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 SAVIELLOE, ERIC JOHNSON, ALISON SMITH, and JOLENE LOVEJOY

Petitioners,

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

DEFENDANTS' BRIEF IN OPPOSITION

Defendants Gov. Paul LePage and Alec Porteous, Commissioner of the Maine Department of Financial and Administrative Services ("DAFS") submit this opposition to plaintiffs' Brief On The Merits of its Rule 80B, 80C, and Independent Claims and in Support Of Motion For Injunctive Relief.

INTRODUCTION

Plaintiffs seek an extraordinary—indeed, unprecedented—order from this Court. They want the Court to direct the Governor to approve a financial order increasing the budgetary allotment of the Maine Commission on Governmental Ethics and Election Practices ("Ethics Commission"). No court in this state has ever ordered such relief, and for good reason. The Maine budgetary statutes vest the Governor with unfettered discretion to determine whether to approve an increase in an agency's quarterly allotment of funds. The Legislature can exempt agencies from any or all aspects of the budgetary process—something it has done for several other agencies, as well as itself and the Judiciary—but simply has not done so for the Clean Election Fund or the Ethics Commission. This Court must respect those legislative judgments.

The Governor's discretionary decision to sign or not sign a financial order is not subject to judicial review. The Maine Administrative Procedure Act ("MAPA") expressly excludes the Governor from the definition of "agency," meaning that the Governor's action or inaction cannot be deemed "final agency action" reviewable under Rule 80C. And for nearly two centuries, Maine's courts have rejected the claim that they have the power to grant mandamus-type relief against the Governor (or other state officials) to require performance an official act (let alone an entirely discretionary act). It is thus unsurprising that there has never been a reported case in Maine even *considering* a challenge to the Governor's refusal to sign a financial order, much less compelling the Governor to sign such an order.

Plaintiffs' constitutional claims fare no better. Courts have repeatedly rejected the notion that the First Amendment provides an affirmative right to public funding or subsidies. Indeed, to the extent public funding schemes have implicated the First Amendment at all, those cases have involved

challenges by *privately funded candidates* who argued that the public funding schemes unfairly disadvantaged their campaigns. No court has ever held that the First Amendment entitles candidates to a certain level of state funding. And plaintiffs' Contract Clause claim fails for several independent reasons. Most notably, even if there is a contract between the candidates and the state (which is doubtful), the Act provides an explicit remedy in the event of insufficient public funding: the Commission can allow candidates to raise private funds to make up any shortfalls. Plaintiffs might not like that option, but the risk of insufficient funding was open and obvious all along when they opted into the public funding system and the Act provides an explicit remedy for that contingency.

Finally, even if plaintiffs could show a likelihood of success, they do not come close to meeting the other criteria for entry of injunctive relief. Wholly apart from the supplemental funds at issue here, every publicly funded candidate received general election funding in mid-June ranging from $5,000 to $600,000. Plaintiffs have utterly failed to show that a delay in receiving one portion of one type of funding will lead to irreparable harm to their campaigns when they received thousands of dollars of other public funds just two weeks before they filed this suit. The Legislature is currently considering a bill that would address the Commission's funding issues, and that process—rather than an extraordinary order from this Court directing the Governor to sign a discretionary financial order—is the proper venue for plaintiffs to seek a remedy for any funding shortfalls.

BACKGROUND

A. The Legislative and Gubernatorial Process for Budgeting

In our State, "[t]he power to appropriate and deappropriate funds is, of course, a core legislative function." Atty. Gen. Op. No. 05-4, 2005 WL 4542877, at *3 (Mar. 30, 2005). Maine's Constitution declares that "[n]o money shall be drawn from the treasury, except in consequence of appropriations or allocations authorized by law." Me. Const. Art. V, Pt. 3, § 4.

Maine operates on a biennial budget calendar, with the Legislature approving two years' worth of expenditures in the first year of any given Legislative session. In addition to the overall appropriation for the biennium, the Legislature provides allocations of funding for various programs over each of two fiscal years in the biennium. Pursuant to its authority over the public fisc, the Legislature has enacted detailed and mandatory statutes governing the budgetmaking process. Among other things, these statutes prohibit expenditures in excess of a total appropriation, 5 M.R.S.A. § 1583. They also require virtually all agencies within the State to submit at the beginning of each fiscal year a "work program" to the Governor. *Id.* § 1667. The work program allocates the expenditures planned for the coming fiscal year over quarters. *Id.; see also* Ex. 1, Gott Aff. ¶¶ 5-7. The State Budget Office assists the Governor in reviewing work programs, and the Legislature has given him broad discretion to adjust, approve or deny proposed work programs. *See* 5 M.R.S.A. § 1667; Gott Aff. ¶ 6.

