

No. 09A1133

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCCLAIN, and TONY BOUIE,

Plaintiff-Appellees,

and

DEAN MARTIN, RICK MURPHY, ROBERT BURNS, ARIZONA FREE
ENTERPRISE CLUB'S FREEDOM CLUB PAC, and ARIZONA TAXPAYERS
ACTION COMMITTEE,

Plaintiff-Intervenor-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,

Defendant-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor-Appellant

ON EMERGENCY APPLICATION TO VACATE APPELLATE STAY
ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

PLAINTIFF-INTERVENOR-APPELLEES' RESPONSE IN SUPPORT OF
PLAINTIFF-APPELLEES' EMERGENCY APPLICATION TO VACATE
APPELLATE STAY AND ANCILLARY APPLICATION TO STAY
MANDATE BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

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CORPORATE DISCLOSURE STATEMENT

The Arizona Free Enterprise Club's Freedom Club PAC has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Free Enterprise Club's Freedom Club PAC.

The Arizona Taxpayers Action Committee has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Taxpayers Action Committee.

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Introduction

Pursuant to Justice Kennedy's May 25 order, Plaintiff-Intervenors file this response in support of Plaintiffs' application to stay the Ninth Circuit's mandate in *McComish v. Bennett*, No. 10-15165, and to vacate the Ninth Circuit's stay of the injunction entered by the District Court of Arizona in *McComish v. Bennett*, No. CV 08-1550-ROS. This Court's immediate intervention is necessary to prevent irreparable harm to the Plaintiffs, the Plaintiff-Intervenors, and the many third-party candidates and independent groups whose First Amendment rights can only be protected by enjoining the issuance of so-called "matching funds" to publicly funded political candidates during Arizona's 2010 election cycle.¹ Defendant Commissioners are scheduled to begin distributing matching funds for the Arizona primary election on June 22, 2010. The Ninth Circuit's mandate is due to issue on June 14, 2010.

¹ For the reasons set forth here, Plaintiff-Intervenors are entitled to a stay of the Ninth Circuit's mandate and the vacation of the Ninth Circuit's stay of the District Court's injunction. To the extent that this relief may be obtained only through Plaintiff-Intervenors' own motion, Plaintiff-Intervenors respectfully request that this Court treat this Response as such a motion. In the event that this Court determines the most appropriate relief is an injunction, as opposed to a stay, Plaintiff-Intervenors respectfully request that this response be treated as a motion for an injunction. Given the substantial overlap in the factors for both forms of relief, *see California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009), Plaintiff-Intervenors satisfy the criteria for injunctive relief.

Matching funds are a discrete part of Arizona’s public financing of elections law, the Citizens Clean Elections Act, Arizona Revised Statutes (“A.R.S.”) §§ 16-940-961 (2010) (the “Act”). Under the matching funds provision, A.R.S. § 16-952(A)-(C), contributions to and expenditures by privately and self-financed candidates, as well as expenditures by independent groups, result in public subsidies to the speaker’s political and ideological opponents.² In the zero-sum game of Arizona electoral contests, matching funds result in *de facto* limits on contributions and expenditures by imposing significant disincentives for speakers to spend above certain state-approved limits. Matching funds are thus designed to achieve indirectly what the state is constitutionally forbidden from doing directly: leveling the political playing field by suppressing independent expenditures and aggregate contributions to and expenditures by privately and self-financed candidates. *See American Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 403 (1950) (“[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under

² Matching funds are the only provision of the Citizens Clean Election Act at issue in this case. The Ninth Circuit’s assertion that the District Court enjoined the operation of the entire law is incorrect. Appendix in Support of Plaintiffs’ Renewed Emergency Application to Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate (“Pl. App.”) 392. The District Court only enjoined the operation of the matching funds provision. The remaining portions of the Clean Elections Act remain in effect. Pl. App. 32.

some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.”).

Under this Court’s precedent, matching funds are unconstitutional because they burden core political speech and are not supported by a compelling government interest. Because the Ninth Circuit concluded otherwise, Arizonans immediately face yet another election in which matching funds will burden fundamental First Amendment rights. Plaintiff-Intervenors therefore respectfully request that this Court issue an order staying the issuance of the Ninth Circuit’s mandate in *McComish v. Bennett*, No. 10-15165, and vacating the Ninth Circuit’s stay of the injunction entered by the District Court of Arizona in *McComish v. Bennett*, No. CV 08-1550-ROS, in order to halt the issuance of all matching funds in the 2010 election cycle.

