No. 09A-1133

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant.

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

DEFENDANTS' RESPONSE TO 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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INTRODUCTION

Defendants Arizona Secretary of State Ken Bennett and the members of the Arizona Citizens Clean Elections Commission respectfully request that this Court deny Plaintiffs' Renewed Emergency Application to Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate ("Application"). Applicants John McComish, Nancy McLain and Tony Bouie ("Applicants") ask this Court to enjoin the enforcement of a twelve-year-old statute that a majority of Arizona voters enacted and that a unanimous Ninth Circuit panel held to be constitutional. Such extraordinary relief is available only through the All Writs Act, and relief under the All Writs Act is available only if the relief sought is necessary for the Court to retain its jurisdiction over the case. 28 U.S.C. § 1651(a). That is not true here, and the Court should deny the Application.

Besides asking the Court to enjoin enforcement of the Arizona law, the Applicants seek to stay the Ninth Circuit's opinion without first seeking a stay in that court. This case does not provide the rare, extraordinary conditions that would force this Court to consider an application for stay before the lower court has had an opportunity to do so.

Enjoining enforcement of the statute is not warranted even if the Court applies traditional criteria used for stays under 28 U.S.C. § 2101(f). Arizona is in the middle of an election year and would be irreparably harmed by having its

campaign finance scheme changed after many candidates have chosen to participate in the system. Indeed, even before the Ninth Circuit reversed and remanded the district court's decision, the district court, which ruled in the Plaintiffs' favor on the merits, and the Ninth Circuit motions panel both found that continued enforcement of Arizona's law caused Plaintiffs no irreparable harm and merely maintained the status quo. Thus these courts issued and extended a stay of the district court's decision pending review by the Ninth Circuit merits panel. After reviewing the briefs and the record and hearing oral argument, the Ninth Circuit reversed the district court's decision and concluded that matching funds impose minimal, if any, burden on the Applicants' free speech. Judge Kleinfeld went further, writing in his concurrence, "The fact that matters is that the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech." (Pl.'s App. 416.) The balance of harms thus weighs heavily in favor of denying Plaintiffs' Application.

Plaintiffs are also not likely to prevail on the merits if this Court accepts review. This case concerns the constitutionality of a critical component of Arizona's public campaign finance program, which Arizona voters established in 1998 by approving the "Citizens Clean Elections Act" initiative. Because of the Act, for the past decade candidates for the ninety seats in Arizona's state legislature and for all statewide offices have had the opportunity to run for public

office without relying on private contributions. Instead, a candidate may choose to run as a publicly funded candidate by collecting a specified amount of $5 qualifying contributions from qualified electors and agreeing to stringent expenditure limits and fundraising restrictions. The State has thus addressed corruption and the perception of corruption created when candidates become dependant on large donors for their political survival. Arizona did this with a system that the Ninth Circuit found places only a minimal, if any, burden on speech. Under this Court's precedent, such minimal burdens are reviewed under intermediate scrutiny, which matching funds will survive if this Court accepts certiorari in this case.

Finally, the public interest is served by maintaining the status quo in this instance. Candidates should be able to rely on election law remaining unchanged during an election cycle. Despite numerous legal challenges to the Clean Elections system, the matching funds provision has remained in force, even following the district court's decision. At this point, there are candidates who have received public funding and who may not run as traditional candidates. To enjoin enforcement of the matching funds provision, after the Ninth Circuit has held the provision to be constitutional, would cause unnecessary confusion in the operation of Arizona's campaign finance system.

Under these circumstances, this Court should deny Plaintiffs' Application and not intervene to disrupt the status quo.

Factual and Procedural History

I. Overview of Arizona's Citizens Clean Elections Act.

Arizona's Citizens Clean Elections Act ("Act") was designed to "improve the integrity of Arizona state government by diminishing the influence of special-interest money, . . . encourage citizen participation in the political process, and . . . promote freedom of speech." A.R.S. § 16-940 (Pl.'s App. 63). The Act's central reform was a public-funding program for candidates for State office.[1] Because of the Act, candidates in Arizona may choose to run as "participating candidates" who receive limited public funding and agree to strict restrictions on private fundraising. Alternatively, candidates may run as traditional, privately financed candidates.

