



August 15, 2018

Jonathan Wayne  
Executive Director  
Commission on Governmental Ethics and Election Practices  
135 State House Station  
Augusta, ME 04333-0135

RE: The Commission's Authority Over the Clean Election Fund in Fiscal Year 2019

Dear Director Wayne:

We appreciate the opportunity to address the Commission on an issue of great importance to MCCE, candidates, and the general public.

We urge the Commission to seize its statutory authority and responsibility for administering the Clean Election Fund and release payments to certified Clean Election candidates as required by Title 21-A. It is critically important to ensure that these mandatory payments resume without further disruption or delay.

Under Maine law, these payments are mandatory. Once a candidate has qualified and met the requirements, the program is not subject to discretion or arbitrary termination. The Commission "shall" and "must" make the payments. 21-A M.R.S. §1125(7). As Justice Stokes wrote just two weeks ago:

The mandatory nature of the distribution of funds to qualified candidates also supports the conclusion that the enactors of the MCEA intended to remove the Legislature and the Governor from the actual distribution of such funds.

Decision at 13-14. Once candidates are certified, the distribution of funds is merely a "ministerial" task. Decision at 15. The only prerequisites for distribution are (1) legislative appropriation of monies into the Maine Clean Election Fund; and (2) the Commission's certification of candidates and determination that they are eligible for distributions under the Clean Election Act. Those conditions have been met. Justice Stokes emphatically rejected any effort to impose additional restraints on the release of funds.

Over the past several months there have been many references to the so-called drafting error in the biennial budget. I would like to explain why that issue is not an impediment to your decision.

The “error” at issue is found in unallocated language at page 814 of the biennial budget, P.L. 2017, Ch. 284, §ZZZZZZ-19. On that page a non-partisan legislative staff person apparently inserted “(\$3,000,000)” to indicate a reduction in allocation for the Maine Clean Election Fund in FY19. The source of the \$3 million in question, however, was the General Fund rather than the Maine Clean Election Fund. Therefore this notation, which in other contexts might constitute a negative allocation, should not be so interpreted here.

Any reduction in allocation for FY19 would have been an error, but even assuming that this notation constituted a reduction in allocation for FY19, the Commission still has statutory authority to distribute the existing revenues in the Fund during this fiscal year.

It has been more than thirteen months since this erroneous notation occurred, and approximately seven months since it was first discovered. In that time *not a single person has disputed the fact that it was an error*. Not a single legislator or other source has indicated that the biennial budget was intended to cut off the Clean Election Fund for FY19, at the height of an election cycle. Indeed, that result would be so extraordinary and absurd that no one could suggest such an intention with a straight face – especially when the contemporaneous media coverage of the 2017 budget plainly stated that funding for Clean Elections was agreed upon as part of the solution to that year’s budget impasse. The “error” plainly conflicts with the general statutory scheme of the MCEA as well as the budget itself, which advanced \$3.0 million from January 2019 to June 2018 for the obvious purpose of funding the Clean Election program in the 2018 election cycle.

So on the one hand, the Commission “must” distribute funds to certified candidates pursuant to the Clean Election Act, and the legislature advanced \$3.0 million from calendar year 2019 to make that possible. On the other hand, a latent error in unallocated language of the 2017 biennial budget has been assumed to stand in the way. But a closer examination of that error makes clear that it does not, in fact, stand in the way at all. Please see the attached memorandum for a more detailed analysis of the significance of the so-called error – the only actual legal analysis of this issue of which we are aware.

It is also critically important to note that the freeze on the Fund is severely disrupting many of the vital activities of the Commission itself. The Fund is used to cover expenses related to the support and maintenance of the Commission’s electronic filing and disclosure system, leaving the current contract in arrears with no obvious remedy. A new contract would be impossible until

this is resolved. In addition, expenses for auditing candidate campaigns are paid from the Clean Election Fund, and such audits will not be possible this year as things now stand. There are also payments to DAFS as well as various administrative and overhead costs that depend on your decision today. In short, it makes no sense to freeze these vital functions of your Commission without even a remote hint of a legislative intention to do so.

