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Nos. 10-238, 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN McCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF *AMICI CURIAE* MAINE CITIZENS FOR CLEAN ELECTIONS, LAWRENCE BLISS, PAMELA JABAR TRINWARD, ANDREW O'BRIEN, AND DAVID VAN WIE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Maine Citizens for Clean Elections ("MCCE") is a non-partisan association of organizations and individuals with the common purpose of working in the public interest to advocate for, increase public support for, defend and improve the Maine Clean Election Act ("MCEA") and other campaign finance reforms. For its fifteen-year history, MCCE has been dedicated to ensuring the orderly and successful functioning of the election process and Maine's citizen-initiated campaign finance system.

MCCE has invested deeply in the success of the MCEA. Attempting to address oft-expressed concerns about the influence of moneyed interests on Maine elections and in Maine's government, the organization drafted the law and successfully campaigned for its approval by popular vote in November 1996. Since then, MCCE has spearheaded significant efforts to educate the public and candidates about the law, ensured its full implementation by the Maine Commission on Governmental Ethics and Election Practices, helped defend the law from the first round of legal challenges, *see Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), and fought for the law's full financing. Most recently, MCCE participated as *amicus* before

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

this Court in *Respect Maine PAC v. McKee*, No. 10-A362, opposing an application for a writ of injunction against the public financing trigger provisions of the MCEA. The Court denied the application. *Respect Maine PAC v. McKee*, 131 S.Ct. 445 (Oct. 22, 2010).

Amici Lawrence Bliss, Pamela Jabar Trinward, Andrew O'Brien, and David van Wie are individuals who ran as participating candidates under the MCEA in the November 2010 elections – and who plan to run again in future races. Lawrence Bliss and Pamela Jabar Trinward competed for seats in Maine's Senate while Andrew O'Brien and David van Wie ran for Maine's House of Representatives.

Their campaigns demonstrated the benefit of supplemental funds in different types of races for Maine's legislative contests: highly competitive races, races against traditionally funded opponents who exceeded the trigger threshold, and races where outside groups funded independent expenditures. Each invested substantial resources qualifying for the public funding system and organizing his or her campaign according to its regulatory scheme and each is strongly inclined to run as a participating candidate in future campaigns, but the availability of matching funds is a factor in whether or not each will participate. Pamela Jabar Trinward and David van Wie also participated with MCCE as *amici* before this Court in *Respect Maine PAC v. McKee*, No. 10-A362.

SUMMARY OF ARGUMENT

Enacted by the citizens of Maine through a voter initiative, the MCEA has offered a full public funding option to candidates for state offices for the past decade. That option provides candidates who demonstrate a threshold level of public support with an initial distribution of public funds in lieu of private contributions. It provides for additional funds in more highly contested elections, subject to a cap, under a formula that takes into account an opponent's spending and spending by independent sources. Maine's successful experience with public financing in six election cycles since 2000 confirms that public funding furthers, not abridges, pertinent First Amendment values.

Full public financing has invigorated the electoral marketplace in Maine. Candidates across the political spectrum have opted into the public financing program in large numbers, reflecting strong and widespread public support for an electoral system that frees candidates from dependency on private donations and thus deters the threat and appearance of *quid pro quo* corruption. The availability of full public financing has spurred electoral competition, dramatically reducing the number of uncontested elections and enhancing challengers' ability to take on incumbents in competitive elections. The full public financing program has enhanced candidates' engagement with voters and increased citizens' participation in state legislative elections.

Maine's law accomplishes all this without placing any limit on what privately funded candidates may spend or on independent expenditures. To encourage participation in the system, the program includes a trigger provision allowing additional public funds to a participating candidate under certain conditions, based on calculations that take into account an opponent's spending as well as independent expenditures both for and against the participating candidate and his opponent. The ability to receive triggered matching funds in more highly contested elections is critical to ensuring strong participation, and thus critical to the success of the MCEA in fulfilling its anti-corruption purpose.

But such additional funds are subject to an upper limit, so a privately financed candidate remains free to outspend his opponent.

The record in Maine refutes any contention that the triggered matching funds work to "chill" fundraising or spending by privately financed candidates or independent sources. Analysis of spending patterns in Maine elections from 2002 through 2010 shows no empirical support for the conjecture that Maine's trigger provisions deter candidates from raising and spending as much as they can. Indeed, the actions of the only candidate ever to have claimed such a First Amendment injury in Maine directly disproved the "chill" theory. He outspent not only his publicly financed opponent, but all other candidates for the Maine House in 2010 – including those who faced no publicly financed opponent.

Finally, the "fear of speech" theory that petitioners advance in this case is fundamentally at odds with the purpose of the First Amendment, which seeks to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citations omitted). In the political marketplace contemplated by the First Amendment, an exchange of diverging viewpoints is to be encouraged, not feared – and the supplemental funds foster rather than inhibit that exchange. The First Amendment therefore should not be twisted into an instrument that shields candidates from other candidates' speech. Instead, the public financing provisions at issue here are fully constitutional as a means to enhance and facilitate the "'uninhibited, robust, and wide-open' public debate" that the First Amendment was designed to ensure. *Id.* at 93 n.127.