Participating candidates raise limited private "seed money" before qualifying for Clean Elections funding. A.R.S. §§ 16-941(A), -945 . To receive public funding, candidates must demonstrate viability by collecting a specified number of $5 contributions from individuals. A.R.S. §§ 16-946, -950 (Pl.'s App. 65-66). For the 2010 elections, the number of qualifying contributions ranges from

[1] The Act established a ten percent surcharge on civil and criminal fines and penalties and authorized a tax credit to support the programs that it established. A.R.S. § 16-954(B), (C).

220 for legislative candidates to 4,410 for gubernatorial candidates. Lang Decl. ¶ 1 (Def.'s App. 3). Once they receive the public funds, participating candidates may use only monies allocated to them from the Clean Elections system. The amounts vary depending on the office. A.R.S. § 16-961(G), (H) (Pl.'s App. 70-71). For example, in 2010, legislative candidates receive a grant of $14,319 for primary elections, and $21,479 for the general election. Candidates for Governor receive $707,447 for the primary and $1,061,171 for the general. Participants are thus immune from allegations that their acts as elected officials amount to quid pro quo exchanges for contributions made during the campaign because they never receive contributions significant enough to motivate such action.

The basic grant amounts may be increased by "matching funds" up to three times the original grant. "Matching funds" are calculated based on the campaign activity in particular races. In the primary election cycle, matching funds are provided to a participating candidate after expenditures in that race exceed the basic grant amount. A.R.S. § 16-452(A). In the general election, matching funds are calculated based on contributions that the privately financed candidate has received for the race, less any amounts expended on the primary. A.R.S. § 16-952(C) (Pl.'s App. 67-68). That amount must exceed the basic general election grant amount to trigger matching funds. In both the primary and general elections, the matching funds calculations consider the monies that a privately financed

candidate is using in the race and independent expenditures for that race. *Id.* All matching funds are capped at three times the initial grant amount. A.R.S. § 16-952(E) (Pl.'s App. 69). Once the cap is reached, a participating candidate can receive no more money from any source for his or her campaign. *Id.* Matching funds allow even candidates in hotly contested races to participate in Arizona's public financing system and remain free of corruption and the perception of corruption.

Plaintiffs disregard two critical aspects of the Act. First, they ignore the cap on matching funds. Because of the cap, candidates who choose private funding, such as Plaintiffs in this case, can *always* out-spend their publicly funded opponents. Second, they misconstrue the Act's anticorruption effect. The anticorruption impact is on the participating, not the traditional, candidates. Matching funds are essential to allow candidates to avoid seeking private funding, and with it, the increased likelihood of being subject to quid pro quo corruption, no matter who the publicly funded candidate is running against. As the Ninth Circuit explained, "[i]n order to promote participation in the program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding.*" (Pl.'s App. 414-15.)

Since Arizona voters approved the Clean Elections program in 1998, the public-funding option has become an integral part of Arizona's campaign finance system. In the elections since 2002, 52% to 67% of the candidates for state offices have run as participating candidates. (App. 15.) In the current 2010 election cycle, there are 155 candidates who have filed the necessary paperwork to be a certified Clean Elections candidate. Lang Decl. ¶ 14 (App. 5).

II. Procedural History.

This lawsuit challenges the matching funds component of Arizona's Clean Elections public-funding program. Plaintiffs in this action are two incumbent legislators (McComish and McLain) and a candidate for the Legislature who lost in 2008 but is running again in 2010 (Bouie). Plaintiff-Intervenors in this action are two other current legislators (Burns and Murphy), the current State Treasurer who is now running for Governor (Martin), and two political committees.

