STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-18- 112

MAINE CITIZENS FOR CLEAN ELECTIONS, SUSAN MACKEY-ANDREWS, BEN CHIPMAN, CRYSTAL CANNEY, GEOFF GRATWICK, LINDA SANBORN, RICH EVANS, WALTER RISEMAN, TOM SAVIELLO, 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 COMMISION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Party-in-Interest

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF ITS RULE 80B, 80C AND INDEPENDENT CLAIMS AND IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

INTRODUCTION

The Defendants fail to provide any reason not to disburse funds plainly due candidates under the Maine Clean Election Act (the "MCEA"). Defendants do not assert that the Legislature has not allocated sufficient funds to make the disbursements (it has), or that the MCEA does not mandate disbursement (it does). Nor do they assert that the Governor's refusal to approve disbursement of the funds is based on any legitimate fiscal reason, or for that matter, *any reason whatsoever*. Rather, Defendants baldly assert that regardless of what the law requires, this Court has no power to require the Governor to do anything. Thus, they argue that the Governor has

"unfettered discretion" to approve or reject work orders, that M.R. Civ. P. 80C does not apply to gubernatorial actions, and that this Court does not have the power to grant injunctive relief against the Governor.

Defendants' argument turns the budget statutes on their head. The budgeting provisions at 5 M.R.S. §1667 and elsewhere were intended to ensure that spending by administrative agencies complies with state law. Defendants, however, view the financial protocols as the source of unfettered discretion to thwart legislative intent. Defendants' argument ignores several important points, all of which compel the conclusion that Plaintiffs' are entitled to the relief they have requested. First, it is a bedrock principle of our nation that that no person – even the Governor – is above the law; and where, as here, the Governor's arbitrary and capricious refusal to permit disbursement of funds violates Plaintiffs' constitutional rights, this Court has the ability—and the obligation— to act. Second, the Governor is not the only party to this suit and this Court clearly has the power to enjoin both the Maine Department of Administrative and Financial Services ("DAFS") and the Maine Commission on Governmental Ethics and Election Practices (the "Ethics Commission") to make the legally required disbursements from the existing revenues within the Clean Election Fund and to enjoin the Governor not to interfere with that disbursement. Third, Count I of Plaintiffs' Amended Complaint requests a declaratory judgment that Defendants' actions are violating the MCEA, something that Defendants all but concede, and regardless of whether this Court issues a mandatory or prohibitory injunction against the Governor, this Court has the power to issue a declaration that Defendants are acting illegally and to enjoin DAFS and the Ethics Commission to make the payments.

ARGUMENT

I. DEFENDANTS' ACTIONS VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS

A. The First Amendment Claim

In opposing Plaintiffs' claim for violation of their First Amendment right to freedom of expression, Defendants argue that violation of a state law is not a *per se* violation of the Constitution and then go on to point out that challenges to campaign spending laws on First Amendment grounds generally come from candidates who decline public funding.[1] These arguments, however, miss the point: Although a violation of a state law does not in every case (or even in most cases) violate the Constitution, in this case it plainly does. The payments mandated by the MCEA are the threads that narrowly tailor its restrictions on campaign spending to its compelling governmental interests.[2] Here, the Defendants' capricious reduction in those payments—in violation of the MCEA—infringes on the Plaintiffs' First Amendment rights. Importantly, the First Amendment constrains the *government* from impinging on the rights of its citizens and is indifferent to whether that attempted infringement is by a legislative act (e.g. restricting campaign expenditures without providing public funding) or an executive action (e.g. refusing to distribute the mandated funding that allows the MCEA to pass constitutional muster).

As explained more fully in Plaintiffs' initial brief, the United States Supreme Court has recognized that because communication in today's society requires the expenditure of money, "restriction on the amount of money a person or group can spend in political communication during a campaign necessarily reduces the quantity of expression by restricting the number of

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[1] Of course, the fact that this is not the type of case that is "generally" brought is irrelevant to whether it has merit. It is presumably a rare occurrence that a member of the executive branch arbitrarily and capriciously violates the specific requirements of a campaign funding law requiring this type of challenge.

