No. 09A-1163

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, LORI DANIELS, and LOUIS J. HOFFMAN in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant.

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

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DEFENDANTS' RESPONSE TO JOINT SECOND 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 the Court deny Plaintiffs/Plaintiff-Intervenors' Joint Second Renewed Emergency Application to Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate ("Application"). Plaintiffs and Plaintiff-Intervenors (collectively "Applicants") ask the Court to disrupt the status quo, when lower courts have refused to do so. By seeking to enjoin matching funds after some candidates have already made irrevocable choices to participate in the Clean Elections funding system, Applicants hope to silence their publicly funded opponents by depriving them of up to two-thirds of the funding available to them under current state law. Because Applicants have failed to show that such extraordinary relief is necessary for the Court to maintain jurisdiction, and because the balance of harms weighs strongly in favor of maintaining the status quo in this case, the Court should deny the Application to enjoin the Ninth Circuit from issuing its mandate and to vacate the Ninth Circuit's extension of the district court's stay.

ARGUMENT

I. The Court Should Not Enjoin the Ninth Circuit from Issuing Its Mandate.

Applicants ask the Court to enjoin enforcement of a twelve-year-old campaign finance law that a majority of Arizona voters enacted by initiative and

that the Ninth Circuit unanimously upheld. They ask the Court to take this dramatic action in the middle of an election cycle after thirty-two candidates have received part of their public funding and thus can no longer choose to raise contributions or self-fund their campaigns. Lang Decl. ¶¶ 14, 16 (Def./Def.-Intervenor's Joint Appendix ("Joint App.") 73-74). The Court should grant such extraordinary relief—whether enjoining the issuance of a lower court's mandate, *Ohio Citizens for Responsible Energy v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers), or preemptively enjoining enforcement of a statute held constitutional by a lower court, *Wisc. Right to Life v. FEC*, 542 U.S. 1305 (2004) (Rehnquist, C.J., in chambers)—only if it is "necessary or appropriate in aid of [the Court's] jurisdiction," 28 U.S.C. § 1651(a), and only if the asserted constitutional right is "indisputably clear," *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers). Applicants cannot show either. In none of Applicants' filings have they explained how the Court will lose jurisdiction over the case if the Ninth Circuit issues its mandate. Although it is true that issuance of the mandate will moot the application to vacate the temporary stay order, enjoining the Ninth Circuit from issuing its mandate after its merits decision just to keep alive a challenge to a temporary stay of the district court's order is letting the tail wag the dog. Also, as explained more fully in Defendants' response to Applicants' first renewed application, incorporated by reference here (Joint App. 19-22, 51-64), Applicants'

right to prevent publicly funded candidates from receiving matching funds is anything but "indisputably clear." Thus, independent of whether the Court vacates the district court's stay, it should not enjoin the Ninth Circuit from issuing its mandate.

II. The Court Should Not Vacate the Stay Issued by the District Court and Extended by the Court of Appeals.

As for vacating the district court's stay of its order, Applicants cannot show that the stay was issued through a "demonstrably wrong [] application of accepted standards in deciding to issue the stay," nor can they show that they "may be seriously and irreparably injured by the stay." *W. Airlines, Inc.*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). None of the cases that Applicants contend established an accepted standard for deciding whether to issue the stay here dealt with matching funds or even publicly funded elections. And none of Applicants' cases asked the Court to restrain the speech of publicly funded candidates because their speech allegedly hampered the speech of privately funded candidates. Also, Applicants did not succeed on the merits in the Court of Appeals; thus, the motion panel's basis for extending the district court's stay was vindicated. Finally, it is Arizona's voters and its elections system that would be harmed by having its carefully crafted campaign finance structure changed after many candidates have chosen to participate in the system.

A. Applicants have not and will not be harmed by leaving the district court's stay in place.

In his concurrence, Judge Kleinfeld wrote, "The fact that matters is that the Arizona public financing scheme imposes no limitations whatsoever on a candidate's speech." (Pl./Pl.-Intervenors' Joint Appendix ("App.") 416.) Aside from showing no direct limits, and therefore no direct burden, on their speech, Applicants cannot support their claim that their speech was chilled and thus indirectly burdened. Two candidates alleging indirect burden admitted during depositions that their speech was not chilled; they accepted contributions and made expenditures despite triggering matching funds. (App. 409-10.) Another confessed to not being able to recall whether his spending triggered matching funds. (App. 410.) The treasurer of one political action committee plaintiff acknowledged never avoiding making any expenditure for fear of matching funds being paid to any candidate. (*Id.*) Only one political action committee claimed that matching funds kept it from spending money during the 2006 election, but that claim "seems disingenuous in light of the fact that it only had $52.72 on hand." (*Id.*) After reviewing the extensive record and the parties' briefs, and after hearing oral argument, the Ninth Circuit wrote, "We agree with the district court's observation that 'Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.'" (App. 399.)

