No. 10-A362

IN THE

Supreme Court of the United States

RESPECT MAINE PAC, HAROLD A. CLOUGH, REP. ANDRE E. CUSHING, III,
Petitioners,

v.

WALTER F. MCKEE, *et al*.,
Respondents.

Application of Andre E. Cushing III, Respect Maine PAC, and Harold A. Clough for a Writ of Injunction Pending Appeal

AMICI CURIAE RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to this Court's Rule 37, the Brennan Center for Justice at NYU School of Law, DEMOS, and John Brautigam respectfully request leave of the Court to file this brief *amici curiae* in support of Respondents on behalf of Maine Citizens for Clean Elections, Phil Bartlett, Justin Alfond, Owen Pickus, Pam Trinward, Sharon Treat, Jon Hinck, David Van Wie and Shelby Wright

Written consent to the filing of this brief has been granted by counsel for the Respondents and for the Applicants. Letters of consent are attached as

Exhibits 3 and 4 to the Declaration of Monica Youn, October 21, 2010 (filed concurrently herewith).

Respectfully submitted,

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AMICI CURIAE RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

INTEREST OF *AMICI CURIAE*

Amici curiae include Maine Citizens for Clean Elections—a nonpartisan association of organizations and individuals with the common purpose of enacting, implementing and defending the Maine Clean Election Act ("MCEA") and other campaign finance reforms. For its fifteen-year history, MCCE has been dedicated to ensuring the orderly and successful functioning of the election process and Maine's campaign finance system. MCCE drafted the MCEA and successfully campaigned for its approval by popular

vote in November 1996. Since then, MCCE has spearheaded significant efforts to educate the public and candidates about the law, ensured its full implementation by the Ethics Commission, defended the law against legal challenges, and fought for the law's full financing.

Eight candidates running for legislative seats in Maine also appear as *amici curiae*, including four Senate candidates (Phil Bartlett, Justin Alfond, Owen Pickus and Pam Trinward) and four House candidates (Sharon Treat, Jon Hinck, David Van Wie and Shelby Wright) ("the candidate-*Amici*"). Their campaigns are broadly representative of Maine's legislative contests as a whole, including highly competitive races, races against traditionally funded opponents with the ability to exceed the trigger threshold, and races where independent expenditures are likely. Each candidate-*amici* has invested substantial resources qualifying for the public funding system and organizing his or her campaign according to its regulatory scheme. Moreover, through participating in the MCEA, each has relinquished the ability to raise private funds and has reasonably relied on supplemental funds from the MCEA as needed and would be unfairly disadvantaged by losing those funds now, in the eleventh hour. Finally, as candidates and Maine citizens, candidate-*amici* have a strong interest in the orderly functioning of the election process for the duration of this campaign.

SUMMARY OF ARGUMENT

Applicants Andre E. Cushing III, Respect Maine PAC, and Harold A. Clough ask this Court to exercise its power under the All Writs Act, 28 U.S.C. § 1651(a), to issue an extraordinary writ of injunction—a remedy so drastic that this Court does not appear to

have granted such a request in over twenty years.[1] Unlike the grant of a stay, which preserves the state of affairs as it existed prior to a court's intervention, a writ of injunction in the Supreme Court represents this Court's direct intrusion into the status quo. *See Turner Broadcasting Systems, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). To grant such relief on this renewed application would require this Court to override the decisions of Justice Stephen Breyer, of a unanimous panel of the First Circuit Court of Appeals, and of the Maine District

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[1] According to our research, the most recent case in which the Supreme Court granted a writ of injunction under the All Writs Act is *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J., in chambers). In that case, the applicant sought an injunction to require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization Tax would be placed, pending further proceedings on the constitutionality of the tax in the Arkansas courts. The Arkansas courts were in recess and would not be able to consider the merits of the applicant's claims for several months. *Id.* at 1307.

Indeed, our research uncovered only *seven* reported cases in which such an application had been granted. *American Trucking Associations*, 483 U.S. at 1306; *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers); *National League of Cities v. Brennan*, 419 U.S. 1321 (1974) (Burger, C.J., in chambers); *Fowler v. Adams*, 400 U.S. 1205 (1970) (Black, J., in chambers); *Matthews v. Little*, 396 U.S. 1223 (1969) (Black, J., in chambers); *Williams v. Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers); *Organized Village of Kake v. Egan*, 80 S. Ct. 33 (1959) (Brennan, J., in chambers). Additionally, in *Atiyeh v. Capps*, 449 U.S. 1312 (1981) (Rehnquist, J., in chambers), Chief Justice Rehnquist invoked the authority of the All Writs Act to stay an injunction issued by the District of Oregon pending either the decision of the Court of Appeals for the Ninth Circuit or the decision of the Supreme Court in *Rhodes v. Champan*, 452 U.S. 337 (1981).

Court, and to do so based on no more than Applicants' untested and highly dubious factual allegations of injury stemming from a novel theory of First Amendment harm.

In urging this extreme course of action, Applicants rely almost exclusively on this Court's stay of the Ninth Circuit's decision in *McComish v. Brewer*, 611 F.3d 510, 513 (9th Cir. 2010), *stayed by* 130 S. Ct. 3408 (U.S. June 8, 2010) (No. 09-A1163). Like the present case, *McComish* included a challenge to triggered supplemental grant provisions ("trigger provisions") [2] in a state public financing system, but the application to this Court arose in a markedly different procedural posture and did not include the broad challenges to campaign finance disclosure laws and contribution limits that are at issue here. Applicants appear to assume that this Court's grant of a stay in *McComish* gives them a free pass to invoke this Court's extraordinary injunctive power to avoid supposed "inconsistency." Appl. Writ Inj. 1. This request is patently improper—Applicants cannot so easily evade the rigorous standards that govern their application for a writ of injunction, nor can Applicants dispense with their burden to prove their alleged injury. In their application, Applicants misstate both the applicable legal precedent and factual allegations regarding their own actions. This Court should not

[2] Although Applicants refer to these provisions as "matching funds," *Amici* prefer to avoid this term, since it has been known to cause confusion between public financing systems such as the presidential primary system, that "match" small contributions to publicly financed candidates and systems like the Maine Clean Election Act ("MCEA"), in which supplemental grant amounts may be "triggered" by hostile spending from an opponent or outside groups. Maine Rev. Stat. Ann. tit. 21A § 1125(9).

countenance Applicants' attempt to railroad their extremely questionable allegations past any and all requirements of jurisdiction, precedent, or proof.

This Court's grant of a stay in *McComish* cannot justify the relief sought here. First, the standard applicable in *McComish*—the four-prong standard governing a stay application[3]—is far more lenient than the requirements for the extraordinary writ sought here, as this Court has reiterated on numerous occasions. *See Lux v. Rodrigues*, No. 3:10CV482-HEH, 2010 WL 3818310, at *1 (August 26, 2010) (Roberts, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). In order for their writ of injunction to be granted, Applicants must demonstrate *both* that their legal rights are "indisputably clear" *and* that a writ of injunction is "necessary or appropriate in aid of this Court's jurisdiction." *Ohio Citizens*, 479 U.S. at 1313. Applicants cannot come close to making either showing.

First, a legal right cannot be "indisputably clear" where it is "novel or uncertain"—as is certainly true of Applicant's effort to import the rationale of *Davis v. FEC*, 128 S. Ct. 2759 (2010), into the body of public

[3] In assessing a stay request, the Circuit Justice considers whether there is (1) a "reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction;" (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous;' (3) a "demonstration that irreparable harm is likely to result from the denial of a stay," and (4) "in a close case it may be appropriate to 'balance the equities' to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted).

financing case law governed by *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny. *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). Moreover, as Chief Justice Roberts ruled just a few weeks ago, a legal right cannot be deemed "indisputably clear" where, as here, multiple federal circuit courts of appeal have reached "divergent results" in considering the issue. *See Lux*, 2010 WL 3818310, at *1. Finally, this Court's precedent utterly forecloses Applicants' claims with regard to the disclosure laws and the gubernatorial contribution limits.

Second, Applicants entirely ignore the requirement that the writ of injunction must be "necessary or appropriate in aid of this Court's jurisdiction," likely because they cannot demonstrate that the present circumstance presents any risk to the ultimate resolution of the merits of this case. In *McComish*, this Court granted a stay only after both the district court and the circuit court had had the opportunity to consider a fully developed factual record on a motion for summary judgment, following two years of intensive litigation. By contrast, the instant renewed application here amounts to no more than the Applicants' effort to take multiple bites at the apple—appealing a denial of emergency relief while retaining their ability to continue litigating in the district court and to seek appellate review at a later date. Such "piecemeal" appeals are exactly what the final judgment rule instructs this Court to avoid. *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009).