[2] Those recognized interests are to "reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley v. Valeo*, 424 U.S. 1, 91 (1976).

issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Therefore, public funding laws, like the MCEA, can only pass constitutional muster if they provide "a roughly proportionate mix of benefits and detriments to candidates seeking public funding, such that it does not burden the First Amendment rights of candidates or contributors." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 472 (1st Cir. 2000) (*citing Vote Choice*); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993)("Put another way, the state exacts a fair price from complying candidates in exchange for receipt of the challenged benefits"); *see, also Bates v. Director of Office of Campaign and Political Finance*, 763 N.E.2d 6, 24 (Mass. 2002) ("The director's implementation of the certification process and his certification of a candidate is an affirmative act of the Commonwealth [of Massachusetts] that statutorily binds it to provide the benefit of the clean elections bargain.").

The Supreme Court has recognized that campaign *expenditure* limits require greater scrutiny than campaign *contribution* limits, and that the Court may in either case need to determine "whether they are too low and too strict to survive First Amendment scrutiny." *Randall v. Sorrell*, 548 U.S. 230, 248, 126 S. Ct. 2479, 2492, 165 L. Ed. 2d 482 (2006). In so doing, the Court recognizes that it has "no scalpel to probe" the "precise restriction necessary to carry out the statute's legitimate objectives" and that "the legislature is better equipped to make such empirical judgments." *Id.* Neither does the Governor have such a scalpel. Nor does he attempt to assert a justification for instead taking a cudgel to the narrowly tailored proportional benefits here mandated by the MCEA.

In this case, Defendants have interfered with the required proportionality by removing the benefits, while candidates are still held to the detriments of the MCEA. Their ability to communicate to the electorate – i.e. their ability to exercise their First Amendment right to expression – has thus been curtailed as a direct result of the Defendants' refusal to comply with the MCEA.[3]

Under the guise of harmonizing the MCEA with the budget statues, Defendants read the budget statues to replace completely the MCEA's mandatory distributions to candidates with the arbitrary and capricious whims of the Governor.[4] The Governor does not deign even to provide the Court with a rationale for his interference with the mandated distribution of existing funds, instead asserting an amorphous "harm to the separation of powers" if his statutory "input over the budget process" is somehow fettered by the Constitutional rights of the Plaintiffs. Defendants' Brief at 19. However, the Constitution fetters all discretionary actions of state officials, *Haywood v. Drown*, 556 U.S. 729, 741 &n.7 (2009), and in this case, the Governor's financial order authority is so fettered. The Governor must take care to ensure that the laws are executed in good faith and that any discretion he has in not exercised in violation of the First Amendment. This must be his guiding principle when reviewing financial orders relating to the MCEA. The notion that the Governor's role in signing financial orders should not be constrained by either the Constitution or the mandatory requirements deeply embedded in statute cannot be reconciled with fundamental concepts of constitutional law. If Defendants were correct that the governor need not provide *any* rationale for refusing to release funds required

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[3] The Ethics Commission agrees that the governmental failure to distribute the funds mandated by the MCEA violates the First Amendment rights of those candidates and their supporters to engage in core political speech. Ethics Commissioner Brief at 11 & n. 9.

[4] This is contrary to the rule of construction that the, when the acts cannot be read harmoniously, it is the specific statute that replaces the general, not the other way around. *See* Plaintiffs' Initial Brief *at 16;* Ethics Commission Brief at 7.

under the MCEA, there would be no way to establish whether the Governor's actions could be constitutional under any level of scrutiny that might be applied. In the context of this case, there is simply no way to permit the Governor's discretionary refusal to sign a financial order without harm to the Constitutional balance of the MCEA on the campaign restrictions on candidates.

As our newest Supreme Court nominee has explained in writing for the Court of Appeals:

> [T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.
>
> Those basic constitutional principles apply to the President and subordinate executive agencies

In re Aiken Cty., 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.). So too do they apply in Maine to the Governor and subordinate executive agencies.

Federal law requires this Court to issue either a mandatory or prohibitory injunction against DAFS, the Governor, or both for violations of First Amendment rights because the federal Constitution fetters "the freedom of a State'" to "regulate 'the practice and procedure of its courts'" in a manner that limits the State Court jurisdiction to relief that excludes "attorney's fees ... punitive damages or injunctive relief." *Haywood,* 556 U.S. at 734, 741 & n.7 (*citing and quoting Angel v. Bullington,* 330 U.S. 183, 188 (1947)). As both the Plaintiffs and the Ethics Commission have noted, the Federal District Court in Maine recently did just that. *See* Plaintiffs' Merits Brief at 4; Ethics Commission's Brief at 10-11. Thus, while *Kelley v. Curtis*, 287 A.2d 426, 429 (Me. 1972), may limit this Court's ability to enjoin the Governor against violations of the State Constitution, the Supremacy Clause of the United States Constitution prevents this Court from applying that same rule of restraint to violations of federal constitutional rights. *Id.*

B. The Contract Clause Claim

As explained above, the MCEA is only constitutional on First Amendment grounds because it creates a contract with its candidate participants. Other courts have enforced this bargain on contract principles. *See New York City Campaign Fin. Bd. v. Snyder*, 10 Misc. 3d 841, 844–45, 804 N.Y.S.2d 662, 666 (Civ. Ct. 2005) ("the legislation supports the finding that a contract-based obligation is incorporated into the Campaign Finance Act.").