The solution is simple. The Commission should look to the intention of the statutory scheme as a whole in order to resolve this issue. We urge you not to prioritize an obscure and latent drafting error in a 900-page budget document – one that no legislator likely ever even saw in the chaotic days of the 2017 government shutdown prior to enactment of the budget – over other more obvious language in the budget and over the Clean Election Act itself.

We urge you to decide without delay, as the election cycle is nearing its peak. Some candidates have submitted additional qualifying contributions and are awaiting their supplemental payments, while many others are holding off on their supplemental funding efforts until this issue is resolved. Most importantly, several replacement candidates are waiting for your decision so they can meet the certification deadline next week. Time is running out; the final day for submitting Clean Election qualifying contributions is only two months away. The unfair burden on these candidates becomes more critical with each passing day. Meanwhile, voters are already beginning to request absentee ballots.

A court has already ruled that the Ethics Commission has plenary authority to release the funds. The Commission should not be deterred by an obscure drafting anomaly the legal significance of which is debatable at best.

Thank you for considering our comments. We look forward to continuing to work with you and the Commission on this and all other matters relating to the Clean Election Act.

Sincerely yours,

A handwritten signature in black ink that reads "John Brautigam". The signature is written in a cursive, flowing style.

John Brautigam, Esq.  
MCCE Legal Counsel

## MEMORANDUM

To: Maine Ethics Commission  
From: Maine Citizens for Clean Elections  
Date: August 14, 2018  
RE: Distributions from the Clean Election Fund in Fiscal Year 2018-19

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### **INTRODUCTION**

This memorandum sets forth the legal basis for the Commission to announce that it will distribute to qualified candidates from the existing revenues currently in the Clean Election Fund (the “Fund”) any amounts for which those candidates qualify in the remainder of the election cycle under the Clean Election Act (the “MCEA” or the “Act”). The Commission has so far reasonably assumed that a purported error in a budget bill (P.L. 2017, Chapter 284) would be corrected by the Legislature in order to remove any question about the Commission’s authority to make these distributions pursuant to the MCEA in this fiscal year. The Commission had also reasonably assumed that the Clean Election Fund was subject to the financial order process that governs other special revenue funds. However, a recent judicial decision of the Maine Superior Court held that the Clean Election Fund was unique among Maine’s special revenue funds, and that it should be free from interference by both the Governor and the Legislature. That decision, together with a close examination of the entire statutory scheme in which that budget bill occurred, make clear that the Commission has the authority to make these distributions—indeed is statutorily required to make them—even without legislative correction of the error that has thus far been assumed (incorrectly) to stand in the way.

### **WHY IS THE COMMISSION BEING ASKED?**

The Commission is not generally asked to interpret budgetary statutes, so it is reasonable to question why the Commission is now being asked to do so, and whether the Commission has

that authority. The reason is that the Commission is charged with a statutory mandate to “administer the Act and the fund.” 21-A M.R.S. § 1123. The Maine Superior Court recently laid out the general principles that govern how the MCEA and the Act operate in the context of the State’s general budgetary statutes (the “Decision”). The Court held that “the MCEA and the Fund are unique among Maine statutes.” Decision at 13. The Court determined that the Commission considers only two factors in determining whether to make a distribution from the Fund, whether: “(1) there are more than sufficient revenues in the Fund and (2) the distribution of such funds is unambiguously required by the MCEA.” Decision at 15.

So the question now before the Commission is whether an unallocated notation in P.L. 2017, Chapter 284 legislatively amended the MCEA to operate differently for fiscal year 2018-19 than the simple two-factor analysis announced by the Superior Court for any other fiscal year. In other words, the task before the Commission is not to interpret a budgetary statute in the abstract, but instead to determine whether the MCEA—the Act administered by the Commission—has been legislatively amended by the inclusion of a numerical parenthetical “(\$3,000,000)” for fiscal year 2018-19 in Section ZZZZZZ-19 of that budgetary statute. As will be explained in more detail below, that parenthetical did not legislatively amend the portions of the MCEA recently discussed by the Superior Court in its Decision, and the MCEA should—indeed must—operate in this fiscal year just as it would in any other fiscal year.

