Nos. 10-238 and 10-239

In The Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

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 capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

At issue in this case is the matching funds provision of Arizona's Citizens Clean Elections Act, A.R.S. § 16-952, which authorizes the payment of campaign subsidies to "participating" candidates for state elective office when competing "traditional" candidates or opposing independent expenditure committees raise or spend campaign money above a "spending limit." The questions presented for review are:

1. Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), require the Court to strike down Arizona's matching funds system under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2. Whether *Citizens United* and *Davis* require the Court to strike down Arizona's matching funds system under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

PARTY LISTING

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiffs-Appellees and Petitioners: John McComish; Nancy McLain; and Tony Bouie.

Plaintiff-Intervenors-Appellees and Respondents in Support: Dean Martin; Robert Burns; Rick Murphy; Arizona Free Enterprise Club's Freedom Club PAC; and Arizona Taxpayers Action Committee, as agent of Taxpayers Action Committee.

Defendants-Appellants and Respondents in Opposition: Ken Bennett, in his official capacity as Secretary of State of the State of Arizona; Gary Scaramazzo, in his official capacity as a member (Commissioner) of the Arizona Citizens Clean Elections Commission (hereinafter "CCEC"); Royann J. Parker, in her official capacity as a member (Commissioner) of the CCEC; Jeffrey L. Fairman, in his official capacity as a member (Commissioner) of the CCEC; Louis Hoffman, in his official capacity as a member (Commissioner) of the CCEC; and Lori S. Daniels, in her official capacity as a member (Commissioner) of the CCEC.

Defendant-Intervenor-Appellant and Respondent in Opposition: Clean Elections Institute, Inc.

The term "Respondents" used hereinafter refers solely to Respondents in Opposition.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, this merits brief has not been filed by or on behalf of a nongovernmental corporation. The Goldwater Institute, which is a nongovernmental corporation that is neither publicly traded nor owned in any percentage by a publicly traded company, furnishes legal representation but is not a party to this proceeding.

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The merits decision of the court of appeals is reported at 605 F.3d 720 and an amendment to footnote 1 of the decision is reported at 611 F.3d 510. *See also* 10-239 McComish Cert. Pet. Appendix ("10-239 PA") at 2-45. The decision of the district court is not officially reported, but is available at 2010 WL 2292213 and 2010 U.S. Dist. LEXIS 4932. *See also* 10-239 PA47-80.

JURISDICTION

Plaintiffs/Appellees' Petition for Writ of Certiorari was filed within 90 days of the court of appeals' judgment. 10-239 PA1. May 21, 2010. The Petition was granted on November 29, 2010 and consolidated with the parallel proceeding under case number 10-238 filed by Plaintiff-Intervenors/Appellees. This merits brief will be filed within 45 days of November 29, 2010. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, as well as A.R.S. §§ 16-940 through 961. Full statements of each of those constitutional and statutory provisions are reproduced at 10-239

PA134-81. The provisions of A.R.S. § 16-905 relating to contributions, together with a restatement of the matching funds provisions of A.R.S. § 16-952 and a full statement of the matching funds implementation provisions of CCEC Administrative Rules R2-20-109 and R2-20-113, are provided below:

A.R.S. § 16-905 provides in relevant part:

Contribution limitations; civil penalty; complaint

A. For an election other than for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's campaign committee shall not accept contributions of more than:

1. For an election for a legislative office, four hundred eighty-eight dollars from an individual.

2. For an election other than for a legislative office, three hundred ninety dollars from an individual.

3. For an election for a legislative office, four hundred eighty-eight dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by paragraph 5 of this subsection and subsection B, paragraph 3 of this section.

4. For an election other than for a legislative office, three hundred ninety dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make

contributions at the higher limits prescribed by subsection B, paragraph 3 of this section.

5. Two thousand dollars from a single political committee, excluding a political party, certified pursuant to subsection G of this section.

B. For an election for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's committee shall not accept contributions of more than:

1. One thousand ten dollars from an individual.

2. One thousand ten dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by subsection A, paragraph 5 of this section and paragraph 3 of this subsection.

3. Five thousand ten dollars from a single political committee excluding political parties certified pursuant to subsection G of this section.

C. A candidate shall not accept contributions from all political committees, excluding political parties, combined totaling more than:

1. For an election for a legislative office, sixteen thousand one hundred fifty dollars.

2. For an office other than a legislative office or a statewide office, ten thousand twenty dollars.

3. For a statewide office, one hundred thousand one hundred ten dollars.

D. A nominee of a political party shall not accept contributions from all political parties or political organizations combined totaling more than ten thousand twenty dollars for an election for an office other than a statewide office, and one hundred thousand one hundred ten dollars for an election for a statewide office.

E. An individual shall not make contributions totaling more than five thousand six hundred ten dollars in a calendar year to state and local candidates and political committees contributing to state or local candidates. Contributions to political parties and contributions to independent expenditure committees are exempt from the limitations of this subsection.

F. A candidate's campaign committee or an individual's exploratory committee shall not make a loan and shall not transfer or contribute money to any other campaign or exploratory committee that is designated pursuant to this chapter or 2 United States Code section 431 except as follows:

1. An exploratory committee may transfer monies to a subsequent candidate's campaign committee of the individual designating the exploratory committee, subject to the limits of subsection B of this section.

2. A candidate's campaign committee may transfer or contribute monies to another campaign committee designated by the same candidate as follows:

(a) Subject to the contribution limits of this section, transfer or contribute monies from one committee to another if both committees have been designated for an election in the same year.

(b) Without application of the contribution limits of this section, transfer or contribute monies from one committee to another designated for an election in a subsequent year.

