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purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have issues to try.[29] A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after a full trial.[30] When viewing the evidence presented at the summary judgment hearing in a light most favorable to the nonmoving party, in this case the defendant, the plaintiff-movant failed to establish each element of his cause of action as a matter of law. Therefore, the district court erred in granting partial judgment. Because we reverse the partial summary judgment in favor of Green and remand the cause for a new trial which will include the issues of negligence and liability, we need not address the parties' remaining assignments of error concerning damages and costs.

VI. CONCLUSION

For the foregoing reasons, we reverse the judgment below and remand the cause for a new trial.

REVERSED AND REMANDED.

WRIGHT, J., not participating in the decision.

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[29] *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 106 N.W.2d 197 (1960).

[30] *Illian v. McManaman*, 156 Neb. 12, 54 N.W.2d 244 (1952).

STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. JOHN A. GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

817 N.W.2d 768

Filed August 3, 2012. No. S-11-933.

1. **Constitutional Law: Statutes.** Whether a statute is constitutional is a question of law.
2. ____: ____. The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
3. **Constitutional Law: Statutes: Proof.** Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the

restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
7. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
8. **Statutes: Constitutional Law.** The public financing provisions of the Campaign Finance Limitation Act impose a substantial burden on the free speech rights of Nebraska citizens without serving a compelling state interest.
9. **Statutes: Constitutional Law: Legislature: Intent: Appeal and Error.** To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.
10. **Statutes: Constitutional Law.** The unconstitutional portions of the Campaign Finance Limitation Act are not severable from the remaining portions, and therefore, the entire act is unconstitutional.

Original action. Judgment for relator.

Jon Bruning, Attorney General, Dale A. Comer, and Lynn A. Melson for relator.

Jeffry D. Patterson and Robert F. Bartle, of Bartle & Geier Law Firm, for respondent.

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amici curiae Common Cause Nebraska and League of Women Voters of Nebraska.

HEAVICAN, C.J., CONNOLLY, STEPHAN, and MCCORMACK, JJ., and IRWIN, CASSEL, and PIRTLE, Judges.

HEAVICAN, C.J.

I. NATURE OF CASE

In this original action, the court is asked to determine the constitutionality of Nebraska's Campaign Finance Limitation

Act (CFLA).[1] After the U.S. Supreme Court declared a campaign finance statute in Arizona to be unconstitutional, the Nebraska Accountability and Disclosure Commission (Commission) sought an opinion from the Nebraska Attorney General as to the constitutionality of the CFLA. The Attorney General opined that the CFLA would likely be found to be unconstitutional by a court, and the Commission determined it would not enforce the CFLA.

Pursuant to Neb. Rev. Stat. § 84-215 (Reissue 2008), the Attorney General was then directed to file an action in court to determine the validity of the CFLA. Section 84-215 charges the Secretary of State with defending the action. We find that the CFLA substantially burdens the First Amendment rights of Nebraska citizens and that it is, therefore, unconstitutional.

II. FACTUAL BACKGROUND

In 1992, the Nebraska Legislature passed the CFLA as 2009 Neb. Laws, L.B. 556. Under the CFLA, candidates for certain covered elective offices, including the Governor, State Treasurer, Secretary of State, Attorney General, and Auditor of Public Accounts, as well as members of the Legislature, Public Service Commission, Board of Regents of the University of Nebraska, and State Board of Education, may choose to abide or to not abide by voluntary spending limits.[2] A candidate who abides by the limits and raises and spends qualifying amounts in accordance with the CFLA becomes eligible for public funds.[3] That candidate is then entitled to receive public funds depending on the estimated maximum expenditures or reported expenditures filed by any of the candidate's opponents.[4]

In 2011, in *Arizona Free Enterprise Club v. Bennett*,[5] the U.S. Supreme Court, by a vote of 5 to 4, found that a provision

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[1] Neb. Rev. Stat. §§ 32-1601 to 32-1613 (Reissue 2008 & Supp. 2011).

[2] §§ 32-1603 and 32-1604.

[3] § 32-1604.

[4] *Id.*

[5] *Arizona Free Enterprise Club v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

of Arizona's public campaign funding law, which granted matching funds to candidates, substantially burdened political speech and was not sufficiently justified by a compelling state interest. The Court held that the Arizona statutory scheme violates the First Amendment to the U.S. Constitution.