Furthermore, this Court should not exercise its equitable jurisdiction to grant a writ of injunction where the balance of hardships tilts so one-sidedly against Applicants. Even without the benefit of extensive discovery, the most cursory investigation

has already revealed Applicants' claims of injury to be completely baseless. Most astonishingly, Applicants continue to repeat the fiction that the trigger provisions have caused Applicant Cushing to "curtail" his campaign spending, even after publicly filed campaign records have debunked this claim. In fact, Applicant Cushing has now raised and spent campaign funds well in excess of the triggering threshold, triggering over $2,800 in supplemental grants to his opponent. Affidavit of Jonathan Wayne, October 21, 2010, ("Wayne Aff.") ¶¶ 4-7.[4] Applicant Respect Maine PAC ("RMPAC") has similarly offered no evidence of "chill" or other injury. Indeed, directly contrary to its allegations, it has used its funds for direct contributions to candidates, and some of those contributions have triggered supplemental funds. *Id.* at ¶¶ 9-10. Furthermore, Applicant Clough's alleged desire to contribute money in excess of the gubernatorial contribution limits simply does not rise to the level of a constitutional injury, as this Court's long-established precedents make clear.

Applicants' manufactured and highly disputable claims of injury stand in stark contrast to the drastic and far-reaching consequences that would result were this Court to interfere directly in Maine's ongoing election. Absentee voting in Maine has already started, and thousands of voters have cast their votes for their chosen candidates. *See* 21-A M.R.S.A. §751. For this Court to enjoin major portions of the campaign finance system less than two weeks before

[4] Moreover, given previous distributions and expenditures, even if Applicant Cushing were to continue spending every penny of the $6,000 of funds he has amassed as of October 15th, *no additional supplemental grants would be triggered for his opponent*. *Id.* at ¶8.

statewide elections would lead to judicially-created chaos, disrupting long-settled expectations and potentially altering electoral outcomes in races affecting 297 publicly financed candidates across the state. Such a result would be particularly unjust given that this disruption would be amplified by Applicants' own delay in filing suit. Equitable considerations should prevent this Court from allowing Applicants to derive strategic electoral advantage from their own delay.

ARGUMENT

I. Applicants Cannot Meet the Incredibly High Standard Necessary to Warrant the Extraordinary Remedy Requested under the All Writs Act.

A. The Standards for a Writ of Injunction Set an Extraordinarily High Bar for Applicants Seeking Such Relief From This Court.

Injunctive relief by the Supreme Court under the All Writs Act is indeed a judicial rarity—a writ of injunction in the Supreme Court does not appear to have been granted in the past twenty years, and has historically been granted in only a scant handful of reported cases.[5] *See Turner Broadcasting*, 507 U.S. at 1303 ("Not surprisingly, [applicants] do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court."). It is well established, under this Act and the Court's own rules, that a writ of injunction pursuant to the All Writs Act is to be used "sparingly and only in the most critical and exigent circumstances." *Wisconsin Right to Life, Inc. v. FEC*, 542 U.S. 1305,

[5] *See* cases listed *supra* note 1.

1306 (2004) (Rehnquist, C.J., in chambers) (refusing to issue writ of injunction against requirement barring applicant from funding its electioneering communications with general treasury funds); *accord Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); *Ohio Citizens*, 479 U.S. at 1313; *Fishman*, 429 U.S. at 1326; *Williams*, 89 S. Ct. at 2. Indeed, in five of the seven reported cases in which a writ of injunction has been granted, the Circuit Justice noted that special circumstances existed, preventing appropriate action from being taken either by the full Court or by the appropriate lower court.[6] No such special circumstances exist in this case.[7]

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[6] *American Trucking Associations*, 483 U.S. at 1308-09 (requiring that Arkansas place tax revenues in escrow fund pending state court's determination of tax's constitutionality since state court was in recess); *National League of Cities*, 419 U.S. at 1322 (temporarily enjoining enforcement of amendments to Fair Labor Standards Act which were to take effect in five hours pending full Court's review of the case); *Matthews*, 396 U.S. at 1224 (1969) (temporarily placing candidates' names on ballot, pending either review by full Court or city's postponement of election); *Williams*, 89 S. Ct. at 2 (requiring that Ohio prepare to place candidates' names on presidential election ballot, pending full Court's decision on merits); *Organized Village of Kake*, 80 S. Ct. at 35 (enjoining prohibition on trap fishing in newly-formed state of Alaska where no state court or federal court of appeal had jurisdiction, Native Americans were dependent for survival on fishing, and limited fishing season of 30-40 days had already begun).

The other two cases in which this Court granted a writ of injunction under the All Writs Act both involved instances where applicants were candidates seeking to be placed on the ballot immediately prior to an election. *See McCarthy,* 429 U.S. at 1317-18; *Fowler,* 400 U.S. at 1205-06. In both of those cases, the factual records indicated that no damage to the states would result from these candidates' placement on the ballot, whereas

Unsurprisingly, the standard for granting such extraordinary relief displays unparalleled rigor. As Justice Scalia has articulated, such a writ of injunction is appropriate "only where the legal rights at issue are indisputably clear. Moreover, the applicant must demonstrate that the injunctive relief is necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens*, 479 U.S. at 1312 (citations and quotation marks omitted); *Turner Broadcasting*, 507 U.S. at 1303 (same). Accordingly, in order for such a request to be granted, Applicants must satisfy *both* the "indisputably clear" requirement *and* the "in aid of jurisdiction" requirement. Otherwise, the application must be denied.

Applicants attempt to escape this rigorous standard by suggesting that any case in which "free speech is

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grave and irreparable damage could result from their exclusion from the ballot. *See McCarthy,* 429 U.S. at 1322-23; *Fowler,* 400 U.S. at 1206. *Compare Fishman*, 429 U.S. at 1330 (denying writ of injunction to add applicants' names to ballot where plaintiffs "delayed unnecessarily" in bringing suit and such late action could "disrupt[] the election").

[7] Moreover, Applicants' renewed request to this Court appears to be little more than an effort to evade the strictures of the final judgment rule. *See Mohawk Industries*, 130 S. Ct. at 605 ("[A] party is entitled to a single appeal, to be deferred until final judgment has been entered."); *see also Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985) ("Although [the All Writs Act] empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."); *Will v. United States*, 389 U.S. 90, 97 (1967) (finding that regular appeals are much preferred to extraordinary writs); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 203 (1945) ("[Extraordinary] writs may not be used as a substitute for an authorized appeal.").

at issue" should be deemed "extraordinary." Appl. Writ Inj. 6. That argument is meritless—in numerous cases, the Court has denied a request for a writ of injunction even where plaintiffs have based their claims of relief on the First Amendment. *See, e.g.*, *Lux*, 2010 WL 3818310, at *1 (declining to enjoin ballot regulation allegedly violating freedom of expression); *Wisconsin Right to Life*, 542 U.S. at 1305 (denying injunction against prohibition on financing electioneering communications with general treasury funds); *Turner Broadcasting*, 507 U.S. at 1304 (denying injunction for requirement that cable operators carry certain broadcast stations); *Fishman*, 429 U.S. at 1330 (denying injunction to add names to ballot).

This is true even where the plaintiffs ultimately prevailed upon the merits of their First Amendment claims. *See, e.g.*, *Wisconsin Right to Life*, 542 U.S. at 1305; *Brown*, 533 U.S. at 1302; *Turner Broadcasting*, 507 U.S. at 1304. For example, the plaintiff in *Wisconsin Right to Life*, another campaign finance case, sought an emergency writ of injunction barring federal electioneering restrictions as applied to its activities in the upcoming election—which was only two months away. 542 U.S. at 1305. Although this Court ultimately agreed with the plaintiff on the First Amendment merits of this case, *see FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 457 (2007), it refused to grant a writ of injunction, noting the high standard necessary to warrant such an "extraordinary remedy." 542 U.S. at 1306.