ARGUMENT

I. MAINE'S SUCCESSFUL EXPERIENCE WITH FULL PUBLIC FINANCING OF ELECTIONS CONFIRMS THAT PUBLIC FUNDING FURTHERS, NOT ABRIDGES, PERTINENT FIRST AMENDMENT VALUES.

Buckley long ago established the principles anchoring the constitutionality of public financing of elections, holding that the role of public funding in expanding public deliberation and debate directly serves the goals of the First Amendment:

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

Id. (citations omitted). Like the presidential public financing system praised by the *Buckley* Court, the MCEA is an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id*. at 92-93.

Following its enactment in 1996, various provisions of the MCEA – including its public financing trigger provisions, disclosure provisions, and contribution limits – were challenged on First Amendment grounds. These provisions all were upheld by both the District Court and Court of Appeals. *Daggett v. Webster,* 74 F. Supp. 2d 53 (D.Me. 1999), *aff'd sub nom. Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000). Maine's experience under the MCEA over the past decade confirms that its public financing program "furthers,

not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 93.[2]

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[2] Following *Buckley*, voluntary public financing schemes repeatedly were upheld in recognition of this principle – that the rights of nonparticipants are not unconstitutionally infringed by the grant of public funds to participating candidates. *See*, in addition to *Daggett*, *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008) (affirming denial of preliminary injunction against public financing system for appellate judicial elections); *Gable v. Patton*, 142 F.3d 940, 948-949 (6th Cir. 1998) (upholding trigger provision lifting certain limits on participating candidates when nonparticipating candidates exceed certain threshold); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system); *but see Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (striking down trigger provision for matching funds where participation in program was nearly 100% before trigger provision was added).

More recently, four circuits have reached varying conclusions about the constitutionality of different trigger provisions within four states' public funding programs. *Respect Maine PAC v. McKee,* 622 F.3d 13 (1st Cir. 2010) (denying request to enjoin trigger provisions); *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010) (upholding trigger provisions); *Green Party v. Garfield*, 616 F.3d 213 (2d Cir. 2010) (striking trigger provisions); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010) (enjoining trigger provisions).

The different outcomes of recent cases underscore that no two public funding programs are alike. *See Daggett*, 205 F.3d at 469 ("no two public funding schemes are identical, and thus no two evaluations of such systems are alike"). Accordingly, it is erroneous to treat all grant distribution plans as identical for constitutional purposes. *Id.*; *see also McComish*, 611 F.3d at 523-526 (examining factual record of Arizona's program to balance extent of burden against strength of state interests). Instead,

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A. Maine's Public Financing System

In November 1996, through a citizen initiative, Maine voters adopted a set of provisions establishing a voluntary public financing program for state legislative and gubernatorial elections, the Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21A §§ 1121 *et seq*. ("MCEA"). Under the MCEA, candidates who meet certain qualifying conditions and agree to limit their private fundraising and expenditures become eligible to receive set amounts of public financing for their campaigns.

Candidates seeking to participate in Maine's public funding program must meet several requirements. They must demonstrate a level of public support by collecting a minimum number of $5 "qualifying contributions" from registered voters in the candidate's district.[3] To facilitate the process of raising qualifying contributions, legislative candidates also may raise a limited total of "seed money" contributions in amounts not greater than $100 per donation; while gubernatorial candidates are required to collect at least $40,000 from in-state donors in such

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the range of burdens and interests presented by each scheme must be closely analyzed and balanced.

[3] Gubernatorial candidates must collect 3,250 qualifying contributions, Senate candidates 175, and House candidates 60. ME. REV. STAT. ANN. tit. 21A § 1125(3). These qualifying contributions are deposited to the Maine Clean Election Fund ("Fund"), not to the individual candidate's account. *See id*. §§ 1122(7) & 1125(3).

$100 seed money contributions as an additional demonstration of the threshold level of support necessary to qualify for the public funding.[4] *See id.* §§ 1122(9), 1125(2) & 1125(5)(C-1).

Once they are certified, participating candidates may not accept any private contributions, and must limit their campaign expenditures to the amount of disbursements they receive from the Fund. *See id.* § 1125(6). Participating candidates are subject to civil and criminal penalties for violating the rules governing participation. *See id.* § 1127.

Candidates who meet the qualifying requirements receive an initial grant from the Fund, which is reduced by the amount of any unspent seed money they have collected. *See id.* §§ 1125(5) & (7).[5] Beyond

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[4] The total amount that participating candidates may raise through these $100 seed money contributions is limited to $500 for House candidates, $1500 for Senate candidates and $200,000 for gubernatorial candidates. ME. REV. STAT. ANN. tit. 21A §§ 1122(9), 1125(2) & 1125(5)(C-1). By contrast, candidates who choose not to participate in the public financing program may accept an unlimited number of donations, and each donor may give $350 per election for legislative elections ($700 total for the primary and general) and $750 per election for gubernatorial races ($1500 total for the primary and general). These limits on contributions to privately financed candidates are adjusted for inflation every two years. *See id.* § 1015.

[5] The initial distribution for participating Senate and House candidates is generally calculated based on the average amount of campaign expenditures in the prior two election cycles for the particular office. ME. REV. STAT. ANN. tit. 21A § 1125(8). Beginning September 1, 2011, that formula will be modified: In determining the amount, the Commission will take

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the initial disbursement, participating candidates may, under certain conditions, receive limited supplemental grants of public funds. These funds may be triggered by the cumulative spending or fundraising of an opponent coupled with independent expenditures opposing the participant or supporting the opponent. *See id.* § 1125(9).

