No. 09A1133

IN THE
Supreme Court of the United States

JOHN MCCOMISH, *et al.*,
Applicants,
v.
KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, *et al.*

On Renewed Emergency Application to Vacate Appellate Stay Entered by the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE BUZ MILLS FOR GOVERNOR CAMPAIGN IN SUPPORT OF RENEWED EMERGENCY APPLICATION TO VACATE ERRONEOUS APPELLATE STAY AND ANCILLARY APPLICATION TO STAY MANDATE BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

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I

MOTION OF BUZ MILLS FOR GOVERNOR CAMPAIGN FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS' RENEWED EMERGENCY APPLICATION TO VACATE ERRONEOUS APPELLATE STAY AND ANCILLARY APPLICATION TO STAY MANDATE BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

The Buz Mills for Governor Campaign ("Campaign")[1] moves for leave to file the accompanying amicus brief in support of Plaintiffs' Renewed Emergency Application to Vacate Erroneous Stay and Ancillary Application to Stay Mandate ("Renewed Application"). The Campaign is an Arizona political campaign committee, organized under ARIZ. REV. STAT. § 16-903, by Owen Buz Mills, a resident of Arizona and a candidate for the nomination of the Republican Party to the office of Governor of Arizona to be voted on at the Arizona 2010 primary election. The Campaign is not a corporation. Defendants-Appellants Bennett, *et al.* ("Respondents"), through counsel, have declined to consent to allow the Campaign to file an amicus brief in support of the Renewed Application. Because of the severe time-constraints, on May 26, 2010, we emailed a copy of this motion and the accompanying brief to counsel for all parties, in addition to the forms of service permitted by the rules.

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored the brief in whole or in part, no such counsel made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than *amicus* or its counsel made such a monetary contribution.

II

The Campaign has a direct interest in the outcome of the pending appeal. Blessed with wealth, Mr. Mills has largely self-financed his Campaign. While he has accepted some contributions, their amount is dwarfed by what he has put in of his own funds. If the judgment of the District Court is affirmed, and the opinion of the Ninth Circuit is reversed or vacated, the Campaign will not suffer the penalty of matching funds under ARIZ. REV. STAT. § 16-952, nor will it suffer the disparate and onerous expenditure reporting requirements imposed by the same statute, described in depth in the accompanying brief.

We acknowledge that is unusual for an amicus brief to be filed in stay-proceedings. Yet this case presents compelling circumstances for the Court to allow such a filing at this stage. The reason is that practically speaking the Campaign will suffer immediate and irreparable injury unless the Ninth Circuit's reversal of the District Court judgment is prevented from going into effect. Under ARIZ. REV. STAT. §§ 16-951 and 16-952, the Clean Elections Commission will pay matching funds exceeding a million dollars to participating candidates for the Republican nomination for Arizona Governor on June 22, the beginning of the primary election period. *See* TRIGGER REPORTING DATES, *available at* http://www.azcleanelections.gov/. If this Court ultimately should reverse the Ninth Circuit, and reinstate the District Court's judgment, there will be no practical way to get the money back, and the injuries the Campaign will suffer can never be remedied.

For these reasons, the Campaign requests leave to file the accompanying amicus brief in the current proceedings.

RESPECTFULLY SUBMITTED,

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May 26, 2010.

QUESTIONS PRESENTED

1. Do Arizona's campaign finance laws, ARIZ. REV. STAT. §§ 16-940 through 16-961, violate the First and Fourteenth Amendments by providing matching funds to participating candidates and by imposing onerous and unequal disclosure requirements on contributor- and self-financed candidates?

2. Are Arizona's campaign finance laws narrowly tailored to support a compelling state interest?

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INTEREST OF AMICUS

The interest of the Campaign is set forth in the motion for leave to file brief of *amicus curiae*.

SUMMARY OF ARGUMENT

Respondents' foundational argument sits on sand. It supposes that government-funded candidates are more virtuous than candidates funded by contributors or by themselves. Yet we know through experience in life that human nature has changed little since David glimpsed Bathsheba. Long experience shows that public office calls the noble, the patriotic, and the great, but also the mediocre, the inept, and the seeker of fame, power, and money. Vice always can infect public office because men and women are imperfect. Whether a candidate draws campaign funds from the public treasury or from individual contributors has no bearing on whether the candidate will make a good legislator, governor, or other office-holder in Arizona. Success in office depends on character and judgment, wisdom and experience. It does not depend on the source of campaign funds.