After filing this lawsuit in 2008, Plaintiffs and Plaintiff-Intervenors moved for a temporary restraining order and a preliminary injunction to prevent payment of matching funds in the 2008 elections, but the district court denied these requests. (Pl.'s App. 34-61.) In its order denying the temporary restraining order, the district court stated that Plaintiffs had shown that the law violates the First Amendment, but it denied the temporary restraining order because of the proximity to the 2008 elections. (*Id.* at 53-61.) Although the court concluded in its order denying the

preliminary injunction that plaintiffs were likely to succeed on the merits, it recognized that the State's compelling interest in preventing corruption may support the Act. (*Id.* at 47-48.) Nevertheless, it expressed concern that potential gamesmanship undermines the anticorruption interest. (*Id.* at 47.)

Following discovery, the parties completed briefing on cross-motions for summary judgment in July 2009, and this was followed by extensive supplemental briefing. During this time, the Commission modified its rules to eliminate the potential abuses about which the court had expressed concerns in its preliminary injunction order. District Ct. Docs. 413, 429 (notices of commission rule change).

In its ruling on summary judgment, the district court did not find that the factual record on summary judgment established that the matching funds component of Arizona's public-funding program deterred Plaintiffs from raising and spending money as Plaintiffs alleged. The court acknowledged that aggregate statistics did not show that candidates spent just enough to avoid triggering matching funds for their opponents as would have been expected under Plaintiffs' theory. (Pl.'s App. 15.) It also commented that Plaintiffs' and Plaintiff-Intervenors' testimony was "somewhat scattered and shows only a vague interpretation of the burden of the Act." (Pl.'s App. 16.) After reviewing the "unusually large and complicated" summary judgment record (Pl.'s App. 12), the court noted that identifying the burden on Plaintiffs was "more difficult than that

alluded to by the prior [temporary restraining order and preliminary injunction] rulings," (Pl.'s App. 20 n.11.)

Even though the court found that the factual record did not establish that matching funds caused candidates to reduce fundraising and spending as Plaintiffs had alleged, and even though the court did not find any asymmetrical treatment of similarly situated candidates, it concluded that matching funds violated First Amendments rights because it felt constrained by this Court's decision in *Davis v. FEC,* 128 S.Ct. 2759 (2008). (*See* Pl.'s App. 24-25 ("Despite the unsettling nature of Plaintiffs' claims, *Davis* requires this Court to find Plaintiffs have established a cognizable burden.").)

Although the court granted Plaintiffs' summary judgment motions, it stayed its order for ten days to permit Defendants to seek a stay from the Ninth Circuit. (Pl.'s App. 32.) In doing so, it found that "there is a sufficient question regarding the likelihood of success [on appeal] to grant a short stay to allow the Ninth Circuit to bring its considered judgment on the issues." (*Id.* at 31.)

The court entered judgment on January 21, 2010, and Defendants filed their notices of appeal the following day. Plaintiffs, Defendants, and Defendant-Intervenor all sought emergency relief from the Ninth Circuit. Plaintiffs asked the court to vacate the ten-day stay that the district court had entered to permit Defendants and Defendant-Intervenor to seek a stay from the Ninth Circuit. Ninth

Cir. Doc. 7210059. Defendants and Defendant-Intervenor asked the court to stay any injunction pending the appeal or at least pending the 2010 elections. Ninth Cir. Docs. 7210472, 7209818. The Ninth Circuit extended the stay that the district court issued "pending further action by the panel assigned to hear the merits of these appeals." (Pl.'s App. 2.) The same order also vacated the prior briefing schedule and required an expedited briefing schedule and oral argument. Plaintiffs then filed their first emergency application to lift the stay the Ninth Circuit had granted, without bringing the matter first to the Ninth Circuit merits panel. This Court denied Plaintiffs' application, but "without prejudice to a renewed application on June 1, 2010 or when the Court of Appeals has issued its decision on the merits of the case, whichever date is earlier." (Pl.'s App. 426.)

On May 21, 2010, the Ninth Circuit reversed and remanded the district court's decision. (Pl.'s App. 416.) The court found that the Act did not impose the sort of asymmetric limits on similarly situated candidates as was the case in *Davis v. FEC*, 128 S. Ct. 2759 (2008). (Pl.'s App. 406.) Noting that "*Davis* does not require [the court] to recognize mere metaphysical threats to political speech as severe burdens," the court analyzed the impact of matching funds based on the evidence in the record. (*Id.* at 408.) The court concluded that matching funds impose a minimal, if any, burden on free speech and "impose no ceiling on campaign-related activities." (*Id.* at 411.)

