COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. CIVIL ACTION
No.

KELLY BATES, et al.,

Plaintiffs,

v.

MICHAEL J. SULLIVAN, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

The plaintiffs seek to enjoin defendants from conducting elections in violation of the Massachusetts Clean Elections Law, G.L. c. 55A, § 1 et seq., and Article 48 of the Amendments to the Massachusetts Constitution. The Clean Elections Law, passed overwhelmingly by Massachusetts voters in November 1998, mandates that candidates for state office who collect a specified number of qualifying contributions and submit to voluntary contribution and spending limits shall be entitled to public campaign financing. G.L. c. 55A, § 1 et seq. However, no funds have been made available for participating candidates. Plaintiffs therefore request that this Court declare that the defendants are conducting

elections in violation of the Clean Elections Law and Article 48, and order that any and all candidates who qualify for public campaign financing must receive the full amounts to which they are entitled.

The Clean Elections Law promises that candidates who voluntarily limit their contributions and spending, and gather sufficient qualifying contributions, will be entitled to public campaign funding in the primary and general elections. G.L. c. 55A, §§ 7 and 11. Relying upon this, the candidate plaintiffs are in the process of qualifying for public financing and continue to limit their spending and forgo contributions over $100, as the law requires, while non-participating candidates may spend unlimited amounts and are free to accept larger contributions.

The lack of public funding jeopardizes the ability of the plaintiffs and others seeking public financing to run an effective campaign for office. *See* affidavits of candidate plaintiffs, Plaintiffs' Exhibits at Tab 1. Absent judicial relief, the lack of funding will cause some candidates to opt out of Clean Elections participation and seek large private contributions, contrary to their desires. Other candidates, unable or unwilling to seek large private contributions, will withdraw from the elections entirely, and still other potential candidates considering a run from office will be deterred from the endeavor by the Commonwealth's failure to guarantee the funding promised by the new law.

The voters of Massachusetts overwhelmingly supported the Clean Elections Law and yet their votes are rendered null by the failure to fund and implement the

law. The fundamental right of citizens to vote for, and enact, laws through the initiative process will be eviscerated unless defendants are ordered to implement the Clean Elections Law immediately. Furthermore, the failure to implement the Clean Election Law threatens imminent harm to voters by depriving them of the ability to support, and vote for, the candidates of their choice.

The defendants' conduct of elections without funding for the Clean Elections Law violates Article 48 of the Amendments to the Massachusetts Constitution, which requires that laws passed through voter initiative be given full effect. "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection…." Art. 48, Initiative and Referendum Pt. 1 § 1. Article 48 further requires that if a law approved by the voters is not repealed by the legislature, the Commonwealth must appropriate "such money as may be necessary to carry such law into effect." Art. 48, Init. Pt. 2 § 2.

While this violation threatens immediate, irreparable harm to plaintiffs, an injunction requiring the defendants to comply with the Clean Elections Law will cause the Commonwealth no substantial injury. Instead, compliance with the Clean Elections Law will further the public interest by reducing the candidates' reliance on special-interest donors, making elections more competitive, and enhancing public confidence in the integrity of the electoral process.

STATEMENT OF FACTS

In November 1998, Massachusetts voters overwhelmingly approved the Clean Elections Law pursuant to the provisions of Article 48 of the Amendments to the Massachusetts Constitution. Approximately two thirds voted for it, and it passed in every legislative district of the state. The law, enacted as Chapter 395 of the Acts of 1998 and codified as Chapter 55A of the General Laws, mandates public funding for qualified candidates who choose to participate.

The Clean Elections Law sets forth procedures and criteria for participating candidates for state office in Massachusetts to become eligible for public campaign funding, by signing a declaration of intent and then raising a minimum number of qualifying contributions and signed supporting forms during a "qualifying period." G.L. c. 55A, §§ 1 and 4. The qualifying period for statewide offices in the 2002 elections is August 1, 2001 to August 27, 2002; for other offices it is January 1, 2002 to May 28, 2002. G.L. c. 55A, § 1; G.L. c. 53, § 10.

