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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0899

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

*Petitioner,*

v.

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; GLEN B. GAINER III, in his  
official capacity as West Virginia State Auditor;  
and JOHN PERDUE, in his official capacity as  
West Virginia State Treasurer,

*Respondents.*

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SUMMARY RESPONSE OF THE RESPONDENTS SECRETARY  
OF STATE AND THE STATE ELECTION COMMISSION

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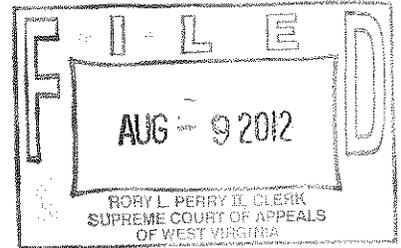
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*Respondents.*

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**SUMMARY RESPONSE OF THE RESPONDENTS SECRETARY OF STATE AND THE STATE ELECTION COMMISSION**

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The Secretary of State and the State Election Commission agree with the Petition herein insofar as it seeks a declaration that the “matching funds” provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code § 3-12-1 *et seq.*, (hereafter “Pilot Program”) are constitutional. However, insofar as the Petition seeks attorney fees from these Respondents, it seeks inappropriate relief given the novelty of the issue and the good faith effort of these Respondents to perform their duties in a manner consistent with the constitutional rights of all parties concerned.

**A. THE GOVERNMENTAL INTERESTS SERVED BY THE PUBLIC CAMPAIGN FINANCING PILOT PROGRAM OUTWEIGH ANY BURDEN IMPOSED ON FREE SPEECH.**

**1. The Balancing Test of the First Amendment.**

While it is often blithely said that a law imposing a burden on “core political speech” must withstand “strict scrutiny” to survive, we know that this over-simplifies First Amendment jurisprudence. “Strict scrutiny” is simply the most restrictive balancing test applied to such laws. It requires the State to show that a regulation imposing a substantial burden on protected speech in a traditionally public forum is “narrowly tailored to serve a compelling [governmental] interest.” *Federal Election Com’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 465, 127 S. Ct. 2652, 2664 (2007). A less-restrictive balancing test – the “exacting scrutiny” test – has been adopted by the United States Supreme Court to determine the constitutionality of reporting and disclosure requirements imposed upon campaign expenditures, because such requirements are less restrictive and less burdensome than direct limitations on the expenditures themselves. *Citizens United v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 914 (2010). (“The Court has subjected [disclosure] requirements to ‘exacting scrutiny.’ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).”

Exacting scrutiny “requires a ‘substantial relation’ between the State-imposed regulatory requirement and a ‘sufficiently important’ governmental interest.” *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). To withstand exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68).

“Time, place and manner” restrictions that allow ample opportunity for other avenues of expression are subject to scrutiny under yet another standard.<sup>1</sup>

As may readily be seen, by whatever name (“reasonableness,” “exacting scrutiny” or “strict scrutiny”), a continuum of balancing tests have been used by the Supreme Court to determine whether a governmental interest is “sufficient” to justify a “reasonable” regulation in light of the burden it imposes on political speech.

With respect to the judiciary, the Supreme Court has already determined that First Amendment values may be compromised to preserve the integrity of judicial proceedings. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 361-63, 86 S. Ct. 1507, 1521-22, 16 L. Ed. 2d 600 (1966) (summarizing restrictions on speech of trial participants that courts may impose to protect an accused's right to a fair trial). However, none of its campaign-finance cases have yet addressed the tension between the State’s interest in maintaining the public-perception of impartiality and integrity of an elected judiciary and the First Amendment values implicated by judicial campaign finance.<sup>2</sup> The public financing statutes at issue in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2806 (2011), applied only to executive and legislative officers, not

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<sup>1</sup>Interestingly, “exacting scrutiny” is even less restrictive than the oft-applied “time, place or manner” doctrine. “Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299, 104 S. Ct. 3065, 3072 (1984). What is “reasonable” depends on whether the restrictions are “narrowly tailored to serve a significant governmental interest.” *Id.*, 468 U.S. at 293, 104 S. Ct. at 3069 (emphasis supplied). *See also Nevada Com’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347 (2011) (Nevada ethics rule precluding a legislator from “advocating” for the passage or defeat of a measure upon which he could not vote was a reasonable time, place or manner restriction).