In applying the intermediate scrutiny that *Buckley* and *Citizens United* require, the court noted Arizona's history of quid pro quo corruption and that matching funds are substantially related to this important interest because "[i]n order to promote participation in the program, and reduce the appearance of quid pro quo corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns." (*Id.* at 415.) Judge Kleinfeld would have ruled against Plaintiffs more easily, writing in his concurrence, "The fact that matters is that the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech. *Davis v. Federal Election Commission* is easily distinguished because there the scheme did indeed impose a limit on the candidate's speech, at least indirectly." (*Id.* at 416.) The court of appeals reversed the district court's decision and remanded the case to the district court for a determination of Plaintiffs' Equal Protection claim, which has not yet been addressed by any court. *Id.*

Plaintiffs filed this Application following the Ninth Circuit's decision asking this Court to stay the mandate of the Ninth Circuit's decision—without first seeking the same relief from the Ninth Circuit—and to lift the stay that the district court initially issued and that the Ninth Circuit motions panel subsequently extended. By giving effect to the district court's ruling but staying the effect of the Ninth Circuit's ruling, Applicants hope to enjoin the enforcement of Arizona's law

for the first time since it was enacted in 1998 and deprive candidates in this year's elections of matching funds.

III. Arizona's 2010 Election Schedule.

The stay proceedings at the district court and Ninth Circuit centered on the impact that relief in this case may have on Arizona's 2010 elections. This is a significant election year in Arizona. All ninety legislative seats and most statewide offices are on the ballot, including Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Mine Inspector and two of the five seats on the Corporation Commission. Lang Decl. ¶ 13 (Def.'s App. 4). Candidates have already decided whether they will run as a participating candidate or as a traditional candidate. (*See, e.g.*, Def.'s App. 6-19 (declarations of publicly funded candidates); Pl.'s App. 317-340 (declarations of privately financed candidates)). And, any candidate that chose to receive public funding must abstain from significant private fundraising, collecting only limited "seed money" from qualified electors in their districts.

One hundred fifty five candidates had filed paperwork to be certified as participating candidates and twenty-six candidates have received their initial funding. Lang Decl. ¶¶ 14, 16 (Def.'s App. 5). This includes candidates for statewide offices as well as for the Legislature. Participating candidates can receive matching funds beginning June 22, 2010. Lang Decl. ¶ 9 (Def.'s App. 4).

Arizona's primary election is August 24, 2010, and early voting begins July 29, 2010. *Id.* ¶ 10.

ISSUE PRESENTED

Should this Court enjoin enforcement of Arizona Revised Statutes § 16-952, the Clean Elections Act's matching funds provision, by preventing the mandate of the Ninth Circuit's opinion upholding the constitutionality of the statute from issuing and at the same time vacating the earlier stay of the district court injunction when Petitioners never sought such relief from the Ninth Circuit and even though enjoining enforcement of the law disrupts the status quo and Arizona's 2010 elections?

ARGUMENT

I. The Court Should Deny the Application Because It Was Never Presented to the Ninth Circuit.

Supreme Court Rules require that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 23(3). Plaintiffs' case does not present extraordinary circumstances that should allow them to circumvent this rule. Comparing this case to *Western Airlines, Inc. v. Int'l Brotherhood of Teamsters* reveals why. 480 U.S. 1301 (1987) (O'Connor, J., in chambers). In *Western Airlines*, Justice O'Connor found an example of the "rare, extraordinary