In response to the *Bennett* opinion, the executive director of the Commission requested an opinion from the Nebraska Attorney General as to the effect of the *Bennett* decision on the CFLA. Section 84-215 provides that the Attorney General may issue a written opinion as to the constitutionality of an act of the Legislature.

In the Attorney General's opinion, he found it "likely" that the matching funds provisions of the CFLA would be found to impose a substantial burden on the speech of privately financed candidates and that a court would "likely" find that the matching funds provisions of the CFLA are unconstitutional.[6] The opinion also stated that the public financing provisions would not be severable and that the portion of the CFLA providing for a limit on aggregate contributions from independent committees, businesses, associations, and political parties could not be enforced independently.[7] The opinion concluded that under *Bennett*, the public financing provisions of the CFLA substantially burden the political speech of those candidates who choose to not abide by the voluntary spending limits and that this burden was not sufficiently justified by a compelling state interest. The Attorney General opined that the CFLA creates a public financing system which unconstitutionally abridges the free speech rights of Nebraska citizens and that the public financing provisions of the CFLA are not severable, making the CFLA unconstitutional in its entirety.[8]

Under § 84-215, if the Attorney General issues a written opinion that an act is unconstitutional and any state officer charged with the duty to implement the act, in reliance on the opinion, refuses to implement the act, the Attorney General is

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[6] Att'y Gen. Op. No. 11003 (Aug. 17, 2011).

[7] *Id.*

[8] *Id.*

required to file a court action to determine the act's validity. In reliance upon the opinion, the Commission adopted a resolution refusing to implement, administer, or enforce the CFLA in connection with the 2012 state election cycle or subsequent election cycles. The Commission also notified the Attorney General of its resolution.

The Attorney General then instituted this original action. The parties stipulated that the action is a civil one in which the State of Nebraska is a party and that it involves public funds; therefore, it is a case relating to the revenue of the State under Neb. Rev. Stat. § 24-204 (Reissue 2008).

III. ISSUES BEFORE COURT

(1) Whether the public financing provisions of the CFLA violate the free speech provisions of article I, § 5, of the Nebraska Constitution and the Free Speech Clause of the First Amendment to the U.S. Constitution.

(2) Whether the public financing provisions of the CFLA are severable or whether the CFLA is unconstitutional in its entirety.

IV. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law.[9]

[2] The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.[10]

V. ANALYSIS

1. Jurisdiction

The Secretary of State asserts that there is a question as to whether this court has jurisdiction. Under § 84-215, the Attorney General is responsible for filing an action in court to determine the validity of a statute after the Attorney General has issued an opinion as to the constitutionality of a statute

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[9] See, *Sarpy Cty. Farm Bureau v. Learning* Community, 283 Neb. 212, 808 N.W.2d 598 (2012); *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

[10] *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

and a state officer or agency that is charged with implementing the statute relies on the opinion and refuses to implement it.

In this case, the Attorney General did not issue a definitive opinion stating that the CFLA is unconstitutional. Rather, he surmised that a court "would likely find the public financing provisions of the [CFLA] to be unconstitutional" and that "a court could find" the entire CFLA invalid, because the offending provision is not severable. The Secretary of State argues that § 84-215 requires a definitive conclusion of unconstitutionality before an agency can reasonably rely on the Attorney General's opinion and refuse to implement the act in dispute.

We find that the court has jurisdiction to determine the constitutionality of the CFLA, and we decline to parse the language of § 84-215 to require that an Attorney General's opinion must definitively state that a statute is unconstitutional. Our review arises from the decision of the Commission to refuse to implement the CFLA. We are asked to determine whether the statute is unconstitutional, not to decide whether the Attorney General's opinion is correct.

The amici curiae, Common Cause Nebraska and the League of Women Voters of Nebraska, also question this court's jurisdiction, asserting that there is no justiciable controversy because the interests of the Attorney General and the Secretary of State, who both represent the State of Nebraska, are not inherently adverse.