Maine's system for distributing additional funds differs somewhat from those of most states. The amount of additional funds provided to a participating candidate in Maine is not solely a product of spending or fundraising by the privately financed candidate and his independent expenditure supporters, but is reduced by the amount of independent expenditures made to support a publicly financed candidate or to oppose the privately financed candidate. 94-270 C.M.S. Ch. 3, § 5(3)(C) (Maine Comm'n on Governmental Ethics & Election Practices). As a result, a candidate who outspends his opponent will not necessarily trigger matching funds. For example, a nonparticipating candidate might spend over the amount of

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into consideration any relevant information including, but not limited to, the range of campaign spending by candidates in the prior two election cycles for the particular office, the Consumer Price Index, significant changes in the costs of campaigning, and the impact of independent expenditures on the payment of supplemental funds. *See id.* § 1125(8-A). Participating gubernatorial candidates receive and will continue to receive a fixed amount for their initial distribution: $400,000 for a contested primary and $600,000 for the general election. *See id.* §§ 1125(8)(E) & (F), 1125(8-A), 1125(9).

the initial distribution but the participating candidate nevertheless would not receive additional funds if there had been offsetting independent expenditures in favor of the participating candidate, or if independent expenditures had been made in opposition to the nonparticipating candidate. *Id.*[6]

The computation of matching funds in Maine also excludes contributions received by Maine's privately financed candidates when they are not actually disbursed to influence the nomination or election of a candidate – such as contributions that a nonparticipating candidate may use to repay a loan, refund a contribution, or transfer to another political committee. 94-270 C.M.S. Ch. 3, § 5(3)(C) & (J).

The triggered matching funds a participating candidate may receive are not unlimited, but are subject to a cap. For legislative candidates, the cap is equal to twice the initial disbursement. ME. REV. STAT. ANN. tit. 21A § 1125(9). For participating gubernatorial candidates in the primary, matching funds may equal one-half of the initial distribution, while for the general, matching funds equal to the initial

[6] In this, Maine's system differs from Arizona's, Connecticut's and Florida's. *Compare with* FLA. STAT. ANN. § 106.355 (independent expenditures not taken into account); Ariz. Admin. Reg. R2-20-113(c) (independent expenditures in opposition to privately financed candidate not considered in calculating matching funds); CONN. GEN. STAT. § 9-714 (repealed 2010) (addressing only independent expenditures "with the intent to promote the defeat of a participating candidate").

distribution may be awarded. *Id.*[7] Once the applicable cap is reached, participating candidates receive no additional public funds regardless of how much money the privately funded opponent raises or spends. Participating candidates in Maine are not entitled to cumulative matching funds for multiple opponents. 94-270 C.M.S. Ch. 3, § 5(3)(G).

Candidates who choose not to participate in the public financing program face no limits on the expenditures they may make in support of their campaigns, or the total amount of contributions they may raise from private sources. Thus, privately funded candidates in Maine (and their independent expenditure supporters) always retain the ability to outspend an opponent who receives public financing.

B. Maine's Public Financing Program Has Attracted Widespread Candidate Participation, Freeing Officeholders from Indebtedness to Private Donors and Deterring Corruption.

Deterring corruption of elected officials and avoiding the appearance of corruption are significant

[7] Thus, in the primary, a participating gubernatorial candidate with an opponent will receive $400,000, with the potential to qualify for an additional $200,000 in matching funds; and in the general election, a participating candidate will receive $600,000, with the potential to qualify for a maximum of $600,000 in matching funds. ME. REV. STAT. ANN. tit. 21A § 1125(9).

and indeed compelling governmental interests. *Buckley*, 424 U.S. at 26-27; *see also Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 901 (2010) (noting the *Buckley* Court's concern that "large contributions could be given 'to secure a political *quid pro quo*.'" (quoting *Buckley*, 424 U.S. at 26)); *Fed. Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (noting the strong governmental interest in maintaining the public's "confidence in the system of representative Government").

By freeing candidates from dependency on private donations from sources that may expect a *quid pro quo* from elected officials, public financing of elections directly serves to deter corruption and its appearance. As *Buckley* observed, "It cannot be gainsaid that public financing as a means of eliminating the influence of large private contributions furthers a significant governmental interest." 424 U.S. at 96.

The MCEA has been extremely successful in ensuring that Maine legislators can serve their constituents without being financially beholden to private interests for funding their campaigns. The great majority of candidates in Maine now run for legislative office – and win – without the need to seek private donations, apart from $5 qualifying contributions or a handful of "seed money" contributions under $100. The last four elections in Maine (2004-2010)

have seen participation rates of 77% to 81% among candidates running for the legislature. Maine Comm'n on Governmental Ethics and Election Practices, *Maine Clean Election Act: Overview of Participation Rates and Payments, 2000-2010* ("Overview Report") at 1 (Jan. 19, 2011), *available at* http://www.mainecleanelections.org/assets/files/Ethics%20Commission%20Overview%202000-2010%20for%20LVA%201.19.11%281%29.pdf (last visited Feb. 17, 2011). Among candidates actually elected to office in Maine, between 78% and 85% ran with public funding over the same time period. Currently, 80% of sitting legislators in Maine are MCEA participants. *Id.*

