreme Court held in *Citizens United*:

> [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

130 S.Ct. at 898 (citations and internal quotations omitted). In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *U.S. v. Alvarez,* 132 S.Ct. 2537, 2551 (2012) (plurality opinion) (citation and internal quotations omitted); *see also Reno v. American Civil Liberties Union,* 521 U.S. 844, 874 (1997) ("That burden on adult speech is unacceptable if less restrictive alternatives would

be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

The SEC Respondents seem to question the applicability of the strict scrutiny standard. As the above cases make clear, there is no doubt that the strict scrutiny standard is appropriate here.

III. The Act's Additional Funds Provisions do not Serve a Compelling State Interest and are not Narrowly Tailored to the Purported State Interest.

Bennett rejected the claim that providing a publicly financed candidate with additional funds to match the spending of privately financed candidates and independent persons or groups served any compelling state interest. Loughry and the SEC Respondents attempt to distinguish this binding precedent by arguing that judicial elections, which were not at issue in *Bennett,* are different. These arguments ignore numerous opinions of the Supreme Court of the United States that establish that the additional funds provisions of the Act cannot meet the strict scrutiny test.

First, *Bennett* rejected the claim that the provision could be justified by a desire to "level the playing field" holding that "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election — a dangerous enterprise and one that cannot justify burdening protected speech." 131 S.Ct. at 2826.

Second, *Bennett* rejected the idea that the additional funds provisions served a compelling interest in combating corruption and the appearance of corruption

holding that "the burdens that the matching funds provision imposes on protected political speech are not justified." 131 S.Ct. at 2826. With respect to candidate expenditure, the Court focused on the burden on a candidate who funds his own campaign:

> Indeed, we have said that "reliance on personal funds *reduces* the threat of corruption" and that "discouraging [the] use of personal funds[ ] disserves the anticorruption interest." *Davis, supra,* at 740–741, 128 S.Ct. 2759. That is because "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. *Buckley, supra,* at 53, 96 S.Ct. 612. The matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

131 S.Ct. at 2826. With respect to independent expenditures, the Court noted:

> We have also held that "independent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United,* 558 U.S., at ——, 130 S.Ct., at 909. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.,* at ——, 130 S.Ct., at 910. The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned. See *id.,* at ——, 130 S.Ct., at 909–911; cf. *Buckley,* 424 U.S., at 46, 96 S.Ct. 612. Including independent expenditures in the matching funds provision cannot be supported by any anticorruption interest.

Bennett, 131 S.Ct. at 2826-27. Finally, the *Bennett* Court rejected the idea that the additional funds served the interest of encouraging participation in public financing. *Id.* at 2827.

Loughry's argument is that somehow judicial elections are different. The United States Supreme Court has consistently rejected this distinction. First, the *Bennett* Court characterized North Carolina's judicial public finance statute as one that

"resemble[s]" the Arizona statute at issue in *Bennett*. 131 S.Ct. at 2816, n.3. The Court has also explicitly rejected any constitutional distinction for judicial elections:

> Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office-that representative government depends on the public's ability to choose agents who will act at its behest-does not carry over to campaigns for the bench." *Post,* at 2551. This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.

White, 536 U.S. at 784; *see also id.* at 792 (O'Connor, J., concurring) ("In [choosing to elect judges] the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling."); *id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."). The SEC Respondents' argument that robust debate is inconsistent with judicial elections, SEC Response at 8, is contrary to the *White* Court's recognition that a state that chooses to elect judges cannot justify the abridgment of the fundamental right to freedom of speech on the grounds that the elections are for judicial offices.

Loughry next argues that *Caperton* somehow changes these established, consistent holdings. Loughry both misreads *Caperton* and ignores subsequent

decisions of the Supreme Court confirming that *Caperton* does not support a less robust right to speech.

First, *Caperton* did not hold that avoiding the appearance of impropriety was a requirement of due process. Instead, *Caperton* held that "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." 556 U.S. at 884. The Court found the contribution in *Caperton* was unprecedented. 556 U.S. at 887 ("The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case."). Due process required recusal in *Caperton* not because of appearances; instead, due process required recusal because the expenditures in that case created "a serious, objective risk of *actual bias*." 556 U.S. at 886 (emphasis added).

The Act in question cannot be justified as preventing the contributions at issue in *Caperton*. First, the Act's match of funds is capped at $700,000.00. W.Va. Code § 3-12-11(h). The $3,000,000.00 expenditure in *Caperton* was made in spite of the fact that an opposing independent expenditure group spent approximately $2,000,000.00. *See http:// forms. irs. gov/ political Orgs Search/ search/gotoSearchDrillDown.action?pacId='22659' & criteriaName=' West+Virginia+ Consumers+for+Justice'*. There are no findings or evidence to support the conclusion that providing limited matching funds will dissuade large independent expenditures like the one in *Caperton*.

Second, as applied to this election, the majority of the large expenditures have been candidate self financing. *See* "Davis, Chafin win Democratic primary for Supreme Court," *Charleston Daily Mail* (May 8, 2012) (http://www.dailymail.com/News/201205080273). What was true with respect to the legislative races in *Bennett* is also true with the judicial races here. Self-funding serves the very interest in an unbiased judiciary that Loughry claims supports the Act. Self-funded candidates simply cannot be perceived as beholden to their contributors.[3]

Caperton's holding that extremely large expenditures by a candidate require recusal both creates the solution to the supposed perception problem and acts as a deterrent to spending by litigants. Because *Caperton* requires recusal when extreme spending on a judicial election occurs, a litigant will be reluctant to engage in this type of spending. Moreover, *Caperton's* required recusal creates the solution to the appearances problem Loughery advances. If a Justice is the beneficiary of *Caperton* level expenditures, it is clear that recusal is now mandatory. Finally, while it is true that the *Caperton* recusal motion will be a rare one, nothing

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[3]The SEC Respondents argue that expenditures of personal funds by judicial candidates suggest a personal agenda that "could very well cause a perception of bias antithetical to an impartial and independent judiciary – a judiciary not influenced by personal agendas." SEC Response at 7-8. This un-sourced speculation is hardly sufficient to withstand strict scrutiny. Neither Petitioner nor Respondents point to any findings or evidence supporting *any* conclusion regarding self-financed candidates. The SEC Respondents' suggestion that equalizing money results in a judiciary perceived to be elected on the merits, SEC Response at 8-9, suffers from the same deficit.

prevents the State from adopting stricter recusal rules. "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." 556 U.S. at 889-90 (citation and internal quotation omitted). Because stricter recusal rules are an available, effective alternative that does not trample on protected speech,[4] the purported interest in avoiding appearances of conflict fails strict scrutiny review. *Alverez, supra; Reno, supra.*

If there was any doubt that *Caperton* did not change the rules to create less robust speech protections in judicial elections, two subsequent decisions settled the issue – *Citizens United* and *Bullock.*

First, in *Citizens United,* the Court expressly rejected *Caperton's* application to campaign finance restrictions:

> *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.,* at ——, 129 S.Ct., at 2263–2264. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *Caperton 's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.*

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[4]*See, e.g.,* Adam Skaggs and Andrew Silver, Promoting Fair and Impartial Courts through Recusal Reform, *Brennan Center for Justice,* August, 2011 (http://brennan.3cdn.net/ 09c926c04c9eed5290_e4m6iv2v0.pdf).

Citizens United, 130 S.Ct. at 910. Thus, *Citizens United* made it clear that the due process concerns in *Caperton* were not compelling interests that withstood a first amendment challenge when the strict scrutiny standard governed.

More recently in *Bullock,* Supreme Court of the United States summarily rejected the same arguments raised by Loughry here. At issue in *Bullock,* was Montana's ban on corporate campaign expenditures. *See Western Tradition Partnership, Inc. v. Attorney General of State*, 363 Mont. 220, 271 P.3d 1 (2011). The Montana Supreme Court recognized that the Court in *Citizens United* applied strict scrutiny and invalidated a ban on electioneering communications in federal elections. 363 Mont. 220, 226-228, 271 P.3d 1, 5-6. The Montana Court, however, attempted to distinguish *Citizens United* -- relying on *Caperton* and the fact that Montana elected its judiciary. To support its holding that Montana had a compelling state interest sufficient to support the burdens on speech in the Montana laws, the Montana Court noted:

> ¶ 39 Montana also has a compelling interest in protecting and preserving its system of elected judges. In this State, the people elect the Justices of the Supreme Court, the Judges of the District Courts, and most lower court judges as well. . . .
>
> The people of the State of Montana have a continuing and compelling interest in, and a constitutional right to, an independent, fair and impartial judiciary. The State has a concomitant interest in preserving the appearance of judicial propriety and independence so as to maintain the public's trust and confidence. In the present case, the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected. . . .

¶ 43 The United States Supreme Court has affirmed the importance of judicial integrity and in maintaining public respect for the judiciary.

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. *Judicial integrity is, in consequence, a state interest of the highest order.*" [Emphasis added.]
>
> *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, ——, 129 S.Ct. 2252, 2266–67, 173 L.Ed.2d 1208 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002)). The Court also recognizes the importance of state codes of judicial conduct, which "serve to maintain the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at ——, 129 S.Ct. at 2266. States have a "compelling interest" in preventing judges from activities that "would undermine actual impartiality, as well as its appearance." *Bauer v. Shepard*, 620 F.3d 704, 711 (7th Cir.2010) (upholding limits on judges acting in posts of political leadership and delivering political speeches). "The state certainly has a compelling state interest in the public's trust and confidence in the integrity of our judicial system." *Simes v. Ark. Judicial Discipline and Disability Comm.*, 368 Ark. 577, 247 S.W.3d 876, 882 (2007).

363 Mont. at 236-239, 271 P.3d at 11-13. Notably, the holding of the Montana Supreme Court made many of the same arguments relied on by Loughry and the SEC Respondents.

Those arguments, however, were rejected in the Supreme Court of the United States. After staying the Montana decision to permit review, the Supreme Court summarily reversed:

> A Montana state law provides that a "corporation may not make ... an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Mont.Code Ann. § 13–35–227(1) (2011). The Montana Supreme Court rejected petitioners' claim that this statute violates the First Amendment. 2011 MT 328, 363 Mont. 220, 271 P.3d 1. In *Citizens United v. Federal Election Commission*, this Court struck down a similar federal law, holding that "political speech does not lose

> First Amendment protection simply because its source is a corporation." 558 U.S. ——, ——, 130 S.Ct. 876, 900, 175 L.Ed.2d 753 (2010) (internal quotation marks omitted). The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U.S. Const., Art. VI, cl. 2. *Montana's arguments in support of the judgment below either were already rejected in Citizens United, or fail to meaningfully distinguish that case.*

Bullock, 132 S.Ct. at 2491 (emphasis added). A review of the briefs filed in the United States Supreme Court makes it clear that the supposed compelling interest in regulating speech in judicial races was directly presented to the United States Supreme Court in *Bullock*.[5] Thus, the *Bullock* Court rejected the reading of *Caperton* advanced by Loughery and the SEC Defendants. *Bullock's* rejection of the claim that *Caperton* creates different First Amendment rules for judicial elections is

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[5] *Bullock,* Respondent's Brief in Opposition, p. 25-26 (http://sblog.s3.amazonaws.com/wpcontent/uploads/2012/05/Montana_brief_to_SCOTUS-5-18-12.pdf); *see also* Amicus Curiae Brief of Retired Justices of The Montana Supreme Court and Justice at Stake in Support of Respondent (http://brennan.3cdn.net/ 282cf914919d7db474 _rom6bn321.pdf); Brief for the States Of New York, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, Rhode Island, Utah, Vermont, Washington, West Virginia, and the District of Columbia, as Amici Curiae in Support of Respondents, p. 18 ("This Court has not yet addressed whether a State's interest in preventing improper influence and the appearance of such influence over judicial, quasi-judicial, and law enforcement officials may support a state law regulating campaign expenditures, particularly when, as in this case, the law does not ban anyone from speaking.") (http://www.ag.ny.gov/sites/default/files/press-releases/2012/ATPvBullock-States-Brief-Supporting-Montana.pdf).

binding on this Court.[6] Any attempt to distinguish *Bennett* here would not likely fair any better.[7]

Finally, Loughry relies on the Fourth Circuit's pre-*Bennett, pre-Davis* opinion in *Leake*. *Leake* did not find that the First Amendment applied differently in the context of judicial elections. Instead the issue was "whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment" at all. 524 F.3d at 437. Prior to *Bennett,* there was a split in the circuits on the question, and the *Leake* Court was convinced that there was no burden. *Id.* Of course, after *Bennett* and *Davis,* this holding is clearly in error. Because *Leake* found no chill on First Amendment rights, *id.* at 438, the *Leake* Court never considered whether the interests supported by the North Carolina act survived strict scrutiny. *Leake* is simply no longer good law. As the Court in *Bennett* noted:

> It is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political

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[6]While the Supreme Court does not give full precedential weight to summary dispositions, *see, e.g., Caban v. Mohammed,* 441 U.S. 380, 390 n.9 (1979), it expects this Court to follow them. *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("The District Court should have followed the Second Circuit's advice. . . . that the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" (quoting *Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)).

[7]The SEC Respondents have focused on the record supposedly before the Legislature and that produced by the Independent Commission on Judicial Reform. The similar record advanced in Montana, *see* 363 Mont. at 236-239, 271 P.3d at 11-13, did not persuade the United Sates Supreme Court. *Bullock,* 132 S.Ct. at 2491.

> adversaries. See, *e.g., Green Party of Conn.*, 616 F.3d, at 242 (matching funds impose "a substantial burden on the exercise of First Amendment rights" (internal quotation marks omitted)); *McComish v. Bennett,* 611 F.3d, at 524 (matching funds create "potential chilling effects" and "impose some First Amendment burden"); *Scott v. Roberts,* 612 F.3d 1279, 1290 (C.A.11 2010) ("we think it is obvious that the [matching funds] subsidy imposes a burden on [privately financed] candidates"); *id.,* at 1291 ("we know of no court that doubts that a [matching funds] subsidy like the one at issue here burdens" the speech of privately financed candidates); see also *Day v. Holahan,* 34 F.3d 1356, 1360 (C.A.8 1994) (it is "clear" that matching funds provisions infringe on "protected speech because of the chilling effect" they have "on the political speech of the person or group making the [triggering] expenditure" (cited in *Davis, supra,* at 739, 128 S.Ct. 2759)).

131 S.Ct. at 2823-24. The *Leake* Court's holding that the statute served "the state's interest in avoiding the danger of corruption (or the appearance thereof) in judicial elections" was rendered in the context of determining whether a ban on contributions twenty-one days prior to the election survived the lesser standard of exacting scrutiny, a standard the Court itself acknowledged does not require that the statute be narrowly tailored. *Id.* at 440-41.

Following *Bennett,* the North Carolina matching provisions for judicial elections, were again challenged. On May 18, 2012, the United States District Court for the Eastern District of North Carolina granted the plaintiffs' motion for summary judgment and found the North Carolina matching provisions unconstitutional based on *Bennett.*[8] *See NCRL PAC v. Leake,* No. 11-CV-472-FL [Doc. 41] (E.D.NC. 2012). The federal district court -- which unlike this Court is bound by Fourth Circuit

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[8]That North Carolina was unable to set forth a credible defense to the constitutionality of its matching funds provision after *Bennett* says more about the constitutional faults in the provision than the persuasive value of the precedent.

opinions -- did not consider itself bound by *Leake I* because it recognized that *Bennett* now controlled. This Court should likewise reach the same conclusion. Following *Bennett* no court has approved the use of these kind of provisions in any elections.

CONCLUSION

Five opinions of the Supreme Court of the United States compel the conclusion that the burden on speech by the additional funds provisions of the Act is not supported by any compelling state interest that is narrowly tailored to the interest. The provision is simply unconstitutional. As the Respondents should not and cannot implement a statutory provision that is unconstitutional, this Court should deny the writ and dismiss this proceeding.

MICHAEL CALLAGHAN

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

vs.) No. 12-0899

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

Respondents.

CERTIFICATE OF SERVICE

On August 24, 2012, comes the undersigned counsel and does hereby certify that service of the attached Brief of Amicus Curiae Michael Callaghan in Opposition to the Petition has been made upon the opposing parties by mailing a true and exact copy thereof by U.S. Mail to the addresses below:

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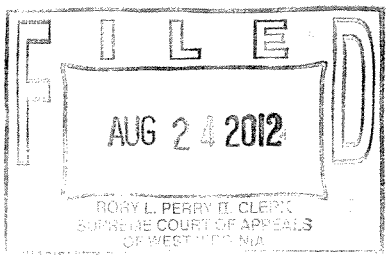
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction
No. 12-0899



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APPENDIX TO BRIEF OF AMICUS CURIAE MICHAEL CALLAGHAN IN OPPOSITION TO THE PETITION

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August 24, 2012

CERTIFICATE OF ACCURACY OF APPENDIX CONTENTS

I, Anthony J. Majestro, counsel for Michael Callaghan, do, on this the 24th day of August 2012, hereby certify, pursuant to the provisions of Rule 7(c)(2) and Rule 16(3) of the Revised Rules of Appellate Procedure, that the contents of this Appendix are, to the best of my knowledge and belief, accurate copies of the items that I have described in the **TABLE OF CONTENTS OF THIS APPENDIX** and **BRIEF OF AMICUS CURIAE MICHAEL CALLAGHAN IN OPPOSITION TO THE PETITION** to which this Appendix is appended.

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

AT CHARLESTON

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-3419

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

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Michael Callaghan, for his Complaint against Defendants, states the following:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the Constitution of the United States. Plaintiff claims that the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W.Va. Code § 3-12-1, et seq. ("the Act"), which provides for matching funds to publicly financed

candidates for the Supreme Court of Appeals of West Virginia, violates the First and Fourteenth Amendments to the United States Constitution by unduly impinging upon protected political speech and association as set forth in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011).