Here, Applicants' already considerable burden is further enhanced because they seek injunctive relief after it was previously denied by Justice Breyer in his authority as the Circuit Justice for the First Circuit. The Supreme Court's Rules expressly note

that renewed applications of this sort are disfavored, Sup. Ct. R. 22, and the Court has reaffirmed that this practice is highly discouraged. *See, e.g.*, *New York Times Co. v. Jascalevich*, 99 S. Ct. 11, 15 (1978) (Marshall, J., in chambers) (explaining that Court "will seldom grant an order that has been denied by another Justice."). Unsurprisingly, Applicants fail to cite *any* instance where a writ of injunction was granted by the Court on a renewed application, and our research has failed to uncover any reported case in which such a renewed application for a writ of injunction was granted.[8]

B. Since a Writ of Injunction Requires a "Substantially Higher Justification" Than a Stay Application, Applicants Cannot Rely Upon This Court's Grant of a Stay in the *McComish* Case.

Although Applicants correctly identify the standard applicable to a writ of injunction, they then proceed to ignore it, pointing this Court to the much

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[8] On rare occasions, the Court has granted a renewed application for a *stay*, where the Circuit Justice had previously denied such a stay. *See, e.g.*, *Spenkelink v. Wainwright*, 442 U.S. 1308 (1979) (Marshall, J., in chambers) (granting stay of execution where full Court could consider case within thirty-six hours); *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973) (Marshall, J., in chambers) (staying district court stay which prohibited bombing of Cambodia); *Tierney v. United States*, 409 U.S. 1232 (1972) (Douglas, J., in chambers) (granting application for bail); *Ex Parte Stickney*, 82 S. Ct. 465 (1962) (Douglas, J., in chambers) (staying execution due to "bothersome" question); *Bandy v. United States*, 81 S. Ct. 25 (1960) (Douglas, J., in chambers) (granting application for bail pending disposition of petition for certiorari). But, as explained below, a stay application is subject to a much more lenient standard than the writ of injunction requested here.

more lenient standard applicable to the grant of a stay of a lower court's ruling. Appl. Writ Inj. 6. This attempt to elide the applicable standards is improper: The relief requested upon an application to stay a lower court's decision is different in kind from the grant of a writ of injunction—the former preserves the status quo prior to judicial intervention, while the latter represents this Court's direct interference with the status quo. "Unlike a stay, which temporarily suspends 'judicial alteration of the status quo,' a writ of injunction 'grants judicial intervention that has been withheld by the lower courts.'" *Turner Broadcasting*, 507 U.S. at 1302 (quoting *Ohio Citizens,* 479 U.S. at 1313). Therefore, the two-pronged test applicable to a writ of injunction "demands a significantly higher justification" than the traditional four-prong test used to evaluate a stay request.[9] *Lux*, 2010 WL 3818310, at *1; *Ohio Citizens*, 479 U.S. at 1312.[10]

Given this divergence in standards between an application for a stay and an application for a writ of injunction, Applicants' nearly exclusive reliance upon this Court's grant of a stay in the *McComish v. Bennett* case is unavailing. In *McComish*, the district court had the opportunity to consider a full evidentiary record on a motion for summary judgment, and ultimately issued a permanent order enjoining the trigger provisions in Arizona's public funding system. *See McComish v. Brewer*, No. CV-08-1550, 2010 WL 2292213, at *1 (D. Ariz. Jan. 20, 2010). The Ninth Circuit stayed this order preliminarily, and then—

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[9] *See supra* note 3 (reciting stay standard).

[10] Concluding that they had failed to "address[] the peculiar requirements" to warrant relief under the All Writs Act, Justice Scalia denied the *Ohio Citizens* plaintiffs' application. *Ohio Citizens*, 479 U.S. at 1312.

after the case had been fully briefed and argued—issued a mandate upholding the trigger provisions and extending the stay while the case was remanded on other grounds. *McComish*, 611 F.3d at 513. Thus, the emergency request for relief in *McComish* asked this Court to vacate the Ninth Circuit's stay and to stay the mandate pending a decision of certiorari. *See* 130 S. Ct. at 3408. Accordingly, in *McComish*, this Court applied the standards applicable to a stay pending certiorari pursuant to 28 U.S.C. § 2101(f). *See id*.[11] Moreover, the *McComish* case had been filed 26 months prior to the 2010 election, and the stay issued in June, nearly 6 months before the general election. [12]

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[11] Although in *McComish*, State Defendants and Intervenor-Defendants had argued, in the alternative, that the stay request should be evaluated under the All Writs Act, the Court apparently rejected that request, instead treating the request as one for a stay pending certiorari pursuant to 28 U.S.C. § 2101(f). *See* 130 S. Ct. at 3408.

[12] As explained below, like Applicants in the instant case, the *McComish* plaintiffs had initially filed their lawsuit in August of the 2008 election year—one full election cycle before this Court eventually granted its stay. *See McComish v. Brewer*, No. CV-08-1550, 2008 WL 4629337, at *1 (D. Ariz. Oct. 17, 2008) (denying preliminary injunction request). Soon thereafter, the plaintiffs moved for a temporary restraining order on August 29, 2008, and, after this request was denied, for a preliminary injunction on October 17, 2008. In its decision on the preliminary injunction, the district court found that "the plaintiffs were likely to succeed on the merits." *Id.* at *9. However, "given the extraordinary balance of the harms required in the context of an ongoing election" the injunction was denied. *Id.* at *12. With early voting already in progress and some candidates having depended upon the triggered supplemental funds to run their campaign, the court found that the balancing of the harms favored the defendants. *Id.* at *10-*12. The court paid "special attention" to the plaintiffs' delay in filing as they had waited

By contrast, and as explored at greater length *infra*, Section II.B., Applicants here seek to base their application on highly questionable factual allegations, without the opportunity for factual discovery. The circuit court found that Applicants had not presented any evidence of immediate injury sufficient to warrant injunctive relief. *See Respect Maine PAC v. McKee*, No. 10-2119, 2010 WL 3861051, at *2 (1st Cir. Oct. 5, 2010). Moreover, Applicants here did not initiate this litigation until August 5, 2010; now, less than two weeks remain until the general election. Indeed, recognizing that "intervention by the federal courts in state elections has always been serious business," this Court has been particularly averse to granting a writ of injunction when a request comes on the eve of an election. *Oden v. Brittain*, 396 U.S. 1210, 1211 (1969) (noting great reluctance, five days from date of election, to disrupt election by granting writ of injunction); *see also Fishman*, 429 U.S. at 1325 (refusing writ of injunction approximately one month from election, in part because of potential "chaotic and disruptive effect upon the electoral process"). This unexplained delay further weakens Applicants' already highly tenuous claim to relief.

C. Applicants Cannot Establish that the Merits of Their Claims Against Trigger Provisions Are "Indisputably Clear."

The "indisputably clear" standard creates an exceptionally high bar for an applicant seeking a writ of

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almost two months after the *Davis* decision before filing their claim, in addition to the proximity of that filing to the election, in balancing the harms. *Id.* at *11. Here, the disruption resulting from the injunction of an ongoing election would be at least as great in *McComish*, and Applicants' delay in filing suit is much more egregious.

injunction, and Applicants cannot come close to making this showing. *Lux*, 2010 WL 3818310, at *2; *Turner Broadcasting*, 507 U.S. at 1303; *Brown*, 533 U.S. at 1303; *Ohio Citizens*, 479 U.S. at 1313. Applicants, in essence, treat this requirement as identical to the "likelihood of success on the merits" prong of the preliminary injunction standard, recycling the same arguments and allegations that the district court and First Circuit both rejected. In truth, the "indisputably clear" standard is far more exacting than mere likelihood of success—indeed, as noted above, in multiple instances, the Supreme Court has rejected applications for a writ of injunction even where applicants ultimately prevailed upon the merits.

Instead, this Court has ruled that legal rights will not be deemed "indisputably clear" where such claims are "novel and uncertain." *Fishman*, 429 U.S. at 1325. Similarly, as Chief Justice Roberts emphasized just last month, legal rights are not "indisputably clear" where, as here, appellate courts considering the issue have reached "divergent results." *Lux*, 2010 WL 3818310, at *1. Here, the novelty of the claim presented by Applicants as well as the divergence of circuit court authority on the issue doom Applicants' request for relief.

First, Applicants' alleged injury from the trigger provisions is a novel issue in this Court—one that this Court has never previously considered, much less recognized. *Davis*, the case upon which Applicants rely for their entitlement to relief, was not a public financing case, but instead provided one similarly-situated candidate a fundraising advantage over another as they competed for private campaign contributions.

Second, as Applicants acknowledge, four circuits have recently reached varying conclusions about the constitutionality of particular trigger provisions within four states' public funding programs. By definition, these varying results belie Applicants' assertion that this legal issue is "indisputably clear." *Lux*, 2010 WL 3818310, at *1. Instead, the different outcome of recent cases underscores that no two public funding programs are alike. Accordingly, the range of burdens and interests presented by each scheme must be closely analyzed and balanced.