The majority of Republicans and Democrats run as MCEA candidates. In the 2010 Senate elections, 94% of Republican candidates, and 82% of Democratic candidates, used MCEA funding. *Id.* In House campaigns, 89% of Democratic candidates and 68% of Republican candidates participated. *Id.* In the three gubernatorial elections since MCEA was enacted, several highly competitive candidates, including nominees of the major parties, participated in MCEA. *Id.*

The ability to receive additional funding beyond the base grant to match at least some of the adverse spending in more highly contested elections is critical to ensuring strong participation, and thus critical to the success of the MCEA in fulfilling its anti-corruption purpose. As one candidate explained:

> The availability of matching funds was an important factor in my decision to use the

> Clean Elections system. The elimination of matching funds would make the system much less attractive to me and no doubt to other candidates, and would leave voters hearing less speech, not more.

Declaration of Andrew O'Brien in Support of Motion to Intervene, ¶ 11 ("O'Brien Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010); *see also* Declaration of Pamela Jabar Trinward, in Support of Motion to Intervene, ¶ 5 ("Trinward Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) ("Matching funds encourage participation in the system" and "enable the voters to have more complete information."); Declaration of Owen Pickus in Support of Motion to Intervene, ¶ 5 ("Pickus Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) (availability of matching funds was a factor in decision to participate in system). *Accord Daggett*, 205 F.3d at 467 ("[T]he government may create incentives for candidates to participate in a public funding system in exchange for their agreement not to rely on private contributions.").

High rates of participation in the public funding program serve the state's critical interest in protecting Maine's electoral process from the threat of corruption and its appearance. *See* Declaration of Alison Smith in Support of Motion to Intervene, ¶ 4 ("Smith Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010) (noting importance of MCEA in preserving "an electoral system that is free of corruption"). Indeed, Maine citizens consistently

express strong support for Maine's public funding program. In recent surveys, two-thirds of Maine voters expressed overall approval for the law and agreed that the MCEA is needed because, prior to the enactment of the law, large donors wielded disproportionate influence. Seventy percent expressed support for the public financing provisions specifically. *See Critical Insights on Maine Tracking Survey: Summary Report of Finding from Proprietary Items 5, 7, 10* (Critical Insights ed., May 2010), *in* Declaration of Mimi Marziani, Exh. 3, *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010).

Candidates and legislators also confirm that high rates of participation in the public funding program serve to protect Maine's electoral process from the threat of corruption. *See* O'Brien Decl. ¶ 4 ("I participated in the Clean Elections system in part because I believe it is important for the public to know that their legislators owe no debt to large contributors."); Trinward Decl. ¶ 3 (noting public financing's role in "reducing the appearance of undue influence").

C. Public Financing Has Enhanced the Competitiveness of Maine Elections.

This Court has recognized that electoral competition is central to democratic governance as a means by which voters can hold elected officials accountable. *See Williams v. Rhodes,* 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First

Amendment freedoms"); *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (expressing concern that entrenchment of incumbents harms competition, "thereby reducing electoral accountability"). *See also, e.g.*, Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition*? *in* THE MARKET PLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 249 (Michael P. McDonald and John Samples, eds., 2006) ("Mayer study") ("meaningful political competition is the foundation of democratic legitimacy"). Studies examining the impact of public financing on Maine's elections have found that the competitiveness of elections has increased in a variety of ways since adoption of full public financing.

As noted in the Mayer study, "[t]here is compelling evidence that Arizona and Maine have become much more competitive states in the wake of the 1998 clean elections programs." *Id.* at 263. With respect to Maine, the study found that after full public financing was adopted, the percentage of legislative elections in which incumbents were challenged increased in both 2002 and 2004, and that "Maine's contested rate in 2004 (98 percent) was higher than it was at any point since 1990." *Id.* at 257. Not only were more incumbents challenged, but the contests themselves were more competitive, as measured by the margin of victory in the election. In 1998, before public financing was instituted, only 35% of legislative incumbents in Maine were in competitive races, while by 2004,

nearly two-thirds of incumbents (64%) faced competitive races. *Id.* at 259.

A 2008 study analyzing the impact of public financing in Arizona and Maine found similar effects:

> [C]lean elections programs in both states significantly increased competition in districts where challengers accepted public funding. These findings suggest that public monies do not simply attract low-quality challengers and that access to campaign funds is an important determinant of competitiveness.

Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POLICY QUARTERLY 263 (2008) (from abstract), *available at* http://spa.sagepub.com/content/8/3/263.abstract (last visited Feb. 18, 2011).

A 2007 study by the Maine Commission on Governmental Ethics and Election Practices ("Commission") also noted gains in competition. While there were typically more than 30 uncontested races in general elections for the Maine legislature in the years preceding the MCEA (1990-1998), the number of uncontested races dropped to 5 in 2004 and only 4 in 2006. Maine Comm'n on Governmental Ethics and Election Practices, *2007 Study Report: Has Public Funding Improved Maine Elections?* ("2007 Report") at 19, Fig. 2.4 (2007), *available at* http://www.maine.gov/ethics/pdf/publications/2007_study_report.pdf (last visited Feb. 17, 2011). A survey of candidates in 2006

showed that the availability of public funding was particularly important to first-time candidates in encouraging them to run. *Id.* at 17. In the recent 2010 elections, 100% of the Senate candidates who won a Senate seat for the first time (14 candidates) did so with MCEA funding.