<sup>2</sup> The major campaign finance cases presented to the Supreme Court have addressed federal campaign finance statutes. Federal judges are appointed, and thus these statutes do cannot impact judicial campaigns.

judges. When a judicial campaign-finance issue reaches the Supreme Court, it will almost certainly apply a balancing test and, whether or not that test turns out to be “strict scrutiny,” the Court will characterize the State’s interest in preserving public confidence impartiality and integrity of its judiciary as “compelling.”<sup>3</sup>

**2. The Governmental Interests Served by the Pilot Program.**

How should the balance be struck in this case? Based on *Bennett*, it appears that the answer depends in large part upon two questions: 1) whether campaign expenditures by non-publicly financed candidates of their own personal funds, or expenditures of independent third parties on their behalf, cause the public to doubt the impartiality of the candidate(s) on whose behalf they are made, and 2) if so, whether that problem can effectively be addressed by making distributions to a publicly-funded candidate that offset those expenditures.

The public financing arrangement at issue in *Bennett* included, as does the arrangement here, so-called “matching” distributions to enable a publicly-financed candidate to meet (up to a statutory maximum) the expenditures made in support of his opponent(s), including personal and independent

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<sup>3</sup> The Petition herein, at page 22, provides ample support for that proposition as follows:

It is, of course, “axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process,’ *Caperton [v. A.T. Massey Coal Co.]*, 556 U.S. 868], 129 S. Ct. at 2259 [2009] (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), but preserving public confidence in a fair and impartial judiciary is a distinct and equally important interest, *see Mistretta v. United States*, 448 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”). “[J]ustice must satisfy the appearance of justice,” *Offut v. United States*, 348 U.S. 11, 13, (1954), because without public faith in fair and unbiased courts, the judiciary cannot function. *See In re Greenberg*, 280 A.3d 370, 372 (Pa. 1971) (“‘[J]ustice must not only be done, it must be seen to be done.’ Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.” (Citation omitted), *vacated on other grounds*, 318 A.2d 740 (Pa. 1974).

expenditures. In the context of executive and legislative elections, Supreme Court precedent compelled the *Bennet* Court to hold that Arizona’s compelling interest in combating corruption or the appearance of corruption, while perhaps served by matching the contributions made directly to an opponent, was *not* served by matching independent expenditures or the opponent’s own personal funds, because the Supreme Court had already held that such expenditures do not present a danger of a *quid pro quo*.<sup>4</sup>

As so aptly addressed by the Petition and the law review article filed by the Amicus herein, *Bennet* identified the prevention of *quid pro quo* corruption as the State interest at stake in Arizona, whereas in this case, the State interests are the preservation of due process and the public perception of impartiality upon which the effectiveness of the judicial branch depend. This is an

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<sup>4</sup>*Bennett* held, at 131 S. Ct. 2826-27:

Burdening a candidate’s expenditure of his own funds on his own campaign does not further the State’s anticorruption interest. 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.

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.

outcome-determinative distinction. The public would expect the policies of executive or legislative candidates to be influenced by, or oriented towards, those who make independent expenditures on their behalf, and this expectation would *not* be antithetical to the structure of our democracy because such officers are elected *because* of their biases. “Legislators are not expected to be impartial; indeed they are elected to advance the policies advocated by particular political parties, interest groups, or individuals.” *Siefert v. Alexander*, 608 F.3d 974, 989 n.6 (7th Cir. 2010). Indeed, after being elected, they would be subject to criticism for straying from their professed biases and thereby betraying those “parties, interest groups, or individuals” who supported them as candidates.

Judges, however, are *not* expected to have a biased agenda – quite the opposite – and would be subject to criticism if they *conformed* to the political agendas of their supporters. Witness the *Caperton* case, where events creating a perception of such conformity “have created a cancer in the affairs of this Court.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 875, 129 S. Ct. 2252, 2258 (2009) (quoting Justice Starcher’s recusal memorandum).