If, during the course of the fiscal year, an agency head believes it necessary to adjust the quarterly allotment in subsequent quarters, but does so in a way that does not exceed the overall fiscal year allocation made by the Legislature, the agency head may submit the revised work program for approval by the Budget Officer and the Governor. *Id.* ¶ 7. Section 1667 imposes no restrictions on the Governor's discretion to approve or deny amended work programs. *Id.*

If an agency wishes to request an allotment during the current fiscal year that would exceed the amount allocated by the Legislature for that fiscal year, the increased allocation must be approved by financial order under the process set forth in 5 M.R.S.A. § 1667-B. That statute imposes a number of conditions on the approval and effectiveness of financial orders, including a requirement to obtain the Governor's approval and (unless waived) a period for legislative review. *See id.* § 1667-B; Gott Aff. ¶¶ 8-10. Nothing in 5 M.R.S.A. § 1667-B requires the Governor to provide any reasons or explanations for his approval or denial of financial orders. *Id.* ¶ 10.

The import of these provisions is that "an agency requires both legislative authorization (appropriation) and executive authorization (approved allotments) in order to spend money." Atty. Gen. Op. No. 02-7, 2002 WL 32360634, at *1 (Oct. 16, 2002). Gubernatorial approval and legislative review are important parts of any process in which adjustments are being made to a department's legislative allocations, because financial orders are not subject to hearings, public comment, or the scrutiny attendant to the enactment of the budget. Indeed, without appropriate checks, an agency could rely on financial orders to avoid or minimize oversight of its spending patterns.

Although sections 1667 and 1667-B generally apply to "each department and agency of the State Government," the Legislature has made certain exemptions to their requirements. For example, neither the Legislative Council nor the judiciary is required to submit financial orders to the Governor for approval. *See* 3 M.R.S.A. § 162(1); 4 M.R.S.A. § 1; Gott Aff. ¶ 12. And other funds cannot avail themselves of the financial order process at all. *See* § 1667-B (exempting from its provisions the State Lottery Fund and the Dirigo Health Enterprise Fund). But almost all other agencies are subject to the budget statutes, including some with considerable independence from the Governor's oversight, such as the Office of the Attorney General, the Secretary of State, the Public Utilities Commission, and the Ethics Commission. Gott. Aff. ¶ 11, Gott Aff. Exs. A-U. Indeed, the Commission has long followed the requirements of sections 1667 and 1667-B, submitting work programs and financial orders to the Governor for approval. *See* Wayne Aff. ¶¶ 34-48, Ex. D (filed July 6).

B. The Maine Clean Election Act and the Clean Elections Fund.

The Maine Clean Election Act (MCEA) creates an optional public funding mechanism for certain candidates for state office, and tasks the Commission with overseeing various aspects of that program. *See* 21-A M.R.S.A. §§ 1121-28. To provide the necessary funding, the MCEA created the Maine Clean Election Fund, which is financed by the Legislature through the General Fund as well as through various other streams of funding (such as a tax checkoff program and election-related fines).

21 M.R.S.A. §1124. Although the Commission is authorized to distribute revenues from the Fund to qualified candidates, nothing in the MCEA purports to exempt the Commission or the Fund from the general budget control statutes discussed above.

Candidates who participate in the MCEA program are eligible for multiple different streams of funding. Participating candidates may raise "seed money" to get their campaigns started and seek qualification. *Id.* §1125(2). Then, once the candidates are certified for the public funding program, they receive amounts ranging from $2,500 to $400,000 for contested primary elections. *Id.* §1125(7)-(8). Candidates who prevail in the primaries may carry forward any remaining funds to the general election, and also receive general election funds (which were paid in mid-June) ranging from $5,000 to $600,000. *Id.* Candidates may also become eligible for "supplemental" distributions by collecting a sufficient number of "qualifying contributions." *Id.*

The MCEA expressly contemplates the possibility that there might be insufficient funds to make the required payments. If "the commission determines that the revenues in the fund are insufficient to meet distributions … the commission may permit certified candidates to accept and spend contributions" from private sources "according to rules adopted by the commission." *Id.* §1125(13-A). The Act is thus crystal clear that the remedy in the event of insufficient funding is to release candidates to raise private funds to make up any shortfall.

C. The Events Precipitating the Filing of this Case.

As it has in prior years, and as state law requires, the Ethics Commission submitted a work program covering Fiscal Year 2018. *See* Wayne Aff. ¶¶ 39-43. Earlier this year, the Commission submitted several financial orders seeking to adjust its approved allotments or allocations:

- In March 2018, the Commission submitted a financial order proposing to move $550,000 from the 4th Quarter to the 3rd Quarter. Gott Aff. ¶ 20; Wayne Aff. ¶ 30, Ex. D. The Governor exercised his discretion to decline to sign this order—as he has more than 20 other times for various agencies and department in the last few years. Gott Aff. ¶ 17, Exs.