D. Public Financing in Maine Has Increased Candidates' Engagement with Voters and Citizens' Participation in Legislative Elections.

Buckley recognized that the "burden of fundraising" solely through private donations is one of the ills addressed by public financing, which the Court found "an appropriate means of relieving major party Presidential candidates of the rigors of soliciting private contributions." 424 U.S. at 96; *see also id.* at 91 (noting Congress' goal of "free[ing] candidates from the rigors of fundraising" through public financing). The record in Maine shows that its public financing program has helped promote a robust electoral debate in part by freeing candidates' resources from the burdens of fundraising and thus facilitating increased engagement with the voting public.

Direct campaign engagement with voters – *e.g.*, face-to-face canvassing and other personal forms of outreach – is well understood as a powerful tool for voter mobilization. *See, e.g.*, Donald Green and Alan Gerber, *Get Out the Vote: How to Increase Voter Turnout*, The Brookings Institution (2008). Thus, if public

funding frees candidates from fundraising duties, they are likely to spend more time on direct voter outreach, and this in turn can stimulate voter engagement in elections. Indeed, a study of states with full public financing (including Maine) shows that "the acceptance of full funding provides candidates with time flexibility sufficiently powerful to facilitate higher levels of direct interaction with citizens, and that this heightened engagement translates to more voters casting ballots in those races." Michael G. Miller, *Citizen Engagement and Voting Behavior in Publicly Funded Elections* at 3 (Working Paper), *available at* http://www.sites.google.com/site/millerpolsci/research (visited Feb. 10, 2011).

According to the study, "the acceptance of full funding such as that in Arizona, Connecticut, and Maine, causes an increase of nearly 10 percentage points in the proportion of time candidates spend directly engaging voters" – a difference that is "highly significant." *Id.* at 15. Indeed, the "enhanced mobilization capability" facilitated by full public financing "translates to at least hundreds, and possibly thousands of high-quality voter contacts that would not have otherwise occurred." *Id.* at 26.

Moreover, the same study found that the additional time candidates spend engaging with voters when full public financing is available translates into increased likelihood of voter participation in legislative elections. Political scientists long have recognized the phenomenon of voter roll-off in elections that are not at the top of the ballot – such as state legislative

elections. *Id.* at 8-9. Voters who cast a vote in the "top of the ballot" race – President, Governor, U.S. Senate – may not be as likely to vote in state legislative races, which are lower down on the ballot and about which they may have less information. Accordingly, a good measure of the impact of public financing on voter engagement is to test whether it reduces voter roll-off in legislative contests where at least one candidate uses public funding. *Id.* at 8. In fact, the study found that ballot roll-off in districts with a candidate using full public financing "is lower by about 1.5 percentage points in Maine and 2 points in Connecticut, a factor of about 20% in each state." *Id.* at 3.

Candidates who have used public financing in Maine confirm that the system facilitates broader engagement with voters. As gubernatorial candidate Libby Mitchell noted, "As soon as we qualified, the only job I had was to connect with voters," she said. "I would often say, 'No you don't have to bring a check to this party. It's a house party to get to know you.' This is strange to many people." Susan M. Cover, *Mitchell: Sees Strong Victory, Doubts Gender Played a Role,* THE PORTLAND PRESS HERALD, June 10, 2010, *available at* http://www.pressherald.com/news/mitchell-sees-strong-victory-doubts-gender-played-a-role_2010-06-10.html?comments=y. Similarly, Lawrence Bliss, a candidate for the Senate in 2010, observed that the public financing system "has allowed me to prioritize and focus my time and efforts on speaking directly with the voters I hope to represent, rather than on fundraising." Declaration of Lawrence Bliss in

Support of Motion to Intervene, ¶ 4 ("Bliss Decl."), *Cushing v. McKee*, No. 10-cv-330, docket # 46 (D.Me. Dec. 6, 2010). *See also* Trinward Decl. ¶ 3 ("I also believe the voters of my district are better served when candidates spend time directly engaged in communication with voters in the district rather than holding fundraisers or calling potential contributors to ask for money.").

II. MAINE'S EXPERIENCE REFUTES THE CLAIM THAT TRIGGERED MATCHING FUNDS "CHILL" SPENDING.

Although opponents of public financing in Maine filed a legal challenge to Maine's trigger provisions prior to the 2010 elections (*Cushing v. McKee*, No. 10-cv-330 (D.Me. filed Aug. 5, 2010)), they were unable to produce any evidence that trigger provisions had chilled candidate spending in Maine. In fact, the spending record of the sole candidate who claimed to be chilled by Maine's trigger provisions emphatically *disproved* the chill theory. Further, broader analysis of spending by privately financed candidates in Maine elections for the past decade also shows no evidence of a chilling effect from the trigger provisions.

