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**MEMORANDUM**

TO: Interested persons

FROM: Brenda Wright
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RE: Constitutionality of Full Public Financing Laws

The following is a brief summary of points concerning the constitutionality of voluntary public financing laws such as those that have been enacted in Maine, Arizona, Vermont, Massachusetts and other states.

Full public financing, or "Clean Election," laws are intended to strengthen public confidence in government and promote electoral competition by substantially reducing the need for candidates to rely upon private contributions to finance their campaigns. Generally, these public financing systems provide qualified candidates with a set amount of funding for their campaigns, in return for the candidate's agreement to forgo most private contributions and limit his or her total campaign expenditures. Candidates who do not wish to accept such limits are not required to participate, but are then ineligible to receive public funding for their campaigns. These "Clean Election" laws do not infringe any protected First Amendment rights, but instead enhance political debate by providing public financing to candidates who can demonstrate public support but might otherwise lack the financial resources to communicate their message and mount a viable electoral campaign.

Contrary to some misconceptions, voluntary public financing schemes have been repeatedly upheld against First Amendment challenges. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court, while striking down mandatory limits on federal campaign expenditures, specifically affirmed the constitutionality of a public financing system in which presidential candidates agree to limit their overall campaign expenditures in return for public matching funds. As the Supreme Court explained:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the

> size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

424 U.S. at 57 n.65. The Court found that the overall effect of the public financing provision was "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. Thus [the public funding provision] furthers, not abridges, pertinent First Amendment values." *Id.* at 93.

Public financing, the Supreme Court also found, was supported by compelling governmental interests "to reduce the deleterious influence of large contributions on our political process, to facilitate communications by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. By permitting candidates to run a viable campaign without having to raise large sums from private contributors, the public financing option reduces the stranglehold of wealthy special interests on the political process without limiting other candidates' ability to solicit and spend as much as they wish.

Relying on *Buckley*, the lower federal courts have rejected most constitutional challenges to legislation providing for public financing. *See Daggett v. Comm'n on Govermental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's "Clean Elections" initiative providing full public financing to qualified candidates); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (upholding Rhode Island's public financing provisions); *Gable v. Patton,* 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (upholding Kentucky's public financing provisions); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996) (upholding Minnesota's public financing provisions); *Republican National Committee v. FEC*, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), *aff'd mem*., 445 U.S. 955 (1980) (upholding voluntary limits for presidential campaigns).

**Incentives for Participation**

Although some opponents of public financing argue that the system is not truly voluntary if it includes incentives that encourage candidates to accept expenditure limits, the courts have accepted the use of reasonable incentives for participation. As the Court of Appeals for the First Circuit has explained:

> The state need not be completely neutral on the matter of public financing of elections. When, as now, the legislature has adopted a public funding alternative, the state possesses a valid interest in having candidates accept public financing because such programs "facilitate communication by candidates with the electorate," *Buckley*, 424 U.S. at 91, free candidates from the pressures of fundraising, *see id.*, and relatedly, tend to combat corruption, *see id.*

*Vote Choice v. DiStefano*, 4 F.3d at 39. The following types of incentives for participating in a public financing scheme have been upheld against constitutional challenge:

> -- Maine: an expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits and receive additional public funding when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute; and an independent expenditure match, which grants additional public funding to candidates to match independent expenditures made either against their candidacy or on behalf of their opponents. *Daggett*, 205 F.3d at 463-465, 468.
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> -- Minnesota: an expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute. *Rosenstiel v. Rodriguez*, 101 F.3d at 1550-1551.
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> -- Kentucky: an expenditure limitation waiver that waives the expenditure limits when a nonparticipating candidate exceeds the limits, and also provides a further two-to-one publicly financed match for participating candidates whose opponents exceed the cap. *Gable v. Patton,* 142 F.3d at 947-949; *see also Wilkinson v. Jones*, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995) (upholding expenditure limitation waiver and matching funds for participating candidate who are outspent by non-participating opponents).
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> -- Rhode Island: a provision doubling the contribution cap for participating candidates, allowing them to receive contributions of up to $2,000 from individuals or PACs while limiting privately funded candidates to contributions of $1,000 per individual or PAC. *Vote Choice v. DiStefano,* 4 F.3d at 37-40. (One district court, however, has enjoined contribution limits that are five times lower for a non-participating candidate than for a participating candidate, *see Wilkinson v. Jones*, 876 F. Supp. at 929).

The Eighth Circuit has taken a different position from that of the First Circuit on the permissibility of providing matching funds for independent expenditures. In contrast to the First Circuit, which upheld the independent expenditure match in Maine's Clean Elections law, the Eighth Circuit struck down a Minnesota provision that provided matching funds for participating candidates who were the target of independent expenditures, reasoning that groups might be deterred from making independent expenditures if they know that the candidate they have targeted will be able to respond using public funding. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The First Circuit's decision in *Daggett* strongly disagrees with this reasoning, pointing out that the right to free speech does not include a right to speak without being answered. *Daggett*, 205 F. 3d at 464-465. We believe the 8th Circuit's decision is an aberration and that a properly crafted independent expenditure match is fully constitutional under the First Amendment.

**Financing Provisions**

A few cases have addressed the constitutionality of various types of funding mechanisms for public financing. The Supreme Court in *Buckley* upheld a provision of the Federal Election Campaign Act of 1971 that allowed taxpayers a one-dollar check-off on income tax returns that resulted in a dollar-for-dollar allocation out of the general fund to qualifying presidential candidates. The Court was not moved by the taxpayers' objection to the potential use of the funds for candidates the taxpayers opposed. It noted that every congressional appropriation "uses public money in a manner to which some taxpayers object." *Id.* In addition, Arizona's provision imposing a 10% surcharge on criminal and civil fines to be distributed to political candidates that observe spending limits was upheld against constitutional challenge by the Arizona Supreme Court. *May v. McNally*, 55 P.3d 768 (Ariz. 2002), *cert. denied*, 538 U.S. 923 (2003).

Other types of financing provisions that single out particular groups or individuals for surcharges to support public financing have not fared as well in the courts. In *Vermont Soc'y of Ass'n Executives v. Milne*, 779 A.2d 20 (Vt. 2001), the Supreme Court of Vermont held, over a strong dissent, that a tax on lobbying expenditures did not withstand strict scrutiny and violated the lobbyists' First Amendment rights to free speech by singling out the First Amendment right to petition the government, and singling out lobbyists as First Amendment speakers. In *Butterworth v. Florida*, 604 So.2d 477 (Fla. 1992), the Florida Supreme Court struck down legislation requiring political party executive committees, committees of continuing existence, and political committees to pay 1.5% assessment of all contributions to finance public elections. Although the *Butterworth* court acknowledged the constitutionality of publicly funded elections, it held that "singling out political parties and associations to support the fund bears no relationship to the interest advanced." *Id.* at 480. Again, there was a strong dissent, which stated "Broadening the use of the First Amendment should not, in my view, be a violation of the First Amendment." *Id.* at 481 (Overton, J., dissenting).

**Conclusion**

Because there are variations in the details of different "Clean Money" systems, the preceding summary is not intended as a full commentary on any particular state's or city's statutory scheme. However, in general, it is clear that laws providing for public financing of elections stand on a strong constitutional footing. States may combat the corrosive influence of money in politics and encourage electoral competition by providing public financing to qualified candidates. These public financing schemes may include reasonable incentives to encourage participation in the public financing system. Most court challenges to public financing provisions have been rejected, following the lead of the Supreme Court's decision in *Buckley* which upheld partial public financing for presidential elections.