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July 28, 2011

The Honorable Natalie E. Tennant
Secretary of State
State Capitol, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Opinion Request of June 30, 2011

Dear Secretary Tennant:

We have received your letter of June 30, 2011, requesting an Opinion of the Attorney General on the following legal issue:

> Is the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program constitutional in light of the recent United States Supreme Court ruling on the Arizona law?

Following our review of the law, and specifically *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, Nos. 10-238 & 239 (U.S. Supreme Court, June 27, 2011), we have concluded that the "matching funds" provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program constitute a substantial burden on the speech of privately financed candidates and are therefore violative of the United States Constitution, amend. I.

Those matching funds provisions are found at West Virginia Code §§ 3-12-11(e) - (I):

> (e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.
>
> (f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating

> candidate, either alone or in combination with the nonparticipating candidates's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.
>
> (g) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission shall authorize the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.
>
> (h) Additional funds released under this section to a certified candidate may not exceed $400,000 in a primary election and $700,000 in a general election.
>
> (I) In the event the commission determines that additional funds beyond the initial distribution are to be released to a participating candidate pursuant to the provisions of the section, the commission, acting in concert with the State Auditor's office and the State Treasurer's office, shall cause a check for any such funds to be issued to the candidate's campaign depository within two business day.

In *Arizona Free Enterprise Club*, the United States Supreme Court examined the Arizona Citizens Clean Elections Act, which created a public financing system to fund the primary and general election campaigns of candidates for state office. Speaking for a majority of the Court, Chief Justice Roberts summed up the Court's opinion as follows:

> Under Arizona law, candidates for state office who accept public financing can receive additional money from the State in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.

Arizona Free Enterprise Club, *supra*, at 1-2. Further:

> We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech.

Id. at 24. Further:

> [E]ven if the ultimate objective of the matching funds is to combat corruption – and not "level the playing field" – the burdens that the matching funds provision imposes on protected political speech are not justified.

Id. at 26. Finally:

> [T]he goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment. The dissent criticizes the Court for standing in the way of what the people of Arizona want. Post, at 2-3, 31-32. But the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign.

Id. at 29.

In response to the various arguments made by the State of Arizona, the United States Supreme Court held, as a threshold matter, that "the matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s] . . .,'" citing *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739 (2008), and that "'the vigorous exercise of the right to use personal funds to finance campaign speech' leads to 'advantages for opponents in the competitive context of electoral politics.'"

Second, the Court held that because each dollar spent by a privately funded candidate in excess of the initial public financing cap "can create a multiplier effect . . . [because] each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate's publicly financed opponents." *Arizona Free Enterprise Club* at 11-12.

Third, the Court held that the privately funded candidate is at a severe disadvantage in terms of strategy and coordination of expenditures, because "[e]ven if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election – regardless whether such support was welcome or helpful – could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit." *Id.* at 12.

Fourth, the Court held that the burden on independent expenditure groups was potentially greater than the burden on the privately funded candidate, because it could only avoid triggering

matching funds by "changing its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether." *Id.* at 13. This, the Court concluded, burdened the fundamental right of a speaker (the independent expenditure group) "to choose the content of [its] own message." *Id.*

Fifth, the Court held that Arizona's avowed intent to foster free, open and robust debate was not a compelling state interest, because "even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups." *Id.* at 15.

Sixth, the Court was unpersuaded by Arizona's argument that if providing all the available money to publicly funded candidates up front does not burden speech, then providing it incrementally would not do so either and serves the purpose to ensure that public funding is not under- or over-distributed. The Court held that "[t]hese arguments miss the point. It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided – in direct response to the political speech of privately financed candidates and independent expenditure groups." *Id.* at 21.

Seventh, the Court gave short shrift to the argument made by the United States as *amicus* that providing funds to a publicly funded candidate does not make a privately funded candidate's speech any less effective, and thus does not substantially burden speech. "Of course it does. One does not have to subscribe to the view that electoral debate is zero sum . . . to see the flaws in the United States' perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted." *Id.* at 21-11.