During the election cycle, all participating candidates must refuse any monetary contributions over $100, and may not accept aggregate contributions in the primaries over limits ranging from $3,300 for State Representative candidates to $322,000 for candidates for Governor, G.L. c. 55A, § 9.[1] The aggregate

[1] All contribution and spending limits, and public financing amounts, are as adjusted for inflation on February 1, 2001, pursuant to G.L. c. 55A, § 13. These figures, attached at Tab 2, are available on the OCPF web site, at http://www.state.ma.us/ocpf/celimits.pdf.

contributions permitted in the general election range from $3,200 (State Representative) to $164,600 (Governor). G.L. c. 55A, § 9.[2] Finally, candidates seeking public funding must also abide by expenditure limits in the primary campaign ranging from $19,500 (State Representative) to $1,944,100 (Governor), and limits in the general election campaign ranging from $12,900 (State Representative) to $1,300,100 (Governor). G.L. c. 55A, § 6. For the 2001-2002 election cycle, all limits apply as of March 31, 2001.

Candidates who raise sufficient qualifying contributions, abide by the contribution and spending limits, and otherwise comply with the law, must be certified by the Director of the Office of Campaign and Political Finance (OCPF) and are then entitled to receive distributions from the Massachusetts Clean Elections Fund (the "Fund"). G.L. c. 55A, §§ 5 and 7. In addition to the base level of funds allocated to certified candidates, each candidate is also entitled to matching funds when a non-participating opponent exceeds the primary or general election expenditure limits, until the candidate's total public financing reaches twice the relevant expenditure limit. G.L. c. 55A, § 11.

During the 2001-2002 primary election, certified candidates are entitled to the following amounts: Governor, $1,622,100 in base funds, up to $2,266,100 matching funds, totaling up to $3,888,200 per candidate; Lieutenant Governor,

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[2] Participating candidates must also limit in-kind contributions from each individual or political committee. G.L. c. 55A, § 10.

$414, 200 base, up to $559,200 matching, $973,400 total; Attorney General or Treasurer, $389,300 base, up to $583,900 matching, $973,200 total; Auditor or Secretary of the Commonwealth, $129,800 base, up to $194,800 matching, $324,600 total; Governor's Councilor, $20,500 base, up to $31,300 matching, $51,800 total; State Senator, $46,500 base, up to $70,300 matching, $116,800 total; State Representative, $16,200 base, up to $22,800 matching, $39,00 total. Distribution of one half of the primary funding is due within five business days of certification, and the remainder is due to candidates with an opponent who will appear on the ballot in the primary within five business days after the end of the qualifying period. G.L. c. 55A § 8.

During the 2001-2002 general election, certified candidates are entitled to the following amounts: Governor, $1,135,500 base, up to $1,464,700 matching, $2,600,200 total; Lieutenant Governor, $275,800 base, up to $373,000 matching, $648,800 total; Attorney General or Treasurer, $259,500 base, up to $389,300 matching, $648,800 total; Auditor or Secretary of the Commonwealth, $86,500 base, up to $129,700 matching, $216,200 total; Governor's Councilor, $14,100 base, up to $20,700 matching, $34,800 total; State Senator, $31,400 base, up to $46,600 matching, $78,000 total; State Representative, $9,700 base, up to $16,100 matching, $25,800 total.

Despite the clear mandate of the Clean Elections Law, no money has been appropriated for disbursement by the Fund. Nevertheless, candidates who wish to remain eligible for financing must abide by the Clean Election Law's contribution

and spending limits, and must expend the time and resources necessary to gather qualifying contributions.[3] At the same time, the candidates' non-participating opponents are free to accept individual contributions up to $500 per calendar year, or $1000 for the 2001-2002 cycle. G.L. c. 55 § 7A.

The candidate plaintiffs include Warren Tolman, who is seeking the Democratic Party nomination for Governor; Jill Stein, who is seeking the Green Party nomination for Governor; Sarah Cannon Holden, who is seeking the Democratic nomination for Lieutenant Governor; Evan Slavitt, who is seeking the Republican nomination for Attorney General; James O'Keefe, who is seeking the Green Party nomination for Treasurer; Stephen Spain, who is seeking the Democratic nomination for State Senate in the Third Middlesex District; and Douglas Petersen, who is seeking the Democratic nomination for State Representative in the Eighth Essex district. All are in the process of qualifying for public campaign financing. *See* Affidavits, Plaintiffs Exhibits Tab 1.

