

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

**PLAINTIFFS' REPLY TO 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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THE PROCEDURAL OBJECTIONS TO THE RENEWED APPLICATION ARE MERITLESS.

Putting the cart before the horse, Defendants and Defendant-Intervenor's ("Defendants") attack Plaintiffs' ancillary request for a stay on the mandate from the May 21, 2010 merits decision before addressing Plaintiffs' principal request that the Court vacate the February 1, 2010 stay. Because the mandate has not issued yet,¹ the only reason to address Plaintiffs' ancillary relief at all is to prevent their principal request to vacate the February 1, 2010 stay from becoming moot. Defendants' objections to Plaintiffs' ancillary relief are otherwise completely irrelevant to the merits of the renewed application to vacate the February 1, 2010 stay, which should be considered independently on the merits.

Plaintiffs nevertheless agree that requesting a stay of the mandate from this Court in the first instance is appropriate only under

¹ On May 26, 2010, Plaintiffs' undersigned counsel confirmed in a telephone conversation at about 8:35 a.m. with "Jerry," a Clerk with the Ninth Circuit Court of Appeals, that June 14, 2010 is indeed the earliest mandate issuance date because the Court customarily issues a separate mandate from the merits decision 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise (*see* http://www.ca9.uscourts.gov/datastore/uploads/forms/post_judgment_info_12-09.pdf).

extraordinary circumstances and to preserve the Court's jurisdiction. Plaintiffs' requested ancillary relief obviously fulfills both requisites.

Until the mandate issues, the district court's permanent injunction is the only final judgment that can be enforced. *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989); *see generally City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (holding the mandate "establishes the law binding further action in the litigation by another body subject to its authority"). And if the February 1, 2010 appellate stay is vacated before the mandate issues, the district court's injunction will have immediate effect notwithstanding the May 21, 2010 merits decision. *See, e.g., California v. American Stores Company*, 492 U.S. 1301, 1304-05 (1989). If, however, the mandate issues, the district court's injunction will itself be vacated, and Plaintiffs' renewed application to vacate the stay on the injunction will become moot. Therefore, it is obvious that the requested stay on the mandate is necessary to preserve the Court's jurisdiction over the Plaintiffs' renewed application. It is a quintessential example of a request for ancillary relief to preserve the Court's jurisdiction, which falls squarely within the exception to the normal rule of seeking a

stay on the mandate from the Court of Appeals in the first instance. *See generally* 1 J. Pomeroy, *Equity Jurisprudence* § 171(1) (5th ed. 1941) (describing ancillary relief as supplemental to some principal relief to make the principal relief effective).

Extraordinary circumstances also exist given the full context in which this renewed application has been sought. By filing the renewed application within days of the issuance of the May 21, 2010 merits decision, Plaintiffs have acted with the very expediency and along the very procedural route contemplated by the Court's previous order. (Vol. IV, App. 426.) Any delay in filing Plaintiffs' renewed application, including waiting for the Ninth Circuit to rule on a petition for rehearing or motion to stay the mandate, would certainly contravene the spirit, if not the letter of this Court's prior order. Moreover, it is absurd to suggest that immediate relief is prematurely sought in view of: 1) the ongoing constitutional harm suffered by Plaintiffs and others; 2) the impending June 1, 2010 trigger reporting date; 3) the possibility of the mandate issuing as soon as June 14, 2010; and 4) the guarantee of matching funds being issued against innocent traditional candidates on June 22, 2010. (Vol. IV, App. 705-14.)

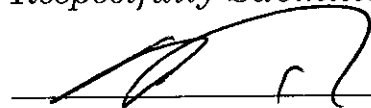
Finally, the same elements that are applied in the context of issuing an appellate stay or a preliminary injunction have been applied by the Court to impose a stay on the issuance of a mandate based on an emergency application to the Circuit Justice. *See, e.g., American Stores Company*, 492 U.S. at 1304-05. The requested ancillary relief is, therefore, properly founded upon the same elements advanced to support Plaintiffs' principal relief, which requests the vacation of the February 1, 2010 stay.

As argued previously, extraordinary circumstances exist for staying the mandate. The Fourteenth Amendment's guarantee of First Amendment protections is held in the balance. Plaintiffs resubmit that the Ninth Circuit's merits decision is clearly erroneous as a matter of law, which has been abundantly demonstrated in the renewed application, the supporting response brief of Plaintiff-Intervenor, and the proposed amicus brief of the Buz Mills Committee. Despite Defendants' claim that the Ninth Circuit merits panel fully considered the arguments and facts presented to it, the truth is that most of the facts and arguments raised by Plaintiffs/Plaintiff-Intervenor's briefings were completely unaddressed by the merits decision; including the core

argument that the matching funds system is not a true public financing system, but a dysfunctional hybrid private-public financing system that launders and leverages all of the supposedly corrupting aspects of private campaign financing condemned in *Buckley*. (*Compare* Vol. IV, App. 388-420 *with* App. 510-28, 534-50, 553-63.) Moreover, the decision contains outright misstatements of fact lacking any foundation in the record that have tarnished the reputation of former Arizona Governor J. Fife Symington. (See attached May 26, 2010 letter, Akin Gump to Ninth Circuit Court of Appeals.)

For these reasons, Plaintiffs ask the Court to grant their Renewed Emergency Application to Vacate the Ninth Circuit's February 1, 2010 order and to enter an ancillary stay on the issuance of the mandate from the Ninth Circuit's May 21, 2010 merits decision on or before May 28, 2010.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The ORIGINAL and TWO COPIES of Plaintiffs' Reply to Responses to Renewed Emergency Application to Vacate Erroneous Appellate Stay were dispatched via email to dbickell@supremecourt.gov and prepaid FedEx Express Overnight courier service on May 27, 2010 to:

Clerk of the Court
SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

I hereby certify that, pursuant to Supreme Court Rule 29.2, each separately represented party was served with ONE COPY of Plaintiffs' Reply to Responses to Renewed Emergency Application to Vacate Erroneous Appellate Stay on May 27, 2010 via email and prepaid FedEx Express Overnight courier service as follows:

Parties and Counsel Served	
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