Because the Commission is statutorily required to administer the MCEA, the Commission must resolve this statutory interpretation issue in the first instance before a Court could even consider the question. We therefore ask the Commission to determine that the MCEA operates in fiscal year 2018-19 in exactly the manner recently determined by the Superior

Court, and that the MCEA has not been legislatively amended by P.L. 2017, Chapter 284 to operate differently in this fiscal year.

**I. THE RULES OF STATUTORY CONSTRUCTION**

When, as here, the Commission is faced with determining whether the MCEA has been amended by the budget bill, it engages in statutory interpretation, a process described by the Maine Supreme Court as follows:

The goal of statutory interpretation is to give effect to the Legislature's intent. Only if the plain language of the statute is ambiguous will we look beyond that language to examine other indicia of legislative intent, such as legislative history. Statutory language is considered ambiguous if it is reasonably susceptible to different interpretations. When a statute administered by an agency is ambiguous, we review whether the agency's interpretation of the statute is reasonable and uphold its interpretation unless the statute plainly compels a contrary result.

*Manirakiza v. Dep't of Health & Human Servs.*, 2018 ME 10, ¶ 8, 177 A.3d 1264, 1266 (internal citations and quotations omitted). In other words, an agency—like the Commission—doesn't need to arrive at the only possible interpretation of a statute; it simply needs to arrive at any “reasonable” interpretation of the statute.

Here, one reasonable interpretation of the MCEA and the various budgetary provisions shifting the timing of payments from the General Fund into the Clean Election Fund is that the legislature simply intended to advance the Fund \$3,000,000 in fiscal year 2017-18, but otherwise intended the MCEA to operate in the ordinary manner in fiscal year 2018-19. Because this interpretation is reasonable, it is available to the Commission—and would be upheld by a Court—even if there might be other reasonable interpretations of the parenthetical “(\$3,000,000)” at issue. For that reason alone, the Commission should find that the MCEA operates in fiscal year 2018-19 in exactly the manner recently determined by the Superior Court for any other fiscal year.

But there are also other rules of statutory construction that the Commission can consider. Those include that the Commission must “consider the language in the context of the whole statutory scheme, and construe the statute to avoid absurd, illogical, or inconsistent results.” *Chadwick-BaRoss, Inc. v. City of Westbrook*, 2016 ME 62, ¶ 11, 137 A.3d 1020, 1023 (internal alterations and quotations omitted). And when there are potentially conflicting individual provisions, they must be read together “in the context of the entire statutory scheme to generate a harmonious result.” *State v. Murphy*, 2016 ME 5, ¶ 7, 130 A.3d 401, 404.

Any reasonable examination of P.L. 2017, Chapter 284 must lead the Commission to conclude that the numerical parenthetical “(\$3,000,000)” for fiscal year 2018-19 in Section ZZZZZZ-19 of P.L. 2017, Chapter 284 was simply the numerical representation of the plain text of Section NNNNNN-1 of that same statute, which provides that “Notwithstanding the Maine Revised Statutes, Title 21-A, section 1124, subsection 2, paragraph B, the State Controller shall transfer \$3,000,000, currently authorized to be transferred on or before January 1, 2019, from the General Fund to the Maine Clean Election Fund on or before June 1, 2018.” *Id.* Had the Legislature instead intended to alter the mandatory distributions in Section 1125 (and not just the timing of the \$3,000,000 transfer in Section 1124(2)(B)), it would have used language such as ““Notwithstanding the Maine Revised Statutes, Title 21-A, section 1125 ...” in either Section NNNNNN-1 or ZZZZZZ-19 just as it did with regard to Section 1124(2)(B). The Legislature did not do so, but simply enclosed the number in parenthesis to show that the money that would ordinarily be transferred from the General Fun in fiscal year 2018-19 would instead be transferred in fiscal year 2017-18. It would be an absurd result indeed to instead conclude that two errant parentheticals in Section ZZZZZZ-19 had the extreme consequence of suspending the plain statutory mandates of 21-A M.R.S. § 1125 and froze all distributions of existing revenues

from Fund without any additional indication of that legislative intent and contrary to the universal understand prevailing at the time of enactment.