A-U. The Commission has not contended that denial of this Order resulted in the failure to make any payments from the Fund in Fiscal Year 2018. Wayne Aff. ¶¶ 45-49.

- In April 2018, the Commission submitted a financial order requesting an increase above the legislative authorization for Fiscal Year 2018 in the All Other line category, of $1,935,444. Gott Aff. ¶ 21; Wayne Aff. ¶ 47, Ex. D. As he has on numerous other occasions, the Governor exercised his discretion to decline to sign this financial order.

- In May 2018, the Commission submitted a financial order to increase the allotment by $986,014, up to legislative authorization for Fiscal Year 2018 in the All Other line category. Gott Aff. ¶ 22; Wayne Aff. ¶ 48, Ex. D. The Governor again exercised his discretion to decline to sign this financial order.

In mid-June, the Commission distributed general election payments to 199 qualifying candidates, totaling $2,293,400. It also distributed additional supplemental funding totaling roughly $375,000, from available cash, but did not distribute an additional $1 million that is in the fund but unavailable due to the restrictions on the expenditure of unallotted funds. Wayne Aff. ¶ 49, Ex. C. The plaintiffs, who include an interest group that supports publicly funded elections and candidates for office who are participants in the MCEA program, subsequently brought this suit challenging the Governor's refusal to sign the Ethics Commission's financial orders.

ARGUMENT

Invoking several state and federal statutes and constitutional provisions, plaintiffs seek an unprecedented order requiring the Governor to execute a financial order in excess of the legislative allocation for 2018. Whether viewed as a claim under the Maine Administrative Appeals Act, an action in the nature of mandamus, or an injunction under state or federal law, their request must be denied.

I. The Claims in the Amended Complaint Fail on the Merits.

A. The Legislature Has Granted the Governor Broad Discretion Over Allotments Pursuant to 5 M.R.S.A. §§ 1667 and 1667-B, Which Apply to the Ethics Commission's Requested Expenditures.

Like virtually every other state agency, the Ethics Commission is subject to mandatory budget control procedures enacted by the Legislature. These statutes provide that "the Governor *shall* require

the head of each department and agency of the State Government to submit to the Bureau of the Budget a work program for the ensuing fiscal year," and require the Governor to review, revise and approve quarterly allotments of the amounts allocated by the Legislature. 5 M.R.S.A. § 1667 (emphasis added). Revisions to quarterly allotments that remain within the legislative allocation for a given fiscal year may be proposed by an agency or department head, but remain expressly subject to "the approval of the Governor[.]" *Id.* Requests to revise an allotment *beyond* the legislative allocation for any given fiscal year are governed by 5 M.R.S.A. § 1667-B, which authorizes such allotments only under certain specific conditions. One of those statutory conditions is that the new allotment be "recommended by the State Budget Officer and approved by the Governor by financial order[.]" *Id.* § 1667-B(2). Nothing in sections 1667 or 1667-B—or any other applicable portions of Title 5[1]—restricts in any way the Governor's discretion in deciding whether to approve an allotment or financial order.

Although plaintiffs deride these duly enacted laws as "the vast bureaucracy that has grown up around the state budget," Mot. 11, they do not—and cannot—dispute that these provisions apply to the Ethics Commission. *See* Wayne Aff. ¶¶ 28, 34-40; Complaint ¶¶ 53-55. Like many other agencies and departments—even those with some degree of independence from the Executive branch, *see* Gott Aff. ¶ 11—the Commission has always observed the requirements of the law, submitting a work program each fiscal year and seeking financial orders as necessary. Wayne Aff. ¶¶ 34-47. The Legislature *could* have exempted the Ethics Commission from the requirement to obtain the Governor's approval for financial orders, as it has done for several other departments. *See* 4 M.R.S.A. § 1; 3 M.R.S.A. § 162(1). Indeed, the Attorney General's Office sought such an exemption earlier this legislative session, in a bill that passed the Legislature but for which a veto was sustained. *See* Exhibit

[1] Plaintiffs focus on the Governor's authority to curtail funds under 5 M.R.S.A. § 1668. *See* Mot. 3, 14, 20. But that is a red herring. The curtailment procedures do not apply here because there is no projected deficit that would require deployment of the Governor's authority to equitably curtail funds under section 1668. This case instead centers on the statutory conditions for approval of financial orders under sections 1667 and 1667-B. *See* Wayne Aff. ¶¶ 34, 37, 47.

2. No such exemption has been enacted for the Ethics Commission, as the existence of this case underscores; if the Commission could make expenditures without following the procedures in sections 1667 and 1667-B, plaintiffs would not need an order from this Court to obtain the funds.

