

No. _____

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' 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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INTRODUCTORY STATEMENT

The Ninth Circuit Court of Appeals has again refused to recognize that the government may not single out and punish Plaintiffs' exercise of First Amendment rights by causing their campaign expenditures to produce fundraising advantages for their political opponents and to disseminate hostile speech. The Ninth Circuit's May 21, 2010 merits decision, like its February 1, 2010 stay decision, thus disregards the core constitutional principles applied in *Citizens United v. Federal Election Comm'n*, 558 U.S. ____ (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008). This grievous error must be contained on or before May 28, 2010 to prevent irreparable injury to Plaintiff Nancy McLain and numerous other third parties, such as gubernatorial candidate Buz Mills and attorney general candidate Tom Horne. (Vol. IV, App. 704-14.)

If the Ninth Circuit's appellate stay stands and its mandate issues, freedom of speech will be chilled and punished. Plaintiff Nancy McLain will refrain from making campaign expenditures to project her message to the public for fear of triggering matching funds to her opponents in the amount of nearly two dollars for every dollar she would otherwise spend. (Vol. IV, App. 712-14.) Similarly, attorney general candidate Tom Horne has testified:

The renewed threat of matching funds being paid by the government to my opponents because of the Ninth Circuit's recent merits decision is already causing me and my supporters

to become more hesitant to contribute to the campaign and also to hesitate to spend money that has already been contributed to the campaign, and thus is chilling the freedom to communicate our ideas and political message to the public.

(Vol. IV, App. 706.) And gubernatorial candidate Buz Mills will be severely punished for exercising his First Amendment rights because his prior, largely self-financed, campaign expenditures will trigger well over one million dollars of matching funds to his participating opponent, which will undoubtedly be used to disseminate hostile speech against him when the primary election cycle begins on June 22, 2010. (Vol. IV, App. 709-11.)

Therefore, in accordance with this Court's previous invitation (Vol. V, App. 426), Plaintiffs renew their request for immediate emergency relief from the erroneous appellate stay granted by the Ninth Circuit, and seek an ancillary stay on the issuance of the mandate from its merits decision, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). It is respectfully requested that the Court grant this application on or before May 28, 2010, before the mandate can issue.

JURISDICTION AND STANDARD OF REVIEW

Previously, this Court invited Plaintiffs to refile their emergency application to vacate the Ninth Circuit's appellate stay upon the earlier of June 1, 2010 or the issuance of its merits decision. (Vol. IV, App. 426.) The

Ninth Circuit's merits decision was issued on May 21, 2010. (Vol. IV, App. 387.) The Court of Appeals' merits decision is not final because no mandate has issued. The only final judgment of record is the district court's permanent injunction barring enforcement of Arizona's matching funds trigger, which remains erroneously stayed. (Vol. I, App. 11-33.) Therefore, this renewed emergency application is not moot; and to prevent it from becoming moot,¹ Plaintiffs request ancillary relief consisting of an emergency imposition of a stay on the issuance of the mandate on or before May 28, 2010.

As underscored by Judge Bea's dissent from the stay decision, the Ninth Circuit's erroneous appellate stay and merits decision defies *Citizens United* and *Davis*. (Vol. I, App. 4-5.) Accordingly, this Court has jurisdiction to decide this application under the All Writs Act, 28 U.S.C. §§ 1651 and 2106. *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quotation marks omitted) (holding a "Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [in the Supreme Court] upon final disposition in the court of appeals, may be seriously and irreparably injured

¹ The mandate may issue as soon as May 29, 2010 or as late as June 1, 2010, if holidays and weekend days are excluded from date calculation. (Vol. IV, App. 421.)

by the stay, and the Circuit Judge is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay”).

BACKGROUND AND PROCEEDINGS BELOW

At issue in this case are the matching funds trigger provisions, A.R.S. § 16-952 (A)-(C), of the so-called Arizona Citizens Clean Elections Act, A.R.S. § 16-940 *et seq.* These provisions, as the name implies, trigger government money grants that match every dollar of private campaign contributions or expenditures made in support of a “traditional” candidate above a certain threshold, called a “spending limit,” with nearly a dollar of government subsidies to each opposing candidate who is “participating” in Arizona’s government campaign financing system. *See* Ariz. Rev. Stat. § 16-952 (A)-(C).