Likewise, the expenditure of a large amount of personal funds by a candidate is often motivated by, or perceived as motivated by, the candidate’s desire to pursue his or her personal agenda after being elected, which implicates no corruption, particularly if those goals are announced during the campaign – a luxury generally reserved to executive and legislative candidates. But it *does* 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.

**3. The “Matching Funds” Provisions Well-Serve Those Interests Without Unduly Burdening Protected Speech.**

Assuming the validity of the above observations, how do matching funds address them? Paradoxically, the *Bennet* decision itself notes the effectiveness of matching funds to address these

concerns in its discussion of how the burdens imposed by matching funds did *not* address Arizona’s interest in combating *quid pro quo* corruption. First, as the Supreme Court observed (131 S. Ct. at 2824), such matching funds will discourage personal and third-party expenditures.<sup>5</sup> The *Bennet* Court observed that this effect burdens “robust debate” (131 S. Ct. at 2829), but such debate is more closely associated with executive and legislative campaigns than judicial races, and in *this* case there are countervailing State interests – the perception of impartiality and due process – that were *not* present in *Bennet* and that *are* directly served by reductions in such expenditures. Second, matching funds encourage candidates to rely on public funding rather than face the prospect that a traditionally-funded campaign will generate funds for their opponent(s). 131 S. Ct. at 2827.<sup>6</sup>

Third, matching funds provide a funding source for the publicly-funded candidate to meet the challenge of his opponent’s traditionally-funded campaign, leading to a public perception that the winner of the race was chosen on merit rather than money – a perception necessary to the integrity of judicial campaigns but not to “political” (executive and legislative) races. Fourth, in North Carolina, upon whose statutes West Virginia’s plan is based, contributions from the attorneys who appeared before the judges dramatically declined following the implementation of public financing, reducing the perception that attorneys felt obliged to “pay” for fairness before their local judge. (Pet’r’s App. 96.) While there is no direct evidence that the “matching funds” provision was responsible for this particular decline, a perception that all candidates in a judicial race enjoy approximately equal funding would dramatically reduce the perceived need to contribute in order

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<sup>5</sup>Statistical information from North Carolina, provided to the West Virginia Independent Commission on Judicial Reform, provided empirical confirmation of this effect. (Pet’r’s App. 18, 96.)

<sup>6</sup> Again, empirical support was provided by North Carolina’s experience. (Pet’r’s App. 96.)

to maintain favor with one of them, particularly if that contribution would simply generate public funds for an opponent.

Note that none of these impacts constitutes a prohibition against a traditional campaign – the sort of campaign that led to the *Caperton* situation – nor do they limit the amount of money that may be spent by candidates or their independent supporters. Rather, they serve merely as incentives to encourage, but not mandate, a different approach. Such incentives do not discourage an individual from running for the Supreme Court of Appeals, but only to influence the manner in which the campaign is funded so as to promote a public perception of integrity and impartiality in the candidate and the process by which she or he was selected. Is this not “narrow tailoring?” And the First Amendment values at stake (robust political debate) are less compelling when applied to the judiciary, whose candidates are not expected to advance policy platforms in their campaigns. Indeed, the Framers would not have considered “robust political debate” to be important to judicial selection because no state or federal judges were elected at the time of ratification of the First Amendment – they were appointed. (See Mr. Delligatti’s article, *A Horse of a Different Color*, 47.)

This Court, above all others, has the expertise to properly weigh the value to the State of such incentives versus those that pre-dated the Pilot Program, and to properly balance them against the modest burdens they impose upon the First Amendment values discussed in the Supreme Court’s decisions regarding executive and legislative races.