Plaintiffs contend that the MCEA *itself* exempts expenditures from the Clean Elections Fund from the general budget statutes. *See* Mot. 10-15. But the relevant statutory language says no such thing. The MCEA requires that *the Commission* "shall distribute" available funds. *See* 21-A M.R.S.A. § 1125(7). But nothing in the Act manifests a clear intent to exempt the Commission from the general budget statutes that, by their own terms, apply generally to all agencies. *Compare* Exhibit 2. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible"; only if they cannot be harmonized does the principle that the specific "prevails over" the general apply. *Butler v. Killoran*, 1998 ME 147, ¶ 11, 714 A.2d 129, 133-34; *see also In re Estate of Footer*, 2000 ME 69, ¶ 8, 749 A.2d 146, 148-49.

Plaintiffs' cursory reliance on *Houlton Water Co. v. Pub. Utilities Comm'n*, 2016 ME 168, ¶ 21, 150 A.3d 1284, 1289, is thus misplaced. Unlike the statutory provisions at issue there, the MCEA's requirements are hardly "irreconcilable" or "inconsistent" with the general requirements of Title 5. *Id.* Here, the statutory language is easily harmonized. The Commission must distribute funds that are available to it, 21-A M.R.S.A. § 1125(7), but that availability is contingent upon the allocation and approval process that applies to all state agencies absent a specific legislative exception.

If the Legislature intended to excuse the Commission from the general obligations of Title 5, it would have said so clearly—as the Legislature did with respect to the judiciary and certain legislative offices. *See supra* at 4; *see also* Exhibit 2. But this Court cannot re-draft the Clean Elections Act to add such a provision. A court may not "use the rubric of construction to rewrite [a] statute." *Milton v. Cary Medical Center*, 538 A.2d, 252, 256 (Me. 1988); *see also Simpson's Case*, 144 Me. 162, 167 (Me. 1949) (court must "construe [a statute] without either adding to or subtracting from its language").

Nor can plaintiffs' policy arguments, *see* Mot. 10, justify a departure from the plain text of the general budget statutes. To begin, the speculative scenario conjured by plaintiffs—a governor denying all funding to a competitor receiving clean elections funding—is emphatically not present here. The Governor is not a candidate in the upcoming election, and the denials in this case were not a complete denial of *any* allocation. If plaintiffs are unhappy with the Governor's use of his delegated budget control powers, they can ask the Legislature to allocate or appropriate additional funds—as they have done (unsuccessfully) for the current Fiscal Year. *See* L.D. 1780 (as amended) (pending bill with amendment reducing requested $1.7 million increase in appropriation to the Clean Election Fund to $700,000). Or the Commission can seek an exemption from the budget procedures in sections 1667 and 1667-B, as the Office of Attorney General unsuccessfully attempted earlier this year. *See* Exhibit 2. In any event, "this court is not empowered to rewrite [a] statute to achieve fairer results." *Wilcox v. City of Portland*, 2008 Me. Super. LEXIS 199, at *39 (Me. Super. Ct. Sep. 10, 2008) (Warren, J.). Rather, "redress for any unfairness in the application of [§ 1667-B] lies with the Legislature." *Id.* at *39-40.

B. The Governor's Refusal to Sign a Financial Order Is Not Final Agency Action Subject to Review Under the Maine Administrative Procedures Act and Rule 80C.

Plaintiffs contend that "[t]he Maine Administrative Procedures Act provides clear authority for this Court to correct the failure or refusal of state agencies to make payments mandated by statute." Mot. 6. But plaintiffs are effectively seeking an order requiring the execution of financial orders, which are by law subject to the Governor's approval. The Governor's unique role as the head of the executive branch, and the broad discretion the Legislature has granted to his office, make clear that his approval or denial of a financial order is not "final agency action" that may be the subject of a Rule 80C petition.

MAPA defines "final agency action" as "a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S.A. § 8002(4). But that definition of "agency" *explicitly excludes the Governor*: "'Agency' means any body of State

Government authorized by law to adopt rules, to issue licenses or to take final action in adjudicatory proceedings. . . but the term does not include the . . . Governor[.]" *Id.* § 8002(2). This provision—which plaintiffs fail to cite in their brief—is fatal to any Rule 80C claim against the Governor.

Plaintiffs attempt to sidestep this obvious flaw in their Rule 80C claim by recasting their challenge as one against the Ethics Commission and the Commissioner of DAFS. Mot. 6. But plaintiffs are not challenging any actions of the Ethics Commission, which is not even a named defendant. Nor have they identified any improper action (or failure to act) by the Commissioner of DAFS. Rather, they are asking the Court to rewrite sections 1667 and 1667-B to require the issuance of a financial order by the Commissioner *without the approval of the Governor. See* Amended Compl. ¶ 74(b). The MAPA does not grant this Court license to rewrite Title 5; it must interpret and apply the statutes as they are written, not as plaintiffs may wish them to be. *Milton*, 538 A.2d at 256.

