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July 16, 2018

BY U.S. Mail

Michele Lumbert
Clerk, Kennebec Superior Court
1 Court Street
Suite 101
Augusta, ME 04330

Re: ***Maine Citizens for Clean Elections, et al. v. LePage,*** **Docket No. CV-18- 112**

Dear Ms. Lumbert:

Enclosed please find a copy of the Defendants' Reply to the brief filed by the Commission of Ethics in this matter on July 13. Per the agreement of the parties, an electronic copy of this document was circulated by email on this afternoon.

Best,

/s/Patrick Strawbridge
Patrick Strawbridge

<table>
<tr><td>STATE OF MAINE
KENNEBEC, ss.</td><td>SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-112</td></tr>
<tr><td>MAINE CITIZENS FOR CLEAN ELECTIONS, SUSAN MACKEY-ANDREWS, BEN CHIPMAN, CRYSTAL CANNEY, GEOFF GRATWICK, LINDA SANBORN, RICH EVANS, WALTER RISEMAN, TOM SAVIELLOE, ERIC JOHNSON, ALISON SMITH, and JOLENE LOVEJOY
Plaintiffs,

v.

HON. PAUL LEPAGE, as GOVERNOR OF MAINE, and HON. ALEC PORTEOUS as COMMISSIONER, MAINE DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES,

Defendants,
and

MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Party-in-Interest.</td><td>DEFENDANTS' REPLY BRIEF</td></tr>
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Defendants Gov. Paul LePage and Alec Porteous, Commissioner of the Maine Department of Administrative and Financial Services ("DAFS") submit this reply to the brief filed by the Maine Commission on Governmental Ethics and Election Practices ("Ethics Commission").

INTRODUCTION

The Ethics Commission agrees with Defendants on several critical points. Unlike plaintiffs, the Ethics Commission does not contend that this Court can order the Governor to take an official act, which includes signing the required financial orders that plaintiffs seek. Nor does the Ethics Commission contend that the approval or denial of a discretionary financial order under the general budget statutes is the type of decision that can be challenged under the Maine Administrative Procedure Act ("MAPA") and Rule 80C. And the Ethics Commission nowhere contends that all of the requirements for injunctive relief are met in this case.

Instead, the Commission contends that this Court should enter a non-binding *declaratory* judgment. But a declaratory judgment is not a license to the court to enter freestanding advisory opinions; Maine's Constitution has a very specific set of requirements under which the Supreme Judicial Court may enter an advisory opinion, none of which is present here. The cases identified by the Commission on this point are easily distinguishable, and do not support its extraordinary request for an unenforceable declaratory judgment.

In any event, neither plaintiffs nor the Commission are entitled to any relief. Like plaintiffs, the Commission fails to cite any language in the text of the Maine Clean Elections Act ("MCEA") that is sufficient to override the general budget statutes, including the provisions governing quarterly allotments and financial orders—provisions the Commission concedes apply to it. The MCEA unquestionably binds the *Commission* to distribute all available funds, but nowhere does its text restrain the Governor or DAFS' ability to exercise the discretion granted to them by the Legislature pursuant to the budget control statutes. The Commission contends that this discretion must be

cabined, but nowhere cites statutory text that does so or explains how courts could police discretionary decisions regarding financial orders (a task no court in the state has previously undertaken).

At bottom, what plaintiffs and the Commission really want is for this Court to create a new exemption from the budget laws and financial order process for the Clean Election Fund. Whatever the policy merits of such a position, doing so requires an act of the Legislature. Indeed, the Attorney General's Office sought—and failed—to obtain precisely that type of authority from the current Legislature. The proper remedy for disagreement with the Governor's exercise of a highly discretionary budgetary function lies with the Legislature, not this Court.

ARGUMENT

I. The Ethics Commission Concedes that this Court Cannot Enter an Injunction Requiring the Governor to Approve a Financial Order.

Unlike plaintiffs, the Ethics Commission recognizes that this Court lacks the power to direct a co-ordinate branch of government (in this case, the Executive) to take an official act. As the Commission explains, the harm plaintiffs identify stems from the "Governor's failure or refusal to approve financial orders authorizing an allotment of unspent revenue" from the Clean Elections Fund. Comm'n Br. 2. It also concedes that the statutory process governing financial orders, 5 M.R.S.A. §§1667 and 1667-B, applies to the Commission, and that the financial orders at issue "require[d] the Governor's approval." Comm'n Br. 4-5. And, in contrast to plaintiffs' argument, the Commission concedes that "[t]he MCEA does not exempt the Commission or the public funding program from the procedural requirements of Title 5 with regard to budgeting, allocations, allotments, or financial orders." *Id.* 7. *Compare* Mot. 3-4 (arguing that "none of these statutes gives the Governor any role in overseeing the Clean Elections Fund"); *id.* at 10 (contending that there is no requirement of "a signed financial order by the Governor as a condition-precedent to the mandatory distributions from the Fund").