**A. The Superior Court Recently Announced the General Principles that Govern the Operation of the MCEA and the Fund in Relation to the Other General Budgetary Statutes.**

The Superior Court recently announced the general budgetary principles that govern the MCEA and the fund. Unless the Commission concludes that the two errant parentheticals clearly alter the statutory mandates interpreted by the Superior Court—which the Commission should not conclude—then the Commission must abide by two-factor analysis recently announced by that Court. The Superior Court said that “The MCEA mandates distributions of supplemental payments to candidates who provide additional qualifying contributions.” Decision at 10-11. The court reasoned that “the enactors intended that there would be no discretion in the distribution of funds in accordance with the terms of the MCEA.” *Id.* at 12. This is in part because “the MCEA and the Fund are unique among Maine statutes.” *Id.* at 13. Thus the Fund is treated differently than even the other Special Revenue Funds modified in the budget bill. “The mandatory nature of the distribution of funds to qualified candidates also supports the conclusion that the enactors of the MCEA intended to remove the Legislature and the Governor from the actual distribution of such funds.” *Id.* at 13-14 (emphasis added). It is significant that the Superior Court went out of its way to state that the Legislature’s power to alter the mandates of Section 1125 are limited in a similar manner to the Governor. This makes sense because the fund similar affects candidates for legislative office. This observation by the Superior Court is yet another indication that it would require a clear statement of the Legislature—more than two errant parentheticals—to suspend the mandatory payments required by Section 1125 whenever there are sufficient revenues in the Fund.



**B. There Is No Statute Or Case Law That Describes How to Interpret Parentheticals in a Budget Document.**

As described above, it would be an absurd result for the Commission to reject the reasonable interpretation that the budget bill simply advanced the timing of a statutorily-scheduled \$3,000,000 transfer from the General Fund to the Clean Election Fund. The Commission has no reason to instead conclude that these two errant parentheticals suspended all distributions under the MCEA for the remainder of this election cycle. There is no judicial determination that would mandate that result. Indeed, the errant parenthesis at issue here surround a number described in Section ZZZZZZ-19 of P.L. 2017, Chapter 284 as an “allocation,” but the term “allocation,” is nowhere defined in statute or in case law. Neither is the term “appropriation”

As previously explained in an Opinion of the Maine Attorney General, “these words have become terms of art in today's budget documents, with “appropriation” generally used to reflect the Legislature's authorization of expenditures from the General Fund, and “allocation” to represent legislative authorization of expenditures from special revenues.” Opinion No. 05-2, 2005 WL 4542875, at \*2 & n.4 (Me. A.G. Mar. 17, 2005) (*citing, inter alia*, “Selected Budget Terms and Definitions,” published by the Legislature's Office of Fiscal and Program Review).

For helpful (but non-binding) definitions, the most recent update to that cited publication of the Office of Policy Review can be found as Appendix V to “The Budget Process,” available here: <http://legislature.maine.gov/doc/1329>. The Office of Policy Review defines some of these terms as follows:

**Allocation** The amount of expenditures authorized by the Legislature from resources legally restricted or otherwise designated for specific operating purposes. ... Negative allocations are called deallocations.

**Appropriation** The amount of expenditures authorized by the Legislature from unrestricted or undesignated resources for specific operating purposes. ... Negative appropriations are called deappropriations.

**Deallocation** A negative Allocation reducing spending authority

**Deappropriation** A negative Appropriation reducing spending authority.

**Encumbered Balance Forward** The balance of funds in an account which is reserved for the future liquidation of encumbered purchase orders and contracts and which carries forward from one fiscal year to the next in accordance with law. Encumbered balances at year-end carry forward only one year unless stated otherwise in law.

**Encumbrance** commitment against allotment for legally binding purchase orders and contracts representing goods and services which have not yet been received. Encumbrances become expenditures and liabilities only when the goods and services are actually received.