G. Only political committees that received monies from five hundred or more individuals in amounts of ten dollars or more in the one year period immediately before application to the secretary of state for qualification as a political committee pursuant to this section may make contributions to candidates under subsection A, paragraph 5 of this section and subsection B, paragraph 3 of this section . . .

H. The secretary of state biennially shall adjust to the nearest ten dollars the amounts in subsections A through E of this section by the percentage change in the consumer price index and publish the new amounts for distribution to election officials, candidates and campaign committees. . . .

A.R.S. § 16-952(A)-(C) provides:

Equal funding of candidates

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by section 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end

of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.

2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length

and relative prominence of the reference to candidates for different offices.

R2-20-109. Reporting Requirements

A. Reporting of transactions; software provided or approved by the Secretary of State. All campaign finance reports shall be filed in electronic format in accordance with A.R.S. § 16-958(E). The Commission shall coordinate with the Secretary of State to make electronic-filing computer software available to candidates. Campaign finance reports shall be available on the Secretary of State's web site. All candidates shall file campaign finance reports that include all receipts and disbursements for their current campaign account using the campaign finance computer software provided or approved by the Secretary of State as follows:

1. Expenditures for consulting, advising, or other such services to a candidate shall include a detailed description of what is included in the service, including an allocation of services to a particular election. The Commission may treat such expenditures as though made during the general election period, and equalizing funds pursuant to A.R.S. § 16-952 shall be paid at the start of the general election period.

2. Original and supplemental campaign finance reports filed pursuant to A.R.S. §§ 16-941 and 16-958 shall include the same information regarding receipts and disbursements as required by A.R.S. § 16-915.

3. A candidate may authorize an agent to purchase goods or services on behalf of such candidate, provided that:

a. The candidate shall report an expenditure as of the date that the agent promises, agrees, contracts or otherwise incurs an obligation to pay for the goods or services;

b. The candidate shall have sufficient funds in the candidate's campaign account to pay for the amount of such expenditure and all other outstanding obligations of the candidate's campaign committee; and

c. Within seven calendar days of the date upon which the amount of the expenditure is known, the candidate shall pay such amount from the candidate's campaign account to the agent who purchases the goods or services.

d. A joint expenditure is made when two or more candidates agree to share the cost of goods or services. Candidates may make a joint expenditure on behalf of one or more other campaigns, but must be authorized in advance by the other candidates involved in the expenditure, and must be reimbursed within seven days.

4. In the event that a candidate purchases goods or services from a subcontractor or other vendor through an agent pursuant to subsection (A)(3), the candidate's campaign finance report shall include the same detail as required in A.R.S. § 16-948(C) for

each such subcontractor or other vendor. Such detail is also required when petty cash funds are used for such expenditures.

5. For the purposes of the Act and Commission rules, a candidate or campaign shall be deemed to have made an expenditure as of the date upon which the candidate or campaign promises, agrees, contracts or otherwise incurs an obligation to pay for goods or services.

B. Participating candidate reporting requirements. In addition to the campaign finance reports filed pursuant to A.R.S. § 16-913, participating candidates shall file the following campaign finance reports and dispose of excess monies as follows:

1. Prior to filing the application for funding pursuant to A.R.S. § 16-950, participating candidates shall file a campaign finance report with the names of persons who have made qualifying contributions to the candidate.

2. End of qualifying period. At the end of the qualifying period, a participating candidate shall file a recap campaign finance report consisting of a recap of all early contributions received, including personal monies and the expenditures of such monies.

a. The recap campaign finance report for the qualifying period shall be filed with the Secretary of State no later than five days after the last day of the qualifying period and shall include all campaign activity through the last day of the qualifying period.

b. If the recap campaign finance report shows any amount unspent by a participating candidate, the candidate, within five days after filing the recap campaign finance report, shall send the Commission a check from the candidate's campaign account that will remit all unspent early contributions to the fund, pursuant to A.R.S. § 16-945(B). Any unspent personal monies shall be returned to the candidate or the candidate's family member within five days.

3. Primary election and general election recap campaign finance reports. Each participating candidate shall file a campaign finance report consisting of a recap of all expenditures made in connection with an election, all contributions received in the election cycle in which such election occurs, and all payments made from such candidate's campaign fund to the Clean Elections Fund. If the recap campaign finance report shows any amount unspent by a participating candidate, the candidate, within five days after filing the recap campaign finance report, shall send the Commission a check from the candidate's campaign account that will return all unspent monies to the Fund.

a. The recap campaign finance report for the primary election shall be filed within five days after the primary election day and shall reflect all activity through the primary election day.

b. The recap campaign finance report for the general election shall be considered filed upon the

filing of the post-general campaign finance report filed in accordance with A.R.S. § 16-913(B)(3).

C. Amending Reports. If a candidate determines that a previously filed campaign finance report contains inaccurate information, then the candidate shall amend the campaign finance report to provide accurate information.

1. Except when a new election period has started, a participating candidate who received Clean Elections funding based upon an inaccurate campaign finance report shall remit to the Commission the excess funds as determined by the amended campaign finance report within five days after filing the amended campaign finance report.

2. If the participating candidate does not have sufficient funds in his or her account to return the required monies, the balance owed shall be withheld from future equalizing funds due to the participating candidate in the election period during which the excess funds were awarded.

D. Independent expenditures.

1. Any individual, group of individuals, corporation, political party or membership organization that makes independent expenditures cumulatively exceeding the amount prescribed in A.R.S. § 16-941(D) in an election cycle that expressly advocate the election or defeat of a specific candidate, as defined in R2-20-101(11), shall file campaign finance reports with

the Secretary of State in accordance with A.R.S. § 16-958.