Jurisdiction And Proceedings Below

Plaintiff-Intervenors agree, for the reasons identified by Plaintiffs, that this Court has jurisdiction to enjoin a circuit court’s mandate and to vacate the circuit court’s stay of a district court’s injunction. Plaintiff-Intervenors also agree with the Plaintiffs’ description of the background and the course of the proceedings below.

Facts

1. Arizona's "Clean Elections" System

Arizona's public financing scheme provides public funds to candidates who collect enough "qualifying contributions" and who agree to abide by the Act's spending limitations. A.R.S. § 16-946. Publicly financed candidates who qualify receive a set level of money in one lump sum and may not make expenditures in excess of that disbursement unless they receive matching funds. The law provides matching funds to publicly financed candidates based on the free speech activities of independent expenditure groups, and privately and self-financed candidates. Privately and self-financed candidates trigger matching funds when they spend (in the primary election) or receive contributions (in the general election) above the scheme's initial lump sum disbursement to publicly financed candidates. Contributions or expenditures by a candidate in support of her own campaign can also trigger matching funds. Independent groups trigger matching funds when they spend money in opposition to a publicly financed candidate or in support of a privately financed opponent.

The amount of matching funds distributed by the government is equal to the amount the privately financed candidate spent or received—or the amount spent by the independent political group—over the initial disbursement, minus 6%. A.R.S. § 16-952(A)-(C). While termed "matching

funds,” this is actually a misnomer, because the amount of such funds often goes far beyond the amount spent or received by the privately financed candidate. This is because matching funds can be triggered to multiple publicly financed candidates running in the same race. *Id.*

Thus, in a campaign with one privately financed candidate and three publicly financed candidates, if an independent group makes an expenditure of \$10,000 in support of the privately financed candidate and the total amount of expenditures for that candidate is above the initial disbursement, the government gives \$10,000 (minus 6%) to *each* publicly financed candidate. Thus, as a result of matching funds, \$10,000 worth of independent expenditures in support of a privately financed candidate (who may not have wanted it) results in \$28,200 worth of matching funds to his opponents that can be spent on speech against that candidate.

2. Identity Of Plaintiff-Intervenors³

Plaintiff-Intervenors include privately financed candidates that have interests similar to Plaintiffs. However, Plaintiff-Intervenors also include two independent expenditures groups who have unique and independent claims regarding the impact of the Act on their First Amendment rights. Specifically, the Arizona Taxpayers Action Committee (“Arizona Taxpayers”)

³ Plaintiff-Intervenor Robert Burns recently announced his retirement from the Arizona Legislature. All other Plaintiff-Intervenors remain active in Arizona state elections.

and the Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") are both groups that make independent expenditures in support of candidates, meaning that both groups are unaffiliated with any political party and neither group coordinates expenditures with candidate campaigns. Plaintiffs-Intervenors' Appendix in Support of Plaintiff's Renewed Emergency Application ("Pl.-Int. App.") 2, 16. Matching funds have harmed both groups in the past by requiring them to alter their campaign strategies and the timing of their speech. Pl.-Int. App. 5-6, 9-10, 12, 17. For example, both groups have delayed independent expenditures in order to avoid triggering matching funds until late in the election cycle. Pl.-Int. App. 5-6, 9-10, 12, 17. Arizona Taxpayers avoided making an independent expenditure altogether in at least one race because of matching funds. Pl.-Int. App. 29. Both groups intend to participate actively in the 2010 election cycle and both groups expect to experience the same types of harm they have experienced in the past. Pl.-Int. App. 9, 17.