Plaintiffs John McComish, Nancy McLain and Tony Bouie are traditional candidates for elected office in the State of Arizona who share the recurring experience of being victimized by matching funds’ punitive and chilling effect on their campaign fundraising, campaign expenditures and, hence, core political speech. (Vol. II, App. 259-66 (Plaintiffs’ Separate Statement of Facts in Opposition to Defendants’ Additional Facts (“PSFO”), ¶¶ 18-64); Vol. V, App. 713-14 (McLain Dec.).)

More than nineteen months ago, the United States District Court for the State of Arizona ruled twice that Arizona’s matching funds trigger

provision violates the First Amendment under *Davis*. (Vol. I, App. 59, 61 (ECF Doc. 30 at 7:18-19, 9:6); App. 43, 48 (ECF Doc. 34 at 10:26-27, 15:3).) Although the district court refrained from issuing preliminary injunctive relief due to ongoing elections, the court's rulings were ultimately finalized in the permanent injunction entered by the district court on January 20, 2010, which barred enforcement of Arizona's matching funds trigger. (Vol. I, App. 11 (ECF Doc. 454).) But in a bare decision entered on February 1, 2010, the Ninth Circuit Court of Appeals stayed enforcement of the District Court's permanent injunction pending unspecified action by the merits panel. (Vol. I, App. 1-2.)

Circuit Judge Bea dissented from this erroneous stay decision with a detailed explanation spanning five pages, stating:

Similarly [to *Davis*], here any expenditures by Plaintiffs in the primary are matched by funds from the State of Arizona given to the Plaintiffs' opponents. Plaintiffs know that if they buy a television advertisement, at a bargain rate now for June broadcasting, or hire a consultant who might go to the other side, that expenditure will result in "matching funds" going to the candidates they are trying to beat in the July primaries. Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent.

(Vol. I, App. 4.) Judge Bea further underscored that Arizona's matching funds trigger mechanism discriminates in favor of participating candidates

and against traditional candidates, recounting the words of this Court in *Citizens United*:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.

(Vol. I, App. 6 (quoting *Citizens United*, 588 U.S. at ____ (slip op. at 23).)

Finally, Judge Bea rejected as implausible the notion that Plaintiffs' loss of constitutional freedom was outweighed by the speculative hardship associated with government subsidized candidates possibly having to switch to a traditional campaign. (Vol. I, App. 5.)

Despite the impassioned dissent of Judge Bea, on May 21, 2010, the Ninth Circuit Court of Appeals compounded the error of its bare stay decision by failing to affirm the District Court's permanent injunction. The Ninth Circuit's merits decision is replete with factual and legal errors, which will be addressed in finer detail in future filings. The most grievous error, addressed here, is the Court's failure and continuing refusal to apply the holding of *Davis* and *Citizens United* in a straightforward manner.

ARGUMENT

The First Amendment is “premised on mistrust of governmental power” and that citizens and associations must be free to participate in the “open marketplace of ideas.” *Citizens United*, 558 U.S. ____ (slip op. at 24, 38). If the Ninth Circuit’s grievous errors are not contained, this foundational policy choice will be undone. Whenever millionaire candidates, corporations, unions or ordinary citizens are deemed to have disproportionate influence through their campaign contributions and expenditures, the government will be free to oppose them by lavishing taxpayer dollars on their political opponents, while maintaining low contribution limits and strict disclosure requirements. The government will thereby freely reshape the “open marketplace of ideas” into whatever it desires through a combination of triggered and targeted campaign subsidies, low contribution limits and strict disclosure requirements. Outright censorship will be replaced with high regulatory hurdles and punitive consequences for exercising First Amendment rights. In a few years’ time, the political process will be jerry-rigged into a system that will produce the same curtailment of free speech that would have obtained had *Citizens United* and *Davis* never come down. And while courts will puzzle over the “motives” of particular iterations of such regulatory schemes and statistical expositions on the magnitude of their burdens—no doubt for decades to come—uninhibited political speech will become extinct.