2. Any individual, group of individuals, corporation, political party or membership organization that makes independent expenditures for literature or an advertisement relating to any one candidate or office within 10 days before the day of any election to which the expenditures relate shall send to the Commission, (a) by overnight delivery; and (b) by facsimile or e-mail, no later than one day after it is mailed, broadcast or published, as applicable, a copy of the campaign literature or advertisement together with a statement declaring the cost of producing and distributing such campaign literature or advertisement. The copy of the literature or advertisement sent to the Commission pursuant to this Section shall be a reproduction that is clearly readable, viewable or audible, as applicable.

3. Any individual, group of individuals, corporation, political party or membership organization that fails to file a campaign finance report pursuant to this subsection (D) shall be subject to a civil penalty as described in A.R.S. § 16-942(B), as applicable.

E. The following will be considered to be a "contribution during the election cycle to date" or "expenditures . . . made through the end of the primary

election period" for purposes of reporting under A.R.S. §§ 16-941(B)(2) and 16-958(A):

1. A contribution to a candidate to retire debt from a prior election cycle if deposited into the current campaign account;

2. Any contributions received and placed in a future, current, or prior, campaign account during the current election cycle;

3. Surplus funds transferred into the current campaign account;

4. Contributions received or expenditures made beginning 21 days after the date of the prior general election.

F. Timing of reporting expenditures.

1. Except as set forth in subsection (F)(2) below, a candidate shall report a contract, promise or agreement to make an expenditure resulting in an extension of credit as an expenditure, in an amount equal to the full future payment obligation, as of the date the contract, promise or agreement is made.

2. In the alternative to reporting in accordance with subsection (F)(1) above, a candidate may report a contract, promise or agreement to make an expenditure resulting in an extension of credit as follows:

a. For a month-to-month or other such periodic contract or agreement that is terminable by a candidate at will and without any termination penalty or payment, the candidate may report an expenditure,

in an amount equal to each future periodic payment, as of the date upon which the candidate's right to terminate the contract or agreement and avoid such future periodic payment elapses.

b. For a contract, promise or agreement to provide goods or services during the general election period that is contingent upon a candidate advancing to the general election period, the candidate may report an expenditure, in an amount equal to the general election period payment obligation, as of the date upon which such contingency is satisfied.

c. For a contract, promise or agreement to pay rent, utility charges or salaries payable to individuals employed by a candidate's campaign committee as staff, the candidate may report an expenditure, in an amount equal to each periodic payment, as of the date that is the sooner of (i) the date upon which payment is made; or (ii) the date upon which payment is due.

G. Transportation expenses.

1. Except as otherwise provided in this subsection (G), the costs of transportation relating to the election of a statewide or legislative office candidate shall not be considered a direct campaign expense and shall not be reported by the candidate as expenditures or as in-kind contributions.

2. If a candidate travels for campaign purposes in a privately owned automobile, the candidate may use campaign funds to reimburse the owner of the automobile at a rate not to exceed the state mileage

reimbursement rate (which is 44.5¢ per mile in 2007), in which event the reimbursement shall be considered a direct campaign expense and shall be reported as an expenditure. If a candidate chooses to use campaign funds to reimburse, the candidate shall keep an itinerary of the trip, including name and type of events(s) attended, miles traveled and the rate at which the reimbursement was made.

3. Use of airplanes.

a. If a candidate travels for campaign purposes in a privately owned airplane, the candidate shall use campaign funds to reimburse the owner of the airplane at a rate of $150 per hour of flying time, in which event the reimbursement shall be considered a direct campaign expense and shall be reported as an expenditure. If the owner of the airplane is unwilling or unable to accept reimbursement, the candidate shall remit to the fund an amount equal to $150 per hour of flying time.

b. If a candidate travels for campaign purposes in a state-owned airplane, the candidate shall use campaign funds to reimburse the state for the portion allocable to the campaign in accordance with subsection 3a, above. The portion of the trip attributable to state business shall not be reimbursed. If payment to the State is not possible, the payment shall be remitted to the Clean Elections Fund.

4. If a candidate rents a vehicle or purchases a ticket or fare on a commercial carrier for campaign purposes, the actual costs of such rental (including

fuel costs), ticket or fare shall be considered a direct campaign expense and shall be reported as an expenditure.

R2-20-113. Calculation of Equalizing Funds

A. During the primary election period, the Commission shall pay any participating candidate in the same party primary of a nonparticipating candidate, the amount of the nonparticipating candidate's expenditures in excess of the amount over the primary election spending limit, not to exceed three times the original primary election spending limit, as follows:

1. The nonparticipating candidates' expenditures, made before any coordinated or joint expenditure between the participating candidate and the nonparticipating candidate, which are defined as:

a. Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by a person for the purpose of influencing an election in this state;

b. A promise or agreement to make an expenditure resulting in an extension of credit; and

c. The value of any in-kind contribution received.

2. If an independent expenditure is made against one or more participating candidates for a single office, each participating candidate will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. The

participating candidates who were the subject of the expenditure will be the only candidates eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

3. If an independent expenditure is made in favor of one or more nonparticipating candidates, all participating candidates in the party primary of the candidate favored by the independent expenditure will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

4. If an independent expenditure is made in favor of a single participating candidate, all of the other participating candidates in that party primary will be eligible to receive equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

B. During the general election period, a participating candidate who has not engaged in a joint or coordinated expenditure with the opposing nonparticipating candidate during the general election period, will receive equalizing funds when the opposing nonparticipating candidate has received in contributions to date, less the amount of expenditures the nonparticipating candidate made through the end of the primary election period, an amount that exceeds the general election spending limit. The Commission shall pay any participating candidate seeking the same office an amount equal to any excess over the general election spending limit, not to exceed three times the original general election spending limit, as follows:

1. The nonparticipating candidate's contributions include:

a. Surplus funds transferred from previous campaign accounts and deposited into the current campaign account;

b. Individual contributions;

c. $25 or less contributions;

d. In-kind contributions;

e. Political committee contributions;

f. Personal monies;

g. Candidate or family loans;

h. Other loans; and

i. Contributions to retire campaign debt, irrespective of whether placed in a prior, current or future campaign account. Contributions to retire debt from the immediately preceding election cycle and received within 51 days following the general election shall be disregarded for purposes of calculating equalizing funds in the subsequent election cycle.