In addition, Plaintiff-Intervenor Rick Murphy is a privately financed candidate for the state senate and is facing at least one publicly financed general election opponent.⁴ Pl.-Int. App. 19. In Murphy's experience,

⁴ Plaintiff-Intervenors include Dean Martin, the current Arizona State Treasurer and an announced candidate for governor. Despite years of philosophical opposition to the Act, the coercive nature of the Act and its negative effect on privately financed candidates has forced him to attempt to

matching funds punish privately financed candidates for raising and spending money against a publicly financed candidate. In the 2006 general election, for example, Murphy stopped raising money entirely to avoid triggering matching funds to his publicly financed opponent. Pl.-Int. App. 26. In the 2008 primary, he did not send out any mailings in order to conserve his resources for the general election, where he accurately anticipated being massively outspent by his three publicly financed opponents. Pl.-Int. App. 27-28. Murphy did not raise funds during the 2008 general election, because doing so would have triggered almost \$3 in matching funds for every \$1 he raised. Even so, his three publicly funded opponents still received approximately \$150,000 to spend against him because of independent expenditures made in his race. Pl.-Int. App. 27-28. For example, when a Realtor group made an independent expenditure of \$3,627.00 to support Murphy's candidacy, all three of his publicly funded opponents received a check for \$3,409.38—meaning that the group's small expenditure in support of Murphy triggered \$10,228.14 in matching funds to his opponents. Pl.-Int. App. 28.

run as a publicly financed candidate in this race. Martin has not, however, qualified for public funding as of this filing.

Argument

Plaintiffs and Plaintiff-Intervenors meet the standards for a stay of the Ninth Circuit's mandate in this case and for the vacation of the stay of the injunction issued by the District Court. Whether this or any other court should issue a stay is guided by "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); see also *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (stay to be vacated where circuit court was "demonstrably wrong in its application of accepted standards in deciding to issue the stay" (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). "There is substantial overlap between these [stay factors] and the factors governing preliminary injunctions." *Nken*, 129 S. Ct. at 1761. The proper merits inquiry, the balance of injuries inflicted, and the public interest affected all favor Plaintiffs and Plaintiff-Intervenors.

1. Plaintiff-Intervenors And Plaintiffs Are Likely To Succeed On The Merits

The Ninth Circuit’s determination that the matching funds provision is constitutional is erroneous for three reasons. First, the Ninth Circuit erred by applying the wrong level of scrutiny. Second, the matching funds provision is not supported by a compelling government interest. Third, the Act severely burdens speech and the Ninth Circuit’s conclusion to the contrary was wrong on both the facts and on the law.

The Ninth Circuit’s conclusion on each point was clearly wrong under this Court’s well-established precedent and Plaintiff-Intervenors and Plaintiffs are therefore likely to succeed on the merits.

A. The Ninth Circuit Applied The Wrong Level Of Scrutiny

The Ninth Circuit erroneously applied only “intermediate scrutiny” to the burdens created by Arizona’s matching funds provisions—burdens that affect “fully protected speech.” Appendix in Support of Plaintiffs’ Renewed Emergency Application to Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate (“Pl. App.”) 404, 412.

The Ninth Circuit applied this erroneous standard because it ignored this Court’s mandate that “the level of scrutiny is based on the importance of the ‘political activity at issue’ to effective speech or political association.”

FEC v. Beaumont, 539 U.S. 146, 161 (2003) (quoting *FEC v. Mass. Citizens*

for Life, Inc., 479 U.S. 238, 259 (1985)). Instead, the Ninth Circuit looked to its own pre-*Beaumont* case, *Lincoln Club v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002), for the rule that “[t]he level of scrutiny that applies to a law which implicates First Amendment concerns is ‘dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue.’” Pl. App. 403 (quoting *Lincoln Club*, 292 F.3d at 938). Based on *Lincoln Club*’s “two-step inquiry,” the Ninth Circuit justified its application of a lower level of scrutiny because, in its view of the facts, this case showed only a minimal burden on speech. Pl. App. 403, 412.

In other words, the Ninth Circuit concluded that the government may burden fully protected speech and escape strict scrutiny if the government’s burden is not too severe. This conclusion is contrary to this Court’s precedent. “Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling government interest and is narrowly tailored to achieve that interest.’” *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (“*WRTL*”). “[I]n setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association.” *Beaumont*, 539 U.S. at 161 (quotation omitted). Direct expenditures are core political expression that is

at the “heart of the First Amendment’s protection.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Accordingly, this Court has held that restrictions on expenditures are limitations “on core First Amendment rights of political expression” and subject to strict or “exacting” scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam). The Ninth Circuit’s conclusion that core political speech can be burdened without triggering strict scrutiny contradicts decades of this Court’s cases.