Another example of how matching funds create no chill is the situation facing Amicus Buz Mills. Mr. Mills has already spent enough money exercising his free speech rights that his publicly funded opponents in the Republican gubernatorial primary are entitled to the full grant of campaign funding—one-third as an initial grant and two-thirds as matching funds. Lang Decl. ¶ 18 (Joint App. 74). That Mr. Mills has already triggered the maximum match available under Arizona law belies any credible claim that matching funds had somehow chilled his political speech. Because Mr. Mills' opponents will receive full funding on the first day Arizona law permits issuing matching funds, Mr. Mills can spend as much more money as he likes, now or later, without a single extra dollar of matching funds going to his opponents. Thus, the only "harm" that Mr. Mills will suffer if the Court denies this application is that his opponents will be able to exercise their free speech too, using money allotted to them by an Arizona law that has been in place since 1998. A politician's desire to silence his opponents, or to have a better chance to win an election, are not harms cognizable under the First Amendment.

With factual findings, affirmed on appeal, that Applicants have suffered no real burden, even indirectly, this is not a case justifying review by the Court, much less a case justifying emergency and extraordinary relief.

B. Vacating the stay would harm Arizona's voters and publicly funded candidates.

To understand the full impact of the relief that Applicants seek, it is necessary to review briefly how Arizona distributes funds to publicly funded candidates. To run publicly funded campaigns in Arizona, candidates must agree, among other things, to accept and use private funds for "seed money" only during the qualifying period, which ends this year on August 19, 2010. Lang Decl. ¶ 15 (Joint App. 73). Publicly funded candidates may accept contributions only from individuals, only up to $140 per person, and only up to a strict aggregate limit. A.R.S. § 16-959. Each publicly funded candidate may contribute no more than $1280 of personal money to the campaign. *Id.* By contrast, privately funded candidates are free to raise money not only from individuals but also from political action committees and political parties. Privately funded candidates may accept private contributions up to $410 per person for local and legislative races and up to $840 per person for statewide races, with no aggregate cap. Finally, privately funded candidates may spend on their campaigns as much of their personal wealth as they see fit. A.R.S. §§ 16-905, -959.

In exchange for agreeing to these restrictions, Clean Elections candidates have access to public funds to run their campaigns. The funding level is set to allow candidates to run a competitive race, which encourages participation in the publicly funded system. (*See* App. 413.) For example, a candidate who is

unopposed in both the primary election and the general election will receive only "an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission." A.R.S. § 16-951(A)(3). If a publicly funded candidate has an opponent for a primary or general race, the state will issue an initial grant equal to one-third of the total funds available for that race. A.R.S. § 16-951(A)(1). As money spent in opposition to the participating candidate or in support of the candidate's opponent(s) exceeds the initial grant, the participating candidate receives matching funds, until the candidate has received the full allotment available. A.R.S. § 16-952. Publicly funded candidates who have received their initial grants would be harmed by enjoining matching funds because such candidates are no longer able to run privately funded campaigns, but they have so far received only one-third of the funding allocation available under Arizona law. Lang Decl. ¶ 16 (Joint App. 74).

Several candidates from both major parties have supplied declarations stating that they will be unable to disseminate their messages if the Court grants the Application. As this Court held in *Buckley v. Valeo*, a publicly funded campaign system "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. 1, 93-94 (1976). 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)). By enjoining matching funds at this point in the campaign cycle, Arizona voters will be largely deprived of the message from these diverse and antagonistic sources.

Tim Sultan explains in his declaration that "[t]he availability of matching funds was a key factor in [his] decision to opt into the public funding program; without matching funds, [he] would have been seriously concerned that [he] would not have had sufficient funds to run a competitive campaign." Sultan Decl. ¶ 4 (Joint App. 104). Sultan will face a crowded primary field that includes one privately funded, incumbent opponent who began fundraising before Sultan entered the race. *Id.* ¶ 5 (Joint App. 104-05). If Sultan wins one of two nominations for his party, he will likely be running against two privately funded candidates, one Democrat and one Republican. To restrict Sultan and other publicly funded candidates to only one-third of the available public funds would make it difficult for their messages to reach the voters and could sway the outcomes of the election. *Id.* ¶ 8 (Joint App. 106); *see also* Sidhwa Decl. (Joint App. 81-83); Gray Decl. (Joint App. 84-86); Dolphin Decl. (Joint App. 93-95); Gilby Decl. (Joint App. 96-98); Conway Decl. (Joint App. 99-101).