2. In accordance with A.R.S. § 16-952, the nonparticipating candidate's contributions shall not include offsets to contributions, including a refund of a contribution to an individual contributor or to a political committee contributor.

3. In accordance with A.R.S. § 16-952(C)(4), when a participating candidate is opposed in the general election by an independent candidate or nonparticipating candidate who was not opposed in the party primary, expenditures made during the primary election period by the nonparticipating candidate or independent candidate will not be included in the calculation of equalizing funds.

4. If an independent expenditure is made against one or more participating candidates for a single office, each participating candidate will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. The participating candidates who were the subject of the expenditure will be the only candidates eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing

funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

5. If an independent expenditure is made in favor of one or more nonparticipating candidates, all participating candidates in the election(s) for the same office(s) will be eligible to receive equalizing funds, if applicable, for the amount of the independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

6. If an independent expenditure is made in favor of a single participating candidate, all of the other participating candidates in the election for that office will be eligible to receive the equalizing funds, if applicable, for the cost of that independent expenditure. If so required by this subsection, the Commission may issue equalizing funds based on an independent expenditure in an amount greater than the amount of such independent expenditure.

C. Independent expenditures made against a nonparticipating candidate during the primary or general election periods will not be considered in the calculation of equalizing funds for a participating candidate.

D. In accordance with A.R.S. § 16-952(C)(6), during the primary and general election periods, expenditures promoting or opposing candidates for more than one office shall be allocated by the Commission among candidates for different offices based on the

relative size or length and relative prominence of the reference to candidates for different offices. Equalizing funds shall be issued to each participating candidate, if applicable, in an amount equal to the proportion of the expenditure that is targeted at the office sought by such participating candidate. If so required by this rule, the Commission may issue equalizing funds based on an expenditure in an amount greater than the amount of such expenditure.

E. The Commission shall cease to disburse equalizing funds for an election period after the Wednesday following the primary or general election day.

F. The Commission may decline to issue equalizing funds on the basis of expenditures that the Commission determines to be of de minimis value, and shall decline to issue equalizing funds during the primary or general election period after the participating candidate and the nonparticipating candidate triggering the match made a joint campaign expenditure during that primary or general election period, on account of expenditures by or contributions to the non-participating candidate with whom the participating candidate made the joint expenditure during the period.

INTRODUCTION

Public financing in Arizona's matching funds system forces a yoke around the neck of traditionally funded candidates. The system conscripts their labor and campaign resources to trigger subsidies for participating candidates. When traditional candidates raise or spend campaign money above a "spending limit," the financial reporting requirements of Arizona's system literally force them to press a button on their computer that will trigger the payment of subsidies to the very participating candidates they oppose. The State of Arizona thereby compels individuals to help disseminate private political speech, which they abhor, as a consequence and condition of speaking freely about politics. Such compulsion strikes at the heart of the First and Fourteenth Amendments.

STATEMENT OF THE CASE

I. PRIOR PROCEEDINGS.

A. The district court applied strict scrutiny and ruled three times that Arizona's matching funds provision, A.R.S. § 16-952, violates the First and Fourteenth Amendments under *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), which struck down 2 U.S.C. § 441a-1(a) (commonly referenced as the "Millionaire's Amendment"). 10-239 PA67-72, 101-13, 124-29. In its first ruling, the district court observed:

> [T]he Supreme Court has held (in a passage quoted approvingly in *Davis*) that, while one

> does not "have the right to be free from vigorous debate, one does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents" . . . Though the Arizona [Clean Elections] Act's mechanism for funding differs [from that of the Millionaire's Amendment], the effect, which forces a candidate to choose to "abide by a limit on personal expenditures" or else endure a burden placed on that right, is substantially the same.

10-239 PA128-29 (citations omitted). The district court's second ruling echoed and elucidated the same point. 10-239 PA106-07 (citations omitted). And based on this reasoning, the district court ultimately granted summary judgment to Petitioners and permanently enjoined enforcement of A.R.S. § 16-952. 10-239 PA80.

B. The Ninth Circuit's motions panel stayed enforcement of the district court's permanent injunction. 10-239 PA84-85. Circuit Judge Bea dissented, emphasizing that Arizona's matching funds system clearly violated the principles enforced in *Davis* and *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010). 10-239 PA85-89. As explained by Circuit Judge Carlos Bea:

> In *Davis*, if Davis spent more than $350,000 of his own money in his campaign, the contribution limitations placed on how much others could contribute to his opponents were lifted, but not for contributions made by

> others to Davis. Quite naturally, this was found to be a disincentive to Davis spending money on his own campaign, lest the expenditure serve to give his opponents an advantage not open to him. Such a disincentive was found to impose a "substantial burden" on Davis' campaign speech which had to be justified under the "strict scrutiny" test. . . . 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.

10-239 PA85-87 (citations omitted). As further observed by Judge Bea, contrary to the principles applied in *Citizens United*, "participating candidates are 'preferred' by the State of Arizona," just as the Millionaire's Amendment preferred opponents of self-financed candidates. 10-239 PA89.