Even if the Governor were not expressly exempted from MAPA, the Rule 80C claim would still fail. MAPA does not encompass every decision that an agency makes. "[E]ven when an agency action is final, it does not follow that the action is subject to judicial review." *New England Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009, 1013. In *New England Outdoor Center*, the Law Court rejected a Rule 80C proceeding initiated by an outfitter who was dissatisfied with the agency head's decision not to bring an enforcement action against other licensees. The Court noted that this outcome was "within the discretion of the Commission," and that "interfering with the agency's discretionary power to investigate" would be "inconsistent with settled principles of the separation of powers." *Id.*, 2000 ME 66, ¶¶ 1, 12, 748 A.2d at 1010-14; *see also Casey v. Sch. Union #106*, No. CIV. A. AP-00-012, 2000 WL 33677440, at *1 (Me. Super. Oct. 11, 2000) (dismissing Rule 80C action because "the law in Maine 'deliberately leaves the decision whether to review a probationary teaching contract to the unfettered discretion of the school board'").

The fact that not all government action is "final agency action" under MAPA flows directly from "the constitutional doctrine of separation of powers." *Brown v. State, Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me. 1981). "The Legislature may not constitutionally confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch. *Some executive action is by its very nature not subject to review by an exercise of judicial power.*" *Id.* (emphasis added). This is undeniably the case with the Governor's authority to approve or deny a financial order under sections 1667 and 1667-B. The Legislature has not imposed any restrictions on the Governor's discretion to sign or refuse to sign a financial order. The Governor is not required to explain the reasons why he may approve or deny any particular order, and there is no record amenable to judicial review.

This is why plaintiffs cannot identify a single case in which a Plaintiff brought a Rule 80C challenge to the failure of the Governor to approve a financial order under Section 1667-B. Given the frequency with which the Governor is presented with such orders, judicial intervention would create endless mischief and involve the courts intimately with the budgetary process. In sum, the denial of the requested financial orders is not the kind of "final agency action" reviewable under Rule 80C.

C. Plaintiffs Cannot Obtain an Order in the Nature of Mandamus Against the Governor (or Commissioner) Requiring Issuance of a Financial Order Without the Governor's Approval

Claims challenging "any action or failure or refusal to act by a governmental agency" that fall outside the scope of MAPA may be pursued under Me. R. Civ. P. 80B and Rule 81(c). Rule 80B "is a procedural device and does not provide any independent substantive rights." *Ray v. Town of Camden*, 533 A.2d 912, 913 (Me. 1987). The Law Court has held that Rule 80B(a)'s allowance of claims "otherwise available by law" permits the Court to treat claims as "the equivalent of a complaint for mandamus to compel government action." *Id.* (citation omitted). Although Rules 81(c) and 80B adjust the procedural requirements for these claims, "the courts look to the basic substantive requirements of a mandamus when determining whether to compel government action." *Ray*, 533 A.2d at 913; *see*

also 1983 Advisory Committee Notes, Me. R. Civ. P. 80B (encouraging "direct application of prior authority" delineating the scope of the extraordinary writs).

"Mandamus is an extraordinary remedy." *Young v. Johnson*, 207 A.2d 392, 395 (1965). Relief will not be granted unless "the plaintiff shows (1) that it has the right to have the act done; (2) that it is the plain duty of the defendant to do the act; and (3) that the writ will be availing and that the plaintiff has no other sufficient and adequate remedy." *Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995); *Young*, 207 A.2d at 395 ("The writ is one requiring the doing of some specific duty, imposed by law, which the applicant, otherwise without remedy, is entitled to have performed.").

1. Mandamus-type relief is not available against the Governor for his discharge of official acts

For more than 150 years, the courts of this state have rejected the claim that they can award mandamus relief against the Governor when he exercises his official duties of office. In *In re Dennett*, 32 Me. 508 (1851), the Petitioner sought an order compelling the Governor and Secretary of State to declare him elected to the office of Lincoln County Commissioner. *Id.* at 509. A statute delegated to the defendants the responsibility to review the election results and declare the winner. *Id.* at 510. Citing the constitutional separation of powers, the Law Court held that the requested relief was beyond its authority: "If the act of opening and comparing the votes returned be an official duty to be performed by the executive department, this court cannot entertain the inquiry, whether it has been correctly or incorrectly performed. That department is responsible for the correct performance of its duties in the manner prescribed by the constitution, but is not responsible to the judicial department." *Id.*

Dennett remains good law. The Law Court most recently addressed the question in *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972), where the petitioners sought an order compelling the Governor to submit a proposed bill to a vote of the people, consistent with procedures set forth in the Constitution. After the trial court issued the requested order, the Law Court reversed. Despite its view that the Governor's actions were inconsistent with the Constitution, the Law Court reaffirmed *Dennett*,

reiterating the Governor's "immunity from judicial coercion by court order in the performance of his official duties[.]" *Kelly*, 287 A.2d at 429. Although it noted that other states had disagreed, the Court declined to retreat from its rationale, concerned that the spectacle of a court determining which acts were discretionary or ministerial exceeded judicial authority "and coercive action by one branch of government against another would tend to create antagonism." *Id.* at 430. "[F]or whatever he does officially, the Governor shall answer only to his own conscience, to the people who elected him, and in case of the possible commission of a high crime or misdemeanor, to a court of impeachment." *Id.*

To this day, the Law Court has never suggested that courts may issue mandamus-type relief against the Governor for his official acts. And the review and disposition of financial orders under sections 1667 and 1667-B is plainly an exercise of his official duties. This Court thus lacks the power to issue the mandamus relief requested by plaintiffs.