The voter plaintiffs supported enactment of the Clean Elections Law, and wish to support publicly funded candidates for elected office. These plaintiffs include four who were among the first ten signers of the petition to place the law on the ballot: Brian Corr, Marc D. Draisen, Arnold S. Hiatt, and John W. Sears. The other voter plaintiffs are Kelly Bates, Ron Bell, Derek Bok, Richard Elrick, Robert A. Feuer, Kathleen E. Grady, Frank N. Jones, Sumner Z. Kaplan, Giovanna

[3] Statewide candidates were permitted to gather qualifying contributions as of August 1, 2001, while for other candidates the qualifying period does not begin

Negretti, Galen Nelson, William O' Connell, Gibran X. Rivera, David C. Robbins, John J. Templeton, Nancy Turner, and Ernest Winsor.

The organizational plaintiffs worked actively to place the Clean Elections Law on the ballot and to secure its passage. Massachusetts Voters for Clean Elections ("Mass Voters") is a nonpartisan, nonprofit citizen effort to reduce the influence of private money in the electoral process and encourage greater competition in statewide and legislative elections. It was the principal proponent of the ballot initiative, and had over 6,000 volunteers working to enact the law by gathering signatures and conducting public education. Common Cause Massachusetts is an affiliate of a thirty-year-old nonprofit, nonpartisan citizen's lobbying organization promoting open, honest, and accountable government. With over 10,000 members, Common Cause Massachusetts was a major proponent of the Clean Elections Law; its members worked to secure the law's passage by gathering signatures and through public advocacy.

The Massachusetts Republican State Committee and the Massachusetts Green Party are recognized political parties in the State of Massachusetts. Candidates are seeking the nominations of these parties for statewide offices, State Senator and State Representative. Numerous candidates from each of these parties are in the process of qualifying for public campaign financing.

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until January 1, 2002. G.L. c. 55A, § 1.

LEGAL ARGUMENT

I. Preliminary Injunction Standard

In considering a motion for a preliminary injunction, a court must first evaluate in combination the moving party's claim of injury and chance of success on the merits. *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617, 405 N.E.2d 106 (1980). If the court is convinced that the failure to issue an injunction would subject the moving party to a substantial risk of irreparable harm, it balances this risk against the risk of harm which granting the injunction would create for the opposing party. *Id*. A preliminary injunction should issue where the balance of the risks favors the moving party. *Id*.

II. Plaintiffs Are Likely to Succeed on the Merits

Article 48 of the Massachusetts Constitution declares the right of citizens to propose and enact laws governing the Commonwealth. "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection …." Art. 48, Initiative and Referendum Pt. 1 § 1.

To ensure that laws passed by voter initiative are given full effect, Article 48 demands that such laws be fully funded. While the legislature may amend or repeal a law approved by the people, Art. 48, Initiative and Referendum Pt. VI, if

it does not do so, the legislature "shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect." Art. 48, Initiative and Referendum Pt. II § 2.

Article 48 is central to the allocation of political power in the Commonwealth, and vests a fundamental right in the citizenry. "It was intended to provide both a check on legislative action and a means of circumventing an unresponsive General Court. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action." *Buckley v. Secretary of the Commonwealth*, 371 Mass. 195, 199, 355 N.E.2d 806 (1976).

Thus Article 48 confers on the people the right to enact laws regardless of the legislature's action or inaction. The Supreme Judicial Court has defined "law" to mean "a measure with binding effect," connoting "a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty." *Mazzone v. Attorney General*, 432 Mass. 515, 530, 736 N.E.2d 358 (2000) (quoting *Opinion of the Justices*, 262 Mass. 603, 605 (1928)).