C. Despite Circuit Judge Bea's dissent, the Ninth Circuit ultimately reversed the district court's permanent injunction on Arizona's matching funds trigger provision. 10-239 PA39. The Ninth Circuit

equated the speech burden of Arizona's matching funds system to that of a financial disclosure requirement, and applied intermediate scrutiny. *Compare* 10-239 PA34-35 *with* 10-239 PA105-06, 128-29. *Davis*' analogy between the Millionaire's Amendment and the matching funds system struck down in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), was relegated by the Ninth Circuit to a footnote, where it was dismissed. *Compare Davis*, 554 U.S. at 739, *with* 10-239 PA28 n.9.

D. On June 8, 2010, the Court entered an order blocking the Ninth Circuit's decision from taking effect. 10-239 PA81. The order stayed the mandate from the decision and lifted the appellate stay on the district court's permanent injunction on A.R.S. § 16-952. It thereby ensured that matching funds would not be distributed in Arizona during the pendency of this case.

II. THE MECHANICS OF MATCHING FUNDS.

A. The CCEC ordinarily pays matching funds to participating candidates based on "trigger reports," which are filed online by traditional candidates and independent expenditure committees both periodically and after reaching inflation-adjusted fundraising and spending thresholds. 10-239 PA312-13; JA272-73; A.R.S. §§ 16-941(B)(2), (D), 952(A), (B), 958(A), (B), (D), (E), 959, 961(G), (H); *CCEC Admin. Rules*, R2-20-109(A), (D). Violations of trigger reporting requirements can result in civil penalties, Class 1 misdemeanor

charges, and *removal from elected office*. A.R.S. §§ 16-941, 942(B), (C), 943.

B. When traditional and participating candidates compete during a primary election, matching funds to participating candidates are triggered by traditional candidate expenditures and independent expenditures (i.e., uncoordinated campaign spending by groups not affiliated with the candidate's campaign) in support of traditional candidates (or in opposition to participating candidates) once the sum of traditional candidate expenditures and independent expenditures exceeds the "primary election spending limit." A.R.S. § 16-952(A), (C); *CCEC Admin. Rules*, R2-20-113. For example, if the primary election spending limit is $10,000, then no matching funds will be triggered until the sum of expenditures by traditional candidates and by allied independent expenditure committees exceeds $10,000. However, once the sum exceeds $10,000, then matching funds are triggered to each participating candidate on a dollar-for-dollar basis less a statutory deduction of 6% and an amount equal to the private "early contributions" participating candidates are allowed to collect under A.R.S. §§ 16-945, 946, 950.

C. During the general election, matching funds are similarly triggered by traditional candidate contributions and independent expenditures once the sum of traditional candidate contributions, independent expenditures and the unspent amount of traditional candidate primary election contributions exceeds the "general election spending limit." A.R.S. § 16-952(B), (C); *CCEC Admin. Rules*, R2-20-113. For

example, if "general election spending limit" is $10,000, then no matching funds will be triggered until the sum of contributions to traditional candidates (including contributions unspent during the primary election) and expenditures by independent expenditure committees in support of traditional candidates (or in opposition to participating candidates) exceeds $10,000. And once the sum exceeds $10,000, then matching funds are, again, triggered to each participating candidate on a dollar-for-dollar basis less a statutory deduction of 6%.

D. The statutory 6% deduction from the amount of the triggering campaign financing is substantially less than the typical out-of-pocket cost of fundraising by traditional candidates. 10-239 PA311-14; JA295, 639-41; District Court Record[1] ("Record") 332(7:12-25, 8:1-24, 9:1-24, 10:1-23). The 6% deduction in the amount matched also does not incorporate any measure of the opportunity cost of fundraising by traditional candidates. *Id.* By failing to adjust matching funds to reflect actual fundraising costs incurred by traditional candidates, Arizona's system ensures that participating opponents will almost always have more financial and personal resources than traditional candidates to conduct their campaign. *Id*.

[1] Numerous district court filings originally included in the Excerpts of Record before the court of appeals have since been assigned different ECF docket numbers. To avoid any possible confusion, reference to the "Record" is made to the current ECF docket.

E. Independent expenditures in favor of traditional candidates or against participating candidates trigger matching funds to participating candidates, but independent expenditures in favor of participating candidates or against traditional candidates trigger nothing to traditional candidates. A.R.S. § 16-952(A)-(C). Because participating candidates have control over the matching funds they receive and traditional candidates do not have control over independent expenditures, the one-sided triggering of matching funds from independent expenditures typically gives participating candidates a greater competitive benefit from those expenditures than traditional candidates received in the first place. 10-239 PA193-94, 248, 313-15, 327-28; JA287-89, 1024-25; Record 317(5:6-21).

III. THE SPEECH BURDEN OF MATCHING FUNDS

A. It is undisputed Petitioners and allied independent expenditure committees, through raising or spending campaign money, collectively triggered tens of thousands of dollars in matching funds to opposing participating candidates. JA925-27(¶¶36, 44, 45, 49, 64), 932-35(¶¶5, 19, 21, 27, 31).