A fork in the road taken by our Republic thus approaches yet again. But this time, thanks to *Citizens United* and *Davis*, the choice to make is clear. Like the contribution limit trigger in *Davis*, the matching funds trigger is obviously designed to cause the exercise of First Amendment rights by traditional candidates and their supporters to enhance fundraising opportunities for opposing participating candidates and to disseminate their hostile speech. And by causing their exercise of First Amendment rights to subsidize their opponents and disseminate hostile speech, the matching funds trigger punishes traditional candidates and their supporters more onerously than the mere threat of asymmetrical fundraising opportunities in *Davis*. Moreover, like the discriminatory campaign finance regulations struck down in *Citizens United*, Arizona's matching funds trigger singles out disfavored speakers—traditional candidates and their supporters—for targeted burdens on their exercise of First Amendment rights.

The Ninth Circuit ignores these core similarities. It thereby continues to defy *Citizens United* and *Davis*. But “[c]ourts, too, are bound by the First Amendment.” *Citizens United*, 558 U.S. ____ (slip op. at 9). The Ninth Circuit's erroneous decisions threaten to cause the same constitutional injury as *Arizona's matching funds trigger itself*. Therefore, based on the elements discussed below, Plaintiffs join their principal request for relief from the

Ninth Circuit's appellate stay with request for an ancillary stay on the issuance of the mandate from its merits decision.

I. This Court Should Stop the Unconstitutional Enforcement of Arizona's Matching Funds Trigger By Vacating the Ninth Circuit's Appellate Stay and Staying the Issuance of the Mandate from the Ninth Circuit's Merits Decision.

The four factors to be considered by a court in issuing a stay pending appeal are: 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 the 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, 1760-61 (2009). These factors are substantially the same as those governing an application for preliminary injunction. *Id.* (citing *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 370 (2008)).

As declared by Circuit Judge Bea in his dissenting opinion, it is implausible and illogical to conclude that any of the legal factors identified in *Nken* could possibly justify punishing and chilling the exercise of First Amendment rights by Plaintiffs and innumerable third parties. (Vol. I, App. 2-7.) The Ninth Circuit's decision to keep the threat of Arizona's matching funds trigger mechanism alive is a clear abuse of discretion that defies *Citizens United* and *Davis*. Correspondingly, a sound exercise of this Court's discretion warrants the issuance of ancillary stay that would bar the issuance

of the mandate from the Ninth Circuit's merits decision to preserve the *status quo*.

A. Plaintiffs have made, and Defendants cannot make, a strong showing of success on the merits under *Citizens United* and *Davis*.

The central issue is whether the matching funds trigger provisions of the Arizona Citizen's Clean Elections Act violate the Fourteenth Amendment's guarantee of First Amendment freedoms. At the outset, it must be emphasized that *Citizens United* forecloses the claim that the matching funds trigger provision is supported by a compelling state interest.

In *Citizens United*, the Court clearly and unequivocally declared that the purpose of diminishing or leveling resources or the disproportionate influence of certain factions is not synonymous with preventing *quid pro quo* anti-corruption:

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. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. Reliance on a generic favoritism or influence

theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.

558 U.S. at ____ (slip op. at 43-44) (emphasis added) (citations and quotation marks omitted).

In direct opposition to *Citizens United*'s holding, the Arizona Citizens Clean Election Act's openly declares that its purpose to "improve the integrity of Arizona state government *by diminishing the influence of special-interest money. . .*" Ariz. Rev. Stat. § 16-940(A) (emphasis added). Moreover, to justify its existence, the Act casts only the following aspersions about private campaign financing:

1. [It a]llows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;
2. [It g]ives incumbents an unhealthy advantage over challengers;
3. [It h]inders communication to voters by many qualified candidates;
4. [It e]ffectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests.
5. [It u]ndermines public confidence in the integrity of public officials;
6. [It c]osts average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors.
7. [It d]rives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and
8. [It r]equires that elected officials spend too much of their time raising funds rather than representing the public.