2. The Act creates a pilot project for public financing for the 2012 election for two seats on the Supreme Court of Appeals of West Virginia. The Act provides for candidates who choose to participate to receive the sum of $350,000.00 for a contested general election. W.Va. Code § 3-12-11(b)(1). In addition, the Act and its accompanying regulations provide that if either a non-participating candidate, a person conducting an independent expenditure, or a combination thereof spend more than $420,000.00, the participating candidate is eligible to receive dollar for dollar contributions of taxpayer dollars of the sums expended in excess of $350,000 up to an additional $700,000.00. W.Va. Code § 3-12-11(e)-(i); W.V.C.S.R. § 146-5-8.8.

3. After *Bennett,* it is clear that the matching funds provisions of the Act are unconstitutional. The *Bennett* Court specifically held that providing public funds to match dollar for dollar the campaign expenditures of privately financed candidates and third-parties conducting independent expenditures imposes a substantial burden on the speech of privately financed candidates and third party contributors by penalizing privately financed candidates and third-parties dollar for dollar based on their speech. 131 S. Ct. at 2818-20.

4. Plaintiff seeks to have W.Va. Code § 3-12-11(e)-(i) and W.V.C.S.R. § 146-5-8.8 declared unconstitutional under the First and Fourteenth Amendments because those provisions chill them from exercising their First Amendment rights. Plaintiff also seeks to have enforcement of these provisions permanently enjoined. This issue should be resolved promptly so that Plaintiff and those similarly situated will not be chilled in their free expression and association and instead will remain free to engage in constitutionally-protected political expression in the upcoming election.

Jurisdiction and Venue

5. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

6. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

7. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) because the defendants have been named in their official capacities as Secretary of State and members of the West Virginia State Elections Commission ("Commission"). "Where a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official residence, that is, where he performs his official duties." *Republican Party of N.C. v. Martin,* 682 F. Supp. 834,

836 (M.D.N.C. 1988) (citation omitted). The Secretary of State and the Commission maintain their official offices in Charleston, West Virginia, and meet in Charleston when making determinations regarding the Act. Alternatively, venue is proper as several of the Defendants reside in this District and all of the Defendants are residents of this State. Finally, venue is appropriate under the provisions of 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District and the decisions under challenge were substantially made at the West Virginia State Capitol in Charleston, West Virginia.

Parties

8. Plaintiff Callaghan is a practicing attorney and small business owner. Plaintiff makes contributions to candidates for elected office in West Virginia and wishes to make contributions to the two non-participating candidates nominated by the Democratic Party for the 2012 election to the Supreme Court of Appeals of West Virginia. Because the contributions would trigger matching funds to one of the opposing candidates, Plaintiff will not do so.

9. Plaintiff also opposes the use of taxpayer money to finance elections. Plaintiff, together and in combination with others, wishes to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns.

10. Defendant Tennant is the West Virginia Secretary of State. As such, she is the chief election officer and a member of the Commission. Defendant Rupp is the Chairman of the Commission. Defendants Collias and Renzelli are members

of the Commission. There is currently one vacancy on the Commission resulting in an even number of members. The Defendants as the members of the Commission are charged with the responsibility of administering the Act and the taxpayer funds making up the Supreme Court of Appeals Public Campaign Financing Fund. W.Va. Code § 3-12-5.

Facts

A. The 2012 Race for the Supreme Court of Appeals.

11. The "West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program" was established in 2010 as a pilot program for the 2012 primary election and the 2012 general election for the office of Justice of the Supreme Court of Appeals. W.Va. Code § 3-12-1. In 2012, the voters will elect two of the five Justices to twelve-year terms. The Act sunsets following this election.

12. Eight candidates sought nomination in the May 8, 2012 West Virginia primary. Only one candidate, Allan Loughry, sought to participate in the pilot project.

13. In the primary, Loughry and John Yoder received the Republican Party nominations in an uncontested primary. Current Justice Robin Jean Davis and candidate Letitia "Tish" Chafin received the Democratic Party's nominations after receiving the two highest vote totals of the six candidates seeking the nomination.

14. Loughry raised $36,395.00 in order to qualify for the taxpayer subsidies provided by the pilot project. As a participating candidate in an

uncontested primary, he received $13,705.00 from the public fund. *See* W.Va. Code § 3-12-11(a)(2). Loughry's April 6, 2012 campaign finance report filed with Secretary Tennant shows receipt of these funds.

15. Once Loughry was certified as a nominee, the Commission authorized the distribution of $350,000.00 in public funds to Loughry, the amount available to a participating candidate in a contested election. *See* W.Va. Code § 3-12-11(b)(1). Loughry's June 19, 2012 campaign finance report filed with Secretary Tennant shows receipt of these funds.

16. The contested 2012 Democratic primary resulted in expenditures substantially in excess of $350,000.00 by the two nominees.

17. The Democratic primary for the two seats on the Supreme Court of Appeals was one of few statewide contested elections and the only statewide election that resulted in substantial mass media purchases. As a result, mass media rates did not increase as a result of the campaign purchases.

18. The general election, however, contains a number of contested races where the candidates are purchasing or likely to purchase media including the races for President of the United States, United States Senate, Governor, and Attorney General. Some of these races have attracted or may in the future attract third-party media expenditures. Moreover, as a number of our media markets serve multi-state areas, West Virginia candidates are competing with candidates in border states for media time. As a result of the forgoing, media rates are increasing and will cost all candidates more money than the purchases in the primary.

B. The Act's Provisions for Matching Funds.

19. The Act contains several provisions that purport to provide matching funds to candidates participating in the pilot project:

> (e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.
>
> (f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating candidate, either alone or in combination with the nonparticipating candidate's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.
>
> (g) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission shall authorize the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.

W.Va. Code § 3-12-11.

20. A participating candidate in a contested general election can receive up to $700,000.00 in additional public funds triggered by expenditures by nonparticipating candidates or independent expenditures. W.Va. Code § 3-12-11(h).

21. Once it has been determined by the Commission that the matching funds provisions have been triggered, the funds must be issued to the participating candidate within two business days. W.Va. Code § 3-12-11(i).

22. While the Act is not clear on the question, the regulations enacted implementing the Act make it clear that an expenditure of one dollar in excess of the 20% threshold results in the participating candidate receiving contributions matching the nonparticipating candidate's expenditures in excess of $350,000.00 up to an additional $700,000.00 in public funds. W.V.C.S.R. § 146-5-8.8(d).

23. The regulations contain reporting requirements for nonparticipating candidates and persons conducting independent expenditures in the 2012 Supreme Court general election. W.V.C.S.R. § 146-5-12.2 (nonparticipating candidates); *id.* at § 146-5-13 (independent expenditures).

24. Under these regulations, nonparticipating candidates were required to report to the Secretary of State by July 7, 2012, "a listing of expenditures and obligations incurred since May 9, 2012 through July 1, 2012, if those expenditures and obligations, in the aggregate, exceed $350,000." *Id.* at § 12.2.a.

C. Litigation over Matching Fund Provisions in Public Campaign Financing Statutes.

25. The West Virginia Act was based on Article 22D of North Carolina's "Elections and Election Laws," G.S. §§ 163-278.62 through 163-278.70, which became effective in 2002. Litigation challenging the constitutionality of the North Carolina law commenced in 2006. Ultimately, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the North Carolina statute.

North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008). The Supreme Court of the United States denied certiorari. 555 U.S. 994 (2008).

26. The West Virginia Act was enacted in 2010. A year after its enactment, the Supreme Court of the United States decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011). In *Bennett,* the Court applied strict scrutiny and struck down Arizona's matching funds provision which applied only to legislative and executive races. Notably, in striking down the Arizona statute, the Supreme Court in *Bennett* specifically characterized the North Carolina act as having "matching funds statutes that resemble Arizona's law." *Id.* at 2816 n.3.

27. Following the decision in *Bennett,* the Commission sought an opinion of the West Virginia Attorney General regarding the constitutionality of the matching funds provision of the West Virginia Act. The Attorney General responded on July 28, 2011, concluding that the Act's matching funds provision could not survive the strict scrutiny analysis mandated by *Bennett.* The Attorney General's opinion is attached as Exhibit A.

28. Following the receipt of the Attorney General's opinion, the Secretary of State publicly announced that she intended to follow the Attorney General's opinion and not implement the matching funds provisions of the Act.

29. Following *Bennett,* the North Carolina matching provisions for judicial elections, were again challenged. On May 18, 2012, the United States District

Court for the Eastern District of North Carolina granted the plaintiffs' motion for summary judgment and found the North Carolina matching provisions unconstitutional based on *Bennett*. *See NCRL PAC v. Leake,* No. 11-CV-472-FL [Doc. 41] (E.D.NC. 2012) (attached as Exhibit B).

D. Post-Primary Election Commission Proceedings.

30. On June 21, 2012, Loughry appeared at a regularly scheduled meeting of the Commission and requested that the Commission take a position on whether it would fully implement the matching funds provision. The Commission refused to take a position.

31. On June 22, 2012, the disclosure provision set forth in W.V.C.S.R. 146-5-12.2 was implemented through the promulgation of a reporting form. The nonparticipating candidates were notified by e-mail of the new form and the requirement that it be filed by July 6, 2012.

32. While § 12.2 of the regulations contemplates disclosure once expenditures exceed $350,000.00, the form provided to the candidates by the Secretary's election division required disclosure only when candidates expended or committed $420,000.00, the trigger for the additional payments.

33. On July 6, 2012, Justice Davis, a nonparticipating candidate, filed the form provided to the nonparticipating candidates. Her filing showed expenditures of $494,471.00. *See* Exhibit C.

34. On July 17, 2012, an emergency meeting of the Commission was held in Charleston, West Virginia. The Commission voted to acknowledge that Justice

Davis had expended sufficient sums to trigger the matching funds provisions under the Act. The Commission then proceeded to vote on a motion to authorize the release of matching funds to Loughry. The motion failed on a tie vote of the four members. The debate against the motions centered around the constitutionality of the matching provisions. The debate over the motion makes it clear that the members of the Commission would welcome a judicial decision from this Court finally resolving the constitutionality of the matching provisions of the Act.

35. Following the vote, Commission Chairman Rupp requested that the Governor fill the vacancy on the Commission to prevent ties in Commission voting.

36. The uncertainty regarding whether the Commission will ultimately vote to release matching funds to Loughry unconstitutionally burdens Plaintiff by threatening the direct and automatic release of public money to their publicly financed opponent. As a direct and proximate result of the Act's matching funds provision, Plaintiff's willingness to engage in protected political speech has been chilled.

37. Although Plaintiff would like to make candidate contributions and independent expenditures in this election, he will not exercise his First Amendment rights because of the speech-chilling effects of the Act's matching funds law.

38. Plaintiff has no adequate remedy at law.

COUNT I

THE ACT'S MATCHING FUND SCHEME SUBSTANTIALLY BURDENS POLITICAL SPEECH AND IS NOT NARROWLY TAILORED TO SERVE A COMPELLING INTEREST

39. Plaintiff realleges the preceding paragraphs.

40. W.Va. Code § 3-12-11 and W.V.C.S.R. § 146-5-8.8 provide for the provision of matching public funds to the publicly financed candidate whenever expenditures by the privately financed candidates individually or in combination with independent expenditures by third parties exceed the sum of $420,000.00 in the general election.

41. Thereafter, this matching funds scheme provides a direct, dollar-for-dollar public subsidy to participating candidates whenever an independent expenditure is made that either opposes a participating candidate with a nonparticipating opponent, or supports a nonparticipating candidate with a participating opponent or whenever the privately financed candidate expends personal or donated funds. As a result, the privately financed candidate must "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on his own candidacy. *Bennett,* 131 S.Ct. at 2818 (internal quotations omitted). Moreover, "[t]he burdens that matching funds impose on independent expenditure groups are akin to those imposed on the privately financed candidates themselves." *Bennett,* 131 S.Ct. at 2819.

42. Under the First Amendment to the U.S. Constitution and *Bennett,* a state public campaign financing scheme violates the right to free political speech where it goes beyond mere promotion of the voluntary use of public funding, and

improperly injects the state into the political process by attempting to equalize the relative financial resources of candidates. As the United States Supreme Court held in striking down Arizona's matching funds scheme, the "constitutionally problematic" aspect of such a scheme is the manner in which that funding is provided—that it is triggered to deliver funds to publicly financed candidates in direct response to the political speech of privately financed opponents and independent expenditure groups. *Bennett*, 131 S.Ct. at 2824.

43. Plaintiff faces imminent injury to their First Amendment rights to free political speech and free association as a direct result of this statutory scheme. The state's payment of matching funds neutralizes the campaign contributor's or independent expender's attempt to exercise its voice through making an independent expenditure or contribution. The knowledge that making a contribution or an independent expenditure that opposes a government-funded candidate will directly result in that candidate receiving a dollar-for-dollar matching public subsidy creates a chilling effect on Plainitiff's free exercise of protected speech, and imposes a climate of self-censorship that is inimical to our American heritage of unfettered political discourse. In so doing, the statute also encroaches upon the ability of like-minded persons to pool their resources in furtherance of common political goals in violation of Plaintiff's right to freedom of association. As the Supreme Court stated in *Bennett,* the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office; thus, the Court will invalidate both limits on uncoordinated political

party expenditures and regulations barring unions, nonprofits, and corporations from making independent expenditures for electioneering communication. 131 S.Ct. at 2817; s*ee also Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

44. The Act's "beggar thy neighbor" approach to free speech--burdening the speech of privately financed candidates and independent expenditure groups to increase the speech of others—is a concept "wholly foreign to the First Amendment." *Bennett,* 131 S.Ct. at 282. The burden is inherent in the choice that confronts contributors to privately financed candidates and independent expenditure groups. *Bennett* recognized that "a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries." *Bennett,* 131 S.Ct. at 2823.

45. Because the Act's matching funds scheme imposes a substantial burden on the speech of privately funded candidates and independent expenditure groups, the provision cannot stand unless it is justified by a compelling state interest. *Bennett,* 131 S.Ct. at 2824.

46. The Act states that the matching funds scheme was created to prohibit the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections because those effects are supposedly especially problematic in judicial elections because "impartiality is uniquely important to the integrity and credibility of the courts." W.Va. Code § 3-12-2(8). The Act is also based on a finding that "as spending by candidates and independent

parties increases, so does the perception that contributors and interested third parties hold too much influence over the judicial process." *Id.* at § 3-12-2(7).

47. As the North Carolina District Court noted in striking down that state's judicial public financing statute, similar interests were rejected in *Bennett. Leake, supra,* at 12-13. As the West Virginia Attorney General persuasively noted, the Act's statutory findings and declarations are not materially different from the findings rejected in *Bennett.* A.G. Opinion at 5.

48. The Supreme Court held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC,* 130 S.Ct. 876, 909 (2010). By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. *Bennett,* 131 S.Ct. at 2826 (*quoting Citizens United,* 130 S.Ct. at 909). The separation between candidates and independent expenditure groups renders it impossible that independent expenditures will result in any *quid pro quo* corruption. *Id* at 2826-27.

49. Finally, the Act cannot be justified by an interest in ensuring that campaign funding is equal across candidates. The Supreme Court has repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech, *see, e.g., Citizens United,* 130 S.Ct. at 904, and the burdens imposed by matching funds cannot be justified by the pursuit of such an interest. In *Bennett,* the Supreme Court held that discriminatory contribution limits meant to "level electoral opportunities for candidates of different personal wealth" did not serve a legitimate

government interest, let alone a compelling one. *Bennett,* 131 S.Ct. at 2825. After all, "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Id.* The First Amendment embodies our choice as a nation that, when it comes to speech, the "guiding principle is freedom . . . not what the State may view as fair." *Bennett,* 131 S.Ct. at 2826 (internal citation omitted).

50. Therefore, the State's chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny. *Bennett,* 131 S.Ct. at 2828.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays the Court to:

(1) Declare W.Va. Code § 3-12-11 unconstitutional;

(2) Declare W.V.C.S.R. § 146-5-8.8 unconstitutional;

(3) Enjoin Defendants, their agents, and successors, from acting pursuant to these provisions and any related provisions implementing them;

(4) Grant Plaintiff all costs and fees available under 42 U.S.C. § 1988 and any other applicable authority; and

(5) Grant him such other relief as may be just and equitable.

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By Counsel,

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State Election Commission Meeting
Wednesday, June 1, 2011 – 9:00 a.m.
Governor's Conference Room
First Webcast of Meeting
Minutes

Attendees:
Dr. Robert Rupp, SEC Chairman
Mr. Gary Collias, Member
Mr. William N. Renzelli, Member
Mr. Brent Pauley, Member
Ms. Sheryl Webb, Deputy Secretary of State
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Layna Valentine-Brown, HAVA Coordinator
Ms. Jackie Harris, Policy Director
Mr. Curt Zickafoose, Legislative Director

The State Election Commission (SEC) met on Wednesday, June 1, 2011 at 9:00 a.m. in the Governor's Conference Room in the State Capitol Building. Dr. Rupp called the meeting to order and welcomed new member Brent Pauley. Minutes from the July 29, 2010 SEC meeting were reviewed. Mr. Renzelli moved to accept the minutes. Mr. Collias seconded the motion. Motion carried.
Minutes from the August 6, 2010 meeting were reviewed. Mr. Collias moved to accept the minutes. Mr. Pauley seconded the motion. Motion carried.

The first order of business was to select a Chairman for the next two years. Mr. Collias nominated Mr. Rupp to continue as Chairman. No other nominations were made. Mr. Rupp was elected as Chairman unanimously.