As shown below, Arizona's matching-funds law, ARIZ. REV. STAT. § 16-952, and the related expenditure reporting laws, ARIZ. REV. STAT. §§ 16-942 and 16-958, unconstitutionally burden the free speech of largely self-financed candidates for public

office in Arizona and unconstitutionally deny them equal protection of the laws. What is more, these laws are not narrowly tailored and they strike at more than they can protect. They do not root out corruption, and they plow new ground for the unscrupulous to game the system.

ARGUMENT

I. MATCHING FUNDS AND THE UNEQUAL AND ONEROUS DISCLOSURE BURDENS IMPOSED ON SELF-FINANCED CANDIDATES VIOLATE THE FREE-SPEECH CLAUSE.

Long ago, Justice Brandeis observed "that in our country 'public discussion is a political duty.'" *Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion)). Thus, our democratic system should encourage citizens to exercise their free speech rights by actively participating in our elections, and by giving of their time and money to do so.

Unfortunately, Arizona's matching-funds campaign finance system violates the free speech of a largely self-financed candidate by imposing vastly unequal reporting requirements on him or her and by providing matching funds to his or her opponents.

A. Unequal and Burdensome Reporting Requirements.

The Fourteenth Amendment prohibits Arizona from discriminating against a person for exercising his or her free speech rights. *See Harwin v. Goleta Water Dist.*, 953 F.2d 488, 490 n. 3 (9th Cir. 1991) ("Discrimination in the First Amendment context has sometimes been characterized as a violation of the First Amendment itself, and has sometimes been characterized as a violation of the Equal Protection Clause.") (citations omitted); *Russell v. Burris*, 146 F.3d 563, 572 (8th Cir. 1998) ("We believe that such differential treatment [in contribution caps] must be evaluated according to a strict scrutiny standard.")

Despite this guarantee of equal protection, matching funds cannot work without imposing unequal and onerous reporting burdens on self-financed candidates. Arizona cannot know what checks to cut to publicly-financed candidates without such reports, and the matching-funds system cannot function without them.

We begin with the relatively light reporting requirements imposed on all candidates — publicly-financed, contributor-financed, or self-financed. Before the primary election, Arizona campaign finance law, specifically ARIZ. REV. STAT. § 16-913(B), requires a candidate to file two or three reports, depending on whether the candidate declared before or after January 1 of the election year: (1) the

January 31 report, if he or she declared and filed the statement of organization required by ARIZ. REV. STAT. § 16-903(A), before January 1; (2) the June 30 report, covering activities from January 1 to May 31; and (3) the Pre-Primary report, due August 12, and covering activities occurring between June 1 and August 4. *See also* TRIGGER REPORTING DATES, *available at* http://www.azcleanelections.gov/.

Arizona, however, imposes additional and far heavier reporting requirements on a self-financed candidate. [2] A self-financed candidate must file the same reports required of a participating candidate by ARIZ. REV. STAT. § 16-913(B). ARIZ. REV. STAT. § 16-941(B)(2), however, requires a self-financed candidate to file as many as 19 additional reports, or more than six times the number of reports required of a participating candidate, if the candidate spends a total of $995,129 on his primary campaign, or $287,682 above the primary election limit of $707,447.

Specifically, once a self-financed candidate has spent 70% of the primary-election limit, or $495,129, the candidate must file a special report with the Arizona Secretary of State. Thereafter, ARIZ. REV. STAT. § 16-958(B) requires a self-financed candidate to file a supplemental report, triggered by expenditures exceeding the primary election spending limit by $25,000, according to the following schedule: Before the primary election period (defined by ARIZ. REV. STAT. § 16-961(B)(4) as the nine-week

[2] The contributor-financed candidate suffers the same reporting requirements.

period ending on primary election day), a self-financed the candidate must file the supplemental report on the first day of each month. During the first seven weeks of the primary election period, the candidate must file a supplement on the first Tuesday of each week. During the last two weeks of the primary elections period, the candidate must file a supplemental report within one business day of making an expenditure of an additional $25,000.