Ariz. Rev. Stat. § 16-940(B) (emphasis added).

Notably absent from the Act's motivating grievances is any scandal spotlighted in the Ninth Circuit's merits decision. In fact, not only does the Act *not* mention any scandal whatsoever, it does not mention any *quid pro quo* anti-corruption purpose and it does not even list a single *quid pro quo* corruption problem among its express criticisms of private campaign financing.

Only one thing is clear: the Act *expressly* aims to level disproportionate influence and resources. The Act unequivocally aims at "diminishing the influence of special interest money," protecting "the voices and influence of the vast majority of American citizens," encouraging qualified candidates to run for office "who lack personal wealth or access to special-interest funding." Ariz. Rev. Stat. § 16-940. The influence and resource-leveling purpose of the Act is also evidenced by hundreds, if not thousands of pages of official documents and statements. (Vol. IV, App. 509-10, 575, 596-98.) No reasonable person could regard such overwhelming evidence as being outweighed by couple of statements vaguely criticizing corruption in the Act's ballot measure pamphlet, as did the Ninth Circuit. (*Compare id. with* Vol. IV, App. 394.) But the influence and resource-leveling purpose of the Act could not be more conclusively demonstrated than by the fact its matching funds provisions plainly target the campaign expenditures of self-financed candidates, such as gubernatorial candidate Buz Mills, and independent

expenditure committees, which pose no threat of *quid pro quo* corruption under *Citizens United* and *Davis*.

In short, reasonable people must take the Act and its matching funds trigger at face value: it was clearly and unambiguously meant to “level the playing field” by diminishing the influence and resources of disfavored speakers—namely independent expenditure committees and privately-funded candidates, even if they are entirely self-financed. *Citizens United* makes it abundantly clear that this is not a viable or relevant anti-corruption purpose that could sustain matching funds. Thus, under *Citizens United*, Arizona’s matching funds trigger mechanism does not serve the sort of compelling state interest required of campaign finance regulations. Consequently, Arizona’s matching funds trigger mechanism cannot withstand a straightforward application of the rationale and holding of this Court’s decision in *Davis*.

1. *Davis* seals the fate of Arizona’s matching funds trigger.

Davis struck down the “Millionaire’s Amendment”—a federal campaign finance regulation that triggered elevated contribution limits for one candidate when an opposing self-financed candidate contributed or spent his own money above a certain threshold. In so doing, it held unconstitutional campaign finance regulations that cause “the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising

advantages for opponents in the competitive context of electoral politics.” *Id.* at 2772. In reaching this ruling, *Davis* cited to *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.

The direct application of *Davis* to strike down Arizona’s matching funds trigger is inescapable because Arizona’s matching funds trigger indisputably causes “the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics.” *Id.* If anything, the adverse consequences heaped on traditional candidates, such as gubernatorial candidate Buz Mills and Plaintiff McLain, for exercising their First Amendment rights is actually far worse than what the Millionaire’s Amendment threatened against Jack Davis. Arizona’s matching funds trigger, after all, *guarantees* that every dollar of private campaign contributions or expenditures in support of a traditional candidate will be matched by nearly a dollar of government subsidies to each opposing participating candidate. *See* Ariz. Rev. Stat. § 16-952 (A)-(C). Of necessity, not mere possibility, the matching funds trigger produces “fundraising advantages” for political opponents of traditional candidates and their

supporters—advantages that are triggered by and targeted to negate the efficacy of First Amendment rights.

Significantly, in declaring *Davis* inapposite, the Ninth Circuit's merits decision completely ignores *Pacific Gas*. But 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 silence on this point is deafening, and only matched by its refusal to acknowledge the clear implications of *Davis*' reliance upon *Day v. Halloran*, 34 F.3d 1356 (8th Cir. 1994), which struck down Minnesota's matching funds system for independent expenditure committees.

