No. _____

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' 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. THE COURT HAS JURISDICTION TO ENTERTAIN THIS RENEWED APPLICATION.

By filing this renewed application, Plaintiffs and Plaintiff-Intervenors[1] ("Movants") are acting along the very procedural route contemplated by the Court's previous orders. This Court has twice invited Plaintiffs to renew their emergency applications to vacate the Ninth Circuit's February 1, 2010 appellate stay. (*Compare* February 16, 2010 and June 1, 2010 orders (attached hereto).) The Court's June 1, 2010 order states that Plaintiffs' application to vacate is "denied without prejudice to a renewed application if the parties represent that they intend to file a timely petition for a writ of certiorari before this Court." In reply, Movants will each file timely petitions for certiorari before the Supreme Court. Because time is of the essence, and this application renews previous requests for relief, Movants incorporate by reference their previous filings and appendices in 09A1133 where indicated.

This renewed emergency application presents a live controversy. The mandate has not issued from the Ninth Circuit's May 21, 2010 merits decision. If the February 1, 2010 appellate stay is vacated before the mandate issues, the district court's injunction will have immediate effect,

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[1] In their Response in Support of Plaintiff-Appellees' Renewed Emergency Application in case number 09A1133, Plaintiff-Intervenors-Appellees requested that this Court treat such Response as a motion for a stay of the Ninth Circuit's Mandate or as a motion for a preliminary injunction. (*See* Pl.-Intervenors-Appellees' Resp. at 1 n.1.)

protecting Movants' constitutional rights. *See, e.g., California v. American Stores Co.*, 492 U.S. 1301, 1304-05 (1989); *see generally Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (stating "an appellate court's decision is not final until its mandate issues") (quoting *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3rd Cir. 1988)). Correspondingly, the requested stay on the issuance of the Ninth Circuit's mandate is necessary ancillary relief to preserve the Court's jurisdiction over this renewed application. 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), available at http://books.google.com. Accordingly, the Court has jurisdiction to decide this application under the All Writs Act, 28 U.S.C. §§ 1651 and 2106, as well as S. Ct. R. 23.3. *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

II. THE MAY 21, 2010 MERITS DECISION MAKES THE RENEWED APPLICATION UNDER THE ALL WRITS ACT EVEN MORE APPROPRIATE.

Under the All Writs Act, an appellate stay should be vacated "where it appears that the rights of the parties to a case pending in the court of appeals . . . may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc.*, 480 U.S. at 1305 (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304

(1976) (Rehnquist, J., in chambers)). As underscored by Circuit Judge Bea's dissent, and as abundantly demonstrated by the previously filed briefs, the bare February 1, 2010 appellate stay is "demonstrably wrong in its application of accepted standards" because it defies *Citizens United v. Federal Election Comm'n,* 130 S. Ct. 876 (2010), *and Davis v. Federal Election Comm'n,* 128 S. Ct. 2759 (2008). (*See* 09A1133 Appendix, Vol. I, App. 2-7; 09A1133 Plaintiffs' Renewed Application, *inter alia,* Plaintiff-Intervenor's Response in Support of Renewed Application, *inter alia,* and Amicus Curiae Brief in Support of Renewed Application, *inter alia.*)

The May 21, 2010 merits decision did not cure the manifest error of the Ninth Circuit's bare stay order. It compounded such error by rejecting this Court's conclusion in *Davis* that laws that disincentive speech are subject to strict scrutiny and disregarding this Court's conclusion in *Citizens United* that the speech of independent expenditure groups and self-financed candidates cannot be burdened under an anti-corruption rationale. (*See* 09A1133 Pl.-Intervenors' Resp., pp. 13-14.) Additionally, the merits decision abandoned the previously well-established rule that the burden on free speech imposed by contribution limit triggers and matching funds triggers is analogous for purposes of First Amendment scrutiny. (*See* 09A1133 Plaintiffs' Renewed Application, pp. 13-17.) The merits decision thus not only exacerbated an old split between the circuits on the constitutionality of

matching funds trigger provisions, upending *Davis*' reliance upon *Day v. Halloran*, 34 F.3d 1356 (8th Cir. 1994), it also created a new split between the circuits. (*Id.*) This leaves the state of the law regarding indirect burdens on campaign speech hopelessly confused. (*See* 09A1133 Appendix, Vol. IV, App. 417 (Kleinfeld, J., concurring) ("Other circuits have divided on whether schemes like Arizona's violate the First Amendment. The Supreme Court cited with apparent approval the Eighth Circuit decision [in *Day*] which may be contrary to the view we take today."). The May 21, 2010 merits decision thereby increased the likelihood of the underlying case being reviewed in the Supreme Court "upon final disposition in the court of appeals;" and this increased likelihood weighs in favor of granting the requested emergency relief under *W. Airlines, Inc.*, 480 U.S. at 1305.

Additionally, by rendering findings without foundation in the record and disregarding most of the facts and argument advanced by Movants in their briefs, the May 21, 2010 merits decision replicates the untenable substance of the bare stay order. (*Compare* May 21, 2010 Merits Decision, *inter alia* (attached hereto), *with* 09A1133 Appendix, Vol. IV, App. 510-28, 534-50, 553-63, and Plaintiff's Reply in Support of Renewed Application (May 26, 2010 letter from Akin Gump to Ninth Circuit).) Most significantly, in declaring *Davis* inapposite, the Ninth Circuit's merits decision completely ignores the Court's reliance upon *Pacific Gas & Elec. Co. v. Public Util.*

Comm'n of Cal., 475 U.S. 1, 14 (1986) (plurality opinion), which held that the First Amendment is violated by laws that force citizens "to help disseminate hostile views" when they speak.

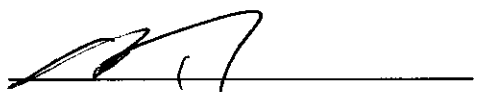
Arizona's matching funds trigger obviously causes the exercise of First Amendment rights to disseminate hostile viewpoints far more directly and effectively than does the mere possibility of enhanced fundraising through elevated contribution limits. To the very extent that the principles enforced in *Pacific Gas* require striking down contribution limit triggers, as held in *Davis*, they also require striking down Arizona's matching funds trigger. The Ninth Circuit's failure to even attempt to harmonize its decision with this Court's decision in *Pacific Gas* and other cases necessitates review and reversal by this Court.

Finally, immediate relief is ripe under the All Writs Act because: 1) Movants and others are presently suffering ongoing irreparable constitutional harm from the threat of matching funds; and 2) if the Court does nothing, Movants and others will certainly be punished for exercising their First Amendment freedoms when matching funds are issued on or after June 22, 2010. (09A1133 Appendix, Vol. IV, App. 705-14.) If this renewed application were not granted upon filing or otherwise as soon as possible, Movants and others will continue to suffer irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding "[t]he loss of First Amendment freedoms,

for even minimal periods of time, unquestionably constitutes irreparable injury"). Indeed, such irreparable harm to constitutionally protected freedoms is far more irremediable than the kind of harm that would result from preventing or undoing corporate mergers, which were found to warrant similar emergency relief in *W. Airlines, Inc.*, 480 U.S. at 1305, and *American Stores Co.*, 492 U.S. at 1304-05.

Extraordinary circumstances thus warrant vacating the Ninth Circuit's bare February 1, 2010 stay order; and the Court should grant ancillary relief consisting of a stay on the issuance of the Ninth Circuit's mandate to preserve its jurisdiction over this renewed application.

Respectfully Submitted,



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