The statutory scheme set forth in § 84-215, as passed by the Legislature, by its very nature establishes adverse interests between the Attorney General and the Secretary of State. The statute requires the Attorney General to bring a court action if a state officer refuses to implement the act. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[11]

We conclude that there is a present, substantial controversy between the Attorney General, who believes that the CFLA

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[11] *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

is unconstitutional, and the Secretary of State, who by statute is directed to defend the constitutionality of all laws. The Commission has stated that it will not enforce the CFLA unless its constitutionality is determined. We find that this court has jurisdiction to decide the constitutionality of the CFLA under state laws.

2. Campaign Finance Limitation Act

The Legislature incorporated into the CFLA its findings that the cost of running for statewide offices and legislative seats has risen and results in the exclusion of qualified candidates from the democratic process.[12] Thus, its opinion that providing public funds to assist in the financing of campaigns would increase the number of qualified candidates carries greater weight than if the finding were only a part of legislative history.

However, the Legislature noted that based on holdings of the U.S. Supreme Court, "any limitation on campaign expenditures must be entered into voluntarily."[13] Use of "public financing of campaigns is a constitutionally permissible way in which to encourage candidates to adopt voluntary campaign spending limitations."[14]

The Legislature stated in the statute that there are

> compelling state interests in preserving the integrity of the electoral process in state elections by ensuring that these elections are free from corruption and the appearance of corruption; in providing the electorate with information that will assist them with electoral decisions; and in gathering the data necessary to permit administration and to detect violations of the [CFLA].[15]

The Legislature found that the State's interests could only be achieved if

> (a) reasonable limits are placed on the amount of campaign contributions from certain sources, (b) the sources

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[12] § 32-1602(1).

[13] *Id.*

[14] *Id.*

[15] § 32-1602(2).

> of funding and the use of that funding in campaigns are fully disclosed within the time periods prescribed by the [CFLA], and (c) public funds are provided to candidates who voluntarily accept spending limitations and otherwise comply with conditions for such funding under the [CFLA].[16]

The CFLA lays out a procedure for candidates to qualify for public funds to support their campaigns. It requires that every candidate, whether or not the candidate seeks public funds, must make timely filings under the CFLA.[17]

The CFLA designated certain statewide offices as "covered."[18] A candidate for a covered office must file an affidavit stating whether he or she agrees to abide or to not abide by spending limitations.[19] The spending limits were established in 2006, at which time they ranged from $2,297,000 for candidates for Governor to $70,000 for candidates for the Public Service Commission or the State Board of Education.[20] Beginning in 2008 and every 4 years thereafter, the spending limits are required to be adjusted for inflation based upon the Consumer Price Index.[21] The candidate may qualify for public funds "if he or she limits his or her campaign spending for the election period," meets other statutory requirements, and faces an opponent who does not agree to limit campaign spending.[22]

A candidate who indicates that he or she will not abide by the spending limits must also file an affidavit providing a reasonable estimate of his or her maximum expenditures for the primary election.[23] If the nonabiding candidate is successful in the primary, he or she must submit another estimate of

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[16] *Id*.

[17] § 32-1604(4) and (5).

[18] § 32-1603(1).

[19] § 32-1604(1) and (4)(a).

[20] § 32-1604(3)(a).

[21] § 32-1604(3)(b).

[22] § 32-1604(2).

[23] § 32-1604(5)(a).

expenditures for the general election on or before the 40th day following the primary.[24]

In order to qualify for public funding, an abiding candidate must raise at least 25 percent of the spending limit for the covered office sought.[25] This amount must be raised from persons who are residents of Nebraska or from a business, corporation, partnership, limited liability company, or association that transacts business in and has an office in Nebraska, all of whom are considered residents.[26] However, at least 65 percent of the qualifying amount must be received from individuals.[27]

The CFLA provides that no candidate shall accept contributions from "independent committees, businesses, including corporations, unions, industry, trade, or professional associations, and political parties" which, when aggregated, exceed 75 percent of the spending limitations for the office under § 32-1604.[28]

A candidate seeking public funds may request such funds upon making expenditures which equal or exceed 25 percent of the spending limitation for the election period.[29] The distribution of public funds to participating, abiding candidates under the CFLA is therefore triggered by either the expenditures or the estimate of expenditures of privately financed or nonabiding candidates.