2. Even if mandamus relief were available, the Governor's review of financial orders is discretionary, not ministerial.

Assuming, *arguendo*, that the Governor's authority to review financial orders were the proper subject of an order from this Court, Plaintiffs still cannot succeed on their claims because the Legislature has undoubtedly vested the Governor with discretion over the approval of the orders in question. "Mandamus is designed to compel action and not to control decision." *Young*, 207 A.2d at 395; *Dunston v. Town of York*, 590 A.2d 526, 528 (Me. 1991) ("It is well established that mandamus can be used to compel officials to perform only mandatory, not discretionary, functions."). Thus, the act compelled must be a "ministerial" duty. *Young*, 207 A.2d at 395. A duty is considered ministerial "[w]hen the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion." *Id.* "When, however, the law requires a judicial determination to be made, such as the decision of a question of fact, or the exercise of judgment … the duty is regarded as judicial, and mandamus will not lie to compel performance." *Id.*

Plaintiffs' complaint—but not their Motion—asserts, in *ipse dixit* fashion, that the approval of financial orders is "ministerial." *See* Amended Compl. ¶ 60. This is demonstrably false. To begin, the statutory language makes it plain that the Governor is not compelled to approve any order. Approval is a necessary condition, the result of which is not pre-ordained under section 1667-B. *See also* 5 M.R.S.A. § 1667 (providing that the "Governor, with the assistance of the State Budget Officer, shall review the requested allotments with respect to the work program of each department or agency and shall, *if the Governor determines it necessary*, revise, alter or change such allotments before approving the same") (emphasis added). The statute thus "does not require" that the Governor "conduct [these actions] in a specific way." *New England Outdoor Ctr.*, 2000 ME 66 ¶ 12, 748 A.2d at 1014. Rather, analysis of an increase in excess of the legislative allocation for a given year will always require weighing "question[s] of fact" and "exercis[ing] judgment." *Young*, 207 A.2d at 395 (quotation omitted). Mandamus relief is thus not available to force the Governor (or Commissioner) to approve the financial orders requested by the Ethics Commission.

D. Plaintiffs' Federal Law Claims Fail on the Merits.

1. Plaintiffs Cannot Prevail on Their First Amendment Claim

The crux of plaintiffs' First Amendment claim is that the Governor has acted unconstitutionally by reducing public election funding below "the amount permitted by statute." Mot. 17. That argument is wrong as a matter of Maine statutory and constitutional law for all the reasons discussed above. But it is even less meritorious as a matter of federal constitutional law. Plaintiffs do not cite a single case for the proposition that the Governor's alleged violation of *state law* can be bootstrapped into a violation of the *First Amendment.* All relevant authority is to the contrary. Courts have held time and again that "[m]ere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *see also Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 102 (1st Cir. 1977) ("The illegality of official conduct under local law 'can neither add to

nor subtract from its constitutional validity.'"); *Stern v. Tarrant Cty. Hosp. Dist.*, 778 F.2d 1052, 1059 (5th Cir. 1985) ("[F]ederal constitutional protection is independent of state law."); *Archie v. Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988). At bottom, plaintiffs are arguing that the Governor should have signed a discretionary financial order increasing the FY2018 allotments for the Maine Commission on Governmental Ethics and Election Practices. That claim fundamentally turns on questions of state law, and plaintiffs badly miss the mark by seeking to enforce purported state-law budgetary obligations through the guise of the First Amendment.

Even if an alleged violation of a state statute could serve as the predicate for a federal First Amendment claim, plaintiffs' claim here would still fail. Indeed, plaintiffs' theory of what the First Amendment requires is unprecedented. To the extent public election funding mechanisms have been scrutinized under the First Amendment, those cases have generally involved challenges to public funding laws on the ground that they impermissibly disadvantaged candidates *who declined to take public funding*. Some of those laws have been struck down as unconstitutional, *see Arizona Free Enterprise Clubs v. Bennett*, 564 U.S. 721 (2011), while others have been upheld, *see Buckley v. Valeo*, 424 U.S. 1, 666-677 (1976); *Daggett v. Comm'n on Gov't Ethics*, 205 F.3d 445, 466-72 (1st Cir. 2000). But plaintiffs have not pointed to a single case in which a court found a First Amendment violation on the ground that candidates received *too little* public funding. Such a theory is unprecedented in First Amendment jurisprudence and would convert the First Amendment from a shield against government overreach into an affirmative entitlement to government funding.