Finally, the challenged disclosure requirements and contribution limits are, under well established jurisprudence, presumptively valid. Applicants have failed to advance any reason why the constitutionality of these provisions should be seriously doubted; they certainly have not shown any "indisputably clear" facts or law in their favor.

1. *Applicants' Alleged Injury from Trigger Provisions Presents a Novel and Uncertain Legal Issue, Not an "Indisputably Clear" Question of Law.*

The subject area of this lawsuit—public financing of campaigns—is one on which this Court has not opined since its landmark decision in *Buckley v. Valeo*. This Court's decision in *Davis v. FEC*—a decision that concerned the regulation of private campaign fundraising—did not alter public financing doctrine because it simply did not concern public financing.[13] Indeed, this Court in *Davis* took care to

[13] Applicants' claim that the *Davis* Court's passing citation to the Eighth Circuit's decision in *Day*, 34 F.3d 1356 (8th Cir. 1994), "expressly equat[ed] the [supplemental] fund[s] in *Day* with the Millionaire's Amendment" is utterly meritless. This Court cited *Day*—in dicta—for nothing more than the uncontro-

distinguish that the constitutional analysis of public funding programs is "quite different" from the First Amendment questions that arise from the regulation of private fundraising. 128 S. Ct. at 2772. Accordingly, the constitutionality of trigger provisions within public financing systems—an innovation that did not exist at the time *Buckley* was decided—will be an issue of first impression for this Court if and when this Court decides to hear such a case. Such a "novel and uncertain" legal claim cannot establish an "indisputably clear" entitlement to relief as is required for a grant of a writ of injunction. *Lux*, 2010 WL 3818310, at *1; *Fishman*, 429 U.S. at 1329.

Although Applicants argue, based on the *Green Party* and *Roberts* decisions, that the reasoning in *Davis* should be inserted into the case law on public financing, this argument for an extension of the *Davis* rationale falls short of demonstrating the indisputable clarity required by the governing standard. Indeed, as recently as September of this year, Chief Justice Roberts, sitting as Circuit Justice, denied an application for a writ of injunction, even though the Chief Justice conceded that the "[c]ircuit precedent relied upon by the District Court . . . has been undermined by our more recent decisions . . . ."

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versial proposition that, under the Millionaire's Amendment, a candidate who makes large personal expenditures in support of his campaign must shoulder a "potentially significant burden." 128 S. Ct. at 2772. There is no reason to believe that a "see" citation was intended to signal, *sub silentio*, the Court's invalidation of a significant body of appellate case law upholding the constitutionality of trigger provisions in public financing systems, particularly when that issue was simply not before the Court. Contrary to Applicants' suggestion, this Court does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Lux, 2010 WL 3818310, at *2. Similarly, in *Brown v. Gilmore*, Chief Justice Rehnquist denied a writ of injunction in a First Amendment case, despite the applicants' assertion that their case was "virtually a replay of [an earlier case], in which [the Supreme Court] struck down a similar Alabama statute." 533 U.S. at 1303. In *Brown*, the merits of the applicant's legal claim could not be deemed "indisputably clear" where the circuit court had distinguished the allegedly controlling decision. *Id*. Here, as in *Brown*, both the district court and the unanimous First Circuit panel found the *Davis* decision to be distinguishable—precluding any claim that *Davis*' applicability is "indisputably clear." *See Respect Maine PAC*, 2010 WL 3861051, at *2 (finding that, due to outstanding issues of fact and law, "we cannot forecast what out ultimate judgment on the merits will be"); *Cushing*, 2010 WL 3699504, at *7 ("The Court is not convinced that *Davis* and/or *Citizens United* cast *Daggett* into disrepute or otherwise reflect an overruling of *Daggett*.").

Moreover, a legal right cannot be deemed "indisputably clear" where this Court's precedents have created "two lines of authority." *Turner Broadcasting*, 507 U.S. at 1304. In *Turner Broadcasting*, applicants sought a writ of injunction on First Amendment grounds against the "must-carry provisions" of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, *see* 47 U.S.C. § 534(a) (2010). The Chief Justice noted that two competing lines of authority potentially controlled the result and accordingly denied the application, explaining that "[i]n light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation." *Turner Broadcasting*,

507 U.S. at 1304. Indeed, even though Turner Broadcasting Systems ultimately prevailed on the merits of its claim, its entitlement to relief could not be deemed "indisputably clear" at the time it sought a writ of injunction.

Similarly, the *Davis* rationale and the *Buckley* decision currently occupy separate spheres of campaign finance doctrine—one regarding the regulation of private campaign fundraising and one regarding the constitutionality of public financing. To import the *Davis* rationale into the arena of public financing would create insuperable tensions within the case law, as explained below. Given the difficulties involved in reconciling these two competing strands of doctrine, as Applicants' theory of injury would require, Applicants' legal rights cannot be deemed "indisputably clear," but instead must be deemed both "novel and uncertain."

In *Buckley,* the Court squarely rejected the notion that granting public funds to participating candidates posed any burden upon nonparticipants. *See, e.g.*, 424 U.S. at 94 n.128. Instead, this Court expressly approved "the enhancement of opportunity to communicate with the electorate" that public financing offers participating candidates, since participating candidates suffer a "countervailing denial"—namely, accepting an expenditure ceiling and agreeing to forgo private fundraising. *Id.* at 94-95. The Court reasoned that this public subsidy of participating candidates creates no constitutional injury to nonparticipants since they "are free to raise money from private sources" and are "free from any expenditure limits." *Id.* at 99.

By contrast, this Court's holding in *Davis*, that the so-called "Millionaire's Amendment" burdened the

speech of high-spending candidates, was predicated on the differential fundraising rules applied to otherwise similarly-situated privately financed candidates. The Millionaire's Amendment represented a drastic departure from the normal rule in congressional elections (namely, that all candidates in privately-funded congressional elections are subject to the same contribution limits) with "a new, asymmetrical regulatory scheme." *Davis,* 128 S. Ct. at 2766. Under this scheme, if one candidate spent over $350,000 of his personal money to fund his own campaign, the initial contribution limits were tripled and the limits on coordinated party-candidate expenditures were eliminated—but *only* for that privately funded candidate's privately funded opponent. It was this disparate treatment of otherwise similarly-situated candidates that the Court ultimately rejected, deeming it an "unprecedented penalty." *Id*. at 2771. *Davis* did not address public financing systems, and, indeed, noted that such schemes are, as a matter of fact and law, "quite different" from the provision at issue there. *Id*. at 2772.

This critical difference between a system of purely private financing and a system with optional public funding is essential. Under *Buckley*'s rationale, since publicly funded candidates can constitutionally be awarded benefits not afforded to privately funded ones, the award of triggered supplemental funds to participating candidates cannot be "discriminatory" or "asymmetrical." *See Buckley,* 424 U.S. at 94. Unlike in *Davis*, where the Millionaire's Amendment imposed differential contribution limits, under the MCEA, publicly financed and traditionally funded candidates cannot be deemed similarly situated. Instead, the MCEA's provisions providing supplemental funds in high-spending races—like all discrete parts of a

public funding program—are part of the package of incentives that participating candidates accept in exchange for "a countervailing denial." *Id.* at 95. Like the lump-sum grants approved in *Buckley*, the system of triggered incremental grants does no more than "substitute[] public funding for what the parties would raise privately," thereby permitting responsive speech in highly competitive races. *Id.*. at 96, n.129. Nothing in this Court's precedents suggests that the First Amendment requires that a publicly financed candidate be unable to engage in the type of speech that a privately financed candidate would undertake as a matter of course.

In short, the *Davis* rationale cannot be imported into the public financing context without substantial revision of *Buckley*'s core reasoning. Whether or not this Court decides to review a case involving the constitutionality of triggered supplemental grant provisions in a public financing system, no current authority can be deemed to provide an "indisputably clear" entitlement to relief on the merits.