Davis' reliance on *Day* was clearly not, as the Ninth Circuit apparently believes, an inexplicable space-filling citation. *Day* was cited because the Court plainly regarded contribution limit and matching funds triggers as warranting similar analysis and treatment under the First Amendment. 128 S. Ct. at 2771-72. Indeed, when *Davis* came down, this analogy was uncontroversial *even among the circuits that upheld matching funds schemes*. The outcomes reached in *Gable*, *Daggett*, and *Leake* (which relied upon

Daggett), for example, were all premised on extending case law that upheld contribution limit triggers to matching funds triggers. *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 436 (4th Cir. 2008); *Daggett v. Comm’n on Gov’t Ethics*, 205 F.3d 445, 469 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 947 n.7 (6th Cir. 1998). This is evident from the fact that *Daggett* and *Gable* expressly relied upon *Wilkinson v. Jones*, 876 F. Supp. 916, 927-28 (W.D. Ky. 1995)—a case that upheld *contribution limit triggers*—to reach their holdings that matching funds triggers were constitutional. *Daggett*, 205 F.3d at 469; *Gable*, 142 F.3d at 947 n.7.

Despite purporting to adopt the reasoning of *Daggett* and *Leake*, the Ninth Circuit is now the *only* circuit that does not regard contribution limit and matching funds triggers as imposing the same kind of speech burden and warranting the same kind of First Amendment scrutiny. The Ninth Circuit has abandoned the analogy between the two triggers only now that maintaining it would require striking down Arizona’s matching funds trigger provisions under *Davis*.

The Ninth Circuit’s complete evasion of *Pacific Gas* and its effort to marginalize *Davis*’ reliance on *Day* thus has the distinct appearance of outcome-based jurisprudential reasoning. Sadly, its reasoning reflects a pattern among the circuits that have upheld matching funds schemes. For example, while both *Daggett* and *Gable* were happy to latch onto *Wilkinson*’s

decision upholding contribution limit triggers, they conveniently ignored *Wilkinson's* pointed observation that the matching funds scheme struck down in *Day* was actually *more coercive* than contribution limit triggers. Compare *Daggett*, 205 F.3d at 469, and *Gable*, 142 F.3d at 947 n.7, with *Wilkinson*, 876 F. Supp. at 927-28 (observing “[w]hile the trigger provision in *Day* seeks to forcibly equalize the contest by directly subsidizing the opposition, there is no such problem with the Kentucky statute”). Additionally, the Ninth Circuit, along with *Leake* and *Daggett*, continue to advance the myth that *Day's* decision to strike down Minnesota's matching funds trigger was somehow overruled in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). In fact, *Rosenstiel* merely rebuffed the claim that Minnesota's *lump sum* public subsidy system coerced participation. 101 F.3d at 1552-1554.

Such outcome-based jurisprudential reasoning is bad enough on its own, but when it involves punishing the exercise of First Amendment rights and contravening the principles of vertical *stare decisis*, as here, it must not be allowed to stand. *Davis* unambiguously stands for the previously uncontroversial proposition that contribution limit and matching funds triggers impose the same kind of burden on free speech. Therefore, following *Davis*, both contribution limit and matching funds triggers substantially burden free speech. As discussed below, *Davis* thus seals the fate of Arizona's matching funds trigger.

2. The substantial burden placed by the matching funds trigger on the exercise of First Amendment rights is not subject to reasonable dispute.

In declaring that there is no evidence Plaintiffs' campaign expenditures or contributions were punished by Arizona's matching funds trigger, the Ninth Circuit's merits decision disregards the manifest weight of the evidence in the record; including the very testimony cited in its own decision, not to mention unrefuted expert testimony, a peer reviewed academic study, and testimony from numerous non-party witnesses. (*Compare* Vol. IV, App. 410-12 *with* App. 510-17.) But there is still no need to wade through competing and voluminous evidentiary claims to discover the meritless nature of any defense of matching funds under *Citizens United* and *Davis*.