Andrew Thomas was elected County Attorney in Arizona's largest county in 2004 and 2008. Thomas Decl. ¶ 2 (Joint App. 90). Both times he privately funded

his campaigns. This year, Thomas has chosen to run for state Attorney General with public funds. He states that by doing so there will be no suspicion of quid pro quo corruption. *Id.* ¶ 8 (Joint App. 91). He notes, however, that he can only run a competitive race with public funds if matching funds are available. Thomas Decl. ¶¶ 5-7 (Joint App. 91). Not only does Thomas face a privately funded opponent who is currently holding statewide office, he believes that he is likely to draw independent expenditures in his primary race and, if successful in the primary, in his general-election bid. *Id.* ¶¶ 9-10 (Joint App. 91-92). With only one-third of the total available public funds, Thomas believes that he will not be able to respond to opposing expenditures; thus, the outcome of the election could be changed. *Id.* ¶¶ 10-11 (Joint App. 92).

The practical harm to be suffered by Arizona's voters and by candidates who have made irrevocable choices to run with public funds at times when the courts had refused to enjoin matching funds, stands in stark contrast to the unsupported, "vague," "scattered," and frankly hypothetical harms alleged by Applicants. Throughout this litigation, the courts have consistently recognized the real harm to the public and participating candidates and refused to enjoin Arizona's matching funds provision. In August of 2008, the district court denied Applicants' motion for a temporary restraining order (App. 61); in October of 2008, the district court denied their motion for a preliminary injunction (App. 51); and in January 2010,

the district court granted their motion for summary judgment but stayed the effect of its order pending review by the Ninth Circuit motions panel (App. 2 (citing the district court's stay of its opinion issued on January 20, 2010)). All three times, even after it had ruled matching funds unconstitutional, the district court determined that the balance of harms tilted in favor of maintaining the status quo pending trial and appeal. Likewise, the Ninth Circuit motions panel extended the district court's stay of its own order pending further action on appeal (App. 2), and the Court refused to vacate that stay (App. 426). Finally, the Court rejected Applicants' first renewed application for preliminary injunction on June 1, 2010. (App. 427.) Thus, Applicants have asked six times to enjoin enforcement of Arizona's statute while a decision was pending. On all six occasions, the courts have denied Applicants' request.

Arizona's matching funds 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). Candidates should be able to rely on current law, absent a court order to the contrary, particularly given that courts in this litigation have universally rejected Applicants' requests to enjoin matching funds.

C. An injunction now will harm confidence in Arizona's election system.

Since *Buckley v. Valeo*, this Court has recognized that the state has an interest in encouraging candidates to run in publicly funded campaign systems to

prevent quid pro quo political corruption or the appearance of it. 424 U.S. 1, 26-28. Candidates are less likely to choose to participate in campaign finance systems that seem unstable or that provide insufficient funds. Candidate's faith in Arizona's publicly funded campaign finance system will be damaged if the Court issues an injunction preventing the Clean Elections Commission from meeting its legal obligations to issue matching funds just weeks before the funds are to be issued. Lost confidence in turn will damage the state's ability to encourage candidates to participate in the Clean Elections system and thus, to fight quid pro quo corruption. See *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.")

As the Court noted in *Lemon v. Kurtzman*, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." 411 U.S. at 200. Courts have protected the continuity of Arizona's campaign finance system throughout this litigation; it would be unnecessary, unfair, and unworkable to destroy that continuity, after the state has prevailed before the court of appeals.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Defendants' and Defendant-Intervenors' responses to Applicants' first renewed Application incorporated herein by reference, the Court should maintain the status quo and deny Applicants' request to enjoin the court of appeals from issuing the mandate of its merits decision and should deny Applicants' request to vacate the district court's stay extended by the court of appeals motions panel.

Respectfully submitted this 7th day of June, 2010.

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[1] 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 Defendants' Response To Joint Second Renewed Emergency Application To Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate Before The Hon. Justice Anthony M. Kennedy was sent via e-mail and via prepaid FedEx Overnight courier service on June 7, 2010 to:

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I further certify that one copy the Defendants' Response To Joint Second Renewed Emergency Application To Vacate Erroneous Appellate Stay and Ancillary Application to Stay Mandate Before The Hon. Justice Anthony M. Kennedy was sent via e-mail, prepaid FedEx Overnight courier service, and via hand-delivery as indicated on June 7, 2010:

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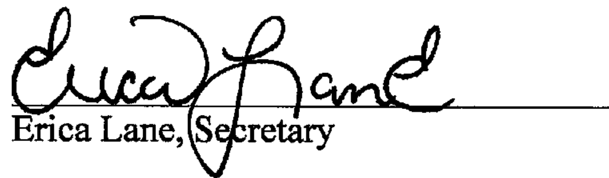
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