circumstances in which request for a stay before the Court of Appeals is not required under the Rule." *Id.* at 1304-05. In *Western Airlines*, the decision below enjoined pending action, *id.* at 1304; in this case the decision below maintains the status quo. In *Western Airlines*, the merger at issue was scheduled to take place twelve hours after the court issued the decision, *id.*; in this case matching funds will not be issued for a month after the decision. In *Western Airlines*, every other court of appeals that had ruled on the issue disagreed with the decision below, *id.* at 1305-06; in this case, all but one of the courts of appeals to have ruled on the issue agree with the decision below. In *Western Airlines*, the court prevent two prevented a delay in two private airlines from merging, *id* at 1304; in this case, Applicants want this Court to enjoin implementation of a twelve-year-old election law in the middle of an election year. In *Western Airlines*, seeking a stay from the Ninth Circuit was "virtually impossible and legally futile." That is not the case here. Applicant's failure to comply with Rule 23, is an independent reason to deny an application for stay. *Conforte v. C.I.R.*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, C.J., in chambers) ("Applicant's failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay.").

Plaintiff's request that this court lift the stay of the district court's decision has different problems. In denying Plaintiffs' motion to lift that stay, this Court invited a new application when the court of appeals issued its decision on the

merits of the case. Applicants should not be required to ask the Ninth Circuit again to lift that stay. However, absent a stay enforcement of the Ninth Circuit's decision on the merits—a stay application which was never presented to the Ninth Circuit—the district court decision is reversed, and that stay is moot.

II. Because the Applicants Cannot Meet the Requirements of the All Writs Act, this Court Should Not Enjoin Enforcement of an Arizona Law That Has Been Continuously Enforced Since 1998.

Although Plaintiffs' failure to seek relief first from the Ninth Circuit is sufficient reason to deny the Application, it also fails to satisfy the requirements for relief under the All Writs Act. The Application is not merely seeking a stay of a lower court judgment, but an injunction against the enforcement of a twelve-year-old Arizona statute. The Court has repeatedly distinguished between the two. *Wisc. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305-06 (2004) (Rehnquist, C.J., in chambers); *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1302-03 (1993) (Rehnquist, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). In *Wisconsin Right to Life*, the applicant requested that Justice Rehnquist enjoin enforcement of a campaign finance law provision. 542 U.S. at 1305. The applicant contended that the provision at issue violated the First Amendment and hoped the Court would enjoin enforcement of the provision while the Court considered the case. *Id.* Justice Rehnquist refused to do so, because the applicant had failed to satisfy the standards

of the All Writs Act, the only authority for the Court to issue relief under the circumstances. *Id.* at 1306.

Of course, Plaintiffs do not seek to directly enjoin enforcement of Arizona's law, but instead ask the Court to first stay the Ninth Circuit from issuing its mandate and then lift the stay that the Ninth Circuit imposed on enforcement of the district court's order. [Application at 3.] As the Applicants recognize, in this case "[t]he Court of Appeals' merits decision is not final because no mandate has issued." [*Id.*] The only authority for the Court to stay court action that is not the product of a "final judgment or decree," *see* 28 U.S.C. § 2101(f), is the All Writs Act, 28 U.S.C. § 1651. *Ohio Citizens*, 479 U.S. at 1312 (Scalia, J., in chambers). The applicant in *Ohio Citizens* sought to suspend the operation of a nuclear power plant through its Application to Stay Mandate of the United States Court of Appeals for the Sixth Circuit Pending Certiorari. *Id.* at 1311. In denying the application, Justice Scalia noted that a traditional stay can be issued only for final orders and that the relief this applicant sought required issuance of a writ under the All Writs Act. *Id.* at 1312.

So whether the Court considers this as a direct application to enjoin enforcement of Arizona's law or as an application to enjoin the Ninth Circuit from issuing its mandate, the All Writs Act is the only authority that would permit the Court to grant the relief sought. The Application initially cites the All Writs Act as

the authority for the Court to issue this stay (Application at 3), but then relies on a case that dealt with a final decision from Ninth Circuit when spelling out the standard for issuing a stay pending appeal. (Application at 9 [citing *Nken v. Holder*, 129 S. Ct. 1749, 1753-55 (2009)].) *Nken* considered an imminent deportation and a stay from a final decision by the Ninth Circuit. As discussed above, *Wisconsin Right to Life* deals with an application to stay enforcement of a campaign finance law and *Ohio Citizens* deals with an application to stay a mandate. These cases provide the correct standard for this case.