The Supreme Court has squarely rejected the notion that the First Amendment requires the government to "grant a benefit … to a person who wishes to exercise a constitutional right." *Regan v. Taxation Without Representation*, 461 U.S. 540, 545 (1983); *see also id.* at 546 ("Congress has not infringed any First Amendment rights or regulated any First Amendment activity" when it "has simply chosen not to pay for [the plaintiff's] lobbying."); *Cammarano v. United States*, 358 U.S. 498, 535 (Douglas, J.,

concurring) (rejecting notion that "First Amendment rights are somehow not fully realized unless they are subsidized by the State"). The First Circuit has similarly held that "the state does not violate an individual's First Amendment rights if it refuses to subsidize those activities of that individual that are protected by the First Amendment." *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Mass.*, 868 F.2d 473, 479 (1st Cir. 1989). There is zero support for the proposition that the First Amendment guarantees plaintiffs a certain level of state-provided funding for their campaigns.[2]

Unable to ground their claim in existing legal doctrine, plaintiffs retreat to policy arguments, asserting that the Governor's actions will reduce the amount of election-related speech. Mot. 17-18. This ignores the reality that all publicly funded candidates just received large lump-sum payments for the general election, and many candidates will also have funds remaining from their primary campaigns (in addition to the initial payment of supplemental funds they just received). *See infra* at II(A). Plaintiffs have not pointed to a single, actual instance in which a publicly funded candidate was unable to make a campaign-related expenditure due to lack of sufficient funding. It is pure hyperbole to suggest that a delay in receiving one portion of one type of election funding for candidates who just received thousands of dollars (or more) of general election funds will "drastically reduce both the quantity and quality of [candidates'] communications with the voters." Mot. 17.

2. Plaintiffs Have No Claim Under the Contract Clause

Plaintiffs' Contract Clause claim also fails for several independent reasons. At the outset, the Supreme Court has rejected the argument that "an expectation of public benefits confer[s] a contractual right to receive the expected amounts." *Richardson v. Belcher*, 404 U.S. 78, 80 (1971). Plaintiffs have not identified a single case holding that public election funding gives rise to a vested

[2] Plaintiffs argue in passing that the Governor's actions also violate various provisions of the Maine Constitution, *see* Mot.18, 20, but they provide no meaningful analysis of that claim. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Melhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290, 293.

right enforceable through the Contract Clause. And plaintiffs' heavy reliance on *Parella v. Retirement Bd. of Rhode Island Emps. Ret. Sys.*, 173 F.3d 46 (1st Cir. 1999), is surprising given that the First Circuit found that the plaintiffs in that case "failed to establish a contractual right to the withheld benefits."[3]

Moreover, there is zero indication in the statutory text that the MCEA has created rights "enforceable against the State." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977). Indeed, the plain text of the MCEA *expressly contemplates* the possibility of insufficient funding. *Cf. Arizona Free Enterprise Clubs*, 564 U.S. at 741 n.7 (noting that, for publicly funded elections, "the level of speech will depend on the State's judgment of the desirable amount [of speech], an amount tethered to available (*and often scarce*) state resources") (emphasis added). The MCEA provides that, "[n]otwithstanding any other provisions of this chapter, if the commission determines that the revenues in the fund are insufficient to meet distributions under subsection 8-F, the commission may permit certified candidates to accept and spend" private contributions "according to rules adopted by the commission." 21-A M.R.S.A. §1125(13-A).

Thus, the express statutory remedy in the event of "insufficient funding" is not to bring an extraordinary lawsuit seeking to compel the Governor to issue a discretionary financial order (or bypass that condition altogether), but to allow candidates to raise private funds to make up any shortfalls. Plaintiffs may not like that option, and it is unsurprising that they would prefer to receive all their funding through the MCEA program. *See* Mot. 5 (citing declarations). But plaintiffs do not—and cannot—dispute that both the risk of insufficient funding and the statutory remedy in the event of insufficient funding were readily apparent at the time they chose to participate in the MCEA program. "[W]hen the Government appropriates public funds to establish a program it is entitled to

[3] *Bates v. Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2004), provides no support for plaintiffs. That case turned solely on Massachusetts law (rather than the Contract Clause) and the remedy the court ordered—mandating the funding of a program in the absence of a specific appropriation by the legislature—has never been recognized in Maine.

define the limits of that program," *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), and plaintiffs offer no reason why this Court should disregard the express remedies in the MCEA in favor of an unprecedented injunction ordering the Governor to sign a discretionary financial order.[4]

Finally, even if there were a binding contract, and even if it were impaired, any such impairment is not "substantial." *General Motors v. Romein*, 503 U.S. 181, 186 (1992). The supplemental election funds at issue here are only one component of a broader public funding program that also includes substantial lump-sum payments for both the primary and general elections that have been disbursed to MCEA candidates on time and in full. A delay in providing one portion of one component of a broader public funding program where the candidates have already received substantial disbursements of public funding hardly constitutes the type of "severe, permanent, and immediate" impairment that is needed to establish a Contract Clause violation. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250 (1978).