Most importantly, the Commission acknowledges that "the Law Court has determined on two prior occasions that to order the Governor to take a specific action in his official capacity would violate the separation of powers clause of the Maine Constitution." Comm'n Br. 9-10 (citing *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972); *In re Dennett*, 32 Me. 508 (1851)).[1] The Commission does not dispute that the Governor's review and approval of financial orders is an exercise of his official duties. *See* Comm'n Br. 8-9. Nor does it contend that the Law Court has overruled *Dennett* or *Kelly*. This binding precedent should dispose of this case. *See* Opp'n Br. 12-13.

II. There is no Basis to Grant Plaintiffs a Non-Enforceable Declaratory Judgment that Would Effectively Constitute an Advisory Opinion.

Despite acknowledging the clear authority prohibiting all of the effective relief requested by plaintiffs, the Commission nonetheless urges this Court to issue an advisory opinion in the form of a declaratory judgment. The Commission contends that such relief is justified by the alleged purposes of the Clean Election Act and the financial management statutes, even though it concedes the text of those laws imposes no constraints on the Governor's oversight of changes to quarterly allotments. The Commission's arguments are wholly without merit.

The Commission does not dispute that the Governor would not be *bound* by a declaratory judgment, noting that he would merely be "trusted … [to] comply without need of an injunction." Comm'n Br. 10. This action is thus not a proper request for a declaratory judgment at all. "[T]he acceptance of jurisdiction over the action for declaratory judgment rests in the sound discretion of the justice, and should be exercised only when 'the court is convinced that by adjudication a *useful purpose will be served*.'" *Cape Elizabeth Sch. Bd. v. Cape Elizabeth Teachers Ass'n*, 435 A.2d 1381, 1383 (Me.

[1] The Commission contends in passing (without elaboration) that in *other* states, the relief requested by plaintiffs could be obtained via mandamus because approval of a financial order "should be construed as a ministerial act." *See* Comm'n Br. 9. Even if this mattered, it is wrong, for the reasons Defendants have already explained. *See* Opp'n Br. 13-14 (explaining why decision to sign or not sign a financial order is discretionary, rather than ministerial, under Maine law).

1981) (quoting *Jones v. Maine State Highway Comm'n*, 238 A.2d 226, 228 (1968)) (emphasis added). By definition, no "useful purpose" can be served by issuing a non-binding declaration regarding an action that falls within the Governor's sole, unreviewable discretion.

What the Commission is actually seeking is not a declaratory judgment but an *advisory opinion* in which a court "give[s] [its] opinion upon important questions of law . . . ." Me. Const. art. VI, §3. But under the Maine Constitution, only the "Governor, Senate or House of Representatives" may request an advisory opinion. *Id.* The Commission offers no basis for this Court to disregard that limitation and enter a non-binding order that would have no meaningful impact on the parties before the Court. *See, e.g.*, *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 251 n.7 (Me. 1974) ("Declaratory judgments are not exceptions to the Court's lack of jurisdiction to render advisory opinions except as mandated by Me. Const., Art VI, §3.").

The Commission vaguely suggests (at 10) that the Law Court's decision in *Maine Senate v. Sec'y of State*, 2018 ME 52, 183 A.3d 749, somehow changed the separation of powers analysis in a manner that would justify relief here. That assertion is baffling. The Law Court in that case explicitly *declined* to inject itself into a dispute between the branches, emphasizing that the Court could not "assume any role in supervising the legislatively delegated tasks of the Secretary of State." *Id.* at ¶ 30.

The Commission also relies heavily on *Coastal Counties Workforce, Inc. v. LePage*, 284 F. Supp. 3d 32 (D. Me. 2018), in support of its view that there is nothing amiss about ordering a state agency to "distribute funds." Comm'n Br. 10-11. But *Coastal Counties* was a *federal* court case decided under *federal* law that addressed the use of *federal* funds by the state pursuant to a *federal* statute. Federal court orders are enforceable through the Supremacy Clause, *see* U.S. Const. art. VI, § 2, even in the face of contrary state constitutional provisions. Unlike this Court, the court in *Coastal Counties* had no need to consider the separation of powers under the Maine Constitution; the Maine budgeting

process; the reviewability of the Governor's refusal to sign a financial order; or the scope of declaratory relief under Maine law.

Finally, the Commission is wrong to suggest in passing that the Court could grant plaintiffs' requested relief in the form of a prohibitory, rather than mandatory, injunction. *See* Comm'n Br. 11 & n.9 As the Commission acknowledges elsewhere, plaintiffs are seeking an expenditure of funds that expressly requires a financial order signed by the Governor. *See id.* at 2. The plaintiffs are not seeking to "prohibit" the Governor from doing anything; instead, they are seeking to *affirmatively order* him to sign a discretionary financial order. *See Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 766 (Me. 1989) ("noting that a mandatory injunction requires a defendant "to take certain affirmative steps"). There is nothing "prohibitory" about this case.