Matching funds burden core political speech because they chill the expenditures of independent advocacy groups, as well as the expenditures (in the primary) of and contributions (in the general) to privately financed candidates. They are therefore subject to strict scrutiny. “Under strict scrutiny, the *Government* must prove that [the statute] . . . furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL.*, 551 U.S. at 464 (emphasis in original). The government has made no such demonstration here.

B. Matching Funds Are Not Supported By A Compelling Government Interest

In applying its erroneous standard, the Ninth Circuit justified the burdens on the speech of self-financing candidates, independent expenditures groups, and privately financed candidates created by the matching funds provision because it was a part of a larger Act that would decrease the

appearance of corruption by participating candidates. Pl. App. 414 (“The fact is, however, that the Act is aimed at reducing corruption among participating candidates”). The Ninth Circuit concluded that matching funds serve the anti-corruption goal of the Act by “encourag[ing] participation in [the] public funding scheme.” Pl. App. 413-14. The Ninth Circuit thus permitted a system under which “fully protected,” non-corrupting speech is burdened in order to entice candidates who can be corrupted into a system that purports to “level” the influence of independent expenditures groups, self-financed candidates, and privately financed candidates.⁵ In other words, the matching funds provision exists to burden or “level” the speech of those who cannot be corrupted in order to lessen the chance that those who can be corrupted will be. The “enticement” of others from corruption is not a sufficient justification for burdening non-corrupting speech, however.

Restrictions on campaign finances must be justified by the government’s interest in preventing *quid pro quo* corruption or its

⁵The Ninth Circuit disregarded Plaintiff-Intervenors’ volumes of evidence demonstrating that the real purpose of matching funds is to “level the playing field” and concluded that “one of the principal purposes of the Act was to reduce *quid pro quo* corruption.” Pl. App. 395-96. However, hours after the Ninth Circuit’s opinion was issued, Arizona’s Attorney General, who has defended this law for most of this litigation, stated once more the government’s true intent in enforcing this law: “It’s a vindication and validation of a process that tries to level the playing field.” Jim Nintzel, *Clean Elections Revived*, Tucson Weekly, May 21, 2010, [available at http://www.tucsonweekly.com/TheRange/archives/2010/05/21/clean-elections-revived](http://www.tucsonweekly.com/TheRange/archives/2010/05/21/clean-elections-revived).

appearance—“the only legitimate and compelling government interests thus far identified for restricting campaign finances.” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); accord *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008), *Citizens United*, 130 S. Ct. at 909 (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”). Here, the Ninth Circuit justified the application of matching funds to independent expenditures and self-financing candidates—two types of speakers that pose no threat of corruption—by arguing that it was an inducement for other speakers to join the public financing system. The Ninth Circuit did not—because it could not—justify matching funds as necessary to combat corruption or its appearance in self-financing candidates and independent groups actually burdened by matching.

Under the matching funds provision, the government awards publicly financed candidates matching funds to counter the non-corrupting spending of independent expenditure committees and self-financing candidates. It is beyond dispute that independent expenditures are not corrupting because the absence of prearrangement and coordination between an independent expenditure committee and a candidate alleviates the danger that the expenditure will be given as a *quid pro quo* for improper commitments from the candidate. *Citizens United*, 130 S. Ct. at 908; see also *Colo. Republican*

Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617 (1996) (noting that the government in that case was unable to “point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures”); *Nat’l Conservative Political Action Comm.*, 470 U.S. at 498 (“But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate”); *Buckley*, 424 U.S. at 46-47 (stating that independent expenditures do not implicate corruption concerns because they are made independently). Self-financing by candidates, moreover, actually reduces the threat of corruption. *Davis*, 128 S. Ct. at 2773.

Nonetheless, in the face of this unanimous precedent, the matching funds provision treats the non-corrupting speech of independent expenditure committees and self-financing candidates as if it were the potentially “corrupt” speech of candidates beholden to large donors. The Ninth Circuit attempted to provide an anti-corruption rationale for burdening such non-corrupting speech by concluding that matching funds act as an inducement to others to participate in the public funding system. Pl. App. 413. However, the law may only reach the speech of those it regulates if it possesses an anti-corruption rationale to regulate them in the first place.