*Id.* What we have here is a question as to whether the errant parentheticals result in a deallocation—the answer to which is that they do not. There is no question about whether we are dealing with a deappropriation because “any method by which the Legislature designates or assigns revenues for certain statutorily defined purposes should be sufficient to constitute an ‘appropriation or allocation authorized by law’ ... All that is essential is that the Legislature, by a valid enactment, shall assign to a particular use a sum of money from the public revenues.” Opinion No. 05-2, 2005 WL 4542875, at \*4 (Me. A.G. Mar. 17, 2005). The MCEA is just such a valid enactment, which makes clear that any money existing in the Clean Election Fund has sufficient legislative “appropriation” authority to be distributed for the purposes mandated by Section 1125. Thus, any dollar amounts that currently exist in the Fund in accordance with Sections 1124 and 1125 have been already been legislatively “appropriated” for distributions pursuant to 21-A M.R.S. § 1125, regardless of whether or not they have been inadvertently (or even intentionally) “deallocated” for this fiscal year. Also, because certification of a candidate creates a contractual commitment by the State to pay that candidate in accordance with the terms of Section 1125 for the remainder of the election cycle, many of the funds that existed in the

account on June 20, 2018 would be subject to an “encumbered balance forward” into this fiscal year.

Such a deallocation would not indicate legislative intent to prevent distributions in accordance with Section 1125 from funds already existing in a non-lapsing Special Revenue Funds. This is because the executive can always expend existing funds in excess of current allocations pursuant to a financial order under 5 M.R.S. § 1667-B, for any Special Revenue Fund. Thus, the very existence of Section 1667-B indicates a legislative intent that a deallocation not be rigidly construed as a legislative suspension of a program funded by a Special Revenue fund. And, as the Superior Court recently held, existing revenues from the Clean Election Fund can be distributed pursuant to Section 1125, even without such a financial order under Section 1667-B. The Commission should therefore follow the mandate of the Superior Court and distribute the funds in accordance with Section 1125, regardless of whether it determines that the two errant parentheticals created a temporary deallocation for this fiscal year, as further explained in Section II below.

**C. The Commission Must Construe the MCEA and the Budgetary Statutes to Avoid, Not Create, Constitutional Violations.**

Any interpretation other than one that concludes that the mandatory distributions will be made from the Fund would violate free speech rights, equal protection rights, and contract rights of the candidates and their contributors. The Commission, just like the Courts, “must construe a statute to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible.” *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551.

The Superior Court recently addressed the issue of whether withholding funds would violate the contract clause rights of the candidates. The court recognized the statutory mandate for Section 1125 was unambiguous, and thus the Court assumed that it created a contractual right

protected by the contract clause of the United States and Maine Constitutions. Decision at 20-21.<sup>1</sup> But the Court noted that the contract clause of the Constitution protects the candidates from acts of the Legislature, not acts of the executive. *Id.* Interpreting the errant parentheticals to prevent distributions pursuant to Section 1125 would be to create just such a Legislative interference giving rise to a contract clause violation. It would likewise violate free rights of free speech and equal protection as further explained in Sections III and IV below.

## **II. THE COMMISSION HAS THE AUTHORITY TO MAKE DISTRIBUTIONS EVEN IF THERE TWO PARENTHICALS ARE A REDUCTION IN ALLOCATION FOR THIS FISCAL YEAR**

For Special Revenue funds other than the Clean Election Fund, if monies exist in a nonlapsing Special Revenue fund (and have thus been “appropriated” for the purpose of the fund), but have not be allocated for expenditure in a particular fiscal year, there is a general mechanism to nonetheless allow their expenditure in the fiscal year. That mechanism is a financial order pursuant to 5 M.R.S. § 1667-B to increase executive “allotment” authority in excess of legislative “allocation” authority for the previously appropriated funds that exist in that Special Revenue Fund. *Id.* The Superior Court stated that the Clean Election Fund is different from these other Special Revenue funds and “no financial order under sections 1667 or 1667-B is necessary for the distribution of funds to qualified candidates as certified by the Commission under the MCEA.” *Id.* at 14. Thus, even if the Commission concluded that the two errant parentheticals had the effect of reducing the Commission’s allocation for this fiscal year—a conclusion that it should not make—the Superior Court plainly held that the Commission would