**B. THE PILOT PROGRAM WAS BASED ON EXPERIENCE, INTENSIVE INVESTIGATION, AND EMPIRICAL DATA.**

As noted in the Petition, the “Legislative findings and declarations” unequivocally demonstrate that the avowed purpose of the Pilot Program at issue here was to promote an impartial judiciary, perceived as such, so as to enhance the credibility and effectiveness of the judiciary, and

the public's confidence therein. W. Va. Code § 3-12-2. Importantly, these findings were not post-hoc rationalizations or self-serving assumptions, but were the result of intensive investigation and reasoning. This is apparent by comparing Legislative efforts that preceded the report of the Independent Commission on Judicial Reform, (Pet'r's App. 1), from the Pilot program that passed after the report was issued.

1. **The Pilot Program Was Specifically Based on the Findings and Recommendations of the Independent Commission on Judicial Reform.**

The Independent Commission on Judicial Reform (hereafter "Commission") was created and tasked by an Executive Order issued in April of 2009, to "bolster public trust and confidence in the judiciary." (Pet'r's App.152.) After several months of investigation and multiple public hearings, its Report was issued in November of 2009. One of the Commission's recommendations was to "adopt a public financing program for one of the Supreme Court seats scheduled for election during the 2012 election cycle." (*Id.* at 18.) The Independent Commission "urge[d] the Legislature to rely both on North Carolina's model, as well as the provisions of Senate Bill No. 311 from the 2009 Regular Session of the Legislature."<sup>7</sup> That recommendation was implemented by the Governor by requesting the Speaker to introduce House Bill 4130, which he did on January 19, 2010 ("By request of the Executive"), and which finally passed on February 26, 2012.

The data and conclusions in the Legislative "findings and declarations" included within H.B. 4130 correspond exactly with the findings made by the Commission following its investigation. The findings in subsections 3-12-2(1) and (2), regarding the lack of any limits on campaign expenditures, correspond with the Commission's observations that West Virginia's statutes, as

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<sup>7</sup>(*Id.*) Senate Bill 311 is reprinted in the Sec'y of State/Comm'n's App. at 66.

modified to conform to federal rulings, contain no such limits. (Pet'r's App. 14-15.) The recitation of the historical dollars spent on campaigns for the Supreme Court of Appeals in subsections 3-6 correspond with those documented in the Commission's Report. (*Id.* at 6).

The detrimental impact of such spending on the perceived impartiality, integrity and credibility of the Court, as recited in subsections 7-9, closely follow the Commission's parallel findings.<sup>8</sup> The findings that the Pilot Program, including its matching funds provisions, would combat these detrimental effects and "strengthen confidence in the judiciary" (subsections 9-10), correspond with the recommendations of the Commission, including a "provision for 'rescue funds' to be disbursed if a non-participating candidate exceeds certain spending amounts." (*Id.* at 19.)

Importantly, the above-described findings of the Commission are supported by documented empirical data included in its Report, including the impact of public financing (including "rescue funds") on spending in North Carolina judicial campaigns, and public opinion surveys (e.g., *id.* at 18).

## **2. Independent Legislative Investigation.**

Although the record is scant (as is usual for West Virginia legislative activities) there is evidence that the Legislature also undertook a substantial independent investigation of judicial campaign finance. During the 2008 session, Senate Concurrent Resolution No. 69 requested the Joint Committee on Government and Finance to "study judicial selection methods and public financing of judicial elections." (Sec'y of State/Comm'n's App. 34.) The task of studying these topics was delegated to the Joint Standing Committee on the Judiciary, which met several times in

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<sup>8</sup>"As spending by candidates and third parties increases, so to will the perception that 'justice may be bought.'" (Pet'r's App. 15.) "The Commission views the rapid influx of third party money into judicial campaigns as a significant threat to the integrity of the judiciary, . . . . (*Id.* at 19.)

late 2008 and early 2009 to hear from a variety of experts on the subject, including a North Carolina appellate judge, as reflected in its minutes. (*Id.* at 40-63.) While there is no documented connection between these activities and Senate Bill No. 311 (2009), later commended to the Legislature by the Commission, it followed closely after these meetings. (*Id.* at 66.)

