No. 09A1163

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, et al,

Plaintiffs-Appellees,

v.

KEN BENNETT, et al,

Defendants-Appellants,

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

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PLAINTIFFS/PLAINTIFF-INTERVENORS' REPLY IN SUPPORT OF 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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I. There is no cognizable interest in the issuance of matching funds that Equity could or should protect.

Defendants/Defendant-Intervenor (hereinafter "Defendants") have asserted that the public interest would not be served by vacating the erroneous appellate stay entered in a bare decision on February 1, 2010. They claim that the irreparable harm to the First Amendment rights of Movants, as well as other traditional candidates and their supporters, could be outweighed by the loss of a portion of the government subsidies upon which participating candidates purportedly relied. But Circuit Judge Carlos Bea said it best when Defendants last made the same argument before the Ninth Circuit:

> That the Defendants, as "participating" (state-subsidized) candidates would have to change their fund-raising strategies—perhaps actually to do some fund-raising—does state some direct effect on them. But the "harm" claimed by fund-raising is simply the loss of state subsidies they would otherwise have if they did not raise these funds.
>
> That "harm" is the mirror effect of the harm caused to the Plaintiffs by staying the district court's order. That is, once the stay is in effect, the Plaintiffs cannot expend money for campaign speech from now until the determination of the appeal—perhaps through the primary campaign—without causing money from the State of Arizona to flow to their opponents' coffers in equal measure to the Plaintiffs' expenditures.
>
> In accounting terms, Plaintiffs' present expenditure of money on free speech in the campaign creates an immediate and equal account receivable for their opponents, due from the State of Arizona under the Matching Funds program, and to be paid by Arizona for use by the opponents against the Plaintiffs. Between

> having to hustle for campaign contributions (Defendant-Appellants' harm) and not being able to spend campaign money without helping one's opponents (Plaintiff-Appellees' harm), the balance of harm caused seems greater to Plaintiffs-Appellees.
>
> . . . [C]hange is always uncomfortable for the vested interests—here, that of "participating" candidates who look forward to state subsidies for their campaigns. But where First Amendment free speech interests are involved, the comfort level of those causing the "chilling effect" on speech is irrelevant.

(Joint Second Renewed Application, Attached Orders, App. 5-6.)

Judge Bea was merely restating in concrete terms how this Court's precedents have applied equitable principles for decades. As a matter of law, "no one acquires a vested or protected right in the violation of the Constitution by long use." *Walz v. Tax Comm.*, 397 U.S. 664, 678 (1970). Moreover, participating candidates have no constitutionally-protected right to public funds. *Maher v. Roe*, 432 U.S. 464 (1977).

Neither Defendants nor any participating candidate can claim to have reasonably relied upon the availability of the matching funds' supplemental subsidies because they have been on notice for over 19 months that those subsidies were unconstitutional. (09A1133 Appendix, Vol. I, App. 11-61.) This was well before any candidate could even begin to attempt to qualify for any public funds. (Def. App. 71 (Lang Decl. ¶ 5, noting that statewide candidates could not start to attempt to qualify for public funding until August 1, 2009, and legislative candidates not until January 1, 2010).) The

Clean Elections Commission itself told participating candidates not to rely on matching funds. (09A1133 Appendix, Vol. II, App. 316.)

Further, by refusing to deny with prejudice Plaintiffs' earlier applications to vacate the Ninth Circuit's bare appellate stay, this Court gave notice that the stay could be overturned at any time. Consequently, no one has any cognizable interest in matching funds that Equity could protect, especially not as compared to the interest of Movants and others in seeing their First Amendment freedom vindicated under the Fourteenth Amendment and 42 U.S.C. § 1983.

Lastly, Plaintiffs' observe that their long-disclosed expert, Dr. Marcus Osborn, has refuted Defendants' newfound "expert" claims that enjoining matching funds would disrupt the 2010 election. (Reply Appendix, App. 4-6 (Osborn Rebuttal Decl.); *see also* 09A1133 Appendix, Vol. II, App. 341-44 (Osborn Dec.).) According to Dr. Osborn, the bottom line is that "reasonable participating candidates and their consultants should have and most likely have anticipated and planned for the possibility of an election without matching funds." (Reply Appendix, App. 8 (Osborn Rebuttal Decl. ¶ 8).)

The balance of equities and the public interest thus favor the vacation of the appellate stay entered on February 1, 2010 because Equity must not concoct legally protected interests where none exist. *Smith v. Sprague*, 143 F.2d 647, 650 (8th Cir. 1944) (observing "[e]ven a court of equity may not

create rights having no existence at law and then take jurisdiction to pass upon and enforce them because the law affords no remedy"). Moreover, as discussed below, the amount of hostile speech financed by matching funds would be far more than an even "match"—it would be an outright windfall.

II. The funding disparities created by Arizona's matching funds trigger would allow the government to finance overwhelming amounts of hostile speech against traditional candidates and their supporters merely because they exercised their First Amendment rights.