In *Wisconsin Right to Life*, the FEC argued that it could regulate constitutionally-protected issue advocacy ads because doing so facilitated its ability to regulate express advocacy ads. *WRTL*, 551 U.S. at 473-74. This Court rejected the FEC's argument, holding that "[g]overnment may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 475 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)). This Court rejected a similar argument in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). There, the government justified its regulation of anonymous leafleting by asserting that the regulation "serve[d] as an aid to enforcement of" other, permissible provisions of the election code and as "a deterrent to the making of false statements by unscrupulous prevaricators." *Id.* at 350-51. This Court rejected the argument, holding that "[a]lthough these ancillary benefits are assuredly legitimate," they could not justify the leafleting regulation. *Id.* at 351.

Other cases have rejected the argument that protected speech may be burdened to facilitate the objectives of permissible regulations. *See, e.g., Free Speech Coal.*, 535 U.S. at 254-55 (striking down law banning virtual child pornography despite government's argument that it facilitated enforcement of ban on actual child pornography); *Stanley v. Georgia*, 394 U.S. 557, 567-68 (1969) (striking down law banning the possession of obscene materials despite government's argument that it was a "necessary incident"

to laws prohibiting the distribution of such materials); *ACLU of Nev. v. Heller*, 378 F.3d 979, 1000 (9th Cir. 2004) (striking down law requiring identification of financial sponsors of campaign literature because the law “reach[ed] a substantial quantity of speech not subject to the reporting and disclosure requirements it purportedly help[ed] to enforce”).

These cases make clear that the State may not rely on an ancillary benefit to others—such as enticing them to avoid corruption—in order to justify burdening protected independent expenditures. The matching funds provision, on its own, is therefore not supported by an independent anti-corruption rationale.

C. Matching Funds Severely Burden Speech

The Ninth Circuit also erred in attempting to distinguish away this Court’s controlling precedent of *Davis* and holding that the matching funds provision only incidentally burdened speech. However, this conclusion is inconsistent with the record, with *Davis*, and with decades of precedent from this Court holding that laws that turn a speaker’s act of speaking into the vehicle by which such speech is countered severely burden speech.

The matching funds provision alters the Plaintiff-Intervenors’ strategy from the outset of an election, distorting the unfettered political speech of those whose speech are subject to matching funds. As political consultant Constantin Querard testified, “every spending decision” is made with

matching funds in view. Pl.-Int. App. 34. Privately financed candidates and independent groups are thus “always aware of the cost of spending that first incremental dollar” that triggers matching funds. Pl.-Int. App. 34. As each of the Plaintiff-Intervenors testified, their entire campaign strategy takes matching funds into account. Each one testified that their strategy was to keep their expenses and fundraising low enough not to trigger excessive amounts of matching funds to their publicly financed opponents. Pl.-Int. App. 25-28. This means, for example, that they mail information to fewer voters and less often. Pl.-Int. App. 27.

Moreover, the Ninth Circuit’s conclusion is wrong as a matter of law. In *Davis*, this Court struck down a federal law that allowed opponents of self-financed candidates to accept contributions three times greater than otherwise permitted if their self-financed opponents spent more than a certain amount of their own money. In doing so, this Court reaffirmed that laws that create disincentives for the unfettered expression of fully protected political speech are unconstitutional. The Millionaire’s Amendment at issue in *Davis* created an “unprecedented penalty” on any self-financing candidate who robustly exercised her First Amendment rights: if she “engage[s] in unfettered political speech” she will be subject “to discriminatory fundraising limitations.” *Davis*, 128 S. Ct. at 2771. Self-financing candidates could still spend their own money, “but they [had to] shoulder a special and potentially

significant burden if they make that choice.” *Id.* at 2772. This Court agreed with Davis that this system “unconstitutionally burden[ed] his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis’ own speech.” *Id.* at 2770.