To illustrate the weight of this burden, consider a self-financed candidate who has spent $995,129, spaced out as follows: 70% of the primary election limit before March 1; $25,000 each month from March to June, $25,000 a week from the June 22 beginning of the primary election period to August 10, two weeks before primary elections day; and $25,000 a day during the two weeks before primary election day. With this pattern of expenditures, this candidate will need to file the three reports required of all candidates plus 19 additional reports, as demonstrated in the Clean Elections Commission's own chart of reporting dates. *See* TRIGGER REPORTING DATES, *available at* http://www.azcleanelections.gov/.

Filing the 19 additional reports costs time and money. In a statewide race, a campaign is likely to spend money all around Arizona. Prompt and accurate records of such expenditures must be kept, compiled, and reported, if the trigger is met, on a daily basis in the last two weeks of the primary campaign. That also is when the contrast in burdens becomes most acute. A publicly-financed candidate

is left free to make his or her case to the voters. A self-financed candidate must divert money and staff-time from campaigning to keep track and timely make the necessary reports.

Besides the cost in time and money of filing the additional 19 reports, the sheer number of reports increases the chance of error, with the attendant legal penalties, ARIZ. REV. STAT. § 16-957, and negative headlines.

Finally, an expenditure report provides campaign intelligence to opposing candidates about the disclosing candidate's tactics and strategy, and in this respect daily reporting gives a hefty advantage to a publicly-funded candidate.

As shown in Section II below, Arizona has no countervailing interest justifying its unequal treatment favoring publicly-financed candidates and penalizing self-financed candidates, and its matching-funds scheme must fall before the First Amendment's guarantee of free speech and the Fourteenth Amendment's guarantee of equal treatment.

B. Arizona Burdens the Citizen's Political Duty of Engaging in Public Discussion of the Issues and Challenges of the Day.

A candidate's right of free speech, protected by the First Amendment, entails the right to spend his

or her own money on a campaign for public office. In this respect, this Court has held,

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. . . . . Section 608(a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

Buckley, 424 U.S. at 52-53.

The First Amendment further prevents a State from penalizing a candidate from spending his or her own money on a campaign. *See Davis v. Federal Elections Comm'n*, 128 S.Ct. 2759, 2771-72 (2008) (finding a First-Amendment violation when a federal law penalized a self-financed candidate who spent more than $350,000 from personal funds by increasing the size of contribution limits for the candidate's opponents.).

Matching funds burden the free speech of a self-financed candidate for the nomination of the candidate's party for Governor at the Arizona 2010 primary election. In Arizona's current gubernatorial election campaign, two publicly-funded candidates, the incumbent and the State Treasurer, are running for the Republican nomination, and every dollar a self-financed candidate spends to bring his ideas before the public results in at least two dollars fighting back at him.

This one-sided system creates a real penalty and a disincentive for him to fund his own campaign, and it is a heavier burden than what this Court rejected in *Davis*. There the penalty levied against a self-financed candidate who spent more than $350,000 in personal funds on a campaign was merely an asymmetric increase in the caps on contributions the candidate's opponents could take in. 128 S.Ct. at 2762-63. In contrast, Arizona eliminates the middle-man contributor, and the grubby necessity of actually having to solicit money from the contributor, and simply cuts a check to the publicly-financed candidate equal to every dollar the self-financed candidate spends over the primary election limit of $707,447. The penalty is multiplied according to the number of publicly-financed candidates who have qualified as publicly-funded candidates under ARIZ. REV. STAT. § 16-952. Each of them gets the same matching-funds check.

This system may have an even worse effect. It likely has discouraged would-be self-financed

candidates from running for office. One of matching-funds' obvious aims is to herd all candidates into the public system. Yet Arizona has no interest, much less a compelling interest, in "leveling the playing field" among candidates, by forcing or inducing them all into the same publicly-financed system. As the Supreme Court explained in *Davis*,

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

128 S.Ct. at 2774.

We can never know the number of candidates who just give up rather than run against matching funds. Yet, the fact remains that matching funds must deter at least some would-be self-financed candidates from jumping into the election arena. *Cf.*

California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (acknowledging the chilling effect of self-censorship). That violates the First Amendment. *Buckley*, 424 U.S. at 52-53.