Where traditional candidates face multiple competing participating candidates or where a participating candidate competes against multiple traditional candidates, the dissemination of hostile speech triggered by Arizona's matching funds provisions can easily swamp the campaign speech of traditional candidates and their supporters. (Reply Appendix, App. 8-21 (Osborn Rebuttal Decl. ¶9, Exhibits 1-5).) Legislative candidate Eric Ulis, for example, describes the threat he faces in the 2010 primary election cycle as follows:

> [B]ecause I face three participating candidates, I am faced with the threat that for every dollar I spend above the spending limit, self-financed or not, nearly three dollars will be paid to my opposing participating candidates in matching funds to spend against me. Moreover, because there are two other traditional candidates running, who are likely to spend above the spending limit, I also face the threat that my three opposing participating candidates will receive nearly another three dollars for every dollar each of my opposing traditional candidates spend. As a result, if my traditional opponents spend as much as I intend to spend, namely at least $10,000 above the spending limit for a

> total of at least $30,000 as a class, it appears likely that each participating opponent of mine will receive at least nearly $30,000 in matching funds and that my participating opponents as a class will receive $90,000 in matching funds. The speech financed by matching funds threatens to swamp the privately-financed speech of all traditional candidates.

(Reply Appendix, App. 12-13 (Osborn Rebuttal Decl., Exhibit 2 (Ulis Decl., ¶5)).) Candidate Ulis' testimony is echoed by candidates Michael Blaire and Dusti Morris, who face the same or similar dynamics in their districts. (Reply Appendix, App. 16, 20 (Osborn Rebuttal Decl., Exhibits 3, 4 (Blaire and Morris Decl., ¶5)).) Additionally, Plaintiff Nancy McLain faces a similar dynamic because she is competing against two participating candidates in her district. (09A1133 Appendix, Vol. IV, App. 712-15.) And when the primary election cycle begins on June 22, 2010, gubernatorial candidate Buz Mills will be severely punished for exercising his First Amendment rights because his self-financed campaign expenditures will trigger well over one million dollars of matching funds for each of his participating opponents. (09A1133 Appendix, Vol. IV, App. 708-11.)

In short, for traditional candidates and their supporters, the threat of matching funds is actually a threat by the government to finance overwhelming amounts of hostile speech against them merely because they exercised their First Amendment rights. Not surprisingly, numerous traditional candidates and their supporters, including Movants, have

testified that the threat of the matching funds trigger causes them to hesitate or refrain from raising or spending campaign money for fear of financing the hostile speech of their political opponents. (09A1133 Appendix, Vol. II, App. 317-40, Vol. IV, App. 706-15.) Others, like former gubernatorial candidate John Munger, have simply been forced out of the political arena and silenced by the threat of matching funds. (Reply Appendix, App. 9-10 (Osborn Rebuttal Decl., Exhibit 1 (Munger Decl.)).) Moreover, Dr. Osborn's expert testimony confirms that the chilling effect of matching funds is universally felt by traditional candidates and their supporters. (Reply Appendix, App. 6-7, 28-49 (Osborn Rebuttal Decl., ¶9, Exhibit 5 (Osborn Decl.).) Vacating the bare appellate stay decision entered by the Ninth Circuit is, therefore, essential to protecting innumerable citizens' ability to vindicate their constitutional rights.

III. The All Writs Act is an appropriate procedural vehicle for the requested relief.

Despite Defendants' arguments to the contrary, the All Writs Act is a perfectly appropriate procedural vehicle to correct a "demonstrably wrong" appellate decision that threatens to exacerbate circuit splits on a First Amendment issue of nationwide importance.[1] Vindicating First Amendment

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[1] So long as the Ninth Circuit's mandate has not issued, it is a red herring for Defendants to divert the Court's attention from vacating the Ninth Circuit's bare appellate stay to Movants' requested ancillary relief, which seeks a stay

freedoms on the eve of an election cycle is at least as important as protecting a corporate merger. *Compare W. Airlines, Inc. v. Int'l Brotherhood of Teamsters,* 480 U.S. 1301, 1305 (1987) (staying order that had effect of enjoining corporate merger) *with CBS, Inc. v. Davis,* 510 U.S. 1315, 1318 (1994) (staying injunction that could have abridged First Amendment freedoms).

CONCLUSION

Contrary to Defendants' arguments, Arizona's election season is not a "Constitution-free zone." If anything, the impending election makes the relief requested by Plaintiffs and Plaintiff-Intervenors all the more necessary. Although Defendants suggest that the state's interest in burdening and "leveling" speech increases the closer Arizona comes to an election, in fact, the opposite is true. The closer Arizona comes to election day, the more essential it becomes to protect the fundamental First Amendment freedoms of Plaintiffs and Plaintiff-Intervenors. For this reason, Plaintiffs and Plaintiff-Intervenors respectfully request this Court to lift the stay of the

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on the issuance of the mandate to preserve the Court's jurisdiction over their principal request to vacate the appellate stay. Simply put, the merits of Movants' principal request to vacate the appellate stay should be decided independently of any requested ancillary remedy needed to effectuate that decision. If the Court chooses not reach Movants' requested ancillary relief, or to deny it at this time, Movants still have time and are poised (as the email exchange referenced by Defendants evidences) to seek a stay of the mandate from the Ninth Circuit Court of Appeals pending the timely filing of their petition for writ of certiorari.

district court's injunction and stay the issuance of the Ninth Circuit's mandate during the pendency of each of their timely filed petitions for writ of certiorari to this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The ORIGINAL and TWO COPIES of Plaintiffs/Plaintiff-Intervenors' Reply in Support of Joint Second Renewed Application, together with One Volume of an Appendix in Support of Reply, were dispatched via prepaid FedEx Express Overnight courier service on June 7, 2010 and electronic mail to:

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I hereby certify that, pursuant to Supreme Court Rule 29.2, each separately represented party was served with ONE COPY of the above documents on June 7, 2010 via prepaid FedEx Express Overnight courier service and electronic mail:

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I, Nicholas C. Dranias, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 7th day of June, 2010.