The candidate-plaintiff in *Cushing v. McKee*, Representative Andre Cushing III, sought a pre-election injunction based on a series of declarations asserting that he would curtail his own fundraising and spending in order to avoid triggering matching funds for his opponent, unless the courts enjoined

Maine's trigger provisions. Nonetheless, when the courts denied injunctive relief, the "chill" that allegedly had threatened Rep. Cushing's First Amendment rights simply dissipated. Additional funds for his opponent were released when Rep. Cushing's spending reached the trigger, but rather than halting his expenditures at that point, his fundraising and spending continued unimpeded, more than doubling the trigger amount by the end of the campaign.[8]

In fact, Rep. Cushing not only outspent his opponents, but raised 25% more than any other candidate for the House in 2010. Indeed, the largest amount raised by a privately funded House candidate who did *not* face a publicly funded opponent was $5,490 – about half of what Rep. Cushing raised. His voice was heard loud and clear by the electorate in Maine – he won the election – and the voters benefited from hearing more total speech than if his legal challenge had succeeded in blocking additional funds to his opponent.[9]

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[8] A graph illustrating Rep. Cushing's fundraising is attached as an Appendix to this Brief. All data for this graph, and relating to fundraising in the 2010 election generally, were obtained from publicly available records of the Maine Commission on Governmental Ethics and Election Practices, www.maine.gov/ethics.

[9] It is worthwhile to consider what conclusions would have been drawn from this same record had the district court, on September 16, 2010, *granted*, rather than denied, Rep. Cushing's request to enjoin Maine's trigger provisions. In that event, the

(Continued on following page)

Moreover, like the example of Rep. Cushing, the larger record of privately financed candidates in Maine's legislative elections spanning five election cycles (2002 through 2010) shows no evidence of a chilling effect from the trigger provisions. If the prospect of triggering additional funds to publicly financed opponents indeed chilled the spending of privately funded candidates, one would expect to see their fundraising stop just short of these thresholds. The patterns in Maine's elections, however, show no such "clustering" below the triggering threshold. Indeed, as noted in an analysis by Professor Anthony Gierzynski, these spending patterns are indistinguishable from patterns seen in other states without public financing programs. Anthony Gierzynski, *Do Maine's Public Funding Program's Trigger Provisions Have a Chilling Effect on Fund Raising?* ("Gierzynski") (2011), *available at* http://www.mainecleanelections.org/assets/files/Do%20Public%20Funding%20Program%20Trigger%20Provisions%20Have%20a%20Chilling%20Effect%20on%20Fund%20Raising.pdf (last visited Feb. 17, 2011). Instead, privately funded candidates in Maine seem to raise

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very same record of spending in the wake of the injunction would have been touted as proving that an injunction against matching funds was the necessary condition allowing Rep. Cushing to make thousands of dollars in additional expenditures beyond the trigger point. Only because the courts denied the injunction is it possible to see that the claim of chill was a fiction, and that the plaintiff made the sensible decision to continue his campaign expenditures regardless of the additional funds triggered for the opponent.

and spend as much as they can – presumably constrained not by the triggering threshold, but by their own fundraising ability. Thus, the record in Maine refutes the claim that privately financed candidates engage in any less First Amendment activity than candidates without publicly funded opposition.

In sum, the facts underlying the most recent challenge to Maine's public financing system only serve to underscore what the courts found a decade ago: the triggered matching funds do not "create an exceptional benefit for the participating candidate." *Daggett*, 205 F.3d at 468. The rights of non-participating candidates and third-party supporters are not unconstitutionally burdened "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding." *Id.* (citation omitted). Indeed, participating candidates who receive triggered matching funds enjoy no competitive advantage relative to their privately funded opponents. The reality under the MCEA is just the opposite: The privately funded candidate, with an unfettered ability to amass private funds and make unlimited expenditures, ultimately enjoys a fundraising advantage over the publicly funded candidate who operates under an expenditure cap.

III. "FEAR OF SPEECH" SHOULD NOT BE RECOGNIZED AS A FIRST AMENDMENT INJURY REQUIRING STRICT SCRUTINY OF PUBLIC FINANCING TRIGGER PROVISIONS.

The electoral arena contemplated by the First Amendment is one of "'uninhibited, robust, and wide-open' public debate." *Buckley*, 424 U.S. at 93 n.127 (citations omitted). Indeed, "[T]he vitality of civil and political institutions in our society depends on free discussion," because "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). "Accordingly, a function of free speech under our system of government is to invite dispute." *Id. See also Buckley*, 424 U.S. at 49 (the First Amendment seeks to "secure the widest possible dissemination of information from diverse and antagonistic sources"). In sum, in the political marketplace contemplated by the First Amendment, an exchange of diverging viewpoints is to be encouraged, not feared.

The claim advanced by petitioners in this case contradicts this constitutional tradition. Instead of needing First Amendment protection from government-imposed spending limits, they ask for First Amendment protection against "hostile speech" by their electoral opponents. *See, e.g.*, Brief of Petitioners John McComish, Nancy McClain and Tony Bouie

("McComish Pet. Br.") at 31, 41, 46.[10] Facing no limits on what they can say, they threaten to censor *themselves* if their opponents are given the means to respond. They ask for creation of a First Amendment "right to speak without response." *Cf. Daggett*, 205 F.3d at 464.

Because such a claim is so inherently at odds with the First Amendment's commitment to robust debate as the foundation of democracy, it should not result in strict scrutiny of trigger provisions even if the likelihood of candidate self-censorship were both plausible and proven. But it is neither, for several reasons.