The next discussion was for a loan request from the Harrison County Commission. Harrison County wants to have one voting system throughout the county; therefore, they want to replace the iVotronic ADA machines with AutoMark machines. Layna Valentine-Brown explained the specifics of the loan request, the amount requested and the procedure for determining the loan amount available. Harrison County requested ½ of the cost of $177,600.00 as a loan. Based upon the amount of available funds and the formula set by WV Code, the SEC can only approve a loan amount of $87.904.28. After discussion, Mr. Pauley made a motion to approve $87,904.28 as a loan for Harrison County. Mr. Renzelli seconded the motion. The motion passed approving the loan.

The de minimis change order approval process was discussed next. Layna Valentine-Brown explained the procedures relating to these change orders and the proposed plan for the SEC to allow the Secretary of State to approve or reject these change orders. After

discussion on this topic Mr. Pauley made a motion to approve the proposal for the Secretary of State to approve or reject the de minimis engineering change orders. Mr. Renzelli seconded the motion. The motion passed approving the proposal.

The status of the voting system computer experts was the following discussion. Layna Valentine-Brown stated that she has spoken with the two current experts and they are willing to continue to service as the experts for the State Election Commission. Mr. Collias moved to continue the appointment of the computer experts. Mr. Pauley seconded the motion. There was no discussion and the motion passed.

Discussion went to the compensation of the computer experts. WV Code 3-4-7 listed the cost of compensation as $200.00, however, all of WV Code 3-4 was repealed by the legislature in the 2011 regular session. WV Code 3-4A-8 allows for the compensation of the computer experts, but does not state the amount to be paid. The vendor pays the compensation for the computer experts to complete an exam and provide a report to the SEC. Mr. Collias made a motion to continue the $200.00 compensation fee the for the computer experts. Mr. Renzelli seconded the motion. There was no discussion. The motion passed.

Public Campaign Finance issues were the next topic for discussion. Mr. Tim Leach notified the commissioners that the procedural rule Title 153 Series 10 has been adopted by the legislature with one minor amendment. The amendment was a reference error in a subsection in the rule. Procedurally, the SEC must file the final version of the rule with the amendment by June 30, 2011, however, a revised rule cannot be filed before June 16, 2011. This will replace the emergency rule that is currently in effect now. Mr. Leach noted that we are in the precandidate period for the Supreme Court race with one person filing as a participant for this program. Mr. Pauley made a motion to approve the amendment to the rule for filing. Mr. Collias seconded the motion. There was no further discussion. The motion passed.

The SEC budget was the last topic on the business agenda. Mr. Brian Messer gave an update on the budget for the SEC and allowable uses of the funds. Discussion ensued regarding past uses of the fund. Chairman Rupp asked the commission and the SOS to think about ideas for the budget for the next fiscal year. These will be discussed at the next meeting. Mr. Pauley made a motion to approve $4,500.00 for SOS staff training from the current fiscal year's budget. Mr. Renzelli seconded the motion. There was no further discussion. The motion passed.

Updates on current issues and events:

Jackie Harris gave updates on UOCAVA voting solutions, such as the online voting pilot program. A review committee of SOS staff and county clerks has been formed to review the systems used and discuss options moving forward. Currently the committee has discussed the county clerk's sending the ballots electronically and having the SOS provide the tracking mechanism. Ms. Harris informed the SEC that the Federal Voting

Assistance Program (FVAP) is issuing a grant for UOCAVA solutions and that West Virginia is planning to submit an application for this grant.

Curt Zickafoose gave a legislative update. Repealed Article 4 of Chapter 3 in the last legislative session because of obsolete language and cleaned up Article 4A. The emergency powers of the Secretary of State in terms of a natural disaster were updated. Early voting was shortened from 20 days to 13 days. Moving forward the focus will be bringing the WV Code into federal compliance and trying to amend the code on the issue of vacancies in office.

Jackie Harris talked about required legislation to enable online voter registration such as being able to accept a signature electronically. Absentee application requires voter to provide medical information in violation of HIPPA, and it will require legislative changes to remove that language from absentee voting requirements. Currently West Virginia has no grace period for voters if they move after the close of books from one county to another and this disenfranchises voters. We are required to provide a Presidential only ballot and current code has no provisions for this.

Sheryl Webb provided information about the National Association of Secretaries of State (NASS) conference which is being hosted by West Virginia in Glade Springs July 10 – 13, 2011. This is the first time West Virginia has hosted the conference. Planning has been ongoing for two years. NASS provides the agenda and evening events are being planned to showcase the hospitality of West Virginia.

With no further discussions proposed Mr. Renzelli moved to adjourn the meeting. Mr. Collias seconded the motion. The motion passed and the meeting was adjourned.

State Election Commission Meeting
Thursday, June 30, 2011 – 10:30 a.m.
Secretary of State Conference Room
Minutes

Attendees:
The Honorable Natalie E. Tennant, Secretary of State
Mr. Brent Pauley, Member (By Teleconference)
Mr. Gary Collias, Member (By Teleconference)
Mr. Dave Nichols, Manager – Elections Division
Mr. Jake Glance, Director of Communications
Mr. Curt Zickafoose, Director of Legislation
Ms. Jackie Harris, Director of Policy
Ms. E. Ashley Summitt, General Counsel
Mr. Tim Leach, Assistant General Counsel
Ms. Missi Kinder, Campaign Finance Specialist
Ms. Ashley Parsons, Executive Assistant

The State Election Commission met on Thursday, June 30, 2011 in the Secretary of State's Conference Room. Secretary Tennant acted as chair due to the absence of Chairman Robert Rupp. Secretary Tennant called the meeting to order at 10:36 a.m.

Mr. Leach addressed the commission concerning the Supreme Court ruling regarding Arizona's Supreme Court Public Funding Pilot Project. The U.S. Supreme Court shot down the Arizona law citing freedom of speech in regards to the support or opposition of candidates. West Virginia has the same provisions as the Arizona law and we are now questioning if the West Virginia law is valid.

The Secretary of State's office has requested a ruling by the Attorney General's office asking if the West Virginia Supreme Court of Appeals Pilot Project is constitutional in light of the Arizona ruling.

Mr. Pauley made the motion for the State Election Commission to join with the Secretary of State's office asking for the Attorney General opinion with Mr. Collias seconding the motion. Motion passed unanimously. The Secretary of State's office will draft the request to the A.G.'s office.

At 10:36 a.m. Mr. Collias moved to adjourn with Mr. Pauley seconding the motion.

State Election Commission Meeting
Wednesday, August 10, 2011 – 10:00 a.m.
Secretary of State Conference Room
Minutes

Attendees:
The Honorable Natalie E. Tennant, Secretary of State
Mr. Gary Collias, Member (Acting Chair)
Mr. William N. Renzelli, Member
Ms. Sheryl Webb, Deputy Secretary of State
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Jackie Harris, Policy Director
Mr. Curt Zickafoose, Legislative Director

The State Election Commission (SEC) met on Wednesday, August 10, 2011 at 10:00 a.m. in the Secretary of State's Conference Room in the State Capitol Building. Mr. Collias called the meeting to order. Minutes from the June 1, 2011 SEC meeting were reviewed. Mr. Renzelli moved to accept the minutes. Secretary Tennant seconded the motion. Motion carried.

The first order of business was the consideration of loan extension requested by the Ohio County Commission. Tim Leach reported that Ohio County had requested a 1 year delay of payment of their 5th, and final, loan repayment from 7/1/11 to 7/1/12. Leach reported that staff recommended approval. Mr. Collias asked if there were any reason to deny. Leach and Secretary Tennant reported that other loans have been extended and no extension requests were known to have been denied in the past. Renzelli moved to approve extension, Tennant seconded, motion passed.

The next discussion was concerning the SEC budget, and ideas for expending funds this fiscal year as requested by Chairman Rupp at the last meeting. Secretary Tennant suggested some ideas including printing copies of constitutions. Mr. Collias suggested expending funds to educate public as to effects of redistricting. Secretary Tennant indicated that appropriations had been approved for that purpose. Mr. Collias suggested that the matter remain on future agendas and that costs associated with each project be reported to the Commission.

Updates on current issues and events:

Jackie Harris presented maps of Congressional and State Senate redistricting and reported on status of all three bills including state Delegate redistricting bill. Mr. Collias had questions about the "one man: one vote" issues for the congressional redistricting. Ms. Harris reported that law suits were anticipated for House of Delegates. Ms. Harris reported that legislature had approved $310,000 for redistricting expenses and notifications.

Legislative update:

Ms. Harris reported that Secretary of State's legislative agenda was deferred until a later special session in order to not distract attention from the redistricting efforts. Ms. Harris identified a couple of areas of election law of concern for the Secretary of State.

WV Supreme Court of Appeals Public Campaign Financing Pilot Project:

Mr. Leach reported on Attorney General Opinion. Mr. Collias asked that Commission members be supplied a copy. Leach reported that the "matching funds" were unconstitutional but that the rest of the program stands. Barring future amendment, qualifying candidates will only receive the initial payment for primary and general campaigns.

Pending Litigation:

Chairman requested an update on CFIF case. Mr. Leach reported that the 2010 attempts to relieve the injunction were largely successful but some parts of the code were still unconstitutional. Leach reported the issue involved anonymity of contributors and their right to free speech. Leach informed the commission that the Secretary of State was in consultation with her counsel for the suit about a possible appeal.

With no further business, Secretary Tennant moved to adjourn, Renzelli seconded, motion passed.

State Election Commission Meeting
Friday, February 3, 2012 – 2:00 p.m.
Secretary of State Conference Room
Minutes

Attendees:

Members
The Honorable Natalie E. Tennant, Secretary of State (In person)
Dr. Robert Rupp, Member (Chair) (By teleconference)
Mr. Gary Collias, Member (By teleconference)
Mr. William N. Renzelli, Member (By teleconference)
Others Attending
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Missi Kinder, Campaign Finance Specialist – Elections Division
Mr. Greg Watson, Campaign Finance Specialist – Elections Division
Mr. Alan Loughry – Candidate for WV Supreme Court of Appeals

The State Election Commission (SEC) met on Friday, February 3, 2012 at 2:00 p.m. by teleconference in the Secretary of State's Conference Room in the State Capitol Building. Dr. Rupp called the meeting to order at 2:18 p.m.

Mr. Leach addressed the commission concerning Mr. Loughry's application for obtaining funds through the West Virginia Supreme Court of Appeals Campaign Financing Pilot Program. He attests that Mr. Loughry achieved the minimum number of signatures and contributions required to gain access to these funds. West Virginia Code states that a State Election Commission meeting is to be held within three days of the Secretary of State's acceptance of the candidate's receipts and reports through this program.

Mr. Loughry has met the following requirements:

1. Submitted 676 qualifying contribution receipts (500 minimum);
2. Each qualifying contribution must be in the amount of $1-100 and must total more than $35,000. $36,295 was raised;
3. More than the required 10% of receipts came from each of the state's three congressional districts;
4. Declaration of Intent form was submitted to the Secretary of State's office on October 13, 2011;
5. There were no duplication of contributors, and none were received before October 13, 2011 or after January 28, 2012;
6. No non-compliance items were found within the receipts.

Finding the candidate has met all requirements set forth by West Virginia Code; Mr. Collias made the motion to grant funds to Mr. Loughry with Mr. Renzelli seconding the motion. With no discussion the motion passed unanimously.

Mr. Leach informed the commission that Secretary Tennant will draft, sign and forward the required documents to the State Auditor's office. The State Auditor's office will issue the funds to the candidate's treasurer in the amount of $13,705 within two business days. Dr. Rupp made a motion giving permission to Secretary Tennant to prepare and sign the documents on behalf of the commission with Mr. Collias seconding the motion. Motion passed unanimously.

Dr. Rupp thanked the staff of the Secretary of State's office for their efforts and hard work with this historic action. Secretary Tennant thanked the commission and the candidate as well.

With no further business, Mr. Renzelli moved to adjourn with Mr. Collias seconding the motion. Meeting adjourned at 2:33 p.m.

State Election Commission Meeting
Thursday, June 21 2012 – 2:00 p.m.
Governor's Press Conference Room
Minutes

Attendees:
Mr. Gary Collias, Acting Chair
The Honorable Natalie E. Tennant, Secretary of State
Mr. William Renzelli, Member
Mr. Tim Leach, Assistant General Counsel
Ms. Ashley Summit, Counsel
Mr. Dave Nichols, Manager – Elections Division
Mr. Curt Zickafoose, Legislative Director
Ms. Sheryl Webb, Deputy Secretary of State
Mr. Jake Glance, Director of Communications
Mr. Andrew Ickes, Elections Specialist
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Ms. Layna Valentine-Brown, HAVA Director
Mr. Dave Tackett, Elections Technology
Ms. Brittany Westfall, HAVA Specialist
Mr. Chris Folio, Intern
Ms. Katie Wright, Intern
Mr. Moses Ibrahim, Intern
Mr. Allen Loughry

The State Election Commission (SEC) met on Thursday, June 21, 2012 at 2:00 p.m. in the Governor's Press Conference Room of the State Capitol Building. In the absence of Chair Robert Rupp, Acting Chair Gary Collias called the meeting to order and established a quorum. Mr. Renzelli moved to approve the minutes from the February 2, 2012 meeting with Secretary Tennant seconding the motion. Motion passed.

Dave Nichols addressed the commission regarding a letter the Secretary of State's office received from David Sims. Mr. Sims is a sitting member of the County Commission and candidate for the same in the 2012 General Election. Mr. Sims submitted his withdrawal of candidacy due to the fact that Governor Earl Ray Tomblin appointed him to replace retired Judge Arthur M. Recht of the First Judicial Circuit. Secretary Tennant added that it would be duty of the Ohio County Democratic Executive Committee to appoint the individual to fill that vacancy. After discussion amongst the members, Mr. Renzelli made a motion to approve the Ohio County Commission to fill the vacancy on the 2012 General Election ballot for County Commission with Secretary Tennant seconding the motion. Motion passed unanimously.

Mr. Nichols also informed the commission that Eugene Billmeyer, a sitting Magistrate and candidate in Hampshire County has submitted a letter to the Secretary of State's Office informing the commission that he has withdrawn from the 2012 general election due to health issues. A letter was also received from the Hampshire County Democratic Executive Committee asking permission to fill the vacancy on the 2012 general election ballot in which this withdrawal has caused. Mr. Renzelli made the motion to approve the request with Secretary Tennant seconding the motion. Motion passed unanimously.

Mr. Leach updated the commission concerning the West Virginia Supreme Court of Appeals Public Financing Pilot Project status. The Federal Court in North Carolina addressed the matching/rescue funds which are additional funds awarded to the participating candidate based upon the spending of their opponent and or individuals making independent expenditures. If they exceed the funds available to the participating candidate by 20%, it triggers a dollar for dollar matching fund from the public finance fund. There is one participating candidate that received a $350,000 initial eligibility payment. 20% excess of this amount is $420,000, which would be the trigger event. Non participating candidates are to report by the first Saturday in July if they exceed the $420,000 figure. When the SEC receives reports or information of excess spending, there is cause to be issued a check within 48 hours of receipt of that news.

Mr. Leach reminded the commission of the US Supreme Court's addressed Arizona's law which is similar to West Virginia's and ruled that the matching fund trigger by candidates other than the person receiving the money was unconstitutional and a restraint of the right of free speech and spending of their own money. There are sufficient differences between the two state's laws, so the Secretary of State's office in conjunction with the State Election Commission requested an Attorney General's opinion on the matter. On July 28, 2011, the AG's office submitted their opinion stating the West Virginia law pertaining to matching funds is also unconstitutional and should not be awarded. The North Carolina Court has also ruled that their matching funds law is unconstitutional.

Mr. Leach suggested the commission could act in one of two ways.

1. They could wait until a report is filed by a non participating candidate triggering the matching funds, calling an emergency meeting if needed to rule if they would authorize the payment;
2. They could address the issue now and take a vote so the participating candidate knows how the situation would be handled.

Mr. Leach thought it would good to let the candidate know what the commission's ruling is now in case any action on his part needs to be done. The commission discussed if they thought whether or not the non-participating candidates would hit the $420,000 mark triggering the event either by the July 7, 2012 date or before the general election.

Mr. Nichols also gave another option. If the commission would vote against awarding the matching funds, this would leave the participating candidate at a set limit. West Virginia State Code does provide the candidate the option to petition the commission and withdraw from the program.

Mr. Collias stated that with the Supreme Court decision and the Attorney General opinion based on the Supreme Court decision it would be hard to move to provide the matching funds. After a discussion concerning candidate spending and reporting periods, Secretary Tennant asked Mr. Loughry to address the commission.

Mr. Loughry, the only candidate participating in the program voiced his disagreements with some of the points that were made during the course of this meeting. The U.S. Supreme Court Arizona case did not deal with Supreme Court candidates, it dealt with public financing for legislative and executive positions. No one has challenged this law in West Virginia. The Supreme Court has made it clear that a law created by the state legislature is presumed constitutional. The U.S. Supreme Court did not address judicial elections in the Bennett decision, nor did it allude to West Virginia's pilot program. Mr. Loughry shared his concerns regarding the millions of dollars that were pumped into past judicial campaigns, the constitutional rights of participating candidates and individuals who contributed to the participating candidate, the likelihood or unlikelihood a non participating candidate would trigger the $420,000 mark, and the implications that would be caused by not ruling on this matter. He also noted that this issue has a drastic impact on this Supreme Court race. He stated that this would be an incredible opportunity for West Virginia to give the pilot program a chance. Mr. Loughry then asked the commission to make a decision on the matching funds issue today.

Secretary Tennant made the motion to not vote on Mr. Loughry's request to release matching funds at this point with Mr. Renzelli seconding the motion. Motion passed 2-1 with Secretary Tennant and Mr. Renzelli voting for the motion and Mr. Collias voting against the motion.

Mr. Nichols presented ideas to the commission to spend down the commission's budget before June 30, 2012. If these funds are not encumbered by June 30, 2012, they will be placed back into the General Revenue Fund. There is approximately $9400 left in the budget.