A nonabiding candidate must also file an affidavit with the Commission when his or her expenditures equal or exceed 40 percent of the spending limitation for the primary election period and a second affidavit for the general election period.[30] If a 40-percent disclosure affidavit is not filed, no public funds will be distributed to the qualified abiding candidate unless

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[24] *Id.*

[25] § 32-1604(4).

[26] *Id.*

[27] *Id.*

[28] § 32-1608.

[29] § 32-1606(1).

[30] § 32-1604(5)(b).

preelection campaign statements show that a candidate has made expenditures requiring the filing of a 40-percent disclosure affidavit.[31]

Public funds are disbursed to the qualified abiding candidate "no earlier than the last date to amend an affidavit stating a reasonable estimate of expenditures," which is up to 30 days before a primary and up to 60 days before the general election, but no later than 14 days after the election.[32]

After an abiding candidate meets the fundraising and filing requirements of § 32-1604(4), he or she is entitled to receive public funding of the greater of either (a) the difference between the office-specific spending limitation and the nonabiding candidate's estimate of expenditures for either the primary or the general election or (b) the difference between the spending limit and the "highest amount of expenditures reported in preelection campaign statements" filed by any of the candidate's opponents.[33] Hence, the distribution of public funds to participating, abiding candidates under the CFLA is clearly triggered by the actual or anticipated expenditures of privately financed or nonabiding candidates, either by the estimate in § 32-1606(1)(a) or the actual reported expenditures as provided in § 32-1606(1)(b). The Commission has authority to assess a civil penalty for violations of the spending limitations.[34]

According to the stipulation of facts entered into by the parties, since the enactment of the CFLA, there have been 486 candidates for elective offices covered by it. Of those 486 candidates, 11 have been advised by the Commission that public funding was available and 10 have received all or part of the public funding available under the CFLA. At least three candidates have challenged the constitutionality of the CFLA through litigation. Two percent of all candidates have received public funding.

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[31] § 32-1604(6).

[32] § 32-1606(2).

[33] § 32-1606(1).

[34] § 32-1612.

3. *Arizona Free Enterprise Club v. Bennett*

The Commission requested the Attorney General's opinion after the U.S. Supreme Court issued its opinion in *Bennett*.[35] In *Bennett*, the Court held that the Arizona statutes providing matching funds for campaign financing "substantially burden[] protected political speech without serving a compelling state interest and therefore violate[] the First Amendment."[36]

Bennett arose under Arizona's Citizens Clean Elections Act, which created a voluntary public financing system to fund campaigns of candidates for state office.[37] The Court explained that the act provides money which is collected from Arizona voters who contribute $5 to the fund. Publicly funded candidates must agree to limit their expenditure of personal funds to $500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public moneys to the state.[38]

Candidates who accept these conditions are given public funds and may be granted additional equalizing or matching funds in both primary and general elections.[39] The funds in a primary are "triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. §§ 16-952(A), (C)."[40] In the general election, the trigger occurs when the contributions received by a privately financed candidate, "combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate,

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[35] *Bennett, supra* note 5.

[36] *Id.*, 564 U.S. at 728.

[37] See Ariz. Rev. Stat. Ann. §§ 16-940 to 16-961 (2006 & Cum. Supp. 2009).

[38] See, *Bennett, supra* note 5; Ariz. Rev. Stat. Ann. §§ 16-941(A)(2), 16-956(A)(2), and 16-953.

[39] See, *Bennett, supra* note 5; Ariz. Rev. Stat. Ann. § 16-952(A), (B), and (C)(4) and (5).

[40] *Bennett, supra* note 5, 564 U.S. at 729.

exceed the general election allotment of state funds to the publicly financed candidate. § 16-952(B).”[41]

Once matching funds are triggered, publicly financed candidates receive $1 in state funding for each additional dollar that a privately financed candidate spends in the primary (less a 6-percent reduction to cover fundraising expenses).[42] The Court determined that during a general election, “every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent.”[43] If “a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.”[44]

In addition, spending by independent groups on behalf of a privately funded candidate or in opposition to a publicly funded candidate results in dollar-for-dollar matching funds once the public financing cap is exceeded.[45] A privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements.[46]

The Court provided several examples to demonstrate how the public financing scheme operates. If the privately funded candidate spent $1,000 of his or her own money to distribute a direct mailing or held a fundraiser that generated $1,000 in contributions, each of his or her publicly funded opponents would receive $940 ($1,000 less the 6-percent offset). And if an independent group spent $1,000 on a brochure opposing one of the publicly financed candidates, but did not mention

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[41] *Id.*

[42] *Id.*; Ariz. Rev. Stat. Ann. § 16-952(A).