Article 48 therefore requires that laws passed by initiative, and not repealed, be binding regardless of the legislature's actions. "A constitutional amendment should be 'interpreted in the light of the conditions under which

it…[was] framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.'" *Mazzone*, 432 Mass. at 526 (quoting *Tax Comm'r v. Putnam*, 227 Mass. 522, 524, 116 N.E. 904 (1917)); *see also, Town of Mt. Washington v. Cook*, 288 Mass. 67, 192 N.E. 464 (1934) ("Statements in the Constitution and its Amendments must be given effect in consonance with the end they are designed to accomplish.").

To plaintiffs' knowledge, no previous reported case has confronted a state agency's responsibility in the face of the Massachusetts legislature's failure to fund a law passed by voter initiative. However, remedies have been ordered against executive agencies when the legislature has breached other provisions of Article 48. For example, where the legislature passed a substitute for a voter initiative which was not a true alternative to the initiative, as required by Art. 48, Part III § 2, the court ordered that the legislative alternative not be placed on the ballot. *Buckley v. Secretary of the Commonwealth*, 371 Mass. at 202-03. The court held that the legislature's actions constituted "the emasculation of the initiative petition" and that to give effect to what the legislature had done "would be to fly in the face of the evident intent of the distinguished members of the Constitutional Convention who prepared the way for the passage of art. 48 by the people." *Id*.

Here, as in *Buckley*, the legislature's actions threaten to undermine the intent of the framers of Article 48 that the will of the people not be "thwarted by legislative action." *Buckley*, 371 Mass. at 199. The Clean Elections Law was

approved by initiative after being stymied in the legislature. Before the law passed overwhelmingly on the 1998 ballot, similar proposals had been introduced in four legislative sessions between 1992 and 1993, and none was ever reported favorably out of the Joint Committee on Election Laws. This is a clear example of the popular will overriding legislative recalcitrance, as anticipated by Article 48. Thus here, as in *Buckley*, executive agencies of the Commonwealth must be held to compliance with Article 48 in order to protect the rights which Article 48 vests in the citizens of Massachusetts.

The Clean Elections Law confers certain duties on the OCPF Director, most saliently the distribution of funds from the Clean Election Fund. G.L. c. 55A § 8(a). This provision states that the distribution of funds is "subject to appropriation." However, this language merely acknowledges that the Clean Elections Law, like any other Massachusetts law authorizing public spending, does of itself not constitute an appropriation. Appropriations are not made in the General Laws but through the operation of the annual budget and appropriation process. *Milton v. Commonwealth*, 416 Mass. 471, 473, 623 N.E.2d 482 (1993).[4]

[4] Furthermore, this language was included only on the advice of the Attorney General, after a draft of the proposed law was submitted to his office for review as required by Art. 48, Init. Pt. 2, § 3. The draft was submitted to the Attorney General in advance of the statutory deadline in order to ensure that the initiative could be modified to meet the requirements for ballot certification. The insertion of such language, as required by the Attorney General, cannot by itself render ineffective Article 48's requirement that voter-enacted initiatives must be funded if not repealed.

Agencies of the Commonwealth must comply with their constitutional duties, and may be ordered by a court to do so, even if compliance requires a legislative appropriation. For example, the Court in *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 458 N.E.2d 702 (1983), ordered improvements in county jails even while noting that the defendants (county commissioners and the Massachusetts Commissioner of Correction) "present a convincing case that access to this money [needed to comply with the court order] involves a process of legislative and executive decision making over which they have no control." *Id*. at 535. Holding that sanitary conditions in county jail facilities violated the Eight Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights, the court stated, "We flatly reject the notion that an arm of the State may be allowed to violate an individual's constitutional rights because funds have not been appropriated to remedy the wrong." *Id*. at 532; *see also, Blaney v. Commissioner of Correction*, 374 Mass. 337, 342 n. 3, 372 N.E.2d 770 (1978) (While there was no showing that existing appropriations were inadequate, if that were the case "the unavailability of funds would not be a defense" to constitutional claims against correction officials.).