Laws that force a speaker to be the unwilling vehicle by which his message is countered create “a special and potentially significant burden.” *Davis*, 128 S. Ct. at 2772 (citing *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994)). In *Davis*, this Court concluded that the Millionaire’s Amendment burdened the “right to spend personal funds for campaign speech” because it “impose[d] some consequences” on a candidate’s choice to self finance above certain amounts. *Davis*, 128 S. Ct. at 2771-72 (quoting FEC brief). Matching funds do more than simply “impose some consequences” on speech. They create distinct and measurable harm to the nature, timing, and amount of expenditures. Indeed, as the district court here found, matching funds are more constitutionally objectionable than increasing an opponent’s individual contribution limits because, under the Millionaire’s Amendment, the non-self-financing candidate must still raise funds, whereas under the Arizona law,

the government simply gives money to the publicly financed candidate. Pl. App. 24, 25.

Davis did not tread new ground. It is consistent with precedent striking down laws that penalize speech through disincentives, whether or not the government's goal is to promote more speech. For instance, in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 14 (1986) (plurality opinion) (cited in *Davis*), California ordered a utility to make its newsletter envelope available to a hostile group. The government justified this rule by arguing that it merely offered "the public a greater variety of views." *Id.* at 12. The plurality concluded, however, that the government's rule was impermissible viewpoint discrimination because access was limited to only those who disagreed with the utility. *Id.* at 12. "[W]enever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views. Appellant might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Id.* at 14 (internal quotation marks and citation omitted). In this light, the plurality concluded that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id.* at 9.

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court struck down a Florida law that granted candidates equal space to reply to criticism by a newspaper. The government claimed this regulation was necessary to ensure a variety of viewpoints reached the public and that the law did not prevent the newspaper from publishing what it wished. *Id.* at 247-48; *see also id.* at 256 (“Appellee’s argument that the Florida statute does not amount to a restriction on the appellant’s right to speak because ‘the statute in question here has not prevented the *Miami Herald* from saying anything it wished’ begs the core question.” (internal citation omitted)). This Court nonetheless concluded that the statute chilled expression about candidates and thus diminished free and robust debate: “[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced.” *Id.* at 257; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995) (“when dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised”).

For these same reasons, matching funds burden speech and the Ninth Circuit’s conclusion otherwise is inconsistent with this Court’s precedent and the record in this case. For this reason, Plaintiff-Intervenors are likely to succeed on the merits.

2. Failure to Enjoin Matching Funds Will Injure Plaintiff-Intervenors

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Act pays matching funds so that publicly financed candidates can counter speech intended to defeat them. Matching funds thus require privately financed candidates and independent groups to either limit their expenditures or trigger the disbursement of public funds to the candidate they oppose. In this way, the matching funds provisions impose a penalty on any privately financed candidate or independent group who robustly exercises their First Amendment rights. *See Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2004) (“Speech can be chilled even when not completely silenced.”). Many candidates and groups may choose to speak despite the matching funds, but when they speak they shoulder a special and potentially significant burden. *See Davis*, 128 S. Ct. at 2772 (citing *Day v. Holahan*, 34 F.3d at 1359-60).

Candidates have an unlimited right to accept contributions within a state’s contribution limits, *Buckley*, 424 U.S. at 21-22, yet the matching funds provision discourages privately financed candidates from accepting contributions because contributions over the initial spending limit trigger additional public subsidies to the privately financed candidates’ political opponents. And if a candidate works hard at fundraising and exceeds the

trigger limits, under the Act, it is his or her publicly financed opponents that benefit. Matching funds give publicly financed candidates a free ride on their privately financed opponents' expressive coattails. The result is that a privately financed candidate faces two choices, both bad: accept expenditure limits by running for office with government funds or subsidize his or her ideological and political opponents (often in amounts far greater than the contributions to, or expenditures by, the privately financed candidate) under the public campaign finance scheme.

Likewise, independent expenditure committees, so long as they make expenditures for the wrong candidates (those that are privately financed) or against the right ones (those that are publicly financed), will have their speech "leveled." This fact demonstrates the hollowness of the Ninth Circuit's reassurance that matching funds are simply the result of a statutorily imposed choice; independent expenditure groups cannot, under the Act, access public funds, yet their speech is burdened nonetheless. The end result is a chilling of speech and a related diminution of information conveyed to the voters of Arizona. *See Nat'l Conservative Political Action Comm.*, 470 U.S. at 493 (independent groups have a right to engage in unlimited expressive activity because such "expenditures . . . produce speech at the core of the First Amendment").