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<sup>1</sup> There is another consequence of recognizing Section 1125 as a contractual right: because Section 1125 creates a contractual right for qualified candidates, certification of a qualified candidate immediately encumbers the maximum amount of money for which that candidate could qualify. And because those funds were encumbered prior to June 1, 2018, their allocation can be carried forward one fiscal year. *See* 5 M.R.S. 1589. Pursuant to the Superior Court’s reasoning, no financial order would be required for this carry-forward.

have the authority to make distributions in excess of legislatively authorized allocations without a financial order under Section 1667-B.<sup>2</sup>

Simply put, the Court held that distributions must be made “where: (1) there are more than sufficient revenues in the Fund and (2) the distribution of such funds is unambiguously required by the MCEA.” *Id.* at 15. That is the exact situation that the Commission finds itself in for FY19 as a result of the \$3,000,000 transferred early pursuant to Section NNNNNN-1, and notwithstanding the two errant parentheticals in Section ZZZZZZ-19 of P.L. 2017, Chapter 284. Accordingly, the Commission should follow the mandate of the Superior Court and distribute the funds in accordance with Section 1125 for the remainder of this elections cycle.

**III. FAILING TO MAKE THE DISTRUBTIONS MANDATED BY THE MCEA WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CANDIDATES AND THE DONORS TO THE FUND.**

As the Commission noted in the recent superior court case, “failing and refusing to sign [] financial orders and thereby blocking statutorily required payments to ... candidates ... violat[es] the First Amendment rights of those candidates and their supporters to engage in core political speech.” Commission’s Memorandum of Law at 11 n.9. And the Superior Court has now ruled that the Commission has the authority without a financial order to make any MCEA mandated distribution that could previously have been made pursuant to a financial order under 5 MRS 1667-B, so long as “(1) there are more than sufficient revenues in the Fund and (2) the distribution of such funds is unambiguously required by the MCEA.” Thus, failing to make the distributions mandated by Section 1125 would, by the Commission’s own previous statement,

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<sup>2</sup> The same reasoning would allow the Commission, without a financial order, to carry forward for one fiscal year the allocation authority necessary to make all future contractual payments under Section 1125 to any candidate who entered into that contract with the State in fiscal year 2017-18 by becoming a certified candidate. Those funds were encumbered at a time when allocation authority for the Fund was not yet impacted by the two errant parentheticals in the budget bill. *See* footnote 1 above.

threaten the First Amendment rights of those candidates and their supporters to engage in core political speech.

Indeed, it is well settled that the First Amendment “has its fullest and most urgent application to speech that is uttered during a campaign for political office.” *EU v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Political dialogue during an election is essential because “[d]iscussion of public issues and debate on the qualifications of candidates [is] integral to the operation of our system of government.” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Any government-imposed “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 issues discussed, the depth of their exploration, and the size of the audience reached.” *Buckley*, 424 U.S. at 19. This is largely because “communicating ideas in today’s mass society requires the expenditure of money.” *Id.* the First Circuit has held with regard to Maine, “Maine’s public financing scheme provides 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).

There is no reason for the Commission to interpret two errant parentheticals to upset the “roughly proportionate mix of benefits and detriments to candidates seeking public funding” pursuant to Section 1125 and unnecessarily reduce “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”

Indeed, to do so would violate the First Amendment, and statutes must be construed wherever possible to avoid—rather than create—constitutional violations.

**IV. FAILING TO MAKE THE DISTRIBUTIONS MANDATED BY THE MCEA WOULD VIOLATE THE EQUAL PROTECTION RIGHTS OF THE CANDIDATES AND THE DONORS TO THE FUND.**

Many of the certified candidates in this election cycle are running against candidates who are also certified candidates. Two candidates running for the same office in the same election cycle are clearly similarly situated individuals for the purpose of the equal protection clause. And there is no legitimate governmental reason to distinguish between these two similarly situated candidates based on the timing of the submission of signatures to qualify for supplemental funds either immediately before or immediately after the arbitrary roll-over of the fiscal year in the middle of the election. Indeed, due to the recent Court order, some candidates received the remainder of their supplemental distributions in this fiscal year while their opponents (in the same race) are now being told that they may be precluded from getting their own supplemental funds in this fiscal year simply because of the timing of when they submitted their signatures. There is no basis in the MCEA to distinguish between similarly situated candidates based on the timing of their qualification for supplemental distributions. Both candidates agreed to the same set of rules, and so long as those candidates are following the agreed upon rules it would violate their equal protection rights to distribute supplemental funds to one candidate in the race, but refuse to distribute funds to the other.