Citizens United is very clear that free speech would be unconstitutionally chilled to the very extent individuals or associations of individuals are forced to hire professional statisticians in order navigate complex, fact-intensive, multifactorial tests before they can speak freely about politics. *See* 558 U.S. at ____ (slip. op. at 7-12). It is totally inconsistent with this principle to hold Plaintiffs' First Amendment rights hostage to an assessment of the severity of a regulation's burden on free speech based on complicated and voluminous evidence or battling expert opinions. *Id.* at ____ (slip op. at 7-12, 16-20). As a matter of law, strict scrutiny is triggered by any

law, such as the matching funds trigger, that threatens adverse consequences from the exercise of First Amendment rights.

Davis, after all, applied strict scrutiny to a campaign finance law that had not actually deterred or punished any campaign speech. The plaintiff in *Davis* continued to contribute and spend his money well past the point of triggering elevated contribution limits for his opponent. *Id.* at 2767-69. And the plaintiff in *Davis* was never actually punished for exercising his First Amendment rights—his opponent never actually raised any additional contributions despite having the benefit of triggered elevated contribution limits. *Id.*

Davis thus clearly establishes that strict scrutiny is warranted for laws that merely threaten adverse consequences for exercising First Amendment rights. Moreover, *Davis* cited *Pacific Gas* because the Court obviously wished to underscore that laws that cause the exercise of First Amendment rights to disseminate hostile speech by way of imposing fundraising advantages are analogous to laws that directly compel the exercise of First Amendment rights to disseminate hostile speech. Consequently, no more than one undisputed fact is needed to establish that matching funds cannot withstand *Davis*.

3. One undisputed fact seals the fate of matching funds under *Davis*.

It is undisputed Plaintiffs' campaign expenditures triggered matching funds to opposing participating candidates during the 2008 election cycle. (*Compare* Vol. I, App. 172-79 (Plaintiffs' Separate Statement of Facts ("PSF")) ¶¶ 36, 44, 45, 49, 64) *with* App. 82-90, 141-45 (Defendants' Joint Response to Plaintiffs' Separate Statement of Facts ("DRSF")), ¶¶ 36, 44, 45, 49, 64, DRSF "Additional Facts," ¶¶ 5, 19, 21, 27, 31.) This undisputed fact proves Arizona's matching funds trigger caused Plaintiffs' exercise of First Amendment rights to produce fundraising advantages for their political opponents, which financed the dissemination of hostile speech. This, in turn, triggers strict scrutiny under *Davis*. Because the matching funds trigger has no real anti-corruption purpose, it must fail strict scrutiny. Therefore, Plaintiffs have made, and Defendants cannot make, a strong showing of success on the merits under *Citizens United* and *Davis*.

B. The Ninth Circuit Stay Irreparably and Substantially Injures Plaintiffs and Other Parties Interested in the Proceeding.

By repeatedly declaring Arizona's matching funds trigger mechanism unconstitutional for the past sixteen months, the district court induced reasonable reliance on matching funds not being available for the 2010 election cycle. Expectations have been so well-settled that even Defendant

Arizona Citizen's Clean Elections Commission advised "participating candidates" at an official training session during the fall of 2009 not to count on matching funds. (Vol. II, App. 316 (Dugan Aff.)) Moreover, Plaintiffs, other traditional candidates, and their supporters, substantially and reasonably relied upon the unavailability of matching funds during the 2010 election cycle. (Vol. II, App. 317-24 (Munger Dec. ¶¶ 4, 5, 6, 13); App. 325-29 (Harper Dec. ¶¶ 4, 5, 6, 12); App. 330-35 (McComish Dec. ¶¶ 4, 5, 6, 13); App. 336-40 (Horne Dec. ¶¶ 3, 5, 13); Vol. IV, App. 709-11 (Mills).) Their reliance consists of contributing, raising and spending money to communicate support for political campaigns in amounts they would not have contributed, raised, or spent had they believed Arizona's matching funds trigger mechanism would likely be allowed to operate during the 2010 election cycle. (Vol. II, App. 317-24 (Munger Dec. ¶¶ 7-12); App. 325-29 (Harper Dec. ¶¶ 7-11, 13); App. 330-35 (McComish Dec. ¶¶ 7-12, 14).) Such reliance is especially substantial for traditional candidates who have already spent so much money in support of their traditional campaigns that they are now legally disqualified from switching to a participating campaign. (*Compare* Vol. II, App. 325-29 (Harper Dec. ¶ 6) and App. 317-24 (Munger Dec. ¶ 6) *with* Ariz. Rev. Stat. § 16-941.)