C. Strict Scrutiny Should Be Applied.

The Ninth Circuit erred in concluding that Arizona's matching funds laws should be reviewed with intermediate scrutiny. *McComish v. Bennett*, __ F.3d __, 2010 WL 2011563, *10 (May 21, 2010) Matching funds and their unequal and onerous reporting requirements do not equate with, and are far more onerous than, the disclosure requirements at issue in either *Buckley*, 424 U.S. at 64, (upholding disclosure requirements on independent expenditures) or *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 915 (2010) (upholding disclaimers on independent campaign movies). It is one thing for Congress to prohibit anonymous hit-pieces, as in *Buckley* or *Citizens United*. It is another for Arizona to penalize a self-funded candidate for exercising his or her free speech by imposing onerous and one-sided reporting requirements on the candidate and by giving matching funds to the candidate's opponents. If it violates the First Amendment for Congress to penalize a self-funded candidate by merely increasing the contribution caps on other candidates, as in *Davis*, 128 S.Ct. at 2771-72, it certainly violates the First Amendment for Arizona to go further and actually cut a matching-funds campaign check to a self-funded candidate's opponents so they

can use it to beat the candidate at the ensuing election.

Under these circumstances, strict scrutiny is the required level of review of Arizona's matching-funds scheme. *See Lincoln Club of Orange County v. City of Irvine, Calif.*, 292 F.3d 934, 937 (9th Cir. 2002) (limiting candidate expenditures violates the First Amendment and invites strict scrutiny); *California Pro-Life Council*, 328 F.3d at 1101 n. 16 ("Post-*Buckley*, the Court has repeatedly held that any regulation severely burdening political speech must be narrowly tailored to advance a compelling state interest.").

II. MATCHING FUNDS ARE NOT NARROWLY TAILORED AND DO NOT SUPPORT A COMPELLING STATE INTEREST.

A. The AZSCAM Scandal Had Nothing to Do with Matching Funds.

The Ninth Circuit posited that the Azscam bribery scandal was the catalyst for adoption of public financing in Arizona in 1998. *McComish*, 2010 WL 2011563, at *10. Yet the Azscam scandal of the early 1990s had nothing to do with campaign contributions. It was a case of bribery, which is not the same and long has been condemned and outlawed.

The Azscam legislators were convicted of agreeing to sell their votes for a casino gambling scheme in return for promises of $370,000 in bribes. "*Scandal in Phoenix*," TIME MAGAZINE, February 18, 1991, *available at* http://www.time.com/time/magazine/article/0,9171,972359,00.html.

The scandal occurred eight years before Arizona's public campaign financing became law. It is illusion to argue that publicly-financed candidates are immune to bribery but contributor-financed or self-financed candidates are not. It is also illusion to suppose that publicly-financed candidates will be immune to bribery if elected. The cure of public-financing does not treat the disease of greed.

B. The Fear of Contribution-Induced Corruption Does Not Apply to a Largely Self-Financed Candidate.

The Ninth Circuit concluded that corruption bred by contributor-financing is Arizona's concern with the matching funds laws. *McComish*, 2010 WL 2011563, at *12-13.[3] Yet this concern has no relevance to a self-financed candidate, because the candidate owes nothing to anyone and received

[3] We are aware of no evidentiary base supporting that discrete conclusion. As in other cases, this may be a theoretical concern but not a proven concern. *See Russell*, 146 F.3d at 569 ("We begin with the observation that no defendant provided any credible evidence to the trial court of actual undue influence or corruption stemming from large contributions.").

contributions from no one. This Court has recognized this fact:

> The primary governmental interest served by the Act [Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263] the prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: 'Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family.' 171 U.S. App. D.C. at 206, 519 F.2d at 855. Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

Buckley, 424 U.S. at 53.

A self-financed candidate answers only to his conscience and to the people of Arizona. Lobbyists cannot touch him, the moneyed interests do not have his ear, and labor and the interest groups own no

part of him, because they donated nothing to him and he paid his own way. Yet, as demonstrated below, the public-campaign-finance laws subject a self-financed candidate to the same onerous reporting requirements and the same deterrents against free speech that they array against a contributor-financed candidate. In doing so they lose any claim to narrow tailoring and thus violate the guarantees of free speech and debate and of equal protection, and the District Court properly set them aside. In this vein, no true interest of the State of Arizona justifies the burdens matching funds impose on the free speech rights of a self-financed candidate.