1. A scanner to be used for scanning paper campaign finance reports received by the Secretary of State's office. The scanned reports can then be placed on the Secretary of State's website for public view. The cost of this scanner would be approximately $5,059.
2. Public information cards regarding the constitutional amendment that will be on the 2012 General Election ballot. These cards would be passed out at public events, voter registration drives and county clerks' offices. The cost of these informational cards would be approximately $2,000.

Mr. Renzelli made the motion to approve the purchase of these items with Secretary Tennant seconding the motion. Motion carried unanimously.

Mr. Leach addressed the issue regarding the vacancy on the State Election Commission. There are currently two expired terms on the board and one vacancy due to Brent Pauley's resignation. Mr. Collias moved to allow Secretary Tennant in the capacity of Secretary of State to send a letter to Governor Tomblin regarding this matter.

Tim Leach updated the commission on Judge Bloom's ruling on the "disclosure law" allowing the disclosure of plaintiff's names in election complaints. The Secretary of State's office is analyzing his decision and considering asking Judge Bloom to clarify or reassess the impact of his decision.

At 3:10 p.m. Mr. Renzelli moved to adjourn with Secretary Tennant seconding the motion.

State Election Commission
Emergency Meeting
Tuesday, July 17, 2012 – 3:00 p.m.
Secretary of State Conference Room
Minutes

Attendees:
Dr. Robert Rupp, Chair
The Honorable Natalie E. Tennant, Secretary of State (By Teleconference)
Mr. Gary Collias, Member (By Teleconference)
Mr. William Renzelli, Member (By Teleconference)
Mr. Tim Leach, Assistant General Counsel
Mr. Dave Nichols, Manager – Elections Division
Mr. Curt Zickafoose, Legislative Director
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Mr. Chris Folio, Intern
Ms. Katie Wright, Intern
Mr. Moses Ibrahim, Intern
Mr. Allen Loughry
Mr. Phil Kabler
Mr. Larry Messino
Mr. Ry Rivard
Mr. Tony Majestro
Ms. Julie Archer
Ms. Andrea Lannom
Ms. Babette Hogan

The State Election Commission (SEC) held an emergency meeting on Tuesday, July 17, 2012 at 3:00 p.m. in the Secretary of State Conference Room of the State Capitol Building. Chairman Dr. Rupp called the meeting to order and established a quorum. This emergency meeting was called for the determination of additional/supplemental payments to the Certified Candidate according to §3-12-11(i) of the W. Va. State Code.

Dr. Rupp stated that he is going to divide the discussion into two parts. The first is to determine if the trigger was met to determine action and secondly a discussion of options for disbursement.

1. Mr. Leach addressed the committee concerning the trigger for matching funds. This trigger is met when one non-participating candidate has expended or obligated an amount equal to 120% of the initial awarded payment to the participating candidate. A report was submitted to the Secretary of State's office by a non-participating candidate that indicated obligations of expenditures greater than 120% of the initial $350,000 awarded to the participating candidate. After review by the Secretary of State's staff, this meets the trigger as set in WV Code §3-12-11(e). Dr. Rupp made the motion announcing that the trigger has been met with Mr. Collias seconding the motion. Motion passed unanimously.

2. Dr. Rupp began the dialogue concerning the options for disbursement. The disbursement amount is $144,471.76. Dr. Rupp questioned what the challenge to this disbursal law is, and the State Election Commission's mission in defending this part of the law. He stated that this is not about public finance or politics. It is about the commission implementing and defending a law enacted by the state legislature. He says the Arizona law does not mirror the West Virginia law, so the opinion by the Supreme County Arizona may not be totally applicable to West Virginia. In addition, he stated the Attorney General in West Virginia gave an opinion not a court decision. Dr. Rupp stated the commission has two options they can do since the trigger amount has been met.
    1. Follow the North Carolina model and "roll over and play dead" who made no sustained effort to defend and protect a law passed by its legislature.
    2. Institute a West Virginia model and follow the law as it was passed and disburse the funds as the law dictates. Then take the issue to court and defend it and then accept the decision the court renders.

Dr. Rupp then urged the commission to show protection to the West Virginia Legislature saying that they are not a court, the Attorney General is not a judge and they neither wear judicial robes.

Mr. Collias stated that he does not agree with Dr. Rupp. He feels that the U. S. Supreme Court decision appears to invalidate the West Virginia law. He states that the North Carolina Federal Court decision which is based on legislation almost identical to the West Virginia law was found to be unconstitutional and our AG opinion was found our law be unconstitutional. He in good faith feels that he cannot vote to release these funds.

Secretary Tennant acknowledged that the Secretary of State's office has been accused of not following the law. She noted that the office has followed the law throughout the whole process as the legislation was crafted there was no indication that we have not followed what was put into place by the West Virginia Legislature. The Secretary of State's office asked for an Attorney General opinion to see if the Legislature should consider making any changes to the current law during this past legislative session. When they chose not to make any changes, they obviously stood on their legislation. Secretary Tennant stated that she as an Executive Branch member does not have the authority or the duty to declare a piece of legislation unconstitutional.

Mr. Loughry thanked the commission for holding the meeting and giving him the opportunity to speak. He quoted the West Virginia Supreme Court via syllabus point saying, "opinions of the Attorney General are not precedential or binding upon this court". He went on to say although it was proper to ask for the Attorney General opinion and proper for the Attorney General to provide the opinion, the opinion is not law. He also stated that the law, which is unchallenged, is mandatory and once the triggering points have been met, the State Election Commission shall issue the payment.

Dr. Rupp made the motion that the State Election Commission release the funds according to statue as trigger funds being met. The motion was seconded by Secretary Tennant. Dr. Rupp asked for an individual vote with Mr. Collias and Mr. Renzelli voting No and Dr. Rupp and Secretary Tennant voting YES. With a tie vote from the commission, the motion fails.

Dr. Rupp made the following suggestions:

1. Have a draft agenda available to all members within 24 hours of a regular scheduled meeting.
2. The minutes of the meeting be completed within 14 days of that meeting.
3. Contacting the Governor's office concerning appointing the 5th member of the SEC.

At 3:40 p.m., Mr. Collias moved to adjourn the meeting with Mr. Renzelli seconding the motion. Motion passed unanimously.

State Election Commission
Emergency Meeting
Tuesday, July 31, 2012 – 10:00 a.m.
Secretary of State Conference Room
Minutes

Attendees:
Dr. Robert Rupp, Chair (By Teleconference)
The Honorable Natalie E. Tennant, Secretary of State
Mr. Gary Collias, Member (By Teleconference)
Mr. William Renzelli, Member (By Teleconference)
Mr. Tim Leach, Assistant General Counsel
Mr. Dave Nichols, Manager – Elections Division
Ms. Ashley Summitt, General Counsel
Mr. Curt Zickafoose, Legislative Director
Mr. Jake Glance, Director of Communications
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Mr. Chris Folio, Intern
Mr. Phil Kabler
Mr. Ry Rivard

The State Election Commission (SEC) held an emergency meeting on Tuesday, July 31, 2012 at 10:00 a.m. in the Secretary of State Conference Room of the State Capitol Building. This emergency meeting was called for the for discussion of lawsuit filed against State Election Commission challenging the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program. An answer to the lawsuit must be filed by August 7, 2012 and SECs defending attorney needs to discuss answer options with members.

Chairman Rupp called the meeting to order with a roll call and a quorum was established. At 10:04 a.m., Mr. Renzelli moved to go into Executive Session with Secretary Tennant seconding the motion. Motion passed unanimously.

At 11:10 a.m. the commission resumed the meeting to open session.

Dr. Rupp proposed the motion that the State Election Commission would actively encouraged our attorney to expedite the resolution of the question of matching funds in court as quickly as possible. Secretary made the motion with Mr. Renzelli seconding the motion. Motion passed unanimously.

Dr. Rupp also requested the commission to entertain the motion that the State Election Commission actively defends the constitutionality of the matching funds law passed by the West Virginia legislature in both State and Federal Courts. Mr. Collias made the motion with Mr. Renzelli seconding. Motion passed unanimously.

Secretary Tennant made mention the next State Election Commission is Wednesday, August 8, 2012 at 10:00 a.m. Secretary Tennant moved to adjourn the meeting at 11:15 with Mr. Collias seconding the motion. Motion passed unanimously.

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

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

Defendants.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Comes now the Plaintiff, by and through his counsel, and moves this Court for a injunction preliminarily enjoining Defendants from implementing W.Va. Code § 3-12-11(e) and W.Va. Code § 3-12-11(f), the provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program which allow participating candidates to receive additional taxpayer funds based on the expenditures of independent third-parties and non-participating candidates.

In support of this motion, Plaintiff submits a contemporaneously filed Memorandum of Law in Support of Preliminary Injunction and the attached Exhibit A (appendix previously filed with the Supreme Court of Appeals) and Exhibit B (Affidavit of Michael Callaghan).

MICHAEL CALLAGHAN
By Counsel

s/ Anthony J. Majestro
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

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

Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel, counsel for the Plaintiff, does hereby certify that on the 22nd day of August, 2012, I electronically filed the foregoing **Plaintiff's Motion for Preliminary Injunction** with the Clerk of the Court by utilizing the CM/ECF system, which will send electronic notification of said filing to counsel of record.

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s/ Anthony J. Majestro
Anthony J. Majestro (WVSB 5165)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction
No. 12-0899

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

Petitioner,

vs.)

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

Respondents.

APPENDIX TO INTERVENOR MICHAEL CALLAGHAN'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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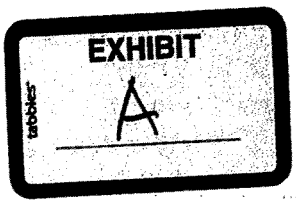
August 10, 2012



CERTIFICATE OF ACCURACY OF APPENDIX CONTENTS

I, Anthony J. Majestro, counsel for Intervenor Michael Callaghan, do, on this the 10th day of August 2012, hereby certify, pursuant to the provisions of Rule 7(c)(2) and Rule 16(3) of the Revised Rules of Appellate Procedure, that the contents of this Appendix are, to the best of my knowledge and belief, accurate copies of the items that I have described in the TABLE OF CONTENTS OF THIS APPENDIX and INTERVENOR CALLAGHAN'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS to which this Appendix is appended.

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Counsel for Intervenor Michael Callaghan

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

AT CHARLESTON

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-3419

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

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Michael Callaghan, for his Complaint against Defendants, states the following:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the Constitution of the United States. Plaintiff claims that the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W.Va. Code § 3-12-1, et seq. ("the Act"), which provides for matching funds to publicly financed

candidates for the Supreme Court of Appeals of West Virginia, violates the First and Fourteenth Amendments to the United States Constitution by unduly impinging upon protected political speech and association as set forth in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011).

2. The Act creates a pilot project for public financing for the 2012 election for two seats on the Supreme Court of Appeals of West Virginia. The Act provides for candidates who choose to participate to receive the sum of $350,000.00 for a contested general election. W.Va. Code § 3-12-11(b)(1). In addition, the Act and its accompanying regulations provide that if either a non-participating candidate, a person conducting an independent expenditure, or a combination thereof spend more than $420,000.00, the participating candidate is eligible to receive dollar for dollar contributions of taxpayer dollars of the sums expended in excess of $350,000 up to an additional $700,000.00. W.Va. Code § 3-12-11(e)-(i); W.V.C.S.R. § 146-5-8.8.

3. After *Bennett,* it is clear that the matching funds provisions of the Act are unconstitutional. The *Bennett* Court specifically held that providing public funds to match dollar for dollar the campaign expenditures of privately financed candidates and third-parties conducting independent expenditures imposes a substantial burden on the speech of privately financed candidates and third party contributors by penalizing privately financed candidates and third-parties dollar for dollar based on their speech. 131 S. Ct. at 2818-20.

4. Plaintiff seeks to have W.Va. Code § 3-12-11(e)-(i) and W.V.C.S.R. § 146-5-8.8 declared unconstitutional under the First and Fourteenth Amendments because those provisions chill them from exercising their First Amendment rights. Plaintiff also seeks to have enforcement of these provisions permanently enjoined. This issue should be resolved promptly so that Plaintiff and those similarly situated will not be chilled in their free expression and association and instead will remain free to engage in constitutionally-protected political expression in the upcoming election.

Jurisdiction and Venue

5. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

6. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

7. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) because the defendants have been named in their official capacities as Secretary of State and members of the West Virginia State Elections Commission ("Commission"). "Where a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official residence, that is, where he performs his official duties." *Republican Party of N.C. v. Martin*, 682 F. Supp. 834,

836 (M.D.N.C. 1988) (citation omitted). The Secretary of State and the Commission maintain their official offices in Charleston, West Virginia, and meet in Charleston when making determinations regarding the Act. Alternatively, venue is proper as several of the Defendants reside in this District and all of the Defendants are residents of this State. Finally, venue is appropriate under the provisions of 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District and the decisions under challenge were substantially made at the West Virginia State Capitol in Charleston, West Virginia.

Parties

8. Plaintiff Callaghan is a practicing attorney and small business owner. Plaintiff makes contributions to candidates for elected office in West Virginia and wishes to make contributions to the two non-participating candidates nominated by the Democratic Party for the 2012 election to the Supreme Court of Appeals of West Virginia. Because the contributions would trigger matching funds to one of the opposing candidates, Plaintiff will not do so.

9. Plaintiff also opposes the use of taxpayer money to finance elections. Plaintiff, together and in combination with others, wishes to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns.

10. Defendant Tennant is the West Virginia Secretary of State. As such, she is the chief election officer and a member of the Commission. Defendant Rupp is the Chairman of the Commission. Defendants Collias and Renzelli are members

of the Commission. There is currently one vacancy on the Commission resulting in an even number of members. The Defendants as the members of the Commission are charged with the responsibility of administering the Act and the taxpayer funds making up the Supreme Court of Appeals Public Campaign Financing Fund. W.Va. Code § 3-12-5.

Facts

A. The 2012 Race for the Supreme Court of Appeals.

11. The "West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program" was established in 2010 as a pilot program for the 2012 primary election and the 2012 general election for the office of Justice of the Supreme Court of Appeals. W.Va. Code § 3-12-1. In 2012, the voters will elect two of the five Justices to twelve-year terms. The Act sunsets following this election.

12. Eight candidates sought nomination in the May 8, 2012 West Virginia primary. Only one candidate, Allan Loughry, sought to participate in the pilot project.

13. In the primary, Loughry and John Yoder received the Republican Party nominations in an uncontested primary. Current Justice Robin Jean Davis and candidate Letitia "Tish" Chafin received the Democratic Party's nominations after receiving the two highest vote totals of the six candidates seeking the nomination.

14. Loughry raised $36,395.00 in order to qualify for the taxpayer subsidies provided by the pilot project. As a participating candidate in an

uncontested primary, he received $13,705.00 from the public fund. *See* W.Va. Code § 3-12-11(a)(2). Loughry's April 6, 2012 campaign finance report filed with Secretary Tennant shows receipt of these funds.

15. Once Loughry was certified as a nominee, the Commission authorized the distribution of $350,000.00 in public funds to Loughry, the amount available to a participating candidate in a contested election. *See* W.Va. Code § 3-12-11(b)(1). Loughry's June 19, 2012 campaign finance report filed with Secretary Tennant shows receipt of these funds.

16. The contested 2012 Democratic primary resulted in expenditures substantially in excess of $350,000.00 by the two nominees.

17. The Democratic primary for the two seats on the Supreme Court of Appeals was one of few statewide contested elections and the only statewide election that resulted in substantial mass media purchases. As a result, mass media rates did not increase as a result of the campaign purchases.

18. The general election, however, contains a number of contested races where the candidates are purchasing or likely to purchase media including the races for President of the United States, United States Senate, Governor, and Attorney General. Some of these races have attracted or may in the future attract third-party media expenditures. Moreover, as a number of our media markets serve multi-state areas, West Virginia candidates are competing with candidates in border states for media time. As a result of the forgoing, media rates are increasing and will cost all candidates more money than the purchases in the primary.

B. The Act's Provisions for Matching Funds.

19. The Act contains several provisions that purport to provide matching funds to candidates participating in the pilot project:

> (e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.
>
> (f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating candidate, either alone or in combination with the nonparticipating candidate's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.
>
> (g) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission shall authorize the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.

W.Va. Code § 3-12-11.

20. A participating candidate in a contested general election can receive up to $700,000.00 in additional public funds triggered by expenditures by nonparticipating candidates or independent expenditures. W.Va. Code § 3-12-11(h).

21. Once it has been determined by the Commission that the matching funds provisions have been triggered, the funds must be issued to the participating candidate within two business days. W.Va. Code § 3-12-11(i).

22. While the Act is not clear on the question, the regulations enacted implementing the Act make it clear that an expenditure of one dollar in excess of the 20% threshold results in the participating candidate receiving contributions matching the nonparticipating candidate's expenditures in excess of $350,000.00 up to an additional $700,000.00 in public funds. W.V.C.S.R. § 146-5-8.8(d).

23. The regulations contain reporting requirements for nonparticipating candidates and persons conducting independent expenditures in the 2012 Supreme Court general election. W.V.C.S.R. § 146-5-12.2 (nonparticipating candidates); *id.* at § 146-5-13 (independent expenditures).

24. Under these regulations, nonparticipating candidates were required to report to the Secretary of State by July 7, 2012, "a listing of expenditures and obligations incurred since May 9, 2012 through July 1, 2012, if those expenditures and obligations, in the aggregate, exceed $350,000." *Id.* at § 12.2.a.

C. Litigation over Matching Fund Provisions in Public Campaign Financing Statutes.

25. The West Virginia Act was based on Article 22D of North Carolina's "Elections and Election Laws," G.S. §§ 163-278.62 through 163-278.70, which became effective in 2002. Litigation challenging the constitutionality of the North Carolina law commenced in 2006. Ultimately, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the North Carolina statute.