[43] *Bennett, supra* note 5, 564 U.S. at 730.

[44] *Id.*

[45] See, *id.*; Ariz. Rev. Stat. Ann. § 16-952(C).

[46] *Id.*

the privately financed candidate, the publicly financed candidate would receive $940 directly.[47]

The petitioners in *Bennett* were five past and future candidates for Arizona state office and two independent groups that spent money in campaigns. They argued that the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights.[48]

The Court stated that "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government."[49] The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office."[50]

[3] The Court has stated that "[l]aws that burden political speech are" accordingly "'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[51]

In *Bennett*, the Court stated that the "matching funds provision 'imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].'"[52] The Arizona provision awards almost one additional dollar to a publicly financed candidate after a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate. "That plainly forces the privately financed candidate to 'shoulder a special and potentially significant

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[47] *Bennett, supra* note 5.

[48] *Id.*

[49] *Id.*, 564 U.S. at 734, quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[50] *Id.*, 564 U.S. at 734, quoting *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).

[51] *Citizens United v. Federal Election Com'n*, 558 U.S.310, 340, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

[52] *Bennett, supra* note 5, 564 U.S. at 736, quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[53]

"The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival."[54] The Court stated that the constitutional problem is not the amount of funding provided by the State to publicly financed candidates, but, rather, "[i]t is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups."[55]

Having found that the matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, the Court then considered whether the provision was justified by a compelling state interest. The Court determined that providing a level playing field to opposing candidates is not a compelling state interest that can justify undue burdens on political speech.[56] In addition, any state interest in combating corruption does not justify burdens imposed on protected political speech. Indeed, the Court stated that "'the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse' of money in politics."[57] A candidate's expenditures of his or her own money on his or her own campaign are counted as contributions under the matching funds provision. To that extent, the provision cannot be supported by "any anticorruption interest."[58]

The Court concluded that Arizona's campaign financing scheme gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group when the opposing candidate has chosen not to accept

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[53] *Id.*

[54] *Bennett, supra* note 5, 564 U.S. at 742.

[55] *Id.*, 564 U.S. at 747.

[56] *Id.*

[57] *Id.*, 564 U.S. at 751, quoting *Buckley, supra* note 49.

[58] *Bennett, supra* note 5.

public financing and has engaged in political speech above a level set by the state.[59] The matching funds provision "substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest. . . . Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[60]

4. Is CFLA Unconstitutional?

We now consider whether the CFLA violates the First Amendment in the wake of the *Bennett* decision. The Attorney General argues that the public financing provisions of the CFLA unconstitutionally infringe on the free speech rights of Nebraska citizens by imposing a substantial burden on the free speech rights of candidates. He also argues that the public financing provisions are not narrowly tailored to serve a compelling state interest.

[4-6] Whether a statute is constitutional is a question of law.[61] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[62] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[63] The unconstitutionality of a statute must be clearly established before it will be declared void.[64]

[7] The 1st Amendment to the U.S. Constitution, as applied to the states through the 14th Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[65] The Nebraska Constitution states that "[e]very person may freely speak . . . on all subjects . . . ."[66] We

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[59] *Id.*

[60] *Id.*, 564 U.S. at 754-55.

[61] See, *Sarpy Cty. Farm Bureau, supra* note 9; *Kiplinger, supra* note 9.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] U.S. Const. amend. I.

[66] Neb. Const. art. I, § 5.

have held that the "parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions."[67]

In *Bennett*, the Court stated that because discussion of public issues and debate on the qualifications of candidates are integral to the system of government, the First Amendment "'"has its fullest and most urgent application" to speech uttered during a campaign for political office.'"[68] Therefore, "'[l]aws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"[69] We therefore apply a strict scrutiny test in this case.