First, the notion that candidates seeking electoral office are so fearful of an opponent's speech that they will routinely turn down donations or curtail their own spending solely to prevent it is not realistic. Except in uncontested elections, entering the electoral arena entails facing an opponent and vying with him or her for public approval. Candidates for office understand that they must face not only responsive speech from their opponents, but sometimes uncomfortable or hostile scrutiny from the press and the public at large.

Indeed, recent events have brought vivid reminders that persons seeking and attaining public office in

[10] The *McComish* petitioners use the phrase "hostile speech" to describe what they fear at least 15 times in their brief on the merits.

these rancorous times must all too often be prepared to face anger, threats and worse because of the public positions they take.[11] Yet the petitioners' First Amendment theory argues that these same aspiring public servants must be considered so fragile that they will hold back from promoting their own campaigns merely because they fear responsive campaign ads or mailings by their publicly funded opponents. Such a timid conception of electoral politics is unrealistic, and in any event makes a poor foundation for a First Amendment claim.[12]

Second, petitioners' First Amendment theory is irrational even on its own terms. It posits that privately financed candidates would prefer to compete

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[11] *See, e.g.*, Timothy Williams, *After Tucson Rampage, A Struggle to Stay in Reach*, N.Y. TIMES, Feb. 6, 2011, *available at* http://www.nytimes.com/2011/02/07/us/politics/07townhalls.html?ref=timothywilliams (describing representatives' continuing public events despite security challenges); Huma Khan, *Four California Lawmakers Get Profiles in Courage Award*, ABCNEWS.COM, May 24, 2010, *available at* http://abcnews.go.com/GMA/profiles-courage-california-state-legislators-recognized-bipartisanship-budget/story?id=10727700 (noting threats received by legislators joining bipartisan budget deficit plan); Charlie Brennan, *Threats in wake of Bruce controversy*, CHICAGO TRIBUNE, Apr. 24, 2008, available at http://www.chicagotribune.com/topic/kdvr-threatsinwakeofbrucecontr-6379598,0,3100002.story (describing threats to legislators).

[12] Indeed, even "harsh criticism, short of unlawful action, is a price our people traditionally have been willing to pay for self-governance." *Doe v. Reed*, 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring in the judgment); *id.* (noting the value of "civic courage, without which democracy is doomed").

under a system where their opponents are *guaranteed* to receive the maximum possible public grant at the outset of the campaign, even if the privately funded opponent never manages to raise comparable amounts. *See* McComish Pet. Br. at 84-85. Such a system would suffer from no constitutional infirmity under petitioners' theory, because the funding for the publicly financed candidate would be unrelated to the spending of the privately financed candidate or his supporters.[13] But no rational political actor would choose such a system over the existing model of incremental supplemental grants to participating candidates. A candidate who fears that an opponent will be able to match his spending clearly cannot relish the prospect that the opponent will exceed his spending.

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[13] Petitioners cannot contend that *all* public financing grants are suspect, because to do so would require overturning *Buckley*, an outcome they have not even attempted to pursue. Accordingly, they are left with the irrational position that privately funded candidates would prefer larger, unconditional grants to their opponents, rather than smaller, incremental grants that merely match what the privately financed candidates spend. In *Davis*, the presumptively constitutional alternative of lifting contribution limits for all candidates would at least have afforded some benefit to the complaining candidate by allowing him to raise larger contributions as well. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 737 (2008). Here, no benefit whatsoever would flow to privately funded candidates by instituting the alternative scheme they claim to prefer.

The transparent goal of their First Amendment challenge, then, is not to make public financing less burdensome for privately financed candidates, but instead to make it entirely unaffordable for states. That goal does not give rise to a viable First Amendment cause of action.

Third, even if public financing trigger provisions are thought to prompt strategic choices by candidates, these would not be different in kind than the choices made in races without public financing. Regardless of public financing, candidates for office realize that their own fundraising and spending may well trigger a response from an opponent or from independent sources that support the opponent, and may assist the opponent in attracting more donations. Candidates frequently cite their opponents' advertisements or fundraising totals in appeals to their own supporters asking for additional donations. "Help me fight Candidate Smith's outrageous attack ad" indeed is a common fundraising pitch.[14]

Therefore, any candidate who enters the political fray must weigh the possibility that his own fundraising, spending and speech will mobilize additional opposition to his campaign. But because a publicly financed candidate has given up the right to engage in additional private fundraising during the heat of a campaign, a grant of additional public funds provides the only means for him to engage in the same kind of

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[14] *See, e.g.*, Becky Bohrer, *Tea party group makes fundraising plea for Miller*, ANCHORAGE DAILY NEWS, Oct. 15, 2010, *available at* http://www.adn.com/2010/10/15/1503377/problems-prompt-fundraising-plea.html (visited Feb. 15, 2011) (fundraising letter cites opponents' fundraising); Massachusetts Election 2010, *Patrick Campaign Responds to RGA Attack Ads*, July 13, 2010, *available at* http://massachusetts-election-2010.com/2849/patrick-campaign-responds-to-rga-attack-ads/ (visited Feb. 15, 2011) (fundraising letter cites opposing attack ads).

responsive fundraising that happens day-in, day-out in traditional campaigns. This merely "substitutes public funding for what the parties would raise privately," the very premise of a public financing system. *Buckley,* 424 U.S. at 96 n.129.