2. *Different Circuits have Rendered Different Decisions on the Constitutionality of Trigger Provisions, Precluding Applicants' Assertion that this Legal Issue is "Indisputably Clear."*

In the last six months, four Courts of Appeal have rendered decisions involving particular trigger provisions in the public funding programs of four different states.[14] Two Circuits, the First and the Ninth, have

[14] Prior to *Davis*, three federal circuit courts had ruled that public financing trigger provisions pass constitutional muster. *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008*)*;

rejected Applicants' claim of unconstitutional injury. *Respect Maine PAC*, 2010 WL 3861051, at *1-*2; *McComish*, 611 F.3d at 513-14. The Second and Eleventh Circuits, on the other hand, have concluded that, given the particular structures of the public financing systems at issue, the operation of the trigger provisions burdened plaintiffs' First Amendment rights. *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 249 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279, 1291 (11th Cir. 2010). The existence of these differing outcomes, by definition, precludes Applicants' assertion that this legal issue is "indisputably clear." *Lux*, 2010 WL 3818310, at *1. Or, in the words of Chief Justice Roberts, since "the courts of appeals appear to be reaching divergent results in this area. . . . . .Accordingly, . . . it cannot be said that [applicant's] right to relief is 'indisputably clear.'" *Id.* at *3.

In fact, far from creating any sort of "indisputably clear" jurisprudence, these mixed decisions confirm that "no two public funding schemes are identical, and thus no two evaluations of such systems are alike." *Daggett*, 205 F.3d at 464. Instead, the constitutionality of any discrete provision turns on an examination of the entire public financing scheme, considering the totality of the program and the underlying state interests. *See, e.g., Buckley*, 424 U.S. at 97-98 (finding that Congress could treat minor-party candidates differently for purposes of public funding eligibility because of historical differences between minor and major party candidates, lack of injury from denial of public funds, and Congress' interest in protecting public fisc); *cf. Burdick v.*

Daggett v. Comm'n on Gov't'l Ethics, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel,* 101 F.3d at 1552.

Takushi, 504 U.S. 428, 435-37 (1992) (evaluating Hawaii's prohibition of write-in voting in light of other provisions permitting easy access to ballot). In short, as the First Circuit noted and as is illustrated by the divergent results within the Circuits, the legal issues raised by trigger provisions "require careful analysis, on a fully developed record." *Respect Maine PAC*, 2010 WL 3861051, at *2. The answers to these complex constitutional and factual questions are not "indisputably clear."

D. Far From Being an "Indisputably Clear" Violation of Applicants' First Amendment Rights, The Challenged Disclosure Provisions are Presumptively Constitutional Under This Court's Precedents.

Applicants do not seriously attempt to argue that Maine's reporting requirements for independent expenditures are clearly and indisputably invalid. Appl. Writ Inj. 19-22. Instead, they advance a series of unsupported claims—that the requirements are unduly burdensome, cannot be justified by any sufficiently important state interests, and are overly broad. In doing so, Applicants wholly ignore decades of case law approving of campaign finance disclosure requirements similar to Maine's. *See, e.g.*, *Citizens United*, 130 S. Ct. at 913-16; *McConnell*, 540 U.S. at 194-202; *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203-04 (1999); *First National Bank of Boston v Bellotti*, 435 U.S. 765 (1978); *Buckley*, 424 U.S. at 60-82.

Maine's disclosure requirements are run-of-the-mill. For those who make (a) independent expenditures that expressly advocate for a candidate, or (b) independent expenditures that clearly name a

publicly funded candidate right before an election, Maine requires that basic information be reported. *See* Maine Rev. Stat. Ann. tit. 21A § 1019. Specifically, the spender must identify the candidate involved, whether the expenditure was in support of or in opposition to candidate, and the amount. *Id*. This information must be reported at periodic intervals throughout the year unless an election is near—then, the information must be reported on an expedited basis. *Id*.

This scheme is modeled on current federal disclosure laws, which have been upheld by this Court in *Citizens United,* 130 S. Ct. at 913-16 and in *McConnell*, 540 U.S. at 194-202.[15] While upholding federal disclosure laws in *Citizens United*, the Court reiterated that disclosure requirements "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64 and *McConnell*, 540 U.S. at 201). And, this Court reaffirmed the informational and anti-corruption interests that, since *Buckley*, have consistently justified any minimal burden

[15] The analogous federal disclosure requirements for electioneering communications, 2 U.S.C. § 434(f)(2), require any person or entity that makes electioneering communications that aggregate more than $10,000 during the year to report, among other things, the elections and the name of candidates to be identified if known, as well as the identity of donors who have contributed at least $1,000. The independent expenditure disclosure requirements, 2 U.S.C. § 434(c), require any person or entity that makes independent expenditure over $250 during the year to report the identity of donors who have contributed at least $200 for the purpose of furthering the independent expenditure and indentify the candidate target by the spending. Spenders must also certify that the expenditure was truly independent.

imposed by disclosure—specifically, "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *accord Citizens United*, 130 S. Ct. at 914; *Buckley*, 242 U.S. at 66-68. Indeed, the *Citizens United* Court found that informational interests alone were sufficient to justify federal laws requiring disclosure of "electioneering communications"—communications clearly identifying a candidate made shortly before election, but not expressly advocating support or opposition to the candidate. *Citizens United*, 130 S. Ct. at 914.

In the face of this case law, Applicants cannot seriously claim that the challenged reporting requirements serve no sufficiently important governmental interests.[16] As explored in greater detail below, Maine voters have substantial interests in robust disclosure, particularly in these final weeks before Election Day. Accordingly, Applicants' claims that the disclosure requirements violate their First Amendment rights appear to be entirely devoid of merit, and certainly do not come close to satisfying

[16] Moreover, Applicants' claim that the law is overly broad because it requires disclosure of executory contracts for independent expenditures is directly foreclosed by *McConnell*. There, the Court expressly upheld a similar requirement under federal law, noting that it was necessary to prevent circumvention of the reporting requirements. 450 U.S. at 200. Applicants' claim of undue burden—which not a scrap of evidence supports—is also not meritorious, given that federal law imposes reporting requirements that are analogous to Maine's. *See, e.g.*, 2 U.S.C.A. § 43(g) (imposing 24 hour disclosure requirements on independent expenditures of $1,000 or more made within 20 days of election).

the "indisputably clear" standard that governs their request for relief.

E. Existing Precedent Forecloses Applicant Clough's Claim That the Gubernatorial Contribution Limits Violate His First Amendment Rights.

Similarly, there is no authority whatsoever, much less any "indisputably clear" law, which would support Applicant Harold Clough's assertion that the $750 limit on campaign contributions to gubernatorial candidates is unconstitutional. In fact, his claim is almost completely foreclosed by *Buckley*. As *Buckley* held, and more recent case law has reinforced, for a campaign contributor such as Applicant Clough, a contribution limit "entails only a marginal restriction" upon speech because contributions serve "as a general expression of support" where the "expression rests solely on the undifferentiated act of contributing." *Buckley*, 424 U.S. at 20-21. Because greater contributions do not equate to greater symbolic support, a limit on the amount of money one can give places only the most minimal burden on First Amendment rights. *Id*. at 21. Similarly, while making a contribution allows one to associate with a candidate, many other actions serve the same purpose—so, that right is not materially diminished by a contribution limit. *Id*.[17]

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[17] Nor are *candidates'* free speech rights unduly burdened by contribution ceilings: These limits are constitutional unless they prevent candidates from "amassing the resources necessary for effective advocacy." *Randall v. Sorrell*, 548 U.S. 230, 249-50 (2006); *Buckley*, 424 U.S. at 21. Limits on the amount any one contributor can give simply force candidates to find more supporters; the limits do not prevent candidates from effectively advocating the issues of concern to their contributors. *Buckley*,

Contribution limits are thus not evaluated under a strict scrutiny standard. Instead, a more lenient standard applies—such limits are deemed permissible when they "are closely drawn to match a sufficiently important interest." *Randall*, 548 U.S. at 247 (internal quotations omitted). In determining whether a contribution limit is "closely drawn," a court has "no scalpel to probe" the appropriateness of a particular dollar limit, especially where, as here, there has been no opportunity for factual discovery regarding the justifications for particular contribution ceilings. Moreover, this Court has recognized that "the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248.

Instead, a court will examine the amount of a contribution limit only in the extreme case where the factual record demonstrates "strong indication[s] . . . , *i.e.* danger signs" that the limit is so low that it will "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 249 (including as "danger signs" contribution limits set on an election-cycle basis and $200 limits that were lowest in nation and well below lowest limit previously upheld). Maine's contribution limits exhibit no such "danger signs," and the available evidence demonstrates that privately-financed candidates are able to raise significant funds and to run highly competitive campaigns. Affidavit of Jonathan Wayne, September

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424 U.S. at 21-22. Here, of course, none of the Applicants is or plans to be a gubernatorial candidate, so none has standing to challenge the contribution limits on these grounds.