The Supreme Judicial Court has also held that the failure of the legislative and executive branches of government to adequately fund educational programs violated the Massachusetts constitution. *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545, 615 N.E.2d 516 (1993). The Court held that the constitution created an enforceable duty to provide an adequate education to all

children of the state, a duty which "lies squarely on the executive (magistrates) and legislative (Legislatures) branches of this commonwealth." *Id*. at 606. The Court issued a declaratory judgment stating that "the constitutional duty is not being currently fulfilled by the Commonwealth," and that "while local governments may be required, in part, to support public schools, it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate." *Id*. at 621. While the Court declined the plaintiffs' request to declare the entire school-financing system unconstitutional, it provided that "the single justice may, in his or her discretion retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken." *Id*.

In *Moe v. Secretary of Administration and Finance*, 382 Mass. 629, 417 N.E. 2d 387 (1981), where plaintiffs challenged Massachusetts' restrictions on Medicaid funding of abortions, the Court rejected the defendants' argument that "fashioning relief in this case will involve a forced appropriation, an intrusion into the legislative sphere purportedly beyond the constitutional power of this court." *Id*. at 642. After noting that the plaintiffs did not seek any forced appropriation of funds, since the legislature had already made a general appropriation of the Medicaid funds in question, the Court addressed the larger point:

> More fundamentally, we have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. In *Colo v.*

> *Treasurer & Receiver Gen*., 392 N.E. 2d 1195 (1979), we rejected the argument that either the doctrine of separation of powers or the political question doctrine requires that result. "Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. 'This,' in the words of Mr. Chief Justice Marshall, 'is of the very essence of judicial duty.'" [quoting *Colo*] Clearly, the relief sought by the plaintiffs is within our power to grant.

Id.

Thus the legislature's actions do not license the OCPF Director or other officials to violate the plaintiffs' constitutional rights. Like the OCPF Director, the Secretary of the Commonwealth is also bound by Article 48 and the Clean Elections Law. As the state official ultimately charged with administration of the election laws, *Socialist Workers Party v. Davoren*, 378 F.Supp. 1245, 1248 (D.C. Mass 1974), the Secretary must act within those laws.

The defendants' duties under Article 48 and the Clean Elections Law are so clearly established that plaintiffs are likely to succeed on the merits of their claims. But plaintiffs need only demonstrate a substantial possibility that they will succeed on the merits in order to be entitled to preliminary relief. Massachusetts courts have adopted the rule articulated by the United States Courts of Appeals for the D.C. Circuit that where the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to itself, and that granting the injunction poses no substantial risk of such harm to the opposing party, a preliminary injunction should issue if there is a "substantial possibility" of success

on the merits. *Packing Industries*, 380 Mass. at 618 n. 12 (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc*, 559 F.2d 841, 844 (D.C. Cir. 1977)). "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed…may grant a stay even though its own approach may be contrary to the movant's view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 843.

As discussed in Section III, *infra*, the failure to fund the Clean Elections Law is causing serious, irreparable harm to plaintiffs while a preliminary injunction would cause only minimal harm, if any, to defendants. Therefore an injunction should issue if plaintiffs have demonstrated a "substantial possibility" that they will succeed on the merits, *Packing Industries*, 380 Mass. at 618 n. 12, a standard that plaintiffs more than meet.

III. Plaintiffs Will Suffer Irreparable Harm Unless A Preliminary Injunction is Granted, While an Injunction Would Cause Only Minimal Injury to Defendants.

The Clean Elections Law offers candidates a trade-off: refuse large contributions, work hard to demonstrate your viability through qualifying contributions, agree to limit your overall spending, and the Commonwealth will provide you with enough public financing to run an effective campaign. By complying with the requirements of the law, candidates expect to be free of the pressures of large-scale fundraising, free of real or perceived obligations to large

contributors, and free to focus their time and attention on the issues that concern voters.

The candidate plaintiffs have held up their side of the bargain, but they are unable to reap the benefits of the law. With neither the promised public financing, nor large individual contributions, the candidates will not be able to mount effective campaigns, while their non-participating opponents continue to amass contributions as high as $500 each. As a result, some candidates will opt out of Clean Elections and seek private funding, while others will withdraw their candidacies, even though all desire to run as publicly financed candidates. *See* Affidavits at Plaintiffs Exhibits, Tab 1. Still others considering a run for office will be deterred by the lack of public financing.