North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008). The Supreme Court of the United States denied certiorari. 555 U.S. 994 (2008).

26. The West Virginia Act was enacted in 2010. A year after its enactment, the Supreme Court of the United States decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). In *Bennett*, the Court applied strict scrutiny and struck down Arizona's matching funds provision which applied only to legislative and executive races. Notably, in striking down the Arizona statute, the Supreme Court in *Bennett* specifically characterized the North Carolina act as having "matching funds statutes that resemble Arizona's law." *Id.* at 2816 n.3.

27. Following the decision in *Bennett*, the Commission sought an opinion of the West Virginia Attorney General regarding the constitutionality of the matching funds provision of the West Virginia Act. The Attorney General responded on July 28, 2011, concluding that the Act's matching funds provision could not survive the strict scrutiny analysis mandated by *Bennett*. The Attorney General's opinion is attached as Exhibit A.

28. Following the receipt of the Attorney General's opinion, the Secretary of State publicly announced that she intended to follow the Attorney General's opinion and not implement the matching funds provisions of the Act.

29. Following *Bennett*, the North Carolina matching provisions for judicial elections, were again challenged. On May 18, 2012, the United States District

Court for the Eastern District of North Carolina granted the plaintiffs' motion for summary judgment and found the North Carolina matching provisions unconstitutional based on *Bennett*. *See NCRL PAC v. Leake*, No. 11-CV-472-FL [Doc. 41] (E.D.NC. 2012) (attached as Exhibit B).

D. Post-Primary Election Commission Proceedings.

30. On June 21, 2012, Loughry appeared at a regularly scheduled meeting of the Commission and requested that the Commission take a position on whether it would fully implement the matching funds provision. The Commission refused to take a position.

31. On June 22, 2012, the disclosure provision set forth in W.V.C.S.R. 146-5-12.2 was implemented through the promulgation of a reporting form. The nonparticipating candidates were notified by e-mail of the new form and the requirement that it be filed by July 6, 2012.

32. While § 12.2 of the regulations contemplates disclosure once expenditures exceed $350,000.00, the form provided to the candidates by the Secretary's election division required disclosure only when candidates expended or committed $420,000.00, the trigger for the additional payments.

33. On July 6, 2012, Justice Davis, a nonparticipating candidate, filed the form provided to the nonparticipating candidates. Her filing showed expenditures of $494,471.00. *See* Exhibit C.

34. On July 17, 2012, an emergency meeting of the Commission was held in Charleston, West Virginia. The Commission voted to acknowledge that Justice

Davis had expended sufficient sums to trigger the matching funds provisions under the Act. The Commission then proceeded to vote on a motion to authorize the release of matching funds to Loughry. The motion failed on a tie vote of the four members. The debate against the motions centered around the constitutionality of the matching provisions. The debate over the motion makes it clear that the members of the Commission would welcome a judicial decision from this Court finally resolving the constitutionality of the matching provisions of the Act.

35. Following the vote, Commission Chairman Rupp requested that the Governor fill the vacancy on the Commission to prevent ties in Commission voting.

36. The uncertainty regarding whether the Commission will ultimately vote to release matching funds to Loughry unconstitutionally burdens Plaintiff by threatening the direct and automatic release of public money to their publicly financed opponent. As a direct and proximate result of the Act's matching funds provision, Plaintiff's willingness to engage in protected political speech has been chilled.

37. Although Plaintiff would like to make candidate contributions and independent expenditures in this election, he will not exercise his First Amendment rights because of the speech-chilling effects of the Act's matching funds law.

38. Plaintiff has no adequate remedy at law.

COUNT I

THE ACT'S MATCHING FUND SCHEME SUBSTANTIALLY BURDENS POLITICAL SPEECH AND IS NOT NARROWLY TAILORED TO SERVE A COMPELLING INTEREST

39. Plaintiff realleges the preceding paragraphs.

40. W.Va. Code § 3-12-11 and W.V.C.S.R. § 146-5-8.8 provide for the provision of matching public funds to the publicly financed candidate whenever expenditures by the privately financed candidates individually or in combination with independent expenditures by third parties exceed the sum of $420,000.00 in the general election.

41. Thereafter, this matching funds scheme provides a direct, dollar-for-dollar public subsidy to participating candidates whenever an independent expenditure is made that either opposes a participating candidate with a nonparticipating opponent, or supports a nonparticipating candidate with a participating opponent or whenever the privately financed candidate expends personal or donated funds. As a result, the privately financed candidate must "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on his own candidacy. *Bennett,* 131 S.Ct. at 2818 (internal quotations omitted). Moreover, "[t]he burdens that matching funds impose on independent expenditure groups are akin to those imposed on the privately financed candidates themselves." *Bennett,* 131 S.Ct. at 2819.

42. Under the First Amendment to the U.S. Constitution and *Bennett,* a state public campaign financing scheme violates the right to free political speech where it goes beyond mere promotion of the voluntary use of public funding, and

improperly injects the state into the political process by attempting to equalize the relative financial resources of candidates. As the United States Supreme Court held in striking down Arizona's matching funds scheme, the "constitutionally problematic" aspect of such a scheme is the manner in which that funding is provided—that it is triggered to deliver funds to publicly financed candidates in direct response to the political speech of privately financed opponents and independent expenditure groups. *Bennett*, 131 S.Ct. at 2824.

43. Plaintiff faces imminent injury to their First Amendment rights to free political speech and free association as a direct result of this statutory scheme. The state's payment of matching funds neutralizes the campaign contributor's or independent expender's attempt to exercise its voice through making an independent expenditure or contribution. The knowledge that making a contribution or an independent expenditure that opposes a government-funded candidate will directly result in that candidate receiving a dollar-for-dollar matching public subsidy creates a chilling effect on Plainitiff's free exercise of protected speech, and imposes a climate of self-censorship that is inimical to our American heritage of unfettered political discourse. In so doing, the statute also encroaches upon the ability of like-minded persons to pool their resources in furtherance of common political goals in violation of Plaintiff's right to freedom of association. As the Supreme Court stated in *Bennett*, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office; thus, the Court will invalidate both limits on uncoordinated political

party expenditures and regulations barring unions, nonprofits, and corporations from making independent expenditures for electioneering communication. 131 S.Ct. at 2817; *see also Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

44. The Act's "beggar thy neighbor" approach to free speech--burdening the speech of privately financed candidates and independent expenditure groups to increase the speech of others—is a concept "wholly foreign to the First Amendment." *Bennett*, 131 S.Ct. at 282. The burden is inherent in the choice that confronts contributors to privately financed candidates and independent expenditure groups. *Bennett* recognized that "a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries." *Bennett*, 131 S.Ct. at 2823.

45. Because the Act's matching funds scheme imposes a substantial burden on the speech of privately funded candidates and independent expenditure groups, the provision cannot stand unless it is justified by a compelling state interest. *Bennett*, 131 S.Ct. at 2824.

46. The Act states that the matching funds scheme was created to prohibit the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections because those effects are supposedly especially problematic in judicial elections because "impartiality is uniquely important to the integrity and credibility of the courts." W.Va. Code § 3-12-2(8). The Act is also based on a finding that "as spending by candidates and independent

parties increases, so does the perception that contributors and interested third parties hold too much influence over the judicial process." *Id.* at § 3-12-2(7).

47. As the North Carolina District Court noted in striking down that state's judicial public financing statute, similar interests were rejected in *Bennett. Leake, supra,* at 12-13. As the West Virginia Attorney General persuasively noted, the Act's statutory findings and declarations are not materially different from the findings rejected in *Bennett.* A.G. Opinion at 5.

48. The Supreme Court held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC,* 130 S.Ct. 876, 909 (2010). By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. *Bennett,* 131 S.Ct. at 2826 (*quoting Citizens United,* 130 S.Ct. at 909). The separation between candidates and independent expenditure groups renders it impossible that independent expenditures will result in any *quid pro quo* corruption. *Id* at 2826-27.

49. Finally, the Act cannot be justified by an interest in ensuring that campaign funding is equal across candidates. The Supreme Court has repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech, *see, e.g., Citizens United,* 130 S.Ct. at 904, and the burdens imposed by matching funds cannot be justified by the pursuit of such an interest. In *Bennett,* the Supreme Court held that discriminatory contribution limits meant to "level electoral opportunities for candidates of different personal wealth" did not serve a legitimate

government interest, let alone a compelling one. *Bennett,* 131 S.Ct. at 2825. After all, "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Id.* The First Amendment embodies our choice as a nation that, when it comes to speech, the "guiding principle is freedom . . . not what the State may view as fair." *Bennett,* 131 S.Ct. at 2826 (internal citation omitted).

50. Therefore, the State's chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny. *Bennett,* 131 S.Ct. at 2828.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays the Court to:

(1) Declare W.Va. Code § 3-12-11 unconstitutional;

(2) Declare W.V.C.S.R. § 146-5-8.8 unconstitutional;

(3) Enjoin Defendants, their agents, and successors, from acting pursuant to these provisions and any related provisions implementing them;

(4) Grant Plaintiff all costs and fees available under 42 U.S.C. § 1988 and any other applicable authority; and

(5) Grant him such other relief as may be just and equitable.

MICHAEL CALLAGHAN
By Counsel,

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State Election Commission Meeting
Wednesday, June 1, 2011 – 9:00 a.m.
Governor's Conference Room
First Webcast of Meeting
Minutes

Attendees:
Dr. Robert Rupp, SEC Chairman
Mr. Gary Collias, Member
Mr. William N. Renzelli, Member
Mr. Brent Pauley, Member
Ms. Sheryl Webb, Deputy Secretary of State
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Layna Valentine-Brown, HAVA Coordinator
Ms. Jackie Harris, Policy Director
Mr. Curt Zickafoose, Legislative Director

The State Election Commission (SEC) met on Wednesday, June 1, 2011 at 9:00 a.m. in the Governor's Conference Room in the State Capitol Building. Dr. Rupp called the meeting to order and welcomed new member Brent Pauley. Minutes from the July 29, 2010 SEC meeting were reviewed. Mr. Renzelli moved to accept the minutes. Mr. Collias seconded the motion. Motion carried.
Minutes from the August 6, 2010 meeting were reviewed. Mr. Collias moved to accept the minutes. Mr. Pauley seconded the motion. Motion carried.

The first order of business was to select a Chairman for the next two years. Mr. Collias nominated Mr. Rupp to continue as Chairman. No other nominations were made. Mr. Rupp was elected as Chairman unanimously.

The next discussion was for a loan request from the Harrison County Commission. Harrison County wants to have one voting system throughout the county; therefore, they want to replace the iVotronic ADA machines with AutoMark machines. Layna Valentine-Brown explained the specifics of the loan request, the amount requested and the procedure for determining the loan amount available. Harrison County requested ½ of the cost of $177,600.00 as a loan. Based upon the amount of available funds and the formula set by WV Code, the SEC can only approve a loan amount of $87.904.28. After discussion, Mr. Pauley made a motion to approve $87,904.28 as a loan for Harrison County. Mr. Renzelli seconded the motion. The motion passed approving the loan.

The de minimis change order approval process was discussed next. Layna Valentine-Brown explained the procedures relating to these change orders and the proposed plan for the SEC to allow the Secretary of State to approve or reject these change orders. After

discussion on this topic Mr. Pauley made a motion to approve the proposal for the Secretary of State to approve or reject the de minimis engineering change orders. Mr. Renzelli seconded the motion. The motion passed approving the proposal.

The status of the voting system computer experts was the following discussion. Layna Valentine-Brown stated that she has spoken with the two current experts and they are willing to continue to service as the experts for the State Election Commission. Mr. Collias moved to continue the appointment of the computer experts. Mr. Pauley seconded the motion. There was no discussion and the motion passed.

Discussion went to the compensation of the computer experts. WV Code 3-4-7 listed the cost of compensation as $200.00, however, all of WV Code 3-4 was repealed by the legislature in the 2011 regular session. WV Code 3-4A-8 allows for the compensation of the computer experts, but does not state the amount to be paid. The vendor pays the compensation for the computer experts to complete an exam and provide a report to the SEC. Mr. Collias made a motion to continue the $200.00 compensation fee the for the computer experts. Mr. Renzelli seconded the motion. There was no discussion. The motion passed.

Public Campaign Finance issues were the next topic for discussion. Mr. Tim Leach notified the commissioners that the procedural rule Title 153 Series 10 has been adopted by the legislature with one minor amendment. The amendment was a reference error in a subsection in the rule. Procedurally, the SEC must file the final version of the rule with the amendment by June 30, 2011, however, a revised rule cannot be filed before June 16, 2011. This will replace the emergency rule that is currently in effect now. Mr. Leach noted that we are in the precandidate period for the Supreme Court race with one person filing as a participant for this program. Mr. Pauley made a motion to approve the amendment to the rule for filing. Mr. Collias seconded the motion. There was no further discussion. The motion passed.

The SEC budget was the last topic on the business agenda. Mr. Brian Messer gave an update on the budget for the SEC and allowable uses of the funds. Discussion ensued regarding past uses of the fund. Chairman Rupp asked the commission and the SOS to think about ideas for the budget for the next fiscal year. These will be discussed at the next meeting. Mr. Pauley made a motion to approve $4,500.00 for SOS staff training from the current fiscal year's budget. Mr. Renzelli seconded the motion. There was no further discussion. The motion passed.

Updates on current issues and events:

Jackie Harris gave updates on UOCAVA voting solutions, such as the online voting pilot program. A review committee of SOS staff and county clerks has been formed to review the systems used and discuss options moving forward. Currently the committee has discussed the county clerk's sending the ballots electronically and having the SOS provide the tracking mechanism. Ms. Harris informed the SEC that the Federal Voting

Assistance Program (FVAP) is issuing a grant for UOCAVA solutions and that West Virginia is planning to submit an application for this grant.

Curt Zickafoose gave a legislative update. Repealed Article 4 of Chapter 3 in the last legislative session because of obsolete language and cleaned up Article 4A. The emergency powers of the Secretary of State in terms of a natural disaster were updated. Early voting was shortened from 20 days to 13 days. Moving forward the focus will be bringing the WV Code into federal compliance and trying to amend the code on the issue of vacancies in office.

Jackie Harris talked about required legislation to enable online voter registration such as being able to accept a signature electronically. Absentee application requires voter to provide medical information in violation of HIPPA, and it will require legislative changes to remove that language from absentee voting requirements. Currently West Virginia has no grace period for voters if they move after the close of books from one county to another and this disenfranchises voters. We are required to provide a Presidential only ballot and current code has no provisions for this.

Sheryl Webb provided information about the National Association of Secretaries of State (NASS) conference which is being hosted by West Virginia in Glade Springs July 10 – 13, 2011. This is the first time West Virginia has hosted the conference. Planning has been ongoing for two years. NASS provides the agenda and evening events are being planned to showcase the hospitality of West Virginia.

With no further discussions proposed Mr. Renzelli moved to adjourn the meeting. Mr. Collias seconded the motion. The motion passed and the meeting was adjourned.

State Election Commission Meeting
Thursday, June 30, 2011 – 10:30 a.m.
Secretary of State Conference Room
Minutes

Attendees:
The Honorable Natalie E. Tennant, Secretary of State
Mr. Brent Pauley, Member (By Teleconference)
Mr. Gary Collias, Member (By Teleconference)
Mr. Dave Nichols, Manager – Elections Division
Mr. Jake Glance, Director of Communications
Mr. Curt Zickafoose, Director of Legislation
Ms. Jackie Harris, Director of Policy
Ms. E. Ashley Summitt, General Counsel
Mr. Tim Leach, Assistant General Counsel
Ms. Missi Kinder, Campaign Finance Specialist
Ms. Ashley Parsons, Executive Assistant

The State Election Commission met on Thursday, June 30, 2011 in the Secretary of State's Conference Room. Secretary Tennant acted as chair due to the absence of Chairman Robert Rupp. Secretary Tennant called the meeting to order at 10:36 a.m.

Mr. Leach addressed the commission concerning the Supreme Court ruling regarding Arizona's Supreme Court Public Funding Pilot Project. The U.S. Supreme Court shot down the Arizona law citing freedom of speech in regards to the support or opposition of candidates. West Virginia has the same provisions as the Arizona law and we are now questioning if the West Virginia law is valid.

The Secretary of State's office has requested a ruling by the Attorney General's office asking if the West Virginia Supreme Court of Appeals Pilot Project is constitutional in light of the Arizona ruling.

Mr. Pauley made the motion for the State Election Commission to join with the Secretary of State's office asking for the Attorney General opinion with Mr. Collias seconding the motion. Motion passed unanimously. The Secretary of State's office will draft the request to the A.G.'s office.

At 10:36 a.m. Mr. Collias moved to adjourn with Mr. Pauley seconding the motion.

State Election Commission Meeting
Wednesday, August 10, 2011 – 10:00 a.m.
Secretary of State Conference Room
Minutes

Attendees:
The Honorable Natalie E. Tennant, Secretary of State
Mr. Gary Collias, Member (Acting Chair)
Mr. William N. Renzelli, Member
Ms. Sheryl Webb, Deputy Secretary of State
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Jackie Harris, Policy Director
Mr. Curt Zickafoose, Legislative Director

The State Election Commission (SEC) met on Wednesday, August 10, 2011 at 10:00 a.m. in the Secretary of State's Conference Room in the State Capitol Building. Mr. Collias called the meeting to order. Minutes from the June 1, 2011 SEC meeting were reviewed. Mr. Renzelli moved to accept the minutes. Secretary Tennant seconded the motion. Motion carried.