10, 2010 ¶¶ 51-52.[18] Applicants fail to offer a single scrap of evidence to support their claim that Maine's $750 contribution limit have caused or will cause Maine's elections to become uncompetitive, or will prevent challengers from amassing the resources to run effective campaigns.

Moreover, as the Supreme Court recently reiterated in *Citizens United*, limits on direct contributions to candidates, "have been an accepted means to prevent quid pro quo corruption" for decades. *Citizens United*, 130 S. Ct. at 909 (citing *McConnell*, 540 U.S. at 136-38 & n. 40). Accordingly, this Court and lower federal courts have repeatedly upheld contribution limits in recognition of compelling governmental anti-corruption interests,[19] *Citizens United*, 130 S. Ct. at 909; *McConnell*, 540 U.S. at 136 (contribution limits prevent "actual corruption" and "appearance of corruption"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (2000) (preventing "corruption and the appearance of corruption" is "constitutionally sufficient justification"), *Buckley*, 424 U.S. at 29 (upholding $1,000 contribution limit to federal candidates), *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1097 (9th Cir. 2003) (upholding state $100 to

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[18] Indeed, the concerns regarding incumbent entrenchment that underlay the *Randall* Court's decision are entirely absent in the present case, since there is no incumbent in Maine's gubernatorial race. Furthermore, Maine's governors are term limited to two consecutive four-year terms, Me. Const. art. 5, § 2, and no governor has ever served for more than eight years in Maine.

[19] In fact, since this Court's decision in *Randall*, no court has struck down a uniformly applicable contribution limits as too low. *See, e.g.*, *Thalheimer v. City of San Diego* 706 F.Supp.2d 1065 (S.D. Cal 2010). (noting *Randall* as only case to strike down contribution limits).

$400 limit), *Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000) (upholding state $250 limit), *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256, at *4 (M.D. Fla. March 20, 2000) (upholding state $500 limit). As Maine's contribution limits are supported by these same interests, *see Daggett*, 205 F.3d at 456-458, and there are no "danger signs" present, these limits are presumptively constitutionally valid. Accordingly, far from being "indisputably clear," Applicant Clough's claim appears to be entirely unsupported, either by current precedent or by any competent evidence.

F. Applicants Fail to Show That an Injunction is Necessary or Appropriate in Aid of This Court's Jurisdiction.

To establish an entitlement to a writ of injunction, Applicants must first demonstrate that the requested relief is "necessary or appropriate in aid of the Court's jurisdiction." 28 U.S.C. § 1651. Applicants do not, however, even attempt to make such a showing. Indeed, as noted *supra*, Section I.A., in nearly every instance in which the Court has granted a writ of injunction under the All Writs Act, it has done so only where circumstances indicated that such extraordinary relief was necessary to preserve the ability of the appropriate state or federal court to reach an ultimate resolution of the merits of the case.[20]

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[20] *See* cases cited *supra* note 5. In the two ballot access cases that appear to be the only reported exceptions to this rule, the factual record showed that the requested interim placement of candidates' names on the ballot would result in no injury to the state and would stave off grave damage to the candidates' political opportunity. *See McCarthy*, 429 U.S. at 1320-21; *Fowler*, 400 U.S. at 1206.

Applicants' heavy reliance on the *McComish* decision merely serves to demonstrate the relative weakness of their application for extraordinary relief. In the *McComish* case, despite the denial of the plaintiffs' request for injunctive relief prior to the 2008 election, the case proceeded past that election through the normal processes of factual and legal development in the lower courts. After over a year of hard-fought litigation, the district court considered a developed factual record comprising of documentary evidence, declarations, deposition and hearing testimony from more than a dozen fact and expert witnesses. *McComish*, 2010 WL 2292213, at *1-*6. Only then did the district court enter an injunction against the challenged trigger provisions, *see id*. at *1, and this Court acted to reinstate that injunction in staying the mandate of the Ninth Circuit. Applicants here can make no argument that their dilatory lawsuit and untested and highly questionable factual allegations are entitled to short-circuit this process. *See Pennsylvania Bureau of Correction*, 474 U.S. at 43 (1985) (the All Writs Act does not excuse the issuance of ad hoc writs to evade statutory requirements of jurisdiction); *Will*, 389 U.S. at 97 (preferring normal appeals process to extraordinary); *United States Alkali Export Ass'n*, 325 U.S. at 203 (extraordinary writs are no substitute for normal appeal).

In short, Applicants have no basis to argue that a writ of injunction is necessary to preserve the litigants' ability to achieve an ultimate resolution on the merits. Applicants fail even to try to satisfy this clear requirement, and their application should be denied on this ground alone. *See Turner Broadcasting*, 507 U.S. at 1303 (denying application because implementation of challenged provisions would not

strip Supreme Court of its jurisdiction to decide merits of any appeal).

II. Equitable Considerations Render a Writ of Injunction Inappropriate.

A. Determination of this Writ of Injunction Requires this Court to Fully Assess the Equitable Considerations Raised by the Instant Application.

A writ of injunction is an equitable remedy, derived from common law. *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). Accordingly, this Court must undertake a "consideration of the competing equities" posed by each request. *Socialist Labor Party*, 80 S. Ct. at 4; *see also Fowler*, 91 S. Ct. at 3.[21] Here, the balance of hardships tilts sharply in Defendant and *Amici*'s favor. At best, Applicants' allegations of injury are conclusory and unsupported; at worst, they are directly contradicted by publicly-available evidence. Indeed, while Applicants claim an entitlement to

[21] Specifically, this Court's case law makes clear that equitable issues such as undue delay, individual reliance interests, and the broader public good must factor into an evaluation of whether this extraordinary remedy is appropriate. *See, e.g.*, *Fishman*, 429 U.S. at 1330 (denying application, after noting equitable considerations like undue delay and "chaotic and disruptive effect upon electoral process"); *Organized Village of Kake*, 80 S. Ct. at 35, 37 (granting application when equities "so plainly support[ed]" application, including reliance interests of affected persons); *Socialist Labor Party*, 80 S. Ct. at 4 (denying application, after balancing equities, in part for undue delay); *Scaggs*, 90 S. Ct. at 5 (denying injunction to halt election after considering equities, noting "considerable expense" already incurred by city); *Westermann*, 409 U.S. at 1236-37 (denying application filed two and a half weeks before election because "orderly election processes would likely be disrupted by so late an action").

emergency relief, they inexplicitly waited until the eve of the election to file this suit—the outcome of which would grant them profound competitive advantages.

On the other hand, enjoining key provisions of Maine's election law at this late hour would cause countless publicly-funded candidates true irreparable harm, disrupting long-settled expectations and potentially altering their electoral outcomes. Even worse, perhaps, an injunction would directly thwart the state's ability to run a fair, orderly, and corruption-free election process. Such a result would undoubtedly undermine voters' trust in Maine's democratic processes and the representative government it produces. In short, myriad equitable considerations should prevent this Court from reaching into Maine's electoral process at this late hour.

B. Recent Factual Developments Underscore Lack of Actual Harm to Applicants.

1. *Applicant Cushing has Failed to Establish Any "Chill."*

At each stage of Applicants' lawsuit thus far, Applicant Cushing's actions have directly contradicted his claim that his campaign spending would be chilled in the absence of an injunction. Indeed, right after the District Court denied Applicant Cushing's initial request for a temporary restraining order and injunction, Applicant Cushing filed a report showing he had cast aside his alleged reservations and continued to collect and spend campaign contributions, ultimately triggering $883 for his opponent, Shelby Wright.[22]

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[22] Andre E. Cushing, 42-Day Pre-General 2010 Campaign Finance Report for the Comm'n on Governmental Ethics & Election Practices (Sept. 21, 2010), *available at* http://www.

Subsequently, despite averments in Applicant Cushing's September 30, 2010 affidavit that he would surely be "chilled" from additional spending in the absence of an injunction pending appeal, Applicant Cushing again overcame his supposed reservations once the First Circuit denied injunctive relief, and proceeded to spend an additional $2,073 beyond the trigger amount, according to a publicly available filing dated October 15, 2010.[23] Moreover, based on recent developments since the First Circuit's order, Applicant Cushing could now spend all of the $6,000 he had on hand as of October 15, 2010, without triggering any additional supplemental funds to his opponent. Wayne Aff. at ¶8,

The facts can no longer be ignored: Applicant Cushing's claim of "chill" has been proven false by his own actions. At each stage, the denial of injunctive relief has spurred more political activity by Applicant Cushing, not less. The allegation that Applicant Cushing's First Amendment rights "will continue to [be] . . . adversely impacted" without injunctive relief, Affidavit of Andre E. Cushing dated Sept. 30, 2010 ("Cushing Aff."), ¶ 4, has been exposed as an utter fiction.[24] Indeed, the absence of injury on this record is

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mainecampaignfinance.com/netCrystalReports/CandidateCombinedReport.aspx?Params=82765;42-Day+Pre-General;YNYNYNNNY&GUID=public&Year=2010&MCEA=0.