II. Plaintiffs Fail to Satisfy the Other Requirements for Injunctive Relief

Although Plaintiffs purportedly assert a claim for injunctive relief, their brief nowhere acknowledges the *standard* for injunctive relief or argues that it meets the requirements for an injunctive relief other than success on the merits. This alone requires denial of any injunction, because "[t]he writ of injunction is declared to be an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case." *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980) (quoting R. Whitehouse, Equity Jurisdiction § 563 (1900)). The moving party accordingly must meet their burden on each of

[4] Plaintiffs suggest that §1125(13-A) is inapplicable because the revenues in the Clean Election Fund "*are* sufficient to meet the required distributions." Mot. 10. But given that the allotted revenues in Q4 2018 were *not* sufficient to cover the supplemental payments, the Commission likely would have been justified in invoking §1125(13-A). In all events, the only material fact for purposes of this case is that plaintiffs are seeking a remedy premised on insufficient funding that departs dramatically from the explicit remedy included in the statute.

the factors. "Failure to demonstrate that any one of these criteria are met requires that injunctive relief be denied." *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 10, 837 A.2d 129, 132–33.

To obtain preliminary or permanent injunctive relief, the Plaintiffs must demonstrate: "(1) that plaintiff will suffer irreparable injury if the injunction is not granted, (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant, (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility), (4) that the public interest will not be adversely affected by granting the injunction." *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982). When (as here) the requested injunction "ha[s] mandatory aspects," the plaintiffs must "show a clear likelihood of success on the merits, not just a reasonable likelihood." *Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989).

A. Plaintiffs Cannot Show an Irreparable Injury

"[P]roof of irreparable injury is a prerequisite to the granting of injunctive relief." *Bar Harbor Banking & Trust Co.*, 411 A.2d at 79. Plaintiffs' 20-page motion fails to mention a rather important fact that is directly relevant to their claims of injury: approximately *two weeks* before Plaintiffs filed this suit, between June 13 and June 21, every one of the MCEA candidates received significant payments of public funds for their general election campaigns, a total of nearly $2.3 million across 199 candidates. *See* Gott Decl. ¶ 22. Candidates for State Representative received $5,075, candidates for Senate received $20,275, and a candidate for Governor received $600,000. *See* Wayne Decl. ¶¶ 15, 31. In addition to those large general election payments, candidates will also have access to any remaining funds from their primary campaigns (which also entailed thousands of dollars of MCEA funds) and their seed funds. And candidates have received substantial amounts of supplemental payments to the extent those payments were consistent with the Commission's Q4 allotment.

It thus strains credulity for plaintiffs to suggest that they are unable to speak or to effectively conduct their campaigns at this time. The candidate declarations submitted with plaintiffs' motion

speculate about harms that *might* occur in the future *if* they do not receive the full amount of MCEA supplemental funds. But not a single one of the declarants asserts that he or she is *currently* unable to fund campaign expenditures or to effectively communicate with voters. That omission is unsurprising given that these candidates each just received thousands of dollars of public funds from the MCEA program for their campaigns.

Finally, it would be especially inappropriate for this Court to intervene now given that the legislative process remains in flux and there could be a development at any time that provides the Commission with the funding needed to make the remaining supplemental payments. *See, e.g.,* L.D. 1894 (as amended), § C-13 (pending errors and omissions bill that would permit distribution of Clean Election Funds in Fiscal Year 2019). Indeed, the fact that this remains a live issue before the Legislature only underscores that this entire dispute is one that should be resolved through the appropriation and budgeting process rather than through an unprecedented action seeking to compel the Governor to sign a financial order.

B. Plaintiffs Fail to Analyze the Harms to the Defendants or the Public

Plaintiffs spend all of one sentence, buried in their statement of facts, conclusorily asserting public harm at the broadest level of generality. *See* Mot. 11. Nowhere do they grapple with (let alone refute) the harm to the separation of powers inherent in the Constitution, the infringement on the Legislature's goal of ensuring orderly review and the Governor's input over the budget process, and the risks associated with overturning 150 years' worth of precedent and incentivizing an unprecedented flood of legal challenges to the award or denial of financial orders. With the burden squarely on Plaintiffs to demonstrate their entitlement to the disfavored remedy of injunctive relief, their failure to even cite (let alone meet) the standard dooms this aspect of their claims, "particularly in view of the strong policy of judicial restraint in mandating the activities of a coordinate branch of government." *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982)

CONCLUSION

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

Respectfully submitted,

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