Turning to the matching funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-(e)-(I), we conclude that these provisions violate the United States Constitution, amend. I, under *Arizona Free Enterprise Club*.

The matching funds are triggered by the expenditures of either a privately funded candidate or an independent expenditure group.

The matching funds have a multiplier effect, as matching funds that are triggered by information relating to one publicly funded candidate are available to "any certified [publicly funded] candidate who is an opponent for the same office."

Although the total amount of matching funds is capped, that would appear to be irrelevant in light of the Supreme Court's observation that "[i]t is not the *amount* of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the

manner in which that funding is provided – in direct response to the political speech of privately financed candidates and independent expenditure groups."

In the "Legislative Findings and Declarations," which are a part of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code § 3-12-2, the West Virginia Legislature notes the "unlimited amounts of money raised from private sources" for judicial elections, the public perception that "contributors and interested third parties hold too much influence over the judicial process," and the "especially problematic" nature of judicial elections, where the perceived impartiality of candidates is uniquely important to voters. None of these findings and declarations would appear to materially distinguish the law's matching fund provisions from the those contained in the Arizona law struck down in *Arizona Free Enterprise Club*, *supra*.

Further, nothing in the recent jurisprudence of the United States Supreme Court would lead us to predict a "judicial exception" to the Court's political speech line of cases. If combating corruption is not a compelling state interest – and the Court held in no uncertain terms in *Arizona Free Enterprise Club* that it is not – we cannot envision it finding the perception of possible judicial partiality to be sufficient.

Although the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-1 *et seq.*, is silent as to the severability of its provisions, we believe that the statutory scheme "can reasonably function as an autonomous whole without the invalid provision[s] . . .," i.e., the matching fund provisions contained in Code §§ 3-12-11(e)-(I). *Louk v. Cormier*, 218 W. Va. 81, 96, 622 S.E.2d 788, 803 (2005), citing Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. Chi. L. Rev. 903-04 (1997). The applicable principle of statutory construction is as follows:

> A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.

Louk v. Cormier, 218 W. Va. at 96-97, 622 S.E.2d at 803-04; Syl. Pt. 6, *State v. Heston*, 137 W. Va. 375, 71 S.E.2d 481 (1952).

Whether the amount of public funding available for certified candidates should be increased, in the absence of the matching funds provisions, is a policy question upon which we express no opinion.[1]

Finally, although we disagree with the decision of the United States Supreme Court in *Arizona Free Enterprise Club*, the Court's opinions are the "supreme law of the land" pursuant to the West Virginia Constitution, art. I, § 1, and therefore binding on all branches of government in this State. We wish to state that we are in accord with the Legislature's "Legislative Findings and Declarations" set forth in West Virginia Code § 3-12-2, and particularly the Legislature's desire to "ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary. . . ."

In summary, it is the opinion of this Office that pursuant to the decision of the United States Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, Nos. 10-238 & 239 (U.S. Supreme Court, June 27, 2011), the provisions of West Virginia Code §§ 3-12-11(e)-(I), the matching funds provisions contained in the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, are violative of the United States Constitution, amend. I.

Please feel free to call this office if you have any questions.

Very truly yours,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By: Barbara H. Allen
BARBARA H. ALLEN
MANAGING DEPUTY ATTORNEY GENERAL

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[1]Pursuant to West Virginia Code §§3-12-11(a)(1) & (2) and 3-12-11(b)(1) & (2), a certified candidate in a contested primary election receives $200,000.00 in initial campaign financing from the fund, minus his or her qualifying contributions; a certified candidate in an uncontested primary election receives $50,000.00, minus his or her qualifying contributions; a certified candidate in a contested general election receives an amount not to exceed $350,000.00; and a certified candidate in an uncontested general election receives $35,000.00.