Candidates cannot wait to see if funding is made available at a future date, for they are faced with an immediate decision. If they continue to participate and forgo contributions over $100 but the full amounts of promised public financing are not available, their campaigns will be left with inadequate funding and they will be at a financial disadvantage relative to non-participating opponents, who are free to accept individual contributions up to $500 per calendar year, or $1000 for the 2001-2002 cycle. G.L. c. 55 § 7A.

However, if they withdraw from participation and accept large private contributions, they must forfeit their right to public funding during the 2001-2002 cycle, despite the clear mandate of the Clean Elections Law establishing a public funding option. Furthermore, for these candidates to withdraw from participation

would be contrary to their personal values and to the message they have conveyed to voters. Those without personal wealth would be forced to solicit and accept private contributions despite their desire not to create the reality or appearance of obligation to donors. Having told voters that they will run a publicly funded campaign, free of real or perceived large-donor influence, their campaigns would be injured if they were to begin accepting private contributions over $100. *See* Affidavits at Tab 1.

Furthermore, those candidates who are unable or unwilling to seek large private campaign contributions must immediately decide whether to continue to invest time and resources in their campaigns, at a personal cost to themselves and their families, while the public financing that would make their candidacies viable is not available. Compounding these difficulties, the lack of funding has made it more difficult to collect qualifying contributions, because it has caused many citizens to believe that the effort to qualify will be futile.

As the failure to implement the Clean Elections Law deters candidates from seeking office, the range of choices available to voters in the 2002 elections will be irrevocably narrowed, and competitiveness of races across the state will be reduced, causing imminent, irreparable harm to voter plaintiffs and the plaintiff organizations representing voters.[5]

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[5] In 1998 and 2000, less than one-third of the legislative races in Massachusetts were contested and only one state had a higher proportion of uncontested legislative races. *See* PILLSBURY, GEORGE & JEFF ARP, THE MONEY THRESHOLD: A SUMMARY OF CAMPAIGN SPENDING, COMPETITION AND CHOICE IN THE 1998

Several individual and organizational plaintiffs supported passage of the initiative, and share an interest in enjoying the benefits of the law as well as preserving the integrity of the ballot initiative process. As reflected in the "Findings and Declarations" of the Clean Elections Law, the measure was designed to improve Massachusetts' electoral process in numerous ways, including reducing the disproportionate influence of large contributors; halting the escalating costs of elections; enabling voters to hear and be heard in the political process; increasing the accountability of elected officials; encouraging more competitive elections; and freeing candidates from the rigors of fundraising, allowing more time for them to carry out official duties. St. 1998, c. 395 (b) (1)-(7). The failure to make available public campaign financing nullifies all of these objectives.

The individual and organizational plaintiffs also share an interest in preserving their legal right to legislate through the ballot initiative process, as provided by Article 48. Art. 48, Initiative and Referendum Pt. 1 § 1. Their ability to utilize the initiative process is threatened by the Commonwealth's failure to implement the Clean Elections Law. If the Clean Elections Law is destroyed by lack of funding, the guarantees of citizen self-government embedded in Article 48

MASSACHUSETTS STATE ELECTIONS 9 (Massachusetts Money and Politics Project, March 1999), attached at Tab 3; PILLSBURY, GEORGE & JEFF ARP, BARRIERS TO ENTRY: MONEY'S ROLE IN DISCOURAGING CANDIDATE COMPETITION IN THE 2000 MASSACHUSETTS LEGISLATIVE ELECTIONS 1-2 (Massachusetts Money and Politics Project, April 2001), attached at Tab 4. In contested races, candidates with a

will be eviscerated. Any law passed by initiative which required funding for implementation could be nullified by a recalcitrant legislature, simply by denying funding, without going on record to repeal the law as required by Article 48. Art. 48, Init. Pt. 2 § 2.