The first order of business was the consideration of loan extension requested by the Ohio County Commission. Tim Leach reported that Ohio County had requested a 1 year delay of payment of their 5th, and final, loan repayment from 7/1/11 to 7/1/12. Leach reported that staff recommended approval. Mr. Collias asked if there were any reason to deny. Leach and Secretary Tennant reported that other loans have been extended and no extension requests were known to have been denied in the past. Renzelli moved to approve extension, Tennant seconded, motion passed.

The next discussion was concerning the SEC budget, and ideas for expending funds this fiscal year as requested by Chairman Rupp at the last meeting. Secretary Tennant suggested some ideas including printing copies of constitutions. Mr. Collias suggested expending funds to educate public as to effects of redistricting. Secretary Tennant indicated that appropriations had been approved for that purpose. Mr. Collias suggested that the matter remain on future agendas and that costs associated with each project be reported to the Commission.

Updates on current issues and events:

Jackie Harris presented maps of Congressional and State Senate redistricting and reported on status of all three bills including state Delegate redistricting bill. Mr. Collias had questions about the "one man: one vote" issues for the congressional redistricting. Ms. Harris reported that law suits were anticipated for House of Delegates. Ms. Harris reported that legislature had approved $310,000 for redistricting expenses and notifications.

Legislative update:

Ms. Harris reported that Secretary of State's legislative agenda was deferred until a later special session in order to not distract attention from the redistricting efforts. Ms. Harris identified a couple of areas of election law of concern for the Secretary of State.

WV Supreme Court of Appeals Public Campaign Financing Pilot Project:

Mr. Leach reported on Attorney General Opinion. Mr. Collias asked that Commission members be supplied a copy. Leach reported that the "matching funds" were unconstitutional but that the rest of the program stands. Barring future amendment, qualifying candidates will only receive the initial payment for primary and general campaigns.

Pending Litigation:

Chairman requested an update on CFIF case. Mr. Leach reported that the 2010 attempts to relieve the injunction were largely successful but some parts of the code were still unconstitutional. Leach reported the issue involved anonymity of contributors and their right to free speech. Leach informed the commission that the Secretary of State was in consultation with her counsel for the suit about a possible appeal.

With no further business, Secretary Tennant moved to adjourn, Renzelli seconded, motion passed.

State Election Commission Meeting
Friday, February 3, 2012 – 2:00 p.m.
Secretary of State Conference Room
Minutes

Attendees:

Members
The Honorable Natalie E. Tennant, Secretary of State (In person)
Dr. Robert Rupp, Member (Chair) (By teleconference)
Mr. Gary Collias, Member (By teleconference)
Mr. William N. Renzelli, Member (By teleconference)
Others Attending
Ms. Ashley Summitt, Chief Counsel – Secretary of State
Mr. Tim Leach, Assistant General Counsel – Secretary of State
Mr. Dave Nichols, Manager – Elections Division
Ms. Missi Kinder, Campaign Finance Specialist – Elections Division
Mr. Greg Watson, Campaign Finance Specialist – Elections Division
Mr. Alan Loughry – Candidate for WV Supreme Court of Appeals

The State Election Commission (SEC) met on Friday, February 3, 2012 at 2:00 p.m. by teleconference in the Secretary of State's Conference Room in the State Capitol Building. Dr. Rupp called the meeting to order at 2:18 p.m.

Mr. Leach addressed the commission concerning Mr. Loughry's application for obtaining funds through the West Virginia Supreme Court of Appeals Campaign Financing Pilot Program. He attests that Mr. Loughry achieved the minimum number of signatures and contributions required to gain access to these funds. West Virginia Code states that a State Election Commission meeting is to be held within three days of the Secretary of State's acceptance of the candidate's receipts and reports through this program.

Mr. Loughry has met the following requirements:

1. Submitted 676 qualifying contribution receipts (500 minimum);
2. Each qualifying contribution must be in the amount of $1-100 and must total more than $35,000. $36,295 was raised;
3. More than the required 10% of receipts came from each of the state's three congressional districts;
4. Declaration of Intent form was submitted to the Secretary of State's office on October 13, 2011;
5. There were no duplication of contributors, and none were received before October 13, 2011 or after January 28, 2012;
6. No non-compliance items were found within the receipts.

Finding the candidate has met all requirements set forth by West Virginia Code; Mr. Collias made the motion to grant funds to Mr. Loughry with Mr. Renzelli seconding the motion. With no discussion the motion passed unanimously.

Mr. Leach informed the commission that Secretary Tennant will draft, sign and forward the required documents to the State Auditor's office. The State Auditor's office will issue the funds to the candidate's treasurer in the amount of $13,705 within two business days. Dr. Rupp made a motion giving permission to Secretary Tennant to prepare and sign the documents on behalf of the commission with Mr. Collias seconding the motion. Motion passed unanimously.

Dr. Rupp thanked the staff of the Secretary of State's office for their efforts and hard work with this historic action. Secretary Tennant thanked the commission and the candidate as well.

With no further business, Mr. Renzelli moved to adjourn with Mr. Collias seconding the motion. Meeting adjourned at 2:33 p.m.

State Election Commission Meeting
Thursday, June 21 2012 – 2:00 p.m.
Governor's Press Conference Room
Minutes

Attendees:
Mr. Gary Collias, Acting Chair
The Honorable Natalie E. Tennant, Secretary of State
Mr. William Renzelli, Member
Mr. Tim Leach, Assistant General Counsel
Ms. Ashley Summit, Counsel
Mr. Dave Nichols, Manager – Elections Division
Mr. Curt Zickafoose, Legislative Director
Ms. Sheryl Webb, Deputy Secretary of State
Mr. Jake Glance, Director of Communications
Mr. Andrew Ickes, Elections Specialist
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Ms. Layna Valentine-Brown, HAVA Director
Mr. Dave Tackett, Elections Technology
Ms. Brittany Westfall, HAVA Specialist
Mr. Chris Follo, Intern
Ms. Katie Wright, Intern
Mr. Moses Ibrahim, Intern
Mr. Allen Loughry

The State Election Commission (SEC) met on Thursday, June 21, 2012 at 2:00 p.m. in the Governor's Press Conference Room of the State Capitol Building. In the absence of Chair Robert Rupp, Acting Chair Gary Collias called the meeting to order and established a quorum. Mr. Renzelli moved to approve the minutes from the February 2, 2012 meeting with Secretary Tennant seconding the motion. Motion passed.

Dave Nichols addressed the commission regarding a letter the Secretary of State's office received from David Sims. Mr. Sims is a sitting member of the County Commission and candidate for the same in the 2012 General Election. Mr. Sims submitted his withdrawal of candidacy due to the fact that Governor Earl Ray Tomblin appointed him to replace retired Judge Arthur M. Recht of the First Judicial Circuit. Secretary Tennant added that it would be duty of the Ohio County Democratic Executive Committee to appoint the individual to fill that vacancy. After discussion amongst the members, Mr. Renzelli made a motion to approve the Ohio County Commission to fill the vacancy on the 2012 General Election ballot for County Commission with Secretary Tennant seconding the motion. Motion passed unanimously.

Mr. Nichols also informed the commission that Eugene Billmeyer, a sitting Magistrate and candidate in Hampshire County has submitted a letter to the Secretary of State's Office informing the commission that he has withdrawn from the 2012 general election due to health issues. A letter was also received from the Hampshire County Democratic Executive Committee asking permission to fill the vacancy on the 2012 general election ballot in which this withdrawal has caused. Mr. Renzelli made the motion to approve the request with Secretary Tennant seconding the motion. Motion passed unanimously.

Mr. Leach updated the commission concerning the West Virginia Supreme Court of Appeals Public Financing Pilot Project status. The Federal Court in North Carolina addressed the matching/rescue funds which are additional funds awarded to the participating candidate based upon the spending of their opponent and or individuals making independent expenditures. If they exceed the funds available to the participating candidate by 20%, it triggers a dollar for dollar matching fund from the public finance fund. There is one participating candidate that received a $350,000 initial eligibility payment. 20% excess of this amount is $420,000, which would be the trigger event. Non participating candidates are to report by the first Saturday in July if they exceed the $420,000 figure. When the SEC receives reports or information of excess spending, there is cause to be issued a check within 48 hours of receipt of that news.

Mr. Leach reminded the commission of the US Supreme Court's addressed Arizona's law which is similar to West Virginia's and ruled that the matching fund trigger by candidates other than the person receiving the money was unconstitutional and a restraint of the right of free speech and spending of their own money. There are sufficient differences between the two state's laws, so the Secretary of State's office in conjunction with the State Election Commission requested an Attorney General's opinion on the matter. On July 28, 2011, the AG's office submitted their opinion stating the West Virginia law pertaining to matching funds is also unconstitutional and should not be awarded. The North Carolina Court has also ruled that their matching funds law is unconstitutional.

Mr. Leach suggested the commission could act in one of two ways.

1. They could wait until a report is filed by a non participating candidate triggering the matching funds, calling an emergency meeting if needed to rule if they would authorize the payment;
2. They could address the issue now and take a vote so the participating candidate knows how the situation would be handled.

Mr. Leach thought it would good to let the candidate know what the commission's ruling is now in case any action on his part needs to be done. The commission discussed if they thought whether or not the non-participating candidates would hit the $420,000 mark triggering the event either by the July 7, 2012 date or before the general election.

Mr. Nichols also gave another option. If the commission would vote against awarding the matching funds, this would leave the participating candidate at a set limit. West Virginia State Code does provide the candidate the option to petition the commission and withdraw from the program.

Mr. Collias stated that with the Supreme Court decision and the Attorney General opinion based on the Supreme Court decision it would be hard to move to provide the matching funds. After a discussion concerning candidate spending and reporting periods, Secretary Tennant asked Mr. Loughry to address the commission.

Mr. Loughry, the only candidate participating in the program voiced his disagreements with some of the points that were made during the course of this meeting. The U.S. Supreme Court Arizona case did not deal with Supreme Court candidates, it dealt with public financing for legislative and executive positions. No one has challenged this law in West Virginia. The Supreme Court has made it clear that a law created by the state legislature is presumed constitutional. The U.S. Supreme Court did not address judicial elections in the Bennett decision, nor did it allude to West Virginia's pilot program. Mr. Loughry shared his concerns regarding the millions of dollars that were pumped into past judicial campaigns, the constitutional rights of participating candidates and individuals who contributed to the participating candidate, the likelihood or unlikelihood a non participating candidate would trigger the $420,000 mark, and the implications that would be caused by not ruling on this matter. He also noted that this issue has a drastic impact on this Supreme Court race. He stated that this would be an incredible opportunity for West Virginia to give the pilot program a chance. Mr. Loughry then asked the commission to make a decision on the matching funds issue today.

Secretary Tennant made the motion to not vote on Mr. Loughry's request to release matching funds at this point with Mr. Renzelli seconding the motion. Motion passed 2-1 with Secretary Tennant and Mr. Renzelli voting for the motion and Mr. Collias voting against the motion.

Mr. Nichols presented ideas to the commission to spend down the commission's budget before June 30, 2012. If these funds are not encumbered by June 30, 2012, they will be placed back into the General Revenue Fund. There is approximately $9400 left in the budget.

1. A scanner to be used for scanning paper campaign finance reports received by the Secretary of State's office. The scanned reports can then be placed on the Secretary of State's website for public view. The cost of this scanner would be approximately $5,059.
2. Public information cards regarding the constitutional amendment that will be on the 2012 General Election ballot. These cards would be passed out at public events, voter registration drives and county clerks' offices. The cost of these informational cards would be approximately $2,000.

Mr. Renzelli made the motion to approve the purchase of these items with Secretary Tennant seconding the motion. Motion carried unanimously.

Mr. Leach addressed the issue regarding the vacancy on the State Election Commission. There are currently two expired terms on the board and one vacancy due to Brent Pauley's resignation. Mr. Collias moved to allow Secretary Tennant in the capacity of Secretary of State to send a letter to Governor Tomblin regarding this matter.

Tim Leach updated the commission on Judge Bloom's ruling on the "disclosure law" allowing the disclosure of plaintiff's names in election complaints. The Secretary of State's office is analyzing his decision and considering asking Judge Bloom to clarify or reassess the impact of his decision.

At 3:10 p.m. Mr. Renzelli moved to adjourn with Secretary Tennant seconding the motion.

State Election Commission
Emergency Meeting
Tuesday, July 17, 2012 – 3:00 p.m.
Secretary of State Conference Room
Minutes

Attendees:
Dr. Robert Rupp, Chair
The Honorable Natalie E. Tennant, Secretary of State (By Teleconference)
Mr. Gary Collias, Member (By Teleconference)
Mr. William Renzelli, Member (By Teleconference)
Mr. Tim Leach, Assistant General Counsel
Mr. Dave Nichols, Manager – Elections Division
Mr. Curt Zickafoose, Legislative Director
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Mr. Chris Folio, Intern
Ms. Katie Wright, Intern
Mr. Moses Ibrahim, Intern
Mr. Allen Loughry
Mr. Phil Kabler
Mr. Larry Messino
Mr. Ry Rivard
Mr. Tony Majestro
Ms. Julie Archer
Ms. Andrea Lannom
Ms. Babette Hogan

The State Election Commission (SEC) held an emergency meeting on Tuesday, July 17, 2012 at 3:00 p.m. in the Secretary of State Conference Room of the State Capitol Building. Chairman Dr. Rupp called the meeting to order and established a quorum. This emergency meeting was called for the determination of additional/supplemental payments to the Certified Candidate according to §3-12-11(i) of the W. Va. State Code.

Dr. Rupp stated that he is going to divide the discussion into two parts. The first is to determine if the trigger was met to determine action and secondly a discussion of options for disbursement.

1. Mr. Leach addressed the committee concerning the trigger for matching funds. This trigger is met when one non-participating candidate has expended or obligated an amount equal to 120% of the initial awarded payment to the participating candidate. A report was submitted to the Secretary of State's office by a non-participating candidate that indicated obligations of expenditures greater than 120% of the initial $350,000 awarded to the participating candidate. After review by the Secretary of State's staff, this meets the trigger as set in WV Code §3-12-11(e). Dr. Rupp made the motion announcing that the trigger has been met with Mr. Collias seconding the motion. Motion passed unanimously.

2. Dr. Rupp began the dialogue concerning the options for disbursement. The disbursement amount is $144,471.76. Dr. Rupp questioned what the challenge to this disbursal law is, and the State Election Commission's mission in defending this part of the law. He stated that this is not about public finance or politics. It is about the commission implementing and defending a law enacted by the state legislature. He says the Arizona law does not mirror the West Virginia law, so the opinion by the Supreme County Arizona may not be totally applicable to West Virginia. In addition, he stated the Attorney General in West Virginia gave an opinion not a court decision. Dr. Rupp stated the commission has two options they can do since the trigger amount has been met.
    1. Follow the North Carolina model and "roll over and play dead" who made no sustained effort to defend and protect a law passed by its legislature.
    2. Institute a West Virginia model and follow the law as it was passed and disburse the funds as the law dictates. Then take the issue to court and defend it and then accept the decision the court renders.

Dr. Rupp then urged the commission to show protection to the West Virginia Legislature saying that they are not a court, the Attorney General is not a judge and they neither wear judicial robes.

Mr. Collias stated that he does not agree with Dr. Rupp. He feels that the U. S. Supreme Court decision appears to invalidate the West Virginia law. He states that the North Carolina Federal Court decision which is based on legislation almost identical to the West Virginia law was found to be unconstitutional and our AG opinion was found our law be unconstitutional. He in good faith feels that he cannot vote to release these funds.

Secretary Tennant acknowledged that the Secretary of State's office has been accused of not following the law. She noted that the office has followed the law throughout the whole process as the legislation was crafted there was no indication that we have not followed what was put into place by the West Virginia Legislature. The Secretary of State's office asked for an Attorney General opinion to see if the Legislature should consider making any changes to the current law during this past legislative session. When they chose not to make any changes, they obviously stood on their legislation. Secretary Tennant stated that she as an Executive Branch member does not have the authority or the duty to declare a piece of legislation unconstitutional.

Mr. Loughry thanked the commission for holding the meeting and giving him the opportunity to speak. He quoted the West Virginia Supreme Court via syllabus point saying, "opinions of the Attorney General are not precedential or binding upon this court". He went on to say although it was proper to ask for the Attorney General opinion and proper for the Attorney General to provide the opinion, the opinion is not law. He also stated that the law, which is unchallenged, is mandatory and once the triggering points have been met, the State Election Commission shall issue the payment.

Dr. Rupp made the motion that the State Election Commission release the funds according to statue as trigger funds being met. The motion was seconded by Secretary Tennant. Dr. Rupp asked for an individual vote with Mr. Collias and Mr. Renzelli voting No and Dr. Rupp and Secretary Tennant voting YES. With a tie vote from the commission, the motion fails.

Dr. Rupp made the following suggestions:

1. Have a draft agenda available to all members within 24 hours of a regular scheduled meeting.
2. The minutes of the meeting be completed within 14 days of that meeting.
3. Contacting the Governor's office concerning appointing the 5th member of the SEC.

At 3:40 p.m., Mr. Collias moved to adjourn the meeting with Mr. Renzelli seconding the motion. Motion passed unanimously.

State Election Commission
Emergency Meeting
Tuesday, July 31, 2012 – 10:00 a.m.
Secretary of State Conference Room
Minutes

Attendees:
Dr. Robert Rupp, Chair (By Teleconference)
The Honorable Natalie E. Tennant, Secretary of State
Mr. Gary Collias, Member (By Teleconference)
Mr. William Renzelli, Member (By Teleconference)
Mr. Tim Leach, Assistant General Counsel
Mr. Dave Nichols, Manager – Elections Division
Ms. Ashley Summitt, General Counsel
Mr. Curt Zickafoose, Legislative Director
Mr. Jake Glance, Director of Communications
Mr. Greg Watson, Campaign Finance Specialist
Ms. Missi Kinder, Campaign Finance Specialist
Mr. Chris Follo, Intern
Mr. Phil Kabler
Mr. Ry Rivard

The State Election Commission (SEC) held an emergency meeting on Tuesday, July 31, 2012 at 10:00 a.m. in the Secretary of State Conference Room of the State Capitol Building. This emergency meeting was called for the for discussion of lawsuit filed against State Election Commission challenging the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program. An answer to the lawsuit must be filed by August 7, 2012 and SECs defending attorney needs to discuss answer options with members.