(a) Compelling State Interest

The CFLA states:

> The Legislature finds that there are compelling state interests in preserving the integrity of the electoral process in state elections by ensuring that these elections are free from corruption and the appearance of corruption; in providing the electorate with information that will assist them with electoral decisions; and in gathering the data necessary to permit administration and to detect violations of the [CFLA].[70]

However, in *Bennett*, the Court held that neither a state's interest in equalizing electoral opportunities nor a state's interest in combating corruption justified the burden imposed on privately financed candidates by the Arizona matching funds provision.[71]

Under the CFLA, a candidate who has agreed to abide by the voluntary spending limits becomes eligible for public funds after meeting the following two requirements: The

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[67] *State ex rel. Lemon v. Gale*, 272 Neb. 295, 310, 721 N.W.2d 347, 360 (2006).

[68] *Bennett, supra* note 5, 564 U.S. at 734, quoting *Eu, supra* note 50.

[69] *Id.*, quoting *Citizens United, supra* note 51.

[70] § 32-1602(2).

[71] *Bennett, supra* note 5.

candidate must raise from residents of Nebraska an amount equal to at least 25 percent of the spending limit for the office, and the candidate must file an affidavit indicating his or her intent to abide by the spending limitations.[72] Candidates who choose not to agree to abide by the spending limits must also file an affidavit with the Commission.[73] The public funds are disbursed when the abiding candidate has spent 25 percent of the spending limit and filed an affidavit requesting public funds.[74] The candidate is entitled to receive the greater of "(a) the difference between the spending limitation and the highest estimated maximum expenditures filed by any of the candidate's opponents or (b) the difference between the spending limitation and the highest amount of expenditures reported in preelection campaign statements."[75] Under either circumstance, the distribution of public funds to abiding candidates is triggered by the expenditures of privately financed or nonabiding candidates.

The Nebraska statutory scheme is similar to that of Arizona, which was found unconstitutional in *Bennett*. In both states, publicly funded candidates may become eligible for matching funds as a direct result of the spending of privately financed candidates who have not agreed to the voluntary spending limits.

As the *Bennett* Court noted, the amount of funding provided by the State is not the problem. "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."[76] The privately financed candidate "'shoulder[s] a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."[77]

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[72] § 32-1604(4).

[73] § 32-1604(5)(a).

[74] § 32-1606(1).

[75] *Id*.

[76] *Bennett, supra* note 5, 564 U.S. at 747.

[77] *Id*., 564 U.S. at 737, quoting *Davis, supra* note 52.

The Secretary of State argues that the CFLA does not impose a substantial burden on political speech unrelated to a compelling state interest merely by establishing voluntary campaign spending limits and allocating public funds to encourage participation in the spending limitation scheme. The Secretary of State claims that the CFLA furthers compelling and substantial state interests in preventing corruption and the appearance of corruption and in encouraging greater participation in the electoral process.

The CFLA is not identical to the Arizona statute which was found to be unconstitutional. In both states, candidates could voluntarily participate in a public financing campaign system if they accepted certain restrictions and obligations. However, in Arizona, candidates who chose to participate were given an initial outlay of public funds for their campaigns. Once a set spending limit was exceeded, the publicly financed candidate received virtually $1 for every dollar spent by a privately financed opponent or certain independent expenditure groups. In addition, under the Arizona law, spending by independent groups was included in the amount that triggered the distribution of public funds.[78]

The Nebraska financing scheme does not provide an initial outlay of public funds to all candidates who opt to participate. However, each candidate must raise private money up to the spending limit provided by statute. As an example, a candidate who chooses to not abide by the CFLA runs for an office which has a spending limit of $100,000. The candidate's affidavit states that he or she reasonably estimates his or her expenditures to be $120,000. The opponent who abides by the limit could therefore receive a public subsidy of $20,000, which is the difference between the spending limit for the office and the nonabiding candidate's estimated expenditures. The abiding candidate could receive the public subsidy of $20,000 even though he or she has raised only the initial $25,000 qualifying amount. In such a case, the nonabiding candidate could spend $120,000, while the abiding candidate would have available the public subsidy of $20,000 and the $25,000 qualifying amount,

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[78] Ariz. Rev. Stat. Ann. § 16-952(A) and (C).

or $45,000. The maximum amount the abiding candidate could raise would be $80,000, which when added to the $20,000 public subsidy, equals the $100,000 spending limit for the office. Therefore, the CFLA does not equalize the campaign funds, but lessens the gap.