[23] Andre E. Cushing, 2010 Accelerated Report for the Comm'n on Governmental Ethics & Election Practices (Oct. 15, 2010), *available at* http://www.state.me.us/ethics/pdf/2010accel/general/Cushing_18-Day.pdf; *see also* Wayne Aff. at ¶¶ 4-7.

[24] Notably, at multiple stages of this litigation, Applicants have failed to reveal the full facts of Applicant Cushing's fundraising and spending, leaving that task to Defendants and *Amici*. Indeed, in their 21-page brief to the First Circuit, Applicants failed to acknowledge that Rep. Cushing had already trig-

so clear it brings into serious question Applicant Cushing's standing to invoke the jurisdiction of this Court. *See O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (noting "threshold requirement by Article III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy").

2. *Applicant Respect Maine PAC Has Suffered No Irreparable Harm*.

Like Applicant Cushing, Applicant Respect Maine PAC ("RMPAC") also has entirely failed to demonstrate irreparable harm or even likely injury adequate to support standing. The sole evidence offered to show harm to RMPAC is the conclusory affidavit of Applicant Cushing that Applicants submitted to this Court. Although Applicant Cushing alleged that RMPAC was chilled from making expenditures, he failed to identify any specific candidates RMPAC intended to support or oppose, much less that RMPAC had plans to target any contests between participating and non-participating candidates. *See* Cushing Aff. ¶ 6.

Moreover, developments since the execution of Applicant Cushing's affidavit further undercut RMPAC's allegations and show that RMPAC simply has no coherent claim of injury. Althought RMPAC alleges that the trigger provisions "chill" it from making independent expenditures, it has now used $2,500

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gered supplemental funds to his opponent; Defendants and *Amici* had to bring this material fact to the First Circuit's attention. (Applicant Cushing's affidavit dated September 30 was never, in fact, filed with the First Circuit, despite its misleading First Circuit caption). Similarly, before this Court, Applicants' papers ignored that, since the First Circuit's order, Applicant Cushing has spent an additional $2,073. Instead, they have chosen to rely on an outdated affidavit.

of the $6,900 it has raised to make direct contributions to candidates. Significantly, some of those contributions have triggered supplemental grants, debunking RMPAC's assertions of "chill."

Further, as of October 15, RMPAC has made only one independent expenditure—on behalf of gubernatorial candidate Mr. LePage—and it was for only $220.[25] RMPAC's interest in Mr. LePage's campaign cannot establish injury, given that his publicly funded opponent, Libby Mitchell, has already been authorized to spend the maximum amount of supplemental funds permissible under Maine's system.[26] That RMPAC can make a much higher expenditure in support of the LePage campaign, but has opted not to do so, belies any contention that RMPAC ever suffered chill. In sum, RMPAC has not demonstrated any injury adequate to show a case or controversy for purposes of standing, *see O'Shea*, 414 U.S. 488 at 493, much less to establish any irreparable harm.

Accepting a claim of injury by RMPAC here requires pure speculation about its plans and about how

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[25] *See* Respect Maine PAC, Independent Expenditure Report—2010 General Election for the Comm'n on Governmental Ethics & Election Practices (Oct. 16, 2010), *available at* http://www.maine.gov/tools/whatsnew/attach.php?id=144911&an=1.

[26] As shown by a report filed by an opposing candidate, the full match had been reached by June 2010. *See* Eliot R. Cutler, 2010 General Election Trigger Report for the Comm'n on Governmental Ethics & Election Practices (June 24, 2010), *available at* http://www.state.me.us/ethics/pdf/2010accel/general/Cutler_trigger.pdf. RMPAC made its independent expenditure on October 14. Respect Maine PAC Independent Expenditure Report—2010 General Election, for the Comm'n on Governmental Ethics & Election Practices (Oct. 16, 2010), *available at* http://www.maine.gov/tools/whatsnew/ attach.php?id=144911&an=1.

hypothetical spending might affect trigger funds for unidentified candidates. For all that this record reveals, all of the candidates RMPAC wishes to support may have opponents who, like Mr. LePage's, have already received the maximum possible grant; or they may not have publicly financed opponents at all. Again, such speculative claims of hypothetical injury call cast doubt on RMPAC's standing to participate in this litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

3. *Applicant Clough Has Suffered No Irreparable Harm*.

Applicant Clough, a contributor who challenges the gubernatorial contribution limits, lacks any colorable claim of irreparable harm from continuation of the contribution limits, as explained *supra*, Section I.E.[27] Applicant Clough has exercised his associational and speech rights by making a $750 contribution to Mr. LePage during this election and contributions totaling $200 in the primary. Wayne Aff. ¶ 50. Notably, Clough could have contributed $550 more in the primary but failed to do so. As *Buckley* establishes, once a contribution of some size has been made, larger contributions do not translate into greater association. 424 U.S. at 20-22. Any associational interests can be fully met through a variety of other means, such as volunteering for the LePage cam-

[27] While there is absolutely no evidence that the contribution limit has prevented LePage from amassing sufficient funds for his campaign, such a hypothetical injury would not be Mr. Clough's to assert in any event. He is a donor, not a candidate. Although Mr. Clough may have an "interest in the problem," he lacks the "direct stake in the outcome" of this litigation that is necessary for him to assert a claim such as that asserted in *Randall*. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

paign. *Id*. at 22. No finding of irreparable harm to Mr. Clough is possible on this record.

C. Granting An Injunction on the Eve of the Election Would Substantially Injure Participating Candidates, Including *Amici*.

That an applicant has "delayed unnecessarily" in bringing suit "militat[es] against the extraordinary relief" of an injunction by an individual circuit justice. *Fishman*, 429 U.S. at 1330; *see also Westermann*, 409 U.S. at 1236-37 (denying application for injunction filed with Supreme Court two and a half weeks before election because "orderly election processes would likely be disrupted by so late an action").

Here, Applicants' legal theory is predicated on the argument that *Davis* renders triggered supplemental funds unconstitutional, yet Applicants waited until the eve of the election—more than two years after *Davis* was decided and sixty-two weeks after this campaign began—to seek relief.[28] Applicants have proffered no excuse for delaying the filing of their

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[28] As the Court below aptly summarized:

> In determining the weight to be accorded to the appellants' claims, we also note that this "emergency" is largely one of their own making. The appellants, well aware of the requirements of the election laws, chose not to bring this suit until August 5, 2010, shortly before the November 2 elections. Appellant Cushing, an incumbent running for reelection, declared his candidacy before March 15, 2010. Appellants did not file their case until at least six months after roughly 280 candidates had declared their intention to rely on MCEA public funding, and two months after the primary election. Further, the case law on which they rely is not new.

See Respect Maine PAC, 2010 WL 3861051, at *2.

complaint until August 6 of this year, long after candidates were required to decide on participation in the program and just weeks before Maine's general election (for which early voting began on Monday, September 27th).[29]

Here, the requested last-minute judicial intervention requested by Applicants would severely disadvantage candidates who have relied on the availability of supplemental funds. This Court should decline to exercise its equitable powers to accomplish such an unjust result. *See, e.g.*, Affidavit of Deborah L. Simpson, September 9, 2010, ¶¶ 4-12. As the First Circuit found, for the candidate *amici*, and for other candidates in Maine, eliminating supplemental funds in the critical closing week of the campaign would disrupt months of strategic planning in justified reliance on the established rules. *See Respect Maine PAC*, 2010 WL 3861051, at *2-*3 (noting "the consi-

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[29] Applicants assert, without support, that it is somehow impossible to challenge election laws except on the eve of an election. That assertion is flatly contradicted by numerous cases, including *McComish*, and also including the litigation that originally challenged Maine's public financing system in 1998. The plaintiffs in that case, *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), filed suit two years before the first election was to be held under the Clean Elections law—represented by the same counsel who represents Applicants before this Court.