Trigger provisions for public financing thus do not inject any dramatically new dynamic into the calculus, but simply change the source of the responsive funding. A candidate willing to censor himself based on fear of responsive speech might do the same in an election without public financing, but those hardy enough to enter the electoral fray at all are highly unlikely to choose such a passive course, regardless whether the responsive speech is facilitated by private or public funding.

All of these considerations underscore that First Amendment doctrine should not be distorted to address a "fear of speech" that is so completely out of place in the electoral marketplace. A presumption of unconstitutionality that flows from applying strict scrutiny is entirely inappropriate for public financing provisions that enhance and facilitate public debate. The First

Amendment should not be twisted into an instrument that shields candidates from other candidates' speech.[15]

CONCLUSION

The judgment of the court below should be affirmed.

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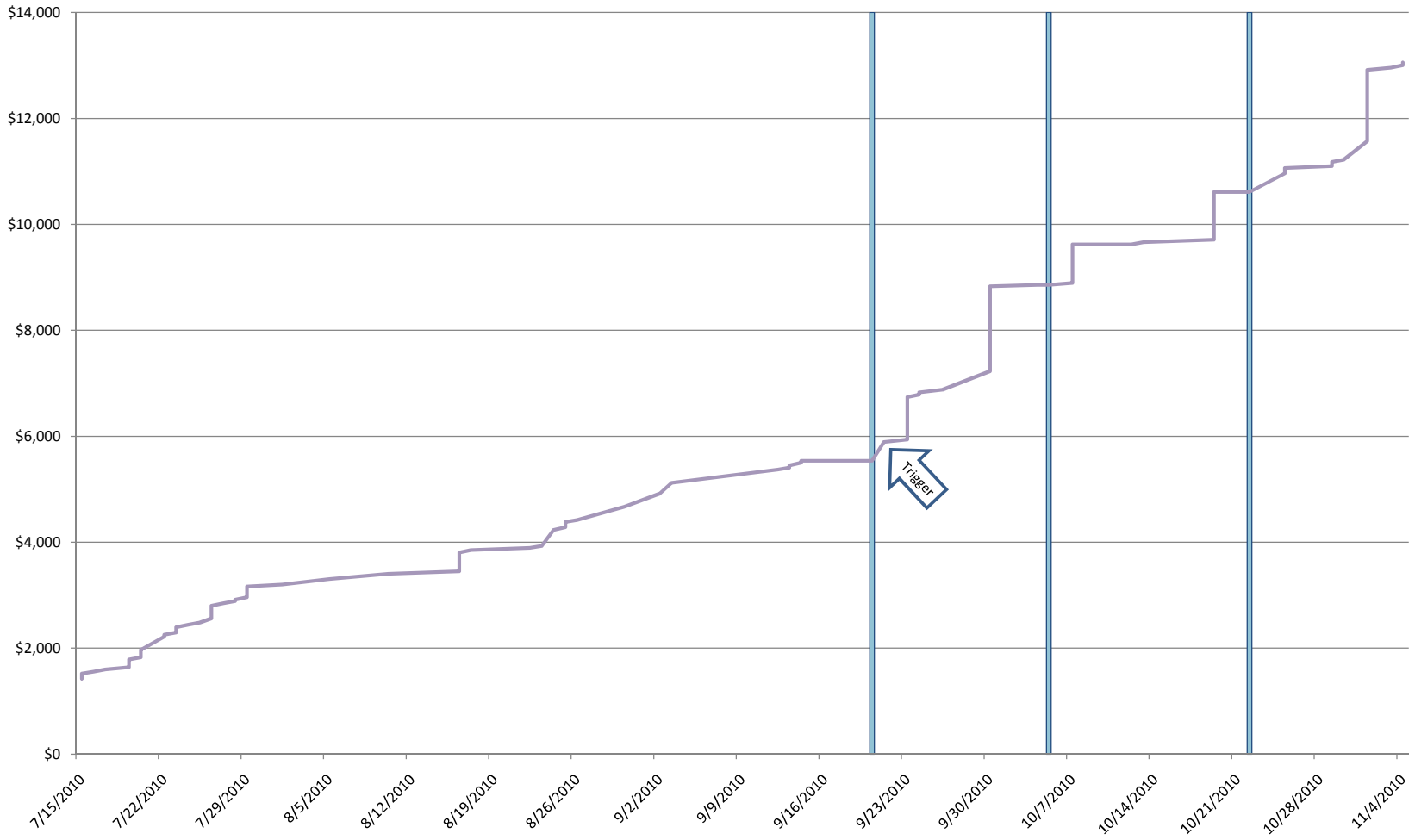
[15] *Amici* also agree fully with the analysis set forth in the briefs of the Respondents explaining why strict scrutiny is inappropriate in examining provisions that place no direct limit on candidate spending, why the holding of *Davis v. Fed. Election Comm'n* is inapplicable, and why Arizona's trigger provisions should be upheld.

2010 Maine Legislative Candidate Andre Cushing Fundraising Showing Dates of Court Orders Denying Injunctive Relief and Trigger Date



The vertical lines indicate dates upon which injunctive relief was denied in the Maine case. The United States District Court for the District of Maine denied Cushing's motion for an injunction on September 20, 2010. The United States Court of Appeals for the First Circuit denied Cushing's motion for an injunction on October 5, 2010. The United States Supreme Court denied an emergency application for a writ of injunction pending appeal on October 22, 2010.