In this case, Applicants must show the following: (1) Enjoining the enforcement of Arizona's twelve-year-old A.R.S. § 16-952, or preventing the Ninth Circuit from issuing its mandate, is "necessary or appropriate in aid of [the Court's] jurisdiction[]," and (2) Plaintiffs' legal right to prevent Arizona from issuing matching funds is "'indisputably clear.'" *Id.* (quoting *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J. in chambers)).

Applicants have not provided, nor can they provide, any reason why this Court will be deprived of jurisdiction over this case if Arizona's statute remains in force, as it has since the voters approved it in 1998. Likewise, this Court may consider whether to accept jurisdiction in this case once the Ninth Circuit issues its mandate. Thus, Applicants have failed to establish the first element necessary for relief under the All Writs Act.

With its unanimous opinion below, the Ninth Circuit joined the First, Fourth, and Sixth Circuits in upholding matching funds against constitutional challenges; thus, Applicants' asserted the legal rights at issue in this matter are far from "indisputably clear." Applicants must establish both elements to be granted the relief they seek. They have established neither. This Court should deny the Application.

III. The Court Should Deny the Application even Under the Traditional Standard for a Stay Pending Appeal.

A. The Relief Plaintiff Seeks Would Cause Irreparable Harm by Preventing the State from Implementing Its Clean Elections Act and Eliminating Funding for Candidates During an Election Year.

This Court should reject Plaintiffs' effort to enjoin the matching funds component of Arizona's Clean Elections Act in the heart of the 2010 election season. At the November general election, Arizona voters will elect most statewide officers, including its governor, and all 90 members of the State Legislature. Lang Decl. ¶13 (Def.'s App. 4). Twenty six candidates have been approved for and received public funding through Clean Elections, and 129 have been certified as clean elections candidates, but have not yet qualified to receive clean elections funding. *Id.* ¶¶ 14, 16 (Def.'s App. 5). Those candidates who have already received clean elections funding are prohibited from now running as privately-funded candidates for the 2010 election cycle. *Id.* ¶ 16 (Def.'s App. 6).

An injunction would cut two-thirds of the funding available for these participating candidates within two months of early voting for the primary. *Id.* ¶¶ 11, 17 (Def.'s App. 4-5).

Plaintiffs' arguments simply reiterate the basis for their constitutional challenge. (Application at 20-22.) That is, they assert that non-participating candidates will not raise and spend money to avoid triggering matching funds. These claims, however, were thoroughly examined in the litigation, and both the district court and the unanimous Ninth Circuit panel agreed that the extensive record in this case showed no chill on campaign fundraising and spending. (App. 15-16, 399-402.) Plaintiffs' alleged harms that they failed to establish in this litigation cannot justify enjoining the law.

The only genuine harm would occur if this Court enjoins matching funds now. Such a decision harms candidates and the public and disregards Arizona's interest in implementing its state laws. *See, e.g., Walter v. Nat'l Assoc. of Radiation Survivors*, 408 U.S. 1324 (1984) (Rehnquist, J., in chambers). Candidates appropriately relied on the current law, including the availability of matching funds, when planning their campaigns, and they should not be harmed for doing so. *See, e.g.,* Declarations of Governor Jan Brewer 2010 Committee, Ed Ableser, David Schapira, Paula Pennypacker, and David Lujan (Def.'s App. 6-18). Even if, as Plaintiffs' assert (Application at 20-21), some candidates thought that

matching funds would not be available for the 2010 election cycle because of this litigation, this erroneous speculation does not support enjoining a State law that has been upheld by the Ninth Circuit and has been in place for the past twelve years. Plaintiffs' relief would upend—not preserve—the status quo under Arizona law.

If matching funds are enjoined now, candidates for the 2010 elections who chose to run as participating candidates will not have money with which to respond to attack ads and support their campaigns in other ways. *See, e.g.,* Declarations of Governor Jan Brewer Committee, Ed Ableser, and David Schapira (Def.'s App. 6-18). A two-thirds cut in public funding available to participating candidates this late in the election cycle harms both candidates and the public by denying voters the opportunity to hear from all of the candidates. To avoid harming the 2010 elections and to respect the status quo under Arizona law, Plaintiffs' Application should be denied.