B. The most significant speech burden imposed by matching funds arises from its "multiplier effect." Petitioner McComish, for example, faced three participating opponents in the 2008 Arizona primary. Consequently, every dollar he spent above his "spending limit" triggered nearly three dollars to be spent

against his candidacy. 10-239 PA247-49, 327-28. In fact, Petitioner McComish watched his three participating opponents collectively receive $140,227.98 in public financing, which included at least $82,081.98 in matching funds triggered by campaign spending made by McComish and independent expenditure committees above the applicable $19,382.00 "spending limit." 10-239 PA328. Reeling from the deluge of hostile speech triggered by his campaign spending, McComish decided not to spend money on an "auto-dialer" campaign marketing program for fear of triggering matching funds to his opponents. 10-239 PA247-49, 325-26, 328-29. Spending $2,500 on the auto-dialer program would have triggered matching funds in the aggregate amount of nearly $7,500 to McComish's participating opponents. 10-239 PA248.

Additionally, when multiple traditional candidates compete against one or more participating candidates, the speech swamping effect of matching funds against traditional candidates and their supporters is even greater. Legislative candidate Eric Ulis described the threat he faced 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.

JA1014-15. Candidate Ulis' testimony was echoed by candidates Michael Blaire and Dusti Morris, who faced the same or similar dynamics in their districts during the 2010 election cycle. JA1010-12, 1023-25.

A similar multiplier effect swamps the speech of independent expenditure committees that support traditional candidates or oppose participating candidates. For example, the Arizona Realtors Association made an independent expenditure in the amount of $6,500 ostensibly to support Petitioner McComish, which triggered $18,330 in the aggregate to his three competing participating opponents. 10-239 PA327-28.

C. Petitioners testified about a number of specific instances in which their exercise of First Amendment rights was burdened by the threat of

triggering matching funds. Petitioner Nancy McLain testified that she decided not to self-finance her campaign during Arizona's 2004 election cycle after she and her husband discussed how Arizona's matching funds trigger would give a like amount to opposing participating candidates. 10-239 PA191-92, 195. Petitioner McLain further testified that the threat of Arizona's matching funds trigger chilled her campaign spending and forced her to decide not to raise any more contributions. 10-239 PA195-97, 250; Record 317(4:14-28, 5-6:1-4, 7:14-28, 8:1-12).

Petitioner Tony Bouie testified that he "made a decision to minimize and delay campaign expenditures after seeing the full impact of" triggering matching funds to his opponents and "decided to wait until the last possible minute . . . to spend money" on his campaign. 10-239 PA243-47, 300-303, 311, 317-18. Bouie's fear of Arizona's matching funds was so profound that, for the 2010 election cycle, he chose to run for an office in which he would not face competition from a participating candidate. 10-239 PA296-97.

The threat of matching funds similarly burdened the campaign finance decisions of former gubernatorial candidate John Munger, legislative candidate Jack Harper, and attorney general candidate Tom Horne. JA984, 986-88, 990, 992-94, 1007-08; Record 430-4(2:20-28, 3-4, 5:1-9). Gubernatorial candidate John Munger was deterred from spending tens of thousands of dollars of his own money to finance his campaign by the threat of triggering potentially

hundreds of thousands of dollars of matching funds to his participating opponents. JA1019-21.

D. Petitioners' testimony has been corroborated by Respondent witnesses. During her deposition, Respondent Commissioner Daniels was asked, "For those individuals who are aware of the impact of matching funds and for those individuals who are engaged in decisions about fund-raising or expenditures in support of their campaign, wouldn't you agree that there would always be a chilling effect of some magnitude on their fund-raising and expenditure decisions?" Eventually, she replied, "The majority of the time, is it a chilling effect with matching funds, yes." 10-239 PA237-38; JA642-43; Record 332(12:10-17, 13:3-4). Daniels also admitted to being familiar with the strategies of ten candidates and that "at least 80 percent" would be chilled by matching funds. 10-239 PA237-38; JA644-45; Record 332(16:8-25, 17:1-8). She concluded that there is "nothing inherently incredible" about Plaintiffs' testimony that they had "been chilled by matching funds in the course of their candidacies." JA646-47; Record 332(18:9-14).

Respondent witness Representative David Lujan similarly corroborated Petitioners' testimony, testifying that before Clean Elections became law it was common to see $100,000 being spent in a legislative campaign, but now it is more common to see around $40,000 being spent because of the influence of matching funds. JA613, 616-19; Record 323(16:13-25, 17:1-25, 18:1-2, 16-25, 19:1-17, 20:20-25, 21:1-14). He also

explained that "under clean elections they [independent expenditure committees] are less likely to make an independent expenditure if they see that the value of that independent expenditure is going to be weakened because it's matched by the clean elections system." 10-239 PA239; JA621.

Respondents' expert witness Dr. Donald Green corroborated Petitioners' testimony by admitting that Arizona's matching funds system "dampens" the "arms race" of campaign spending. JA766-68.

E. Third party political action committees echoed the testimony of the parties. Victory 2008 and Arizonans for a Healthy Economy ("AFHE"), for example, brought a separate lawsuit to block the issuance of matching funds during Arizona's 2008 election cycle, claiming that the CCEC led them to believe that matching funds would not be available in their district and that they would not have made independent expenditures had they known matching funds were available. 10-239 PA240-43; JA548-62. When responding to the question, "In making the decision as to whether or not to make an expenditure, can you tell us generally . . . what role the matching funds provisions under Clean Elections plays?" AFHE's representative replied, "It played a huge role. And Arizonans for a Healthy Economy conducted efforts in numerous districts. And we actually had more districts that we would like to be in. But because of the matching funds issue, there were decisions made to not advocate in specific districts because – because of the matching-funds issue. That

was one step. The second step was other districts that we didn't want to go into – we didn't want to advocate in until very late because of the matching-funds issue." 10-239 PA242-43; JA560-61.