**V. THE COMMISSION SHOULD ACT QUICKLY**

Timely receipt of funds is essential for all candidates to compete in this election cycle. But the timing on this issue is particularly urgent for any candidate that has not yet received the first distribution of funds. This includes replacement candidates who have not yet been certified. The deadline for many replacement candidates to enter the Clean Election program is fast

approaching. A final resolution of this question should be reached as soon as possible. If the Commission is unable to resolve this issue immediately, it should extend the regulatory deadline for replacement candidates to enter the program until some reasonable time after the Commission is able to resolve the issue.

### CONCLUSION

The Commission has been assuming that this budget bill would prevent distributions in the fiscal year, and required a legislative fix. That assumption was reasonable, just as it was reasonable for the Commission to assume that DAFS was correct when it told the Commission that the Clean Election Fund monies were subject to the financial order process. The second assumption proved wrong, as we now know for the recent Superior Court decision. And while a legislative fix would have been ideal to clear up any possible confusion, a closer analysis of the actual issue in the budget bill, together with the recent Superior Court decision, shows that the first assumption is just as wrong as the second assumption.

The Superior Court recent held that the people of Maine who enacted the MCEA intended to insulate the Fund from actions of “the Governor or the Legislature.” Decision at 13-14. Thus the Superior Court concluded that the Commission can consider only two factors in determining whether to make a distribution from the Fund: whether “(1) there are more than sufficient revenues in the Fund and (2) the distribution of such funds is unambiguously required by the MCEA.” *Id.* at 15. That is the exact situation the Commission now faces, and nothing about the two errant parentheticals in Section ZZZZZZ-19 mandates any different result.

Our view is that this is the only reasonable interpretation that the Commission could make. But the Commission is not required to agree with us that this is the *only* reading of the statute. To the contrary, even if the Commission believes there may be other reasonable interpretations of Section ZZZZZZ-19, the Commission is still free to select *any reasonable*



interpretation of the statutory scheme as a whole. Clearly, one such reasonable interpretation is that the mandates of Section 1125 are intended to apply for this entire election cycle. Not only is that a reasonable interpretation available to the Commission, it is the only interpretation consistent with the legislative intention when enacting the budget in July 2017, and the only fair outcome.

Accordingly, we urge the Commission to take the necessary actions to release funds to any candidate who qualifies in this cycle, up to the amount of revenues currently existing in the Fund. We note that DAFS has confirmed that “[t]he revenues from the Maine Clean Elections Fund are accessible to the Commission.” August 6 Letter from Commissioner Porteous. We believe that the Commission has every justification for announcing that it will now distribute those available funds in the amounts for which candidates qualify in the remainder of the cycle and thereby restore the program in full for eligible candidates.

Dated: August 15, 2018

*David Kallin by jrb*

David M. Kallin, Bar No. 4558  
Melissa A. Hewey, Bar No. 3587  
Drummond Woodsum & MacMahon  
84 Marginal Way, Suite 600  
Portland, Maine 04101  
Tel: (207) 772-1941  
Fax: (207) 772-362  
[dkallin@dwmlaw.com](mailto:dkallin@dwmlaw.com)  
[mhewey@dwmlaw.com](mailto:mhewey@dwmlaw.com)



John R. Brautigam, Bar Number 8223  
John R. Brautigam, Esq. LLC  
1 Knight Hill Road  
Falmouth, Maine 04105  
207-671-6700  
[jblaw@maine.rr.com](mailto:jblaw@maine.rr.com)  
Attorneys for MCCE