**3. Earlier Efforts at Public Campaign Finance Lack the Insight of the Pilot Program.**

Respondent's Appendix includes representative examples of historical bills, none of which passed, to implement public campaign financing in West Virginia. One such effort, in 2002, sought public financing of a broad range of offices – legislative, executive and judicial (*id.* at 1).<sup>9</sup> Many sought public financing only for Legislative offices. (*Id.* at 9, 18, 26.) The interesting thing about these earlier efforts, none of which focused solely on the judiciary, is the broad range of “findings and declarations” included therein, most of which represent interests that the Supreme Court, in *Bennet*, later held were insufficient to justify Arizona's “matching funds” provisions with respect to executive and legislative races.<sup>10</sup>

By contrast, the “findings and declarations” of the Pilot Program at issue here focus solely on the need to enhance the credibility and integrity of the judicial branch by restoring public confidence in the impartiality of its judges. The Pilot Program was borne of a well-informed Legislature acting upon a well-considered recommendation that was, in turn, based on extensive

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<sup>9</sup>Another such broad bill failed in 2005.

<ftp://www.legis.state.wv.us/publicdocs/2005/RS/Senate/SB1-99/sb91%20intr.wpd>

<sup>10</sup>For instance, these bills include findings that public financing will enhance “the free speech rights of those candidates and voters who are not wealthy” (e.g., *id.* at 26), an interest held insufficient to justify suppressing traditional campaign expenditures in *Bennet*.

investigation of empirical data, all to serve an important public policy goal – the preservation of an independent and impartial judiciary.

**C. A GOVERNMENT OFFICIAL MAY DECLINE TO ENFORCE A STATUTE WHEN ADVISED BY THE ATTORNEY GENERAL THAT SUCH ENFORCEMENT WOULD CONSTITUTE A VIOLATION OF ANOTHER'S CONSTITUTIONAL RIGHTS.**

Although a State official has no power to make a determination that a particular statute is or is not unconstitutional, such an official does have a duty to follow “clearly established . . . constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Upon being advised by the Attorney General that the *Bennet* decision abrogated the matching funds provisions of the Pilot Program, Respondents could, in good faith, refuse to enforce them pending the outcome of litigation thereon. Indeed, this is the exact means by which test cases are often initiated to determine issues of public importance that might not otherwise be litigated until it was too late to undo the damage:

Experience dictates that there are occasions on which courts must undertake something in the nature of advisory opinions. We have done this in cases involving elections because of the expense attendant upon campaigns and the deleterious effect on representative government which uncertainty in elections causes. *State ex rel. Maloney v. McCartney*, [159] W.Va. [513], 223 S.E.2d 607 (1976). Similarly we have rendered essentially advisory opinions when it was necessary to permit bond counsel to authorize the marketing of bonds for public authorities. *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 207 S.E.2d 113 (1973).

*State ex rel. West Virginia Deputy Sheriff's Ass'n, Inc. v. Sims*, 204 W. Va. 442, 446, 513 S.E.2d 669, 673 (1998).

The Election Commission was acting responsibly when it decline to authorize the expenditure of public funds in the face of an official opinion of the Attorney General that such expenditure would violate the constitutional rights of candidates and their supporters.

**D. CONCLUSION.**

WHEREFORE, the Secretary of State and the State Election Commission pray that this Court determine that the West Virginia Supreme Court of Appeals Public Campaign Pilot Program is constitutional.

Respectfully submitted,

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, Respondents,

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**CERTIFICATE OF SERVICE**

I, Silas B. Taylor, counsel for the Respondents Secretary of State and the State Election Commission, do hereby certify that true copies of the "*Summary Response of the Respondents Secretary of State and the State Election Commission*" were served on all parties by depositing said copies in the United States mail, with first-class postage prepaid, on this 9th day of August, 2012, addressed as follows:

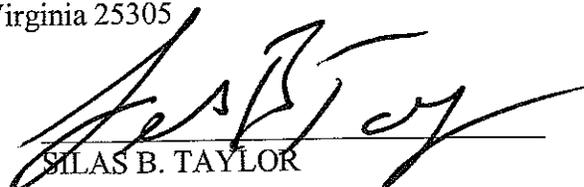
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