B. The Plaintiffs Are Not Likely to Succeed on the Merits.

1. This Court Has Not Addressed Matching Funds in a Public-funding System.

Plaintiffs wrongly argue that this Court's decisions in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Davis v. FEC* resolve the issues in this case. Neither case addressed the issue of the constitutionality of matching funds in a public-funding system.

Davis invalidated the "Millionaire's Amendment," which increased contribution limits when a candidate's opponent spent a specified amount of personal money on his or her campaign. This requirement resulted in different contribution limits depending on whether a candidate used personal monies on his campaign. This Court concluded that this asymmetric treatment of candidates who use their personal monies burdened the First Amendment rights of those candidates. Significantly, the Millionaire's Amendment did not serve an anticorruption purpose. Its only purpose was to "level electoral opportunities." *Davis* at 2773.

Unlike *Davis*, this case does not involve discriminatory treatment of a candidate who chooses to rely on significant amounts of personal monies. As the Ninth Circuit explained, to "reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*." (Pl.'s App. 415.) Here, the only differences result from a candidate's choice either to run a traditional campaign or to run a publicly funded one. There are two systems with different requirements. The Clean Elections Act imposes no asymmetrical requirements on a candidate who chooses to fund a campaign with his or her personal monies. In addition, the Act at issue here serves an anticorruption purpose, while the amendment at issue in *Davis* did not.

Citizens United, which addressed prohibitions on corporate independent expenditures, also does not resolve this case. *Citizens United* did not address public campaign funding. While its discussion of anticorruption legislation may inform the analysis of the Act's state interest and it establishes the standard of review for legislation placing a minimal burden on speech, *Citizens United* does not answer the question presented here.

As the district court recognized, the majority of the circuit courts that have considered the issue in this case have upheld the constitutionality of matching funds in public-funding programs. (Pl.'s App. 41.) Only *Day v. Holahan,* 34 F.3d 1356 (8th Cir. 1994), reached a contrary conclusion. All other circuit courts that have addressed the issue rejected *Day's* reasoning and upheld matching funds. (*See* Pl.'s App. 41-42.) Plaintiffs assert that because the Supreme Court cited *Day* in *Davis,* the Supreme Court effectively resolved the issue in this case already, but that simply is not true. *Davis* did not address public campaign finance programs.

Plaintiffs also ignore this Court's approval of public campaign funding in *Buckley v. Valeo,* 424 U.S. 1 (1976), in which the Court recognized that it "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley,* 424 U.S. at 92-93. This Court acknowledged that public funding "furthers . . . pertinent First Amendment values," *id.*, which include securing "'the widest possible dissemination of

information from diverse and antagonistic sources,'" *id* at 49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)). Matching funds are a means of allocating a limited amount of money to candidates who participate in a public-funding system. And, providing matching funds as part of a public-funding program "is likely to result in more, not less, speech." *N. C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008), *cert. denied by Duke v. Leake,* 129 S. Ct. 490 (Nov. 3, 2008).

Even though the record did not support Plaintiffs' claim that candidates avoid raising and spending money to keep from triggering matching funds, the district court nevertheless concluded that *Davis v. FEC* required it to find that matching funds burdened Plaintiffs' speech. (Pl.'s App. 24-25.) Providing a thorough analysis of *Davis*, *Citizens United*, and *Day*, the Ninth Circuit reversed the district court, largely because, having found no support for Plaintiffs' claims of a significant burden, the district court should have applied intermediate scrutiny as *Buckley* and *Citizens United* require. The Ninth Circuit's decision effectively distinguishes *Davis* from the instant case, noting that the Act does not impose the sort of asymmetric limits on similarly situated candidates and that *Davis* did not address public-funding systems. (Pl.'s App. 407-08.) The unanimous court concluded that matching funds were most like disclosure requirements in that they

imposed a minimal, if any, burden on free speech and "impose no ceiling on campaign-related activities." (*Id.* at 411.)