Nonetheless, two ostensible interests are advanced in defense of matching funds: Rooting out corruption, and expanding access to the ballot. *McComish*, 2010 WL 2011563, at *12-13. Both objectives are sound in theory, but both hide the system's true targets — the unconstitutional goals of leveling the playing field and herding all candidates into the public-finance system. What's more, this defense ignores the new forms of manipulation or corruption that matching funds invite, which are detailed below.

If corruption is found in contributor-financing, public financing cannot stop it, because a state cannot ban contributor-financing. A state can limit contributor financing. It can require disclosure of the names of contributors and the amounts donated. But it cannot prohibit campaign contributions under the First Amendment.

In any event, the concern with corruption is misplaced in the case of self-financed candidates. There are no contributors to be worried about. The candidate pays for the campaign with his or her own funds.

Regardless, even if there were some just concern, the fear of contributor corruption does not justify the end of matching funds. We are cautioned against the small as well as the large encroachment on free speech:

> Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.

Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 264-65 (1986).

When abuse is to be cut from free speech, we need a scalpel in the hand of a surgeon. Matching funds unfortunately put a butcher knife in the hands of a bureaucracy, and the result is a carving up of free speech.

The better form of public financing is lump-sum financing, which we have had for many years at the presidential level. Lump-sum financing does not carry with it the free-speech burdens inherent in matching funds. Lump-sum financing does not implicate the onerous reporting requirements of Arizona law, outlined above, nor does it penalize a candidate for spending his or her own money on the campaign. It simply provides a set amount of campaign funding for any candidate who can qualify.

The Ninth Circuit rejected lump-sum financing so as "prohibitively expensive [as would] spell its doom." *McComish*, 2010 WL 2011563, at *13. Contrary to this supposition, the opposite may be true. A lump sum limits the State's outlay, which may be particularly important in a multi-candidate race. Recognizing the potential that matching funds may break the bank, Arizona has placed an ultimate cap on matching funds of three times the original spending limit in any given election. ARIZ. REV. STAT. § 16-952(E).

Similarly, expanding access to a ballot line to other candidates may be a legitimate concern of the State of Arizona, but matching funds are a ham-fisted means to achieve that end and do nothing that cannot be achieved with lump-sum public financing.

Arizona already provides $707,447 to publicly financed candidates for a party's nomination to the governorship. If that figure is short, which we do not concede, the remedy is not matching funds. It is to increase that figure.

It may be suggested that lump-sum financing is "one-size-fits-all." If that is a legitimate fear, it can be fixed. It is up to Arizona to set and pay out a figure gauged to the needs of today's campaigning. In addition, Arizona can adjust the lump-sum to fit the peculiarities of particular races or legislative districts. It already draws appropriate distinctions involving matching funds triggered by independent expenditures:

> In accordance with A.R.S. § 16-952(C)(6), during the primary and general election periods, expenditures promoting or opposing candidates for more than one office shall be allocated by the Commission among candidates for different offices based on the relative size or length and relative prominence of the reference to candidates for different offices. Equalizing funds shall be issued to each participating candidate, if applicable, in an amount equal to the proportion of the expenditure that is targeted at the office sought by such participating candidate. If so required by this rule, the Commission may issue equalizing funds based on an expenditure in an

> amount greater than the amount of such expenditure.

ARIZ. ADMIN. CODE § R2-20-113(D). The inescapable conclusion is that the one-size-fits-all objection does not justify the ills of matching funds.

What Arizona is really up to with matching funds is, first, to "level the playing field" by giving publicly-financed candidates dollar for dollar what contributor-financed candidates or self-financed candidates spend on their campaigns. "Leveling the playing field" is chimerical at best and not a true state interest in any event, and it cannot justify matching funds. *Davis*, 128 S.Ct. at 2774.