A stay pending appeal is deterring, chilling and threatening to punish the exercise of First Amendment rights by Plaintiffs, other traditional

candidates and their supporters by diminishing their willingness to freely fund and/or spend money promoting their preferred political campaign. (Vol. II, App. 317-24 (Munger Dec., ¶¶ 3, 7-12, 14); App. 325-29 (Harper Dec. ¶¶ 3, 7-11, 13); App. 330-35 (McComish Dec. ¶¶ 3, 7-12, 14); Vol. IV, App. 712-14 (McLain Dec.), 705-08 (Horne Dec.), 709-11 (Mills Dec.).) Gubernatorial candidate Buz Mills, for example, is only weeks away from watching his prior campaign expenditures produce “fundraising advantages” for his opponents worth millions of dollars, which will punish him severely for robustly exercising his First Amendment rights. (Vol. IV, App. 709-11.) Moreover, the mere threat of matching funds makes supporters of traditional candidates less likely to contribute as much money to their preferred campaign, and it makes traditional candidates themselves more hesitant to spend money in support of their campaign message. (Vol. II, App. 317-24 (Munger Dec., ¶¶ 3, 7-12, 14-17); App. 325-29 (Harper Dec. ¶¶ 3, 7-11, 13); App. 330-35 (McComish Dec. ¶¶ 3, 7-12, 14, 15); App. 336-40 (Horne Dec., ¶¶ 7-12); Vol. IV, App. 713-14 (McLain Dec.), 706 (Horne Dec.), 710-11 (Mills Dec.).) This denial of First Amendment rights causes irreparable harm as a matter of law. *Elrod*, 427 U.S. at 373.

C. No Cognizable Harm Would Result from Vacating the Stay.

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”); *Hall v. Hall*, 506 S.W.2d 42, 45 (Mo. Ct. App. 1974) (observing “[a] court of equity may not act merely upon its own conceptions of what may be right in a particular case, but is bound by established rules and precedents”) (citations omitted). No one has any cognizable interest in matching funds that equity could protect. Participating candidates have no constitutionally-protected right to public funds. *Maher v. Roe*, 432 U.S. 464 (1977).

Participating candidates cannot claim a vested or protected right in the unconstitutional issuance of matching funds. *Walz v. Tax Comm.*, 397 U.S. 664, 678 (1970) (holding “no one acquires a vested or protected right in the violation of the Constitution by long use”). Participating candidates, in fact, knowingly assumed the risk that matching funds would not be available during the 2010 election cycle because they were told by the Clean Elections Commission not to count on matching funds. (Vol. II, App. 316 (Dugan Aff.))

Taken together, equity cannot recognize any interest in issuing matching funds that could be harmed by lifting the appellate stay.

D. The Public Interest Is Not Served by the Stay.

The public interest ordinarily favors preliminarily enjoining the enforcement of a law that violates the First Amendment. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (collecting cases). The State's interest in seeing its laws enforced is not the kind of public interest that could warrant delay in the vindication of the First Amendment. *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009); *see also ACLU v. Reno*, 217 F.3d 162, 181 (3rd Cir. 2000) (internal quotations omitted). In order to justify delay or restraint in enforcing First Amendment rights, there must be countervailing public interests of equivalent importance at stake, such as the fundamental need to maintain an orderly election or to protect the right the vote. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (challenge to apportionment); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (challenge to voting mechanism brought two months before election); *Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176 (9th Cir. 1988) (challenge to legality of initiative brought after voter approval). Such interests are not implicated by a decision that would merely prevent government subsidized candidates from receiving more subsidies. No case has ever held that the public interest requires courts to refrain from vindicating the First Amendment in order to

ensure government campaign subsidies are distributed to participating candidates.