Applicants' novel argument that the balance of harms is not applicable where constitutional harms are alleged is similarly unavailing. *See, e.g., Brown*, 533 U.S. at 1301 (citing delay in seeking relief as "inconsistent with the urgency [applicants] now assert" in First Amendment case); *O'Brien v. Skinner*, 409 U.S. 1240 (Marshall, J., in chambers) (despite importance of constitutional right to vote, "compelling practical considerations"—including plaintiffs' delay in seeking relief—required denial of stay).

derable harm that an emergency injunction would cause the many candidates, both MCEA participants and not, who have relied on the challenged provisions"). Candidates who opted to participate in the Clean Elections system as early as August of 2009 gave up their legal right to raise contributions from private donors as a condition for receiving public funds, including the triggered supplemental funds, and would be unable to raise additional funds outside the system at this point. They gave up this right knowing that Maine's Clean Elections system provides triggered supplemental funds (subject to a cap) as a substitute for such private fundraising.

Moreover, an injunction at this late date would make the Court party to manipulation of the electoral process, giving privately funded candidates a marked competitive advantage. Nothing prevented Applicants from seeking an injunction months ago. If they had, other candidates could have adjusted their plans accordingly based on the outcome of the challenge. A court of equity should not allow Applicants to benefit from their own delay.

D. Granting an Injunction on the Eve of the Election Would Reduce the Total Spending in Maine's Election, Cause Severe Disruption to Orderly Elections, and Undermine the State's Strong Interest in Deterring Corruption, to the Detriment of the Public Interest.

1. *A Last-Minute Injunction Would Result in Less, Not More, Political Speech, Undermining the Ability of Maine's Electorate to Engage in Democratic Deliberation*.

As the Supreme Court has repeatedly recognized, the ultimate goal of First Amendment protection is to

enable the process of democratic deliberation that is the foundation of this republic:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.

Citizens United, 130 S. Ct. at 898 (citations omitted); *see also Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."). Thus, the asserted constitutional rights of political spenders like Applicants are not the only constitutional interests implicated by the instant litigation. In fact, like all cases concerning the regulation of political spending, "constitutionally protected interests lie on both sides of the legal equation." *Nixon*, 528 U.S. at 400. Accordingly, this Court must consider how the requested injunction would affect not just *Amici*, but the broader Maine public.

Enjoining the trigger provisions would threaten the First Amendment benefit Maine's citizens derive from the political dialogue that the supplemental funds facilitate. As *Buckley* noted:

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception.

Id. at 93 n.127 (citations omitted); *see also Citizens United*, 130 S. Ct. at 911 ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). Like the presidential public financing system praised by the *Buckley* Court, the MCEA is an effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. The "more speech" approach exemplified by public financing and facilitated by trigger funds furthers the primary First Amendment goal of democratic deliberation.

Indeed, examination of the spending record of privately financed candidates in Maine's 2008 general elections shows that an injunction now would result in less speech, not more, in the final days of Maine's elections. Despite Maine's ten-year history of elections under the provisions challenged here, Applicants have adduced no evidence that any candidate or PAC ever previously has curtailed its spending because of Maine's trigger provisions. The record of campaign spending in Maine in fact shows the opposite. If the prospect of triggering supplemental grants to publicly financed opponents indeed "chilled" the spending of privately funded candidates, one would expect to see such spending stop just short of these thresholds.[30] But the actual spending patterns of non-participating (privately funded) Maine candidates shows no such

[30] For the Court's convenience, this information is portrayed graphically in two charts, attached as Exhibit 1 to the Declaration of Monica Youn, October 21, 2010 (filed concurrently herewith). Candidate spending data is publicly available on the Maine Commission on Governmental Ethics and Election Practices website at www.mainecampaignfinance.com.

"clustering" below the threshold. Instead, privately funded candidates seem to spend as much as they can raise—presumably constrained not by the triggering threshold, but by their own fundraising ability.

This means that an injunction against trigger funds can only reduce, not increase, the amount of spending in Maine's elections in these final days: Privately financed candidates would spend all available funds regardless of an injunction, but an injunction will leave participating candidates unable to spend beyond the original base amounts. The clear net reduction in political speech that would result from an injunction under the facts of this particular case weighs heavily against granting such extraordinary relief.

2. *The Requested Injunction Would Also Result in Extensive Disruption, Causing Unwarranted Damage to the State's Interests in Deterring Corruption and Informing the Electorate.*

As noted above, Maine's election season is in full swing, and early voting commenced over three weeks ago. A last-minute injunction would cause unnecessary chaos, throwing doubt on the entirety of the MCEA, even though only discrete provisions of the system are challenged here. The citizens of Maine have a strong First Amendment interest in a system of campaign finance that facilitates representative and accountable government and, to that end, an interest in orderly elections. The turmoil resulting from a mid-election injunction would undermine voters' confidence in a system they have depended upon to

keep their elections orderly and corruption-free.[31] In this case, the public has an overwhelming interest in avoiding the "chaotic and disruptive effect upon the electoral process" of a last-minute injunction. *Fishman*, 429 U.S. at 1330; *see also Westermann*, 409 U.S. at 1236-37 (denying application for injunction filed with Supreme Court two and a half weeks before election because "orderly election processes would likely be disrupted by so late an action"); *Brown*, 533 U.S. at 1302 (failure to make "immediate application" to individual justice in months past "is somewhat inconsistent with the urgency [Applicants] now assert"). The goal of robust public debate over the substantive issues would be poorly served by the distraction of candidates scrambling to adapt to new rules and arguing over the impact of court decisions just days before the election, when thousands of votes already have been cast under Maine's early voting system.

Moreover, as noted *supra*, Section I.D., this Court has long recognized that the public has considerable informational and anti-corruption interests in the disclosure of money in politics. These interests are perhaps never as acute as they are now—just days from Election Day. Information about who is funding political advertisements is necessary "so that the

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[31] For example, public polling has consistently shown strong support for the public financing program across Maine's electorate. In recent surveys, two-thirds of Maine voters agreed that the MCEA is needed because, prior to the enactment of the law, large donors wielded disproportionate influence, and two-thirds expressed overall approval for the law. Seventy percent expressed support for the public financing provisions specifically. *See* Critical Insights on Maine Tracking Survey: Summary Report of Finding from Proprietary Items 5, 7, 10 (Critical Insights ed., May 2010), attached as Exhibit 2 to Youn Decl.

people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 130 S. Ct. at 915 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); *Buckley*, 424 U.S. at 67 (disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"). Moreover, as the *Buckley* Court first articulated, political expenditure disclosure "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67; *accord McConnell*, 540 U.S. at 196.[32] Thus, in numerous cases over the decades, the Supreme Court has echoed Justice Louis Brandeis' insight that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933), *quoted in Buckley*, 424 U.S. at 67; *accord Buckley II*, 525 U.S. at 223. A last-minute injunction against disclosure requirements would subject Maine's electorate to an information blackout, just when at the point when such information is crucially needed to assist the deliberative process.

Finally, in light of the well-established compelling state interest in deterring the corrupting effect of large contributions, *see Buckley*, 424 U.S. at 36, the harm to the public interest from enjoining Maine's $750 limit on contributions to gubernatorial candi-

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[32] In addition, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance laws—like contribution limits and prohibitions against foreign spending. *Id*. at 67-68; *accord McConnell*, 540 U.S. at 196.

dates during the final week of the election is equally clear. An injunction against the current contribution limit would leave Maine with no limits at all on individual contributions to candidates, because such unexpected Court action would leave the Maine legislature no opportunity adopt a new, higher limit prior to the election. A donor could suddenly bestow a gift of any size on a Maine gubernatorial candidate in the final days of the campaign, creating precisely the risk of actual and apparent corruption that *Buckley* and its progeny have repeatedly found to justify contribution limits. *Buckley*, 424 U.S. at 28 (finding contribution ceilings "a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions"). No justification has been offered, and none exists, to force Maine to join the dwindling minority of states that still have no limits at all on individual contributions to candidates.[33]

[33] Only fourteen states still allow unlimited individual contributions to candidates. *See* Nat'l Conference of State Legislatures, State Limits on Contributions to Candidates (2010), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf. Of these, two—Illinois and New Mexico—have recently adopted contribution limits that will take effect in the next election cycle. See 10 Ill. Comp. Stat. 5/9-8.5(a) (2010); N.M. Stat. Ann. § 1-19-34.7A(1)(a) (2010).

CONCLUSION

For these reasons, this Court should deny the Renewed Emergency Application of Appellants for a Writ of Injunction Pending Appeal.

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