The candidate-Plaintiffs and other participating candidates have been induced to participate in the clean elections program through the promise of the funds that they would receive for that participation. In so doing, they did not assume the risk that the governor would capriciously block access to the funds previously appropriated to the Clean Election Fund. Those funds have routinely been used in this manner for over a decade. Indeed, no governor in the eighteen year history of the Fund has used the financial order power to thwart Title 21-A. Participating candidates have complied with all of the MCEA's requirements on their end of the bargain, including the signing of a mandatory pledge limiting their campaign expenditures and prohibiting their acceptance of campaign contributions (even from themselves), and they have gathered the necessary qualifying contributions (which are, pursuant to the MCEA, paid into the Clean Election Funds now unlawfully frozen by the Governor, and not into their own campaign accounts.

The Defendants argue that the Plaintiffs' "express statutory remedy" for the failure to be paid, is not to seek payment of the funds owed, but instead to be allowed to raise private funds to make up the difference. Defendants' Brief at 17. However, the MCEA only permits that if "revenues in the fund are insufficient to meet distribution" 21-A M.R.S. §1125(13-A). As the Ethics Commission makes clear, "because there are adequate revenues in the MCE Fund, the

Ethics Commission has not been able to make such a determination." Ethics Commission Brief at 3. Plaintiffs are entitle to the declaratory and injunctive relief that they seek: that the Governor and DAFS may not thwart the State's performance of its contractual obligations under the MCEA.

II. PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT AND AN ORDER THAT THE ETHICS COMMISSION DISBURSE FUNDS IN ACCORDANCE WITH THE MCEA

Defendants devote a substantial portion of their brief to arguing that M.R.Civ. P. 80C does not afford judicial review of action by the Governor and that the Law Court's decisions in *In Re Dennett,* 32 Me. 508 (1851) and *Kelly v. Curtis*, prohibit this Court from issuing an order in the nature of mandamus against the Governor. Even if that is true, which Plaintiffs do not concede,[5] DAFS and its Commissioner are also named Defendants here. Action by DAFS is unquestionably subject to review under Rule 80C and Defendants make no argument that this Court cannot enjoin DAFS to act. DAFS has the obligation to release the funds required by the Ethics Commission, from the Clean Election fund over which the Ethics Commission has sole statutory administrative power, and for which it pays DAFS an annual management fee. The primary relief Plaintiffs seek is only to prohibit either Defendant from blocking the Ethics Commission from accessing the funds needed to secure their First Amendment and contractual rights.

Additionally, Defendants' Brief nowhere addresses nor challenges this Court's ability to issue a declaratory judgment that the State owes the funds to the Plaintiffs and that it is unlawful for the Governor to arbitrarily and capriciously prevent the distribution of those funds.

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[5] *Dennett* and *Kelly v. Curtis* both involved efforts to force a governor to comply with state law. Where, as here, federal constitutional rights are involved, the result should be different. *See Haywood v. Drown*, 556 U.S. 729, 741 &n.7 (2009)

Presumably, as the Ethics Commission points out in its brief, if this Court finds that the Governor's actions are contrary to law, he will authorize release of the funds.

III. PLAINTIFFS HAVE CARRIED THEIR BURDEN FOR INJUNCTIVE RELIEF

Finally, Defendants argue that Plaintiffs are not entitled to injunctive relief because they have not shown that they will be irreparably injured and have not adequately discussed how the public interest would be impacted in this case. As an initial matter, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, the harm to both the candidates and to the public increases with each passing day. Defendants' unlawful curtailment of funding reduces the political speech upon which the election will be decided, distorts the election in favor of non-participating candidates who may continue to raise and spend unlimited amounts of money, and severely tips the scales in favor of non-participating candidates who face a participating opponent. *See* Plaintiffs' Merits Brief at 6.