Under the Nebraska law, both abiding and nonabiding candidates must file with the Commission affidavits indicating their intention to abide or to not abide within 10 days after a candidate committee is formed.[79] A candidate committee must be formed when a candidate raises, receives, or spends more than $5,000 in a calendar year.[80] Thus, the nonabiding candidate indicates his or her intention to exceed the spending limits before he or she knows whether an opponent will decide to abide or to not abide by the spending limitations. A candidate must make decisions about his or her campaign expenses without knowledge of the opponent's plan to accept public funding.

Although the U.S. Supreme Court has held that a voluntary system of "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest,"[81] the *Bennett* Court stated that the constitutionality of the matching funds provision of the Arizona statute was not established by the fact that "burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing."[82]

[8] Under the CFLA's public financing provisions, public funds are disbursed to abiding candidates in response to the political speech of privately financed candidates. Such restrictions on campaign spending create substantial burdens on the rights of free speech under the First Amendment, as determined by the *Bennett* Court. The public financing provisions impose a substantial burden on the free speech rights of Nebraska citizens without serving a compelling state interest.

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[79] § 32-1604.01(1).

[80] Neb. Rev. Stat. § 49-1445 (Reissue 2010).

[81] *Buckley, supra* note 49, 424 U.S. at 96.

[82] *Bennett, supra* note 5, 564 U.S. at 752-53.

(b) Narrowly Tailored

We must also consider whether the CFLA's public financing provisions are narrowly tailored to serve a compelling state interest. In the CFLA, the Legislature found several compelling state interests in providing public funds for campaigns. It stated that the integrity of the electoral process would be preserved "by ensuring that these elections are free from corruption and the appearance of corruption," by "providing the electorate with information that will assist them with electoral decisions," and by "gathering the data necessary to permit administration and to detect violations of the [CFLA]."[83]

The *Bennett* Court held that the burden imposed on privately financed candidates by the Arizona matching funds provision was not justified by a state's interest in equalizing electoral opportunities or a state's interest in combating corruption. "Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that 'reliance on personal funds *reduces* the threat of corruption[.]'"[84] The Court held that "[l]aws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[85]

In *FEC v. National Conservative PAC*,[86] the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."

Thus, the CFLA, like the Arizona statutes, is not narrowly tailored to serve a compelling state interest, because the interests identified by the Legislature—maintaining the integrity of the electoral process and ensuring elections that are free from corruption—have been held not to be sufficient in *Bennett*. The

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[83] § 32-1602(2).

[84] *Bennett, supra* note 5, 564 U.S. at 751, quoting *Davis, supra* note 52 (emphasis in original).

[85] *Bennett, supra* note 5, 564 U.S. at 755.

[86] *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985).

Court stated that "'[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations.'"[87]

The Court also addressed Arizona's argument that the matching funds provision indirectly served the anticorruption interest by ensuring that enough candidates participate in the State's public funding system.[88] The Court determined that such an indirect way of serving the anticorruption interest does not establish the constitutionality of the matching funds provision.[89]

The CFLA provides for public funds for campaigns which are triggered by the expenditures of privately financed candidates, just as the Arizona statutes provided. The Court has held that a state's interests in equalizing opportunities for candidates and in combating corruption do not serve a compelling state interest to justify the burdens placed on a candidate's First Amendment rights. The CFLA is not narrowly tailored to serve a compelling state interest, and it does not pass constitutional muster.

5. Is Unconstitutional Portion of CFLA Severable?

Having determined that the public financing provisions of the CFLA are unconstitutional, we must decide whether those provisions are severable. Our general rule provides that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.[90]

[9] To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether

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[87] *Bennett, supra* note 5, 564 U.S. at 751, quoting *Buckley, supra* note 49.