F. *Gaming Arizona: Public Money and Shifting Candidate Strategies*, an article in a peer-reviewed academic journal, also corroborated the parties' testimony. 10-239 PA235-37; JA357-81. Confirming how the threat of matching funds induces delay in expenditures, *Gaming Arizona* reported that between 2002 and 2006 the proportion of matching fund contribution distributions in the final week of the campaign cycle never dropped below one-third of the total expenditures. JA378. *Gaming Arizona* further reported, "The desire for cost efficiency is present in all campaigns, but the effects of matching funds shift the spending calculus well beyond simple husbandry." JA364. Finally, *Gaming Arizona* observed: "According to every informant interviewed, traditionally funded candidates try to maximize competitive effect of the money that they do spend by releasing funds at the last minute." JA366.

G. By prohibiting conspiracies to postpone campaign donations for the purpose of postponing related trigger reporting, A.R.S. § 16-958(C) anticipates efforts by traditional candidates to avoid triggering matching funds until just before the general election.

H. The parties' testimony is further corroborated by measurements of campaign spending in

Arizona since 1998, which show i) per capita growth of independent expenditure spending in Arizona lagged per capita growth of PAC spending nationally by at least 33% between 1998 and 2006, and ii) average per capita expenditures in Arizona by traditional legislative candidates of major parties declined 6% in real terms between 1998 and 2006. 10-239 PA285-86, 290.

I. Finally, the dampening effect of matching funds on campaign spending is corroborated by statements by proponents of Arizona's system that it is designed to limit campaign spending and reduce the cost of running for office. JA95, 106-07, 110, 213, 227.

IV. THE PURPOSE OF MATCHING FUNDS.

A. The Clean Elections Act explicitly describes its purpose as protecting the "voices" and "influence" of "Arizona citizens" from "a small number of wealthy special interests" and reducing the "influence" of "special interest money." A.R.S. § 16-940(A), (B)(4).

B. Arizona's matching funds provision is titled "Equal funding of candidates," the CCEC's administrative rules refer to triggered matching funds as "equalizing funds," and hundreds of related administrative records identify matching funds as "equalization" payments. A.R.S. § 16-952; *CCEC Admin. Rules*, R2-20-113; JA885.

C. Respondent CCEC has repeatedly stated that the purpose of the Clean Elections Act is to "level the playing field." JA308, 457, 840, 854-55; Record 145-4(19:23-25, 20:1-10, 25, 26), 326-3(1). For example, a legal brief filed by the CCEC repeatedly declares that "[i]t can not be disputed that the purpose of the Citizens Clean Elections Act is to equalize the playing field and give participating candidates equal opportunity to get their message out." JA236. The CCEC's insistence on this interpretation of the Act has led to at least one determination by an administrative law judge that the purpose of Arizona's matching funds system is to level the playing field and equalize spending. JA240.

D. After the Court blocked the issuance of matching funds for Arizona's 2010 election cycle, Respondent Commissioners discussed how the decision was "unfair" to candidates because it prevented the Clean Elections Act from "leveling the playing field," which it was "designed to do." 10-239 PA186-87.

E. According to Respondent Clean Elections Institute, the purpose of matching funds is "[t]o combat the inequalities that exist with disproportionate funding, when a non-participating candidate outspends his Clean Elections participating opponent." JA257. Proponents of Clean Elections have repeatedly emphasized the electoral opportunity, influence and resource leveling purpose and effect of Arizona's matching funds system. JA95, 106, 109, 228-29, 248, 263-64, 809-54.

V. THE DISCONNECT BETWEEN MATCHING FUNDS AND ANTICORRUPTION PURPOSES.

A. CCEC Executive Director Todd Lang admitted matching funds do not address an actual corruption problem in Arizona, stating: "I don't think we have any corrupt legislators right now, I hope. This [Arizona's matching funds system] is about appearances and encouraging participation and reinforcing good feelings about our – you know, our system of government." JA449.

B. Arizona was ranked in 2005 as having *the* most stringent contribution limits and the 5th most stringent overall campaign finance disclosure system in the nation. 10-239 PA264-66; Record 325-9(10). Arizona's campaign financing regulations remain among the most stringent in the nation. JA679-702; Record 325-10(2-13). Adjusted for inflation, the contribution limits for individual contributions to legislative and statewide candidates in the 2010 election cycle were $410 and $840, respectively. *See* A.R.S. §§ 16-905(A)(1), 941(B)(1); Arizona Office of the Secretary of State, 2009-10 Contribution Limits, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm.

C. According to expert witness Dr. Osborn, Arizona's contribution limits are sufficiently low and its disclosure requirements sufficiently extensive to prevent private campaign contributions from having any significant influence on candidates. 10-239 PA109, 255-75; JA462-64, 474; Record 143-6(6-7),

144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Public financing in general, and Arizona's matching funds trigger in particular, do nothing that could further prevent actual or apparent corruption from private campaign financing. *Id.*

D. Dr. Osborn further testified that matching funds do not prevent actual or apparent corruption because: a) the Clean Elections Act allows participating candidates to raise private contributions from individuals, lobbyists and bundlers; b) the matching funds system is gamed to generate the functional equivalent of unlimited and undisclosed contributions to participating candidates from private donors; c) the voting behavior of participating candidates is not materially different than traditional candidates; d) the CCEC lacks objective standards when awarding matching funds based on unreported campaign expenditures or contributions; and e) the CCEC actively lobbies the legislature it both funds and regulates through a highly paid contract lobbyist. 10-239 PA255-75.

SUMMARY OF ARGUMENT

1. The essence of Arizona's matching funds system is revealed by Secretary of Homeland Security Janet Napolitano's reminiscence about her successful Arizona gubernatorial race against Matt Salmon:

> At the next debate, I pulled Matt aside and thanked him, because under the Clean Elections match, his event raised $750,000 for my campaign. I am quite certain that I am the only Democratic Governor in the country for whom George Bush has held a fundraiser.