3. Neither The Defendant Commissioners Nor The Public Will Suffer Any Harm If Matching Funds Are Enjoined

There will be no injury to the Defendant Commissioners—or to the public—if matching funds are enjoined.

- The Government has no interest in enforcing an unconstitutional law. *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (“[I]t is clear that it would not be equitable or in the public’s interest to allow the state to continue to violate the requirements of federal law . . .”).
- Enjoining matching funds will not prevent any publicly financed candidate from receiving their up-front lump sum subsidies.
- Enjoining matching funds will not prevent any publicly financed candidate from appearing on the ballot.
- Candidates who chose to run publicly financed campaigns were on notice that matching funds may not be available in the 2010 election cycle. Years prior to its January 20, 2010 order and injunction, the district court had repeatedly warned that the matching funds provision “violates the First Amendment of the U.S. Constitution.” Pl. App. 59 (Order dated August 29, 2008); *see also* Pl. App. 49 (movants had “shown a very high likelihood that their First Amendment rights of free speech are being

restrained”) (Oder dated October 17, 2008). Moreover, the Arizona Clean Elections Commission told potential candidates not to expect matching funds to be available for the 2010 election cycle. Pl. App. 316 (Affidavit of Margaret Dugan).

- Enjoining matching funds will ensure a robust, healthy political debate by freeing privately financed candidates and independent political groups from the burdens imposed by matching funds.
- Neither candidates nor the public have any fundamental right to publicly financed elections. *See NAACP v. Jones*, 131 F.3d 1317, 1323-24 (9th Cir. 1997) (voters “have no fundamental right to have candidates’ campaigns publicly funded” nor a “right to receive publicly funded campaign speech”). “Neither candidates nor voters have a right to . . . elections that are financially viable for all candidates seeking election.” *Id.* at 1325.
- Independent expenditure groups, self-financing candidates, and privately financed candidates, on the other hand, do have a fundamental right to make expenditures without government restrictions.

It may be that the Defendant Commissioners would prefer to issue matching funds. It may be that they will be uncomfortable or even upset at having to deny matching funds to publicly financed candidates. But as Judge

Bea said in his dissent from the Ninth Circuit's order extending the stay of the District Court's injunction, "where First Amendment free speech interests are involved, the comfort level of those causing the 'chilling effect' on speech is irrelevant." Pl. App. 6 (Bea, J., dissenting from Order extending stay).

The Defendant Commissioners have no interest in the continued operation of matching funds.

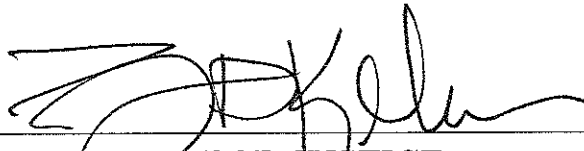
4. Enjoining Matching Funds Will Foster The Greatest Public Good

It is well established that allowing enforcement of unconstitutional laws does not advance the public interest. "Curtailing constitutionally protected speech will not advance the public interest, and neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Reno*, 217 F.3d 162, 180-81 (3rd Cir. 2000) (quotation marks omitted), *vacated on other grounds*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002). This is even more apparent when confronted with a law that chills political speech about the very people the voters of the state of Arizona will elect to govern them.

Conclusion

The Ninth Circuit's decision conflicts with this Court's precedent. Plaintiff-Intervenors respectfully request that the Ninth Circuit's stay of the District Court's injunction should be lifted, and the Ninth Circuit's mandate should be stayed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Supreme Court Rule 29.2, the original and two copies of the foregoing document were dispatched via UPS overnight courier service on May 26, 2010 to:

Clerk of the Court
Supreme Court of the United States
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I further certify that, pursuant to Supreme Court Rule 29.3, counsel for each separately represented party was served with one copy of the foregoing document on May 26, 2010 via UPS overnight courier service:

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Executed this 26th day of May, 2010

A handwritten signature in black ink, appearing to read "TKeller". The signature is written over a horizontal line. The letters "T" and "K" are large and stylized, with the "K" having a prominent vertical stroke. The "e", "l", "l", and "er" are written in a cursive, flowing style.

Timothy D. Keller