Chairman Rupp called the meeting to order with a roll call and a quorum was established. At 10:04 a.m., Mr. Renzelli moved to go into Executive Session with Secretary Tennant seconding the motion. Motion passed unanimously.

At 11:10 a.m. the commission resumed the meeting to open session.

Dr. Rupp proposed the motion that the State Election Commission would actively encouraged our attorney to expedite the resolution of the question of matching funds in court as quickly as possible. Secretary made the motion with Mr. Renzelli seconding the motion. Motion passed unanimously.

Dr. Rupp also requested the commission to entertain the motion that the State Election Commission actively defends the constitutionality of the matching funds law passed by the West Virginia legislature in both State and Federal Courts. Mr. Collias made the motion with Mr. Renzelli seconding. Motion passed unanimously.

Secretary Tennant made mention the next State Election Commission is Wednesday, August 8, 2012 at 10:00 a.m. Secretary Tennant moved to adjourn the meeting at 11:15 with Mr. Collias seconding the motion. Motion passed unanimously.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

vs.) **No. 12-0899**

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

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "Appendix to Intervenor Michael Callaghan's Response to Petition for Writ of Mandamus" was served upon the persons listed below by mailing a true copy thereof as required by Rule 37, Revised Rules of Appellate Procedure, on this 10th day of August, 2012:

Marc E. Williams, Esquire
Randall L. Saunders, Esquire
Jenna E. Hess, Esquire
Nelson, Mullins, Riley & Scarbrough, LLP
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and
J. Adam Skaggs, Esquire (Pro Hac Vice pending)
Matthew Menendez, Esquire (Pro Hac Vice pending)
Brennan Center for Justice at NYU School of Law
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Counsel for Petitioner

Honorable Darrell V. McGraw, Jr., Esquire
Silas Taylor, Esquire
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Counsel for Respondents Tennant, Collias Renzelli and Rupp

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

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

Defendants.

AFFIDAVIT OF MICHAEL CALLAGHAN

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA:

After first duly sworn, affiant states as follows:

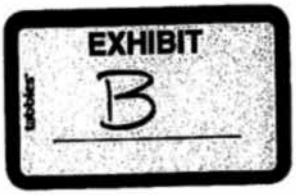
1. I am over the age of 18 and a citizen and resident of Kanawha County.

2. I am a practicing attorney duly licensed to practice in the State of West Virginia and am a small business owner.

3. I make contributions to candidates for elected office in West Virginia.

4. I wish to make contributions to the two non-participating candidates nominated by the Democratic Party for the 2012 election to the Supreme Court of Appeals of West Virginia.

5. I oppose the use of taxpayer money to finance elections.



6. I, together and in combination with others, wish to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns.

7. I have not and will not make these contributions and expenditures because of the existence of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program which allows the participating candidate I oppose to receive funds matching the contributions and expenditures of persons supporting other candidates or opposing a participating candidate.

8. Because I would otherwise make these contributions and expenditures, the existence of these provisions, chills my right to unencumbered speech protected by the First Amendment.

Further your affiant sayeth not.

MICHAEL CALLAGHAN

Taken, subscribed and sworn to before me this 22nd day of August, 2012.

My commission expires 10-16-2016

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Rebecca G. Drumheller
Reely & Callaghan
759 Summers St.
Charleston, WV 25301
My Commission Expires Oct. 16, 2016

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

NATALIE E. TENNANT, et. al,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, Michael Callaghan, has filed a Motion for a Preliminary Injunction. Plaintiff now files this Memorandum in Support of that Motion.

STATEMENT OF RELEVANT FACTS

The West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program ("the Act") was established in 2010 as a pilot program for the 2012 primary election and the 2012 general election for the office of Justice of the Supreme Court of Appeals. W.Va. Code § 3-12-1. In 2012, the voters will elect two of the five Justices to twelve-year terms.

In the primary, Allen Loughry and John Yoder received the Republican Party nominations in an uncontested primary. Current Justice Robin Jean Davis and candidate Letitia "Tish" Chafin received the Democratic Party's nominations.

Loughry raised $36,295 in order to qualify for the taxpayer subsidies provided by the pilot project. Ex. A at 24. The West Virginia State Election Commission

("Commission") certified Loughry to receive taxpayer funding. Ex. A at 25. As a certified candidate in an uncontested primary, Loughry received $13,705 from the public fund to give him $50,000.00 to spend in the primary. Ex. A at 25.

Thereafter, the Commission authorized the distribution of $350,000.00 in public funds to Loughry, the amount available to a participating candidate in a contested election. Ex. A at 27; *see also* W.Va. Code § 3-12-11(b)(1).

The Act contains two provisions that purport to provide matching funds to certified candidates participating in the pilot project. *See* W.Va. Code § 3-12-11(e); W.Va. Code § 3-12-11(i).

Under these additional funds provisions in the Act, a participating candidate in a contested general election can receive up to $700,000.00 in additional public funds triggered by expenditures by nonparticipating candidates or independent expenditures by third parties. W.Va. Code § 3-12-11(h). Once it has been determined by the Commission that the matching funds provisions have been triggered, the Act requires that the funds be issued to the participating candidate within two business days. W.Va. Code § 3-12-11(i).

The regulations promulgated by the Commission contain reporting requirements for nonparticipating candidates, W.V.C.S.R. § 146-5-12.2, and persons conducting independent expenditures. *Id.* at § 146-5-13. These regulations require a report by the Secretary of State by July 7, 2012, listing expenditures and obligations from May 9, 2012, through July 1, 2012, in excess of $350,000." *Id.* at § 12.2.a.

The West Virginia Act was based on a similar North Carolina law. Litigation challenging the constitutionality of the North Carolina law commenced in 2006. Ultimately, the Fourth Circuit upheld the constitutionality of the North Carolina statute. *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). The Supreme Court of the United States denied certiorari. 555 U.S. 994 (2008).

A year after the West Virginia Act was passed, the Supreme Court of the United States decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S. Ct. 2806 (2011). In *Bennett,* the Court applied strict scrutiny and struck down Arizona's matching funds provision, which applied only to legislative and executive races. After *Bennett,* the West Virginia Election Commission sought an opinion from the West Virginia Attorney General regarding the constitutionality of the West Virginia Act. App. at 21. On July 28, 2011, the Attorney General concluded that the Act's matching funds provision was unconstitutional after *Bennett.* Doc 1-1.

Thereafter, the Secretary publicly announced her intent to follow the Attorney General's opinion and not implement the matching funds provisions. *See http://tinyurl.com/d8hnszu.* The Commission apparently agreed. Ex. A at 23. Notably, Loughry made the decision to participate in the pilot project after *Bennett* was decided and after the Defendants indicated they would not, based on *Bennett,* implement the additional funds provisions of the Act. Ex. A at 24; Doc. 18-3 at 59.

On June 21, 2012, Loughry appeared at a regularly scheduled meeting of the Commission and requested that the Commission take a position on whether it

would fully implement the matching funds provision. Ex. A at 27-28. The Commission refused to take a position. Ex. A at 28.

On July 6, 2012, Justice Davis filed a disclosure provided by the Commission showing post-primary expenditures of $494,471.00. *See* Doc. 18-3 at 62.

On July 17, 2012, an emergency meeting of the Commission was held in Charleston, West Virginia where it then voted to acknowledge that Justice Davis had expended sufficient sums to trigger the matching funds provisions under the Act. *Id.* The Commission, however, refused on a tie vote to authorize the release of matching funds to Loughry. Ex. A at 32.

Plaintiff Michael Callaghan makes contributions to candidates for elected office in West Virginia and wishes to make contributions to the two candidates nominated by the Democratic Party. *Id.* at 1. Callaghan, together and in combination with others, also wishes to conduct independent expenditures in favor of candidates who oppose public financing and/or in opposition to candidates who accept public funds to support their campaigns. *Id. at* 2. Because the expenditures would trigger additional funds to one of the opposing candidates, Callaghan will not do so which chills his rights to unencumbered speech protected by the First Amendment. *Id.*

STANDARD FOR GRANTING THE MOTION

In this Circuit a litigant is entitled to a preliminary injunction if he can establish:

> [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Real Truth About Obama, Inc. v. Federal Election Com'n, 575 F.3d 342, 346 (4th Cir. 2009) ("*RTAO I*") (citation to and quotation of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 374-76 (2008) omitted).

ARGUMENT

I. CALLAGHAN IS ENTITLED TO JUDGMENT ON HIS CLAIMS THAT THE ADDITIONAL FUNDS PROVISIONS IN THE ACT ARE UNCONSTITUTIONAL.

The central issue with respect to the motion for preliminary relief is whether the Plaintiff is likely to be entitled to judgment on the merits. *WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim. Therefore, we focus our review on the merits of plaintiff's First Amendment claim." (citations omitted). Callaghan has established a strong showing that he is likely to succeed on the merits.

A. Because the Additional Funds Provisions in the Act are a Substantial Burden on Candidate and Third-Party Expenditures Implicating the Right to Free Speech Protected by the First Amendment, they are Subject to Review under the Strict Scrutiny Test.

The First Amendment protects citizens from laws "abridging the freedom of speech." U.S. Const., Amend. 1. In *Bennett,* the Court emphasized the special importance that these protections hold in the context of a campaign:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *As a result, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.*

Bennett, 131 S.Ct. at 2817 (emphasis added; citations and quotations omitted).

In *Bennett,* the Court considered the constitutionality of Arizona's public finance statute which, like the Act here, provided an initial award of public funds to a participating candidate and additional sums to the publicly funded candidate if the privately financed candidate or a third-party expended funds in excess of the initial grant. 131 S.Ct. at 2815-16. The Supreme Court concluded that the provision "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]." 131 S.Ct. at 2812 (quoting *Davis,* 554 U.S. at 739). With respect to independent expenditure groups, the *Bennett* Court concluded that the burden was even greater than the burden imposed on privately financed candidates because, while candidates have the choice of accepting public funds if they decide that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, individuals or organizations desiring to support or oppose a candidate do not. 131 S.Ct. at 2819.

The Court explained that the additional funds provisions burden speech in several ways. First, the threat of additional funds chills candidates from speaking by threatening speech with the "direct and automatic release of public money." *Id.* The Act here causes even a greater chill due to the implementation of the trigger. A nonparticipating candidate can spend up to $420,000.00 before triggering additional funds; however, if one dollar more is spent by the non-participating candidate, the participating candidate receives taxpayer funds matching the nonparticipating candidate's entire expenditures in excess of $350,000.00. W.V.C.S.R. § 146-5-8.8(d). Thus, one dollar expenditure could be matched seventy times with public funds.

Bennett characterized a much smaller multiplier effect as a "significant burden." 131 S.Ct. at 2819.

The *Bennett* Court found a final burden due to the disparity of control:

> Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds.

131 S.Ct. at 2819. This lack of control is even more pronounced here as the multiple seat race results in the participating candidate receiving taxpayer funds if even one of the nonparticipating candidates opts to exceed the trigger.

Because the additional funds provision "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups," strict scrutiny applies. *Bennett,* 131 S.Ct. at 2824. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. F.E.C.*, 130 S.Ct. 898 (2010). In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *U.S. v. Alvarez*, 132 S.Ct. 2537, 2551 (2012) (plurality opinion) (citation and internal quotations omitted); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("That burden on adult

speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

B. The Act's Additional Funds Provisions do not Serve a Compelling State Interest and are not Narrowly Tailored to the Purported State Interest.

Loughry and the Defendants attempt to distinguish *Bennett* by arguing that judicial elections, which were not at issue in *Bennett,* are different. These arguments ignore numerous opinions of the Supreme Court of the United States that establish that the additional funds provisions of the Act cannot meet the strict scrutiny test.

First, *Bennett* rejected the claim that the provision could be justified by a desire to "level the playing field" holding that "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election — a dangerous enterprise and one that cannot justify burdening protected speech." 131 S.Ct. at 2826.

Second, *Bennett* rejected the idea that the additional funds provisions served a compelling interest in combating corruption and the appearance of corruption holding that "the burdens that the matching funds provision imposes on protected political speech are not justified." 131 S.Ct. at 2826. With respect to candidate expenditure, the Court focused on the burden of a candidate who funds his own campaign:

> Indeed, we have said that "reliance on personal funds *reduces* the threat of corruption" and that "discouraging [the] use of personal funds disserves the anticorruption interest." *Davis, supra,* at 740–741, 128 S.Ct. 2759. That is because "the use of personal funds reduces the candidate's dependence on

> outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. *Buckley, supra,* at 53, 96 S.Ct. 612. The matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

131 S.Ct. at 2826. With respect to independent expenditures, the Court noted:

> We have also held that "independent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United,* 558 U.S., at ——, 130 S.Ct., at 909. Including independent expenditures in the matching funds provision cannot be supported by any anticorruption interest.

Bennett, 131 S.Ct. at 2826-27. Finally, *Bennett* rejected the justification that the additional funds could encourage participation in public financing. *Id.* at 2827.

Loughry and the Defendants' primary argument in support of the Act is that *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009) somehow allows them to distinguish *Bennett.* This Argument both misreads *Caperton* and ignores a number of decisions of the Supreme Court.

The argument advanced by Loughry and the Defendants is that avoiding the appearance of impropriety in the judiciary is a compelling state interest served by the Act. *Caperton* does not support this argument.

First, *Caperton* did not hold that avoiding the appearance of impropriety was a requirement of due process. Instead, *Caperton* held that "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." 556 U.S. at 884. The Court found that the size of contribution in *Caperton* was unique and unprecedented. 556 U.S. at 887. Due process required recusal in *Caperton* not because of appearances; instead, due process required

recusal because the expenditures in that case created "a serious, objective risk of *actual bias*." 556 U.S. at 886 (emphasis added).

The Act here cannot be justified as preventing the contributions at issue in *Caperton*. First, the Act's match of funds is capped at $700,000.00. W. Va. Code § 3-12-11(h). The $3,000,000.00 expenditure in *Caperton* was made in spite of the fact that an opposing independent expenditure group spent approximately $2,000,000.00. There are no findings or evidence to support the conclusion that providing limited matching funds will dissuade large independent expenditures like the one in *Caperton*.

Second, as applied to this election, the majority of the large expenditures have been candidate self-financing. *See* "Davis, Chafin win Democratic primary for Supreme Court," *Charleston Daily Mail* (May 8, 2012) (http://www.dailymail.com/News/201205080273). Self-funding serves the very interest in an unbiased judiciary that supposedly supports the Act. Self-funded candidates simply cannot be perceived as beholden to their contributors.

Caperton's holding that extremely large expenditures on behalf of a candidate require recusal both creates the solution to the supposed perception problem and acts as a deterrent to spending by litigants. Because *Caperton* requires recusal when extreme spending on a judicial election occurs, a litigant will be reluctant to engage in this type of spending. Moreover, because *Caperton* requires recusal in response to extreme spending, the decision itself creates the solution to the appearances problem Loughry advances. If a Justice is the beneficiary of *Caperton*

level expenditures, recusal is now mandatory and the appearance problem identified by Loughry and the Defendants is solved.

While it is true that the *Caperton* recusal motion will be a rare one, nothing prevents the State from adopting stricter recusal rules. *See Caperton*, 556 U.S. at 889-90. Because stricter recusal rules are an available, effective alternative that does not trample on protected speech, [1] the purported interest in avoiding appearances of conflicts fails strict scrutiny review. *Alverez, supra; Reno, supra.*

United States Supreme Court has consistently rejected any judicial election distinction in its First Amendment jurisprudence. First, *Bennett* characterized North Carolina's judicial public finance statute as one that "resemble[s]" the Arizona statute at issue in *Bennett.* 131 S.Ct. at 2816, n.3. The Court has also explicitly rejected any constitutional distinction in judicial elections:

> Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office-that representative government depends on the public's ability to choose agents who will act at its behest-does not carry over to campaigns for the bench." *Post,* at 2551. This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.

Republican Party of Minnesota v. White, 536 U.S. 765, 784 (2002); *id.* at 792 (O'Connor, J., concurring) ("In [choosing to elect judges] the State has voluntarily

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[1] *See, e.g.,* Adam Skaggs and Andrew Silver, Promoting Fair and Impartial Courts through Recusal Reform, *Brennan Center for Justice*, August, 2011 (http://brennan.3cdn.net/ 09c926c04c9eed5290_e4m6iv2v0.pdf).

taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling."); *id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."). Thus for the purposes of the First Amendment, a state that chooses to elect judges cannot justify the abridgment of the fundamental right to freedom of speech on the grounds that the elections are for judicial offices.

In *Citizens United,* the Court expressly rejected *Caperton's* application to campaign finance restrictions:

> [*Caperton's*] remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. . . . Caperton 's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

Citizens United, 130 S.Ct. at 910 (citation omitted). Thus, *Citizens United* made it clear that the due process concerns in *Caperton* were not compelling interests that withstood a First Amendment challenge when the strict scrutiny standard governed. *See also Stay the Course West Virginia v. Tennant,* 2012 WL 3263623, 8 (S.D.W.Va. 2012) ("*Caperton* dealt with the Fourteenth Amendment and recusal rules, not the First Amendment's free speech guarantees.").