III. Even if the Court Could Properly Order Declaratory Relief, it is not Justified Here.

Setting aside the Ethics Commission's misguided request for an advisory opinion, such relief would not be warranted here in any circumstances. There is no basis for reading the MCEA to provide an atextual exemption from the ordinary requirement that an agency obtain a financial order before exceeding its previously approved quarterly allotments. The Ethics Commission concedes as much—*see* Comm'n Br. 7—but then turns around and contends that Defendants must approve immediate distribution of the funds in order to "faithfully execute the laws of this State." *Id.* at 11. The Governor's actions, however, are entirely consistent with "the laws of this State."

As Defendants explained in their opposition brief, courts must "seek to harmonize" apparently contradictory "statutes if possible[.]" *In re Estate of Footer*, 2000 ME 69, ¶ 8, 749 A.2d 146, 148; *see also Butler v. Killoran*, 1998 ME 147, ¶ 11, 714 A.2d 129, 133-34; Opp'n Br. 6-9. The Commission recognizes this principle. *See* Comm'n Br. 7. But it then urges this Court to ignore the language of the budgetary statutes and impose limits that go beyond the actual language enacted by the Legislature.

For example, the Commission contends that "section 1667-B does not provide unfettered discretion to the Governor to approve or disapprove financial orders." Comm'n Br. 8. The text says otherwise. It provides that an allotment may not be increased above the current year allocation unless it is, *inter alia*, "recommended by the State Budget Officer and approved by the Governor by financial order as an allotment increase in the annual work program[.]" Nothing in the text of section 1667-B purports to cabin, in any way, the Governor's discretion or require him to explain or justify the approval or disapproval of any particular order. And indeed, it is not unusual for the Governor to decline to sign financial orders without providing any explanation. *See* Opp'n 4-5, Gott Aff. Exs. A-U. To the best of Defendants' knowledge, there has never been a single case in Maine challenging the Governor's decision to sign or not sign a financial order, which belies the Commission's claim that the Legislature provided any limitations on this discretion.

In an effort to import such limits into the statute, the Commission generously allows that if it sought a financial order to spend money "for a purpose that was not authorized by the MCEA, then the Governor would have reasonable grounds to refuse to sign the financial order." Comm'n Br. 8. This neatly demonstrates the extent to which the Commission is ignoring the text of section 1667-B. Another provision of that statute already *independently* requires that any additional funds awarded through a proposed financial order "must be expended in accordance with the statutes that establish the accounts and for no other purpose." 5 M.R.S.A. § 1667-B. The Governor's approval is a *separate* requirement. *See id.* § 1667-B(2). Those different conditions cannot be read identically. "'All words in a statute are to be given meaning,' and no words are to be treated as surplusage 'if they can be reasonably construed.'" *Cent. Maine Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262, 1266 (quoting *Davis Forestry Prods., Inc. v. DownEast Power Co.*, 2011 ME 10, ¶ 9, 12 A.3d 1180).

Interpretations that construe separate provisions to be identical "are to be avoided." *Kennebec Cnty. v. Maine Pub. Employees Retir. Sys.*, 2014 ME 26, ¶ 20, 86 A.3d 1204, 1211.[2]

In the end, the Commission is not attempting to harmonize the MCEA and the general budgetary statutes; it is *rewriting* them to create an exception to the Governor's discretion for reasons external to the statute. If the Legislature (or the people through the initiative process) were concerned that the Governor's discretion over management of the budget would frustrate the policies of the Act, it could have added language altering the applicability of the budget statutes to the Commission or the Fund—as it has in other cases. *See* § 1667-B; 3 M.R.S.A. § 162(1); 4 M.R.S.A. § 1, Opp'n Ex. 2. Given the absence of any language reflecting such intent, the Court cannot resort to alleged concerns of policy or legislative purpose to change the meaning of the relevant provisions. This Court's "duty is to give effect to the intent of the Legislature as evidenced by the language of the statute." *Concord Gen. Mut. Ins. Co. v. Patrons-Oxford Mut. Ins. Co.*, 411 A.2d 1017, 1020 (Me. 1980). Here, the natural way to harmonize and give effect to the entire statutory scheme is to recognize that unavailability of funds to distribute to candidates can trigger the MCEA's provision permitting certified candidates to accept and spend private contributions to make up any shortfalls. *See* 21-A M.R.S.A. §1125(13-A). Certainly, that reading is preferable to the separation-of-powers problems inherent in ordering the Governor to sign or approve financial orders that the Legislature has left to his discretion alone.

CONCLUSION

For the reasons stated, the Court should deny the requested relief and enter judgment in favor of the Defendants.

Respectfully submitted,

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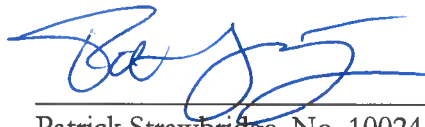
[2] The Commission offers no other insight as to the standard a court could apply to determine whether denial of a financial order was "reasonable," and notably—unlike Plaintiffs—nowhere contends that the discretionary authority of the Governor is reviewable under the MAPA and Rule 80C.



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