Furthermore, Plaintiffs have presented affidavit testimony that establishes the injury they will suffer if they do not receive adequate funding to run their campaigns.[6] Defendants' apparent contention that the 26% of funding due them is enough flies in the face of both common sense and the Supreme Court's pronouncements in *Buckley* and its progeny. *E.g. Randall v. Sorrell*,

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[6] Cryptically, Defendants argue that Plaintiffs' injury is speculative. If, by characterizing the refusal to release funds as a mere "delay," Defendants' Brief at 16, Defendants are suggesting that the Governor will release the funds at some point in the future, there is no reason that he should not do so now, before the candidate-Plaintiffs have lost their ability to effectively run their campaigns (unless, of course, that is his intent). If Defendants are suggesting that a party moving for injunctive relief must already have suffered irreparable harm in order to be entitled to relief, they are wrong as a matter of law. The requirement is that the moving party show that it "will suffer irreparable injury if the injunction is not granted." *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982) (emphasis added). Here the Plaintiffs have already been harmed because the State has already failed to distribute the mandated funds, and that harm will soon become irreparable because it will burden their first amendment rights until it is corrected. *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

548 U.S. 230 (2006): *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004).

The substantial injury to the Plaintiffs' core campaign speech rights clearly outweighs the complete lack of harm to Defendants if the Court issues the requested relief. Defendants do not assert any articulable harm, nor could they. There are sufficient funds in the Clean Election Fund that have been appropriated for this purpose. Nor is there a separation of powers harm to the Court preventing the Governor from acting contrary to the First Amendment.

Finally, Defendants turn to the public interest prong and baldly assert a separation of powers harm if the Defendants are required to act in accordance with the MCEA, or if the Constitutional rights of the Plaintiffs could fetter the Governors discretion over financial orders, but nowhere articulate the basis for that harm. That, of course, is because the opposite is true: The ruling requested by Defendants – that there is no constraint on the Governor's discretion to deny financial orders – would wreak havoc in our system of checks and balances. The use of the financial order authority to circumvent legislative intent is never appropriate or lawful.

Allowing the Defendants to flout the MCEA in the face of the unambiguous command of the statute profoundly disserves the public interest. The measure was enacted by the people and has been funded consistently by the legislature. Supporting the mandates of the MCEA is fundamentally in the public interest. Ignoring those mandates, moreover, would undermine the people's faith in their democracy and create a precedent, contrary to existing budget statutes and practices, that the un-explained whims of the Executive could prevent distribution of already-appropriated revenues in a non-lapsing fund in flagrant violation to an unambiguous statutory mandate.

That is the real separation of powers issue presented here. "When administrative agencies fail to follow statutory procedures, the public suffers." *Nat. Res. Def. Council, Inc., v. U.S. Food & Drug Admin., 884 F. Supp. 2d 108, 125 (S.D.N.Y. 2012)*; *see also Friends of the Wild Swan, Inc. v. U.S. E.P.A.,* 130 F. Supp. 2d 1207, 1213 (D. Mont. 2000) ("The public interest is best served by prompt action, even any meaningful action, on the part of the [government] to comply with the law's charge."). When the head of an executive branch confuses his personal view with that of the "public interest," it is at least as serious as judicial misconduct, and the role of this Court must be to "reassure the public that the judiciary of this state is dedicated to the principle that ours is a government of laws and not of men."). *Matter of Benoit*, 487 A.2d 1158, 1174 (Me. 1985); *In re Aiken Cty.*, 725 F.3d at 259. Here, the public interest undoubtedly favors faithful execution of the laws, and not the arbitrary and capricious whims of an executive who refuses to even give an explanation for his unlawful decision to freeze the existing funds already appropriated to the Clean Election Fund.

CONCLUSION

If the budget statutes are to be harmonized with the MCEA in a manner that passes constitutional muster, then the Governor's discretion must be exercised in furtherance of some compelling governmental interest. Here, the Governor has provided no justification whatsoever for his actions. Defendants' position in this case is essentially that it does not matter that the Governor is violating the MCEA because he is the Governor and Plaintiffs are therefore left without a remedy. As set forth above and in Plaintiffs' initial brief and the brief filed by the Ethics Commission, that is not true: even the Governor is bound to follow the law. This Court should therefore enjoin the Defendants from interfering with disbursement by the Ethics

Commission of funds pursuant to the requirements of the MCEA and enter judgment in Plaintiffs' favor on all counts of the Complaint.

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