More recently in *In American Tradition Partnership, Inc. v. Bullock,* 132 S.Ct. 2490 (per curium) (2012), the Court summarily rejected the same arguments raised by Loughry here. At issue in *Bullock,* was Montana's ban on corporate campaign expenditures, a ban subject to strict scrutiny. *See Western Tradition Partnership,*

Inc. v. Attorney General of State, 363 Mont. 220, 271 P.3d 1 (2011). The Montana Supreme Court recognized that the Court in *Citizens United* applied strict scrutiny and invalidated a ban on electioneering communications in *federal* elections. 363 Mont. 220, 226-228, 271 P.3d 1, 5-6. The Montana Court, however, attempted to distinguish *Citizens United* in part by making an extensive argument relying on *Caperton* and the fact that Montana elected its judiciary. 363 Mont. at 236-239, 271 P.3d at 11-13. Notably, in support of its holding, the Montana Supreme Court made many of the same arguments relied on by Loughry and the Defendants. *Id.*

Those arguments, however, were summarily rejected by the Supreme Court of the United States. After staying the Montana decision to permit review, the Supreme Court summarily reversed: holding that "*Montana's arguments in support of the judgment below either were already rejected in Citizens United, or fail to meaningfully distinguish that case.*" *Bullock*, 132 S.Ct. at 2491 (emphasis added). A review of the briefs filed in the United States Supreme Court makes it clear that the supposed compelling interest in regulating speech in judicial races was directly presented to the United States Supreme Court in *Bullock*.[2] Thus, the *Bullock* Court rejected the reading of *Caperton* advanced by Loughry and the Defendants.

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[2] *Bullock,* Respondent's Brief in Opposition, p. 25-26 (http://sblog.s3.amazonaws.com/wpcontent/uploads/2012/05/Montana_brief_to_SCOTUS-5-18-12.pdf); *see also* Amicus Curiae Brief of Retired Justices of The Montana Supreme Court and Justice at Stake in Support of Respondent (http://brennan.3cdn.net/ 282cf914919d7db474 _rom6bn321.pdf); Brief for the States Of New York, et al as Amici Curiae in Support of Respondents, p. 18 (http://www.ag.ny.gov/sites/default/files/press-releases/2012/ATPvBullock-States-Brief-Supporting-Montana.pdf).

Bullock's rejection of the idea that *Caperton* creates different rules for judicial elections is binding on this Court.[3] Like the attempt to distinguish *Citizens United* in *Bullock,* any attempt to distinguish *Bennett* here would not be likely to fair any better.

Finally, Loughry has relied in the past on the Fourth Circuit's pre-*Bennett, pre-Davis* opinion in *Leake*. *Leake* did not find that the First Amendment applied differently in the context of judicial elections. Instead, the issue was "whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment" at all. 524 F.3d at 437. After *Bennett* and *Davis,* this holding is clearly in error. Not even Loughry and the Defendants argue post-*Bennett* that additional funds provisions do not burden First Amendment rights. Thus, because *Leake* incorrectly found no chill on First Amendment rights, *id.* at 438, the *Leake* Court never considered whether the interests supported by the North Carolina act survived strict scrutiny. As the Court in *Bennett* noted, "every other court to have considered the question after *Davis"* has recognized the burden imposed upon a candidate or independent group that might not spend money if the direct result of that spending is additional funding to political adversaries. 131 S.Ct. at 2823-24.

Leake is simply no longer good law. Following *Bennett,* the North Carolina matching provisions for judicial elections, were again challenged. On May 18, 2012, the United States District Court for the Eastern District of North Carolina granted

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[3]While the Supreme Court does not give full precedential weight to summary dispositions, *see, e.g., Caban v. Mohammed,* 441 U.S. 380, 390 n.9 (1979), it expects this Court to follow them. *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975).

the plaintiffs' motion for summary judgment and found the North Carolina matching provisions unconstitutional based on *Bennett. See NCRL PAC v. Leake,* No. 11-CV-472-FL [Doc. 41] (E.D.NC. 2012). The federal district court -- which like this Court is bound by Fourth Circuit opinions -- did not consider itself bound by *Leake I* because it recognized that *Bennett* now controlled. This Court should likewise reach the same conclusion. Following *Bennett,* no court has approved the use of these kind of additional fund provisions in any elections.

C. Callaghan has Standing to Challenge the Act's Additional Funds Provisions.

Loughry and the Defendants have argued that Callaghan lacks standing to challenge the constitutionality of W.Va. Code § 3-12-11(e) which contains a trigger for additional funds based solely on candidate expenditures.

Callaghan clearly has in interest in this litigation that is substantial. First, as noted above, Callaghan seeks to participate in independent expenditures supporting two of the non-participating candidates and/or opposing Loughry. He also seeks to make direct campaign contributions to Loughry's Democratic opponents. For the reasons noted above, the release of the taxpayer funds sought by Loughry will impose a substantial burden on Callaghan's speech and associational rights guaranteed by the First Amendment to the United States Constitution. For the reasons noted herein, Callaghan clearly has standing to challenge these provisions.

First, Callaghan clearly has standing to challenge W.Va. Code § 3-12-11(e) which would trigger additional funds if Callaghan conducts an independent expenditure. This is one of the challenges upheld in *Bennett.*

Moreover, while Loughry is seeking additional funds based solely on candidate expenditures, Callaghan is still directly harmed because W.Va. Code § 3-12-11(e) computes the additional funds available to Loughry based on the total of candidate and independent expenditures. Thus, candidate expenditures count for purposes of assessing whether the trigger has been met when independent expenditures are made. If the candidate expenditures were truly irrelevant to Callaghan's interests (as Defendants and Loughry argue), Callaghan would be able to conduct unmatched independent expenditures up to 20% of the $350,000.00 in initial taxpayer funds provided under W.Va. Code § 3-12-11(b)(1). Instead, Justice Davis' expenditures are counted and Loughry receives additional funds if Callaghan spends even $1.00. Finally, as a prospective contributor, Callaghan has an interest in seeing that his contributions are not unconstitutionally used to trigger additional funds to Loughry.

In making the challenge to Callaghan's standing, Loughry and the Defendants assume that W.Va. Code § 3-12-11(e) is severable from a successful challenge to W.Va. Code § 3-12-11(f). It is not. Whether or not Callaghan has standing to challenge W.Va. Code § 3-12-11(e), because this subsection cannot be severed from W.Va. Code § 3-12-11(f), this Court's determination that W.Va. Code § 3-12-11(f) is unconstitutional necessarily voids W.Va. Code § 3-12-11(e).

First, it is clear that severability and standing are interrelated:

> Plaintiffs have demonstrated that they have an injury in fact attributable to § 1A(B)(2)-(4) and that a favorable decision that § 1A is non-severable and void in its entirety will redress that injury. Thus, plaintiffs' claims regarding § 1A(B)(1) are justiciable even if plaintiffs could not bring a distinct claim seeking relief only in relation to that provision.

Local 514 Transport Workers Union of America v. Keating, 66 Fed.Appx. 768, 774, 2003 WL 2007934, 5 (10th Cir. 2003); *see also Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 998 (3rd Cir. 1993) (party has third-party standing to assert the rights of others "where the statute is not severable and therefore a party's challenge to the statute necessarily involves assertion of the rights of others affected by the statute."); *cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990) (remanding to determine severability). Whether unconstitutional provisions of a state statute are severable "is of course a matter of state law." *Virginia v. Hicks*, 539 U.S. 113, 121 (2003).

In West Virginia, a court finding a statute unconstitutional must make an independent determination of whether the unconstitutional provision is severable. *Louk v. Cormier*, 218 W.Va. 81, 96-97, 622 S.E.2d 788, 803- 04 (2005) (plurality opinion); *Shenandoah Sales & Service, Inc. v. Assessor of Jefferson County*, 724 S.E.2d 733, 741-42 (2012). This is true regardless of whether the statute in question contains a severability clause.[4] *Shenandoah Sales & Service, supra* (citing *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 93, 150 S.E.2d 449, 457 (1966)).

In determining severability, the Supreme Court of Appeals has traditionally applied the following test:

> "'A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in

[4]The Act under review here does not contain a severability clause.

> itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.' Point 6, syllabus, *State v. Heston,* 137 W.Va. 375 [71 S.E.2d 481]." Syl. Pt. 4, *State ex rel. State Building Comm'n v. Bailey,* 151 W.Va. 79, 150 S.E.2d 449 (1966).

Syl. pt. 3, Frantz v. Palmer, 211 W.Va. 188, 189-90, 564 S.E.2d 398, 399- 400 (2001); *see also Louk, supra* (same); *Shenandoah Sales & Service, Inc., supra* (citing *Frantz, supra; Louk, supra;* and *Bailey supra*).

Applying this test, it is clear that the additional funds provisions rise and fall together. Both provisions involve the same subject matter -- additional funds to a participating candidate based on expenditures supporting nonparticipating candidates or opposing the participating candidate. Indeed, as noted above, candidate expenditures are intertwined with independent expenditures in W.Va. Code § 3-12-11(f). The statutory findings detailing the supposed harms from judicial campaign expenditures make no distinction between candidate expenditures and independent expenditures. *See* W.Va. Code § 3-12-2(7), (8).

Moreover, it is doubtful that the Legislature would have wanted to expend taxpayer dollars addressing additional funds to counter the expenditures of self-financed candidates without addressing the supposed problem caused by independent expenditures. The statutory scheme is simply incomplete without addressing both candidate expenditures and independent expenditures.

Finally, severability presumes that the remaining provisions are constitutional. For the remaining portions of the statute to "be upheld and sustained," it is necessary for them to be "in all other respects . . . valid." *Franz, supra.* West

Virginia Code § 3-12-11(e) suffers from the same constitutional defect as W.Va. Code § 3-12-11(f). Thus, it is not "in all other respects . . . valid" and the Court cannot merely sever W.Va. Code § 3-12-11(f) from the Act as its unconstitutionality prohibits this Court from separately upholding and sustaining it. In the end, the severability test seeks the answer to the question of whether "the Legislature would have passed the one without the other." *Louk,* 218 W.Va. at 97, 622 S.E.2d at 804 (quoting syl. pt. 9, *Robertson v. Hatcher,* 148 W.Va. 239, 135 S.E.2d 675 (1964)). It is doubtful that the Legislature, whose members are required to take an oath to support the United States Constitution, W.Va. Const., art. 4, sec. 5, would have intended to leave one of two unconstitutional provisions in the Act.

Callaghan has made a strong showing of unconstitutionality that is sufficient to support a finding that Callaghan is likely to succeed on the merits.

D. Callaghan is Entitled to a Preliminary Injunction.

As noted above, the four-factor test from *RTAO I* also requires a person seeking a preliminary injunction to establish that he is likely to suffer irreparable harm, that the balance of equities tips in his favor, and that an injunction is in the public interest. *RTAO I,* 575 F.3d at 346. These remaining elements are also met here.

The threat that Callaghan's independent expenditures and candidate contributions will trigger additional funds to Loughry have chilled Callaghan's speech as Callaghan does not wish for his expenditures to result in additional taxpayer funds for Loughry. This Court has consistently held:

> The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. And "monetary damages are inadequate to compensate for the loss of First Amendment freedoms."

Stay the Course West Virginia v. Tennant, 2012 WL 3263623, 7 (S.D.W.Va. 2012) (citations omitted). It is clear that this element has been established.

Given the strong showing of likelihood of Callaghan's success, the balance of equities clearly favors granting the injunctions. The public and the Defendants are "in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302 -303 (4th Cir. 2011); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (same; noting "the system is improved by such an injunction" precluding the enforcement of an unconstitutional statute); *Stay the Course West Virginia, supra* (same). Loughry also had no reasonable expectation of receiving additional funds when he entered the program after *Bennett* and after the Defendants publicly indicated that they were not going to implement the challenged provisions.

Finally, "upholding constitutional rights is in the public interest." *Miller*, 637 F.3d at 303; *Bason*, 303 F.3d at 521 ("we agree with the district court that upholding constitutional rights surely serves the public interest."); *Stay the Course, supra* ("there is a significant public interest in upholding the free speech principles that are integral to our democratic society.").

Thus, as all of the elements necessary for preliminary relief have been met, this Court should grant Callaghan the requested preliminary injunction.

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

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

Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel, counsel for the Plaintiff, does hereby certify that on the 23rd day of August, 2012, I electronically filed the foregoing **Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction** with the Clerk of the Court by utilizing the CM/ECF system, which will send electronic notification of said filing to counsel of record.

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

NATALIE E. TENNANT, et. al,

Defendants.

MOTION TO EXPEDITE BRIEFING

1. On July 30, 2012, after this action was filed in this Court, Intervenor Loughry filed a Petition for a Writ of Mandamus in the Supreme Court of Appeals of West Virginia. A copy of the pleadings in that action has been filed with this Court. [Doc. 18]

2. Immediately upon filing the Petition in state court, the Supreme Court of Appeals set a briefing schedule. [Doc 18-4 at p.2] The Defendants herein, who are Respondents in that action, voted to support the Petition and defend the constitutionality of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program ("the Act"). [Doc 22-1 at p. 36]

3. On August 3, 2012, Plaintiff Callaghan and his attorney each received a telephone call from a senior member of the staff of the Supreme Court of Appeals requesting that Plaintiff intervene in Loughry's action in the Supreme Court of Appeals as no party in the case would be arguing against the constitutionality of the Act. Callaghan agreed to do so and was assured that he could file the Motion by August 9, 2012 and subsequently assured that he could file a Response to the

Petition by Noon, August 10, 2012. These filings were made on that schedule. [Doc. 18-5 at p.2, Doc. 19-1]

4. Callaghan contacted the attorneys for the parties in the state court proceedings. All of the counsel, including Loughry's counsel, assured the undersigned that they would not object to the proposed intervention. Callaghan's undersigned counsel then informed the Court that the parties had agreed not to oppose the intervention.

5. Prior to receiving the call from the Supreme Court of Appeals, Callaghan's undersigned counsel had been drafting a motion seeking preliminary relief in this Court. After receiving that call, and because of the seeming agreement of the parties not to object to the intervention, Callaghan turned to drafting the motion to intervene and response to Loughry's Petition.

6. On August 10, the Supreme Court of Appeals ordered the parties to respond to the motion to intervene by 5:00 pm Tuesday, August 14, 2012. [Doc. 18-5 at p. 46] Less than an hour before that deadline Loughry filed a 13-page objection to the intervention request. No other party objected. The objection was filed without informing Callaghan that Loughry would break his promise not to object to the Motion to Intervene.

7. The Supreme Court of Appeals denied the Motion to Intervene the next morning prior to Callaghan having the opportunity to reply to the objection. [Doc. 18-5 at p.66] The Court did invite Callaghan and the Attorney General to file amicus briefs in opposition to the Petition. *Id.*

8. As the state court action is currently situated, there is no party who opposes the Petition which means there is no party with standing to either seek relief in the Supreme Court of the United States or oppose relief therein should Loughry seek a Petition for a Writ of Certiorari.

9. Oral argument in state court is currently set for September 4, 2012. In election mandamus cases, the Court's practice is to issue orders granting or denying relief following up with a formal opinion in due course. The Court has in the past issued orders the same day as the argument.

10. Loughry seeks additional funds in the amount of $144,471. The Complaint in this case seeks to enjoin the implementation of the provisions of the Act which provide for that transfer. Under the Act, the Defendants have two business days to release additional funds to Loughery once it makes the determination that additional funds are due. W.Va. Code § 3-12-11(i).

11. Plaintiff continues to suffer irreparable harm due to the chilling of his speech protected by the First Amendment. Plaintiff was content to litigate these issues before the Supreme Court of Appeals when that Court and the parties therein had indicated to him that he had that opportunity. That option is no longer available to him. Plaintiff now seeks relief in this Court.

12. If the Supreme Court of Appeals grants Loughry the relief he seeks prior to this Court ruling, it will be necessary for Callaghan to seek emergency relief in this Court.

13. Rather than proceed on an emergency basis, Callaghan believes that it would be better for this Court to order a briefing schedule on the Plaintiff's Motion and/or set a hearing for September 5, 2012. While this may force the parties to file briefs in parallel cases, Plaintiff believes that the Court will be in a better position to decide the issues should it be necessary for the Court to rule quickly.

14. Plaintiff proposes that the Court order responses to the Motion for a Preliminary Injunction by August 31, 2012 and Replies by September 4, 2012. Plaintiff also suggests that the Court set a hearing on September 5 or September 6, 2012.

15. Loughry and the Defendants oppose this proposed schedule and seek a filing deadline of September 11, 2012 for the response, a deadline that is in excess of the time permitted by the rules. Loughry and the Defendants are unwilling to agree to any provisional relief preserving the status quo should the Supreme Court rule in their favor prior to that date.

16. It should be noted that it was Loughry who waited a year to even request that the Defendants re-consider their decision not to implement the unconstitutional additional funds provision. He then chose to file a duplicative action in state court, intervene in this action, and then agree to and then oppose Callaghan's intervention in the state proceedings. Any claims of prejudice should be judged in light of his actions.

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

MICHAEL CALLAGHAN,

Plaintiff,

v. Civil Action No. 2:12-cv-03419

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

Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel, counsel for the Plaintiff, does hereby certify that on the 23rd day of August, 2012, I electronically filed the foregoing **Plaintiff's Motion to Expedite Briefing** with the Clerk of the Court by utilizing the CM/ECF system, which will send electronic notification of said filing to counsel of record.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

vs.) No. 12-0899

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

Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "**APPENDIX TO BRIEF OF AMICUS CURIAE MICHAEL CALLAGHAN IN OPPOSITION TO THE PETITION**" was served upon the persons listed below by mailing a true copy thereof as required by Rule 37, Revised Rules of Appellate Procedure, on this 24th day of August, 2012:

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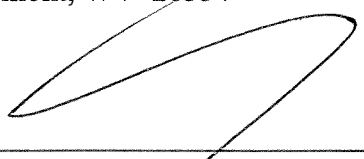

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