[88] *Id.*

[89] *Id.*

[90] *Jaksha, supra* note 10.

severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.[91]

Only one section of the CFLA, § 32-1606, specifically concerns disbursement of public funds. Other sections include legislative findings,[92] definitions,[93] requirements for voluntary participation in the spending limitation scheme,[94] and penalties and rules.[95]

In *State ex rel. Stenberg v. Moore*,[96] this court determined that one section of the CFLA which concerned expenditures by independent committees or political parties was unconstitutional as a burden on speech and that its restrictions were not narrowly tailored to serve the State's interest. However, we concluded that the particular section was severable from the remainder of the CFLA.

The portions of the CFLA which do not concern the public financing scheme address aggregate contribution limits,[97] civil penalties for violation of the CFLA,[98] the statute of limitations for CFLA violations,[99] and the acceptance of contributions from independent groups.[100] Section 32-1608 prohibits candidates from accepting contributions "from independent committees, businesses, including corporations, unions, industry, trade, or professional associations, and political parties which, when aggregated, are in excess of seventy-five percent of the spending limitation for the office set pursuant to section 32-1604."

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[91] *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[92] § 32-1602.

[93] § 32-1603.

[94] §§ 32-1604, 32-1605, 32-1606.01, 32-1608.02, and 32-1608.03.

[95] §§ 32-1606.01, 32-1607, 32-1608.01, 32-1612, and 32-1613.

[96] *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000).

[97] § 32-1608.

[98] § 32-1612.

[99] § 32-1613.

[100] § 32-1608.

The first two factors we are to consider in determining severability are whether a workable statutory scheme remains without the unconstitutional portion and whether valid portions of the statute can be enforced independently.[101] We find that § 32-1608, which covers aggregate contribution limits, cannot be enforced independently of the voluntary campaign limits. Section 32-1608 specifically sets a limit on contributions to a percentage tied to the limitations established in § 32-1604. Section 32-1608 also refers to candidates for a "covered elective office," which is defined by § 32-1603(1).

The statute concerning civil penalties also specifically provides for penalties based on violations of spending limitations set out in § 32-1604.01, and it cannot stand if the campaign financing limitations are unconstitutional.[102]

We next consider whether the invalid portion of the CFLA was an inducement to its passage. The legislative history shows that the CFLA was introduced to "help control the rapidly escalating costs of running political campaigns."[103] The goal was to open up the elective process and to decrease reliance on large contributors.[104] The introducer stated that the bill had financing provisions and contribution provisions and that "one doesn't have to take place for the other one to go into effect because we have a contribution limitation side and also the spending limitation side."[105] Thus, it does not appear that the public matching funds were the *sole* reason the Legislature passed the CFLA, but the Legislature sought to establish spending limits to control the cost of running for public office, and it set up the matching public funds to assist candidates with the cost of campaigns. The provision of public funds appears to have been a factor in the passage of the CFLA.

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[101] See *Gales, supra* note 91.

[102] § 32-1612.

[103] Introducer's Statement of Intent, L.B. 556, Committee on Government, Military, and Veterans' Affairs, 92d Leg., 1st Sess. (Feb. 14, 1991).

[104] *Id.*

[105] Floor Debate, 92d Leg., 1st Sess. 7-8 (Feb. 14, 1991).

Finally, we note that the CFLA did not include a severability clause when it was passed in 1992.[106] "Such a clause is an aid to interpretation, and is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted."[107]

[10] The Legislature specifically found that campaign finance limits, disclosure of the sources of funding, and the provision of public funds were all necessary to achieve its goals in passing campaign election reform.[108] The unconstitutional portions of the CFLA are not severable from the remaining portions, and therefore, the entire act is unconstitutional.

VI. CONCLUSION

Based upon the decision of the U.S. Supreme Court in *Bennett*, the CFLA, §§ 32-1602 through 32-1613, violates the First Amendment and is unconstitutional in its entirety.

JUDGMENT FOR RELATOR.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[106] See L.B. 556 (operative Jan. 1, 1993).

[107] See *State ex rel. Meyer v. Duxbury*, 183 Neb. 302, 310, 160 N.W.2d 88, 94 (1968).

[108] See § 32-1602(2).

FARMINGTON WOODS HOMEOWNERS ASSOCIATION, INC., APPELLEE, V. GLEN WOLF AND RHONDA WOLF, HUSBAND AND WIFE, APPELLANTS.

817 N.W.2d 758

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1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was