While the status quo is causing immediate, irreparable harm to plaintiffs, a preliminary injunction would cause no serious injury to defendants. Rather, it would compel defendants to comply with their clear legal duties under the Massachusetts constitution and statutes. Public officials may not claim that the financial cost of compliance with a valid law constitutes irreparable harm. *Healey v. Commissioner of Public Welfare*, 414 Mass. 18, 28, 605 N.E.2d 279 (1992). This logic is even more persuasive when, as here, a constitutional right is also at stake. In analogous contexts, most courts considering federal constitutional rights have held that when an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary to justify a preliminary injunction. 11A C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE CIV. 2D § 2948.1 (1995); *see also, Elrod v. Burns*, 427 U.S. 347, 373 (1976) (First Amendment interests clearly threatened or impaired at time relief was sought, and so irreparable injury was shown); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by

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significant financial advantage (over twenty percent) have won over nine out of ten races. PILLSBURY & ARP, BARRIERS TO ENTRY 4 (2001).

undisputed evidence that he is being denied a constitutional right."); *Lanier v. City of Boston*, 95 F.Supp.2d 17 (D. Mass. 2000) (unconstitutional arrest policy constitutes irreparable harm; "[T]he deprivation of constitutional rights may constitute per se irreparable injury") (citing *Elrod*, 427 U.S. at 373).

Furthermore, the costs to the Commonwealth in this case would not be unduly burdensome. Defendant Sullivan has estimated that from $31.2 million to $37.6 million will be needed for the 2002 election. *See* Sullivan Letter and appendices at Plaintiffs Exhibits, Tab 5. This amount is only a trivial portion of the Commonwealth's total budget, which for 2001 is projected to be approximately $22.118 billion. Even if a fiscal deficit existed, the small amount needed to fund Clean Elections could be paid from the Commonwealth's "rainy day fund," which now has about $1.7 billion.[6]

Even if defendants were able to argue that compliance with the Clean Election Law would limit spending in other areas, this would not constitute harm to the defendants. *Healey*, 414 Mass. at 28 (rejecting argument that preliminary injunction requiring Department of Public Welfare to comply with federal law would cause irreparable harm by reducing resources available to the Department for other beneficiaries, citing *Woods v. Executive Office of Communities & Dev.*, 411 Mass. 599, 606, 583 N.E.2d 845 (1992)).

[6] These figures were provided by budget analysts with the Taxpayer Equity Alliance of Massachusetts on September 10, 2001.

IV. The Public Interest Requires that a Preliminary Injunction Issue

Where a party seeks a preliminary injunction against a government agency, it is appropriate for the court to consider the public interest. *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001). The public interest in this case overwhelmingly favors a grant of preliminary relief.

The harm suffered by the candidate plaintiffs and voters, as described in section II, *supra*, is shared by every citizen in the state who desires the benefits of publicly funded elections. When the voters overwhelmingly approved the Massachusetts Clean Elections Law, they expressed their dissatisfaction with the system of exclusively private campaign funding, and their belief that voluntary public funding of campaigns for state office would benefit the public interest. *See* "Findings and Declarations," St. 1998, c. 395 (b) (1)-(7).

Although it is candidates who suffer most directly from the absence of public campaign funding, the injury to voters is no less concrete. The rights of candidates are "intertwined with the rights of voters." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). The law was intended to enable voters to hear and be heard in the political process, and to encourage more competitive elections, providing voters with greater choice. *See* "Findings and Declarations," St. 1998, c. 395 (b).

Every day that the election process goes forward without Clean Elections funding diminishes the effectiveness of the law and impairs the voting rights of Massachusetts citizens. "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good

citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)(footnote omitted) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526 (1964)). The constitutional right to vote is "a fundamental political right….preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The injury from the lack of funding for the Clean Elections Law is broader than simply a denial of the benefits of the law. The very integrity of the initiative process is at stake. The citizenry of the Commonwealth has reserved for itself, under the Massachusetts constitution, the power and the right to enact laws by voter initiative. Art. 48, Initiative and Referendum Pt. 1 § 1. This right will be rendered meaningless if a law passed by initiative can be destroyed through the budget process. The very balance of political power established by the Constitution is threatened.

Conclusion

For the reasons discussed above, the Court should grant Plaintiffs' motion for a preliminary injunction and order defendants to implement fully the Massachusetts Clean Elections Law by making available to any and all certified candidates the full amounts of public financing to which they are entitled.

Respectfully submitted this day of October, 2001.

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* *Application for Admission Pro Hac Vice pending.*