2. This Court Has Approved of Systems Similar to Arizona's.

This Court has approved of campaign finance regulations that limit private campaign contributions because direct campaign contributions can be used to "'secure a political *quid pro quo*' . . . and 'the scope of such pernicious practices can never be reliably ascertained.'" *Citizens United,* 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 27, 96 S.Ct. at 638). Similarly, the Court approved public campaign finance programs "as a means of eliminating the improper influence of large private contributions." *Buckley,* 424 U.S. at 96.

Public funding serves this anticorruption purpose by providing candidates with a means to run a viable campaign without relying on private contributions that raise the risk of quid pro quo corruption. *See id.* Limited matching funds are an integral part of many public finance programs because they provide a mechanism for allocating sufficient funding for a viable campaign to publicly funded candidates. Public funding's anticorruption purpose of is served only if such funding is a viable option for candidates. If candidates do not choose to participate in the public-funding program, the public-funding program does not further its anticorruption purpose because all candidates continue to rely on private funding to run for office. Because public funding's anticorruption purpose is served only if

candidates participate in the public-funding program, Arizona's Clean Elections program provides a viable public-funding option for a candidate regardless of the source of his or her opponents' funds.

Instead of focusing on the anticorruption function of public campaign funding, the district court relied on language in *Davis* stating that "reliance on personal funds *reduces* the threat of corruption" and "discouraging use of personal funds disserves the anticorruption interest." (Pl.'s App. 26-7 [quoting *Davis,* 128 S. Ct. at 2773].) As the Ninth Circuit recognized, this comment compares the opportunities for corruption when a candidate uses his or her own money with raising private contributions in a traditional system of privately funded campaigns. The Act's anticorruption purpose is not served by discouraging the use of personal money. Rather, it is served by encouraging candidate participation in the public-funding program.

Arizona's law is also substantially related to preventing corruption and the perception of corruption. The matching funds are tailored to provide sufficient funding so that publicly funded candidates can run viable campaigns, but it avoids over-funding candidates. Thus, Arizona's public-funding program is substantially related to its intended purpose. As the unanimous circuit court decision demonstrates, there is not sufficient likelihood that Applicants will prevail on the merits to support granting the Application. (Pl.'s App. 31.)

A. Maintaining the Status Quo Serves the Public Interest.

The Ninth Circuit's unanimous opinion upholding the law's constitutionality against this most recent attack maintains the status quo in Arizona law. No court has ever determined that matching funds would not be available for the 2010 election. Candidates may have speculated about the outcome of this litigation, but candidates should not have to guess about the outcome and timing of complex constitutional litigation when planning their campaigns. They should be able to rely on current law, absent a court order to the contrary. The matching funds provision of Arizona law is "a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon v. Kurtzman,* 411 U.S. 192, 209 (1973). As of May 25, 2010, 155 candidates have relied on matching funds, filing paperwork indicating that they intend to run as participating candidates in the 2010 elections. Lang Decl. ¶ 14 (Def.'s App. 5). Twenty-six candidates have accepted funds, meaning that they have lost the opportunity to change their mind and run as a traditional candidate. Lang Decl. ¶ 16 (Def.'s App. 5).

"[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon*, 411 U.S. at 200. The district court and the Ninth Circuit motions panel applied appropriate legal standards in granting and subsequently extending a limited stay in

this case. It would be nonsensical, now that the State has prevailed in the Ninth Circuit, to enjoin enforcement of the law for the first time.

CONCLUSION

For these reasons, the Court should deny the Application.

Respectfully submitted this 27th day of May, 2010.

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[2] Attorney General Terry Goddard has recused himself from this matter and has delegated Timothy A. Nelson, Chief Deputy Attorney General, to serve as the Acting Attorney General in this case.

CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of Defendant/Appellants' Response To Renewed Emergency Application To Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate Before The Hon. Justice Anthony M. Kennedy and the accompanying Appendix was sent via e-mail and via prepaid FedEx Overnight courier service on May 27, 2010 to:

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