As Judge Bea emphasized in his dissent from the Ninth Circuit's bare stay decision, it borders on the absurd to suggest that the equities or the public interest favor the stay issued by the Court of Appeals. (Vol. I, App. 4-7.) The stay pending appeal has created a public interest tragedy of vast proportions. Hundreds, if not tens of thousands, of people are being forced to watch their already spent contributions push their preferred candidates closer to triggering matching funds for competing participating candidates, transforming their expression of political association and support for specific political messages into a resource for disseminating hostile ideas.

Gubernatorial candidate Buz Mills, for example, faces the imminent threat of punishment for having exercised his First Amendment rights if millions of dollars in matching funds are issued to his opponents on June 22, 2010. (Vol. IV, App. 710-11.)

There is simply no way that the constitutional freedom of Plaintiffs and innumerable third parties can be outweighed by the mere inconvenience experienced by participating candidates who fear they might have to abandon a portion of their generous government subsidies. (Vol. I, App. 5.) As held in *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970), "no one acquires a vested or protected right in the violation of the Constitution by long use." Accordingly,

this Court should vacate the appellate stay because Ninth Circuit would have abused its discretion in finding that the public interest favors a stay; and it should stay the issuance of the mandate from the Ninth Circuit's merits decision.

II. Alternative Request for Supersedeas Bond.

It was and would be manifestly inequitable to impose a stay pending appeal without making any provision to compensate for injuries that may be suffered by interested parties if the stay were later determined to be erroneous. *Merch. Shipping Ass'n v. Cackette*, 2007 U.S. Dist. LEXIS 76933, *9 (E.D. Cal. 2007). Accordingly, if the Court is inclined to allow the Ninth Circuit's stay to stand, the stay should be made contingent on Defendants posting a substantial supersedeas bond. Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a)(2)(E).²

Plaintiffs request that the Court use the aggregate amount of matching funds issued during the 2006 election cycle (the last gubernatorial election cycle), adjusted for inflation, to estimate the monetary value of private campaign fundraising and expenditures negated by the issuance of matching funds during the 2010 election cycle. That amount is \$2,171,542.31. (Vol. II,

² A bond should not be required to stay the mandate because the Court should exercise its discretion and waive bond for plaintiffs in cases involving constitutional rights. *See, e.g., Olshock v. Village of Skokie*, 401 F. Supp. 1219 (N.D. Ill. 1975).

App. 345-47 (Hartrick Dec.) ¶ 6.) Allowing for the customary 150% multiplier, Defendants should be required to post a supersedeas bond in the amount of \$3,257,313.47 for the benefit of Plaintiffs, other traditional candidates and independent expenditure committees. The bond should be made payable in proportion to, but not in excess of, the total amount of matching funds each secured party respectively triggers through campaign fundraising and expenditures during the 2010 election cycle.

CONCLUSION

For all of the reasons expressed by Circuit Judge Bea in his dissent, the Ninth Circuit “is demonstrably wrong” for enabling the State of Arizona to punish Plaintiffs’ exercise of First Amendment rights, causing serious and irreparable injury every day the stay remains in place. *W. Airlines, Inc.*, 480 U.S. at 1305. If the stay on the district court’s permanent injunction were to stand, and the mandate allowed to issue, the Ninth Circuit will be complicit in Arizona’s violation of the Fourteenth Amendment’s guarantee of Plaintiffs’ First Amendment freedoms. For this fundamental reason, 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' Application and Appendix were dispatched via prepaid FedEx Express Overnight courier service on May 24, 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' Application and Appendix (Vols. I through IV) on May 24, 2010 via prepaid FedEx Express Overnight courier service:

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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 24th day of May, 2010.