Arizona, second, is attempting to herd all candidates into public-financing by means of the burdens and disincentives imposed on contributor-financed and self-financed candidates. This tramples on the free speech rights of a self-financed candidate. Arizona cannot directly place a "ceiling on personal expenditures by a candidate in furtherance of his own candidacy . . . ." *Buckley*, 424 U.S. at 52-53. Nor can it do indirectly by means of such burdens and disincentives what the Constitution prohibits it from doing directly. *See Gralike v. Cook*, 996 F.Supp. 901, 916 (W.D. Mo. 1998), *aff'd sub nom. Cook v. Gralike*, 531 U.S. 510 (2001). ("Because the Amendment is an attempt by Missouri citizens to do indirectly what Article V prohibits them from doing directly, plaintiff has stated a claim that the Amendments to Article VIII

are unconstitutional under Article V of the United States Constitution.").

The foregoing review demonstrates that matching funds are not narrowly tailored to meet constitutional ends and instead make broad swipes at the free speech rights of self-financed candidates and in truth are aimed at the unconstitutional ends of leveling the playing field and ending private campaign financing. Under these circumstances, District Court correctly rejected Arizona's unconstitutional scheme of matching funds. *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 264-65; *Russell*, 146 F.3d at 571.

C. Matching Funds Invite New Forms of Corruption.

Matching funds invite new forms of corruption, because as Willy Sutton is supposed to have remarked, that is where the money is. There are at least two novel methods of corruption engendered by the matching funds system.

The first is to get a phony candidate to run in a primary to create the image of a contested primary race. If a candidate is unopposed in the primary election, but opposed in the general election, Arizona's public financing focuses its resources on the general-election campaign and provides the candidate with only minimal primary-election funding. ARIZ. ADMIN. CODE § R2-20-106. The phony-primary-candidate scheme trumps this

funding allocation. It gives the candidate increased funding in the primary election, and the lap-over from the primary to the general election provides the candidate with an illegal edge in the general election.

The second involves a race in which more than one candidate is elected statewide, as with the Arizona Corporation Commission. One confederate candidate runs as a contributor-financed candidate, which triggers matching funds to the other confederate candidates who are running on public financing. *See* Sarah Fenske, "*Sandra Kennedy and Sam George used the Clean Elections system to their advantage — so why was it so hard to get 'Team Solar' to talk?"* PHOENIX NEW TIMES, Sept. 16, 2008, *available at* http://www.phoenixnewtimes.com/2008-09-18/news/sandra-kennedy-and-sam-george-used-the-clean-elections-system-to-their-advantage-so-why-was-it-so-hard-to-get-team-solar-to-talk/ ("George's plan, according to some brave Democratic whistleblowers, was to run as a team with fellow Democrats Paul Newman and Sandra Kennedy. Kennedy and Newman would file as Clean Elections candidates and receive public money; George would finance his own campaign.").

The same ploy can work in elections to the Arizona House of Representatives, in which a political party's top two vote-getters in a legislative district advance from the primary to the party's line on the general election ballot, and the top two vote-getters in the general election advance from the general election ballot to seats in the State House. A

publicly-funded candidate can recruit a privately-financed candidate into a clandestine confederation, in which expenditures of the privately-financed candidate drive up matching funds to the publicly-financed candidate. The two then run as a team and share expenses, such as common campaign signs, brochures, and mailers, and in doing so defeat in practicality the intent of public-funding's expenditure limits.

This all harks back to the sad history of warfare where every offensive innovation has invited a defensive countermeasure, and vice versa. Experience since the Watergate reforms of the 1970s has shown that every innovation in public campaign financing invites a circumventing stratagem. We will only see the end of this vicious spiral when money ceases to be a factor in campaigning. Unfortunately, that is a day so distant in the future that it can be dreamed of but its dawn will never be seen.

CONCLUSION

Matching funds burden a self-financed candidate's free speech, and impose unequal reporting requirements on a self-financed candidate, while failing to further any legitimate state interest and while inviting new forms of corruption. Matching funds are not necessary to accomplishing whatever good public financing causes. Lump-sum financing achieves the aims of public financing without the burdens on free speech attending

matching funds. This Court accordingly should lift the Ninth Circuit's stay of the District Court's judgment and should stay issuance of the mandate.

RESPECTFULLY SUBMITTED,

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