JA345; Record 327(10); *see also* JA244, 286-92. Matt Salmon probably did not laugh.

2. Political opponents of participating candidates, like Matt Salmon, are punished when their rightful campaign financing triggers hostile speech against them. Especially in the competitive context of electoral politics, the threat of such punishment constitutes a substantial deterrent to any rational person who would otherwise want to raise and spend private money in support of a traditional candidacy or to oppose a participating candidate. This deterrent imposes more than a severe burden on strategic decisions. Anyone who takes ideas seriously will be chilled by the prospect of being instrumental in funding the dissemination of ideas one opposes or abhors as a condition of raising or spending money to engage in campaign speech.

3. Arizona's "Clean Elections" system thus impales political opponents of participating candidates

on the horns of a dilemma by compelling their campaign fundraising and expenditures to trigger subsidies to the very candidates they oppose. Arizona's matching funds system severely burdens whether, how and when traditional candidates and independent expenditure committees raise or spend money on campaign speech; and it typically causes them to diminish and delay their campaign fundraising and expenditures.

a. Just like the Millionaire's Amendment, which was struck down in *Davis*, 554 U.S. 724, Arizona's matching funds system imposes substantial negative consequences on individuals and groups for choosing to exercise their First Amendment rights, which necessarily creates a substantial "drag" on free speech. Even when political opponents of participating candidates disregard the drag imposed on their free speech by Arizona's system, its punitive effect is downright devastating. Even more so than the Millionaire's Amendment, Arizona's system is the functional equivalent of the compelled speech regime struck down in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

b. Like the regulatory regime in *Pacific Gas & Elec. Co.*, which forced a public utility to help disseminate consumer advocacy messages, Arizona's system forces traditional candidates to help disseminate hostile speech by their political opponents. The only way traditional candidates can avoid the punishment of matching funds is either to avoid competing against participating candidates or to run as a participating candidate. And independent

expenditure committees are always burdened by matching funds when they spend money on messages that support traditional candidates, who are in competition with participating candidates, or when they oppose participating candidates. This couples content-based regulation with systemic discrimination against traditional candidates in violation of the principles applied in *Citizens United*, 130 S. Ct. 876, which prohibit the government from favoring some speakers over others. The First and Fourteenth Amendments thus require Respondents to prove that Arizona's matching funds trigger can withstand strict scrutiny.

c. Arizona's matching funds provision is not closely drawn, much less narrowly tailored, to anticorruption purposes. The burden it imposes on both self-financed candidates and independent expenditure committees proves that the provision does not directly serve anticorruption purposes. Instead, the chief interest of matching funds is to level electoral opportunities, resources and influence. *Davis* and *Citizens United*, however, make it abundantly clear that such egalitarian goals do not justify burdening the exercise of core First Amendment rights under any level of heightened scrutiny.

d. Of course, advocates of Arizona's system argue matching funds indirectly serve anticorruption purposes by promoting participation in public financing. But Arizona's stringent campaign finance regulations are already adequate to prevent private campaign financing from causing actual or apparent corruption. Matching funds, even if they encourage participation in public financing, do nothing to further

prevent actual or apparent *quid pro quo* corruption from private campaign financing. In fact, Arizona's matching funds system is so poorly tailored that it enables the evasion of contribution limits and disclosure requirements by supporters of participating candidates. Moreover, by lobbying the same candidates it funds and regulates, the CCEC itself risks creating the very appearance of *quid pro quo* corruption that contribution limits seek to prevent. Thus, to the very extent existing contribution limits and disclosure requirements are posited to prevent actual or apparent *quid pro quo* corruption, Arizona's matching funds system is counterproductive. Therefore, the speech burden imposed by matching funds is "disproportionate" to advancing anticorruption interests. *Randall v. Sorrell*, 548 U.S. 230 (2006).

e. Participation in public financing is not, itself, a compelling state interest; it is only a prophylactic means of advancing anticorruption purposes. If matching funds can be said to serve a compelling state interest because they promote participation in public financing, then so could outright censorship of traditional candidates. There would be no limit to the abridgement of free speech that could be justified as serving a compelling state interest with such an argument. *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007), thus prohibits Arizona's matching funds system from piling "prophylaxis upon prophylaxis." Because Arizona's matching funds system does not directly serve anticorruption purposes, it cannot survive strict scrutiny.

f. Replacing matching funds with lump sum public financing would achieve any anticorruption purpose ascribed to public financing in a far less burdensome manner.

4. Taken together, Arizona's matching funds system imposes a substantial burden on the exercise of First Amendment rights; it is chiefly interested in equalizing resources, influence and electoral opportunities; and is neither closely drawn nor narrowly tailored to furthering anticorruption interests. The system, therefore, cannot possibly withstand intermediate scrutiny, much less strict scrutiny. Accordingly, the Ninth Circuit committed reversible error when it vacated the district court's permanent injunction on A.R.S. § 16-952. The Ninth Circuit's decision should be reversed, and the district court's permanent injunction should be affirmed because the Constitution obliges the Court to strike down unconstitutional laws. *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803).

STANDARD OF REVIEW

On appeal from summary judgment, the Court conducts its review *de novo* and may affirm the district court on any basis afforded by the record. *See generally Eastern Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466 (1992); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

ARGUMENT

I. STRICT SCRUTINY APPLIES TO ARIZONA'S MATCHING FUNDS SYSTEM BECAUSE IT DETERS AND PENALIZES THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The Ninth Circuit's analogy between Arizona's matching funds system and the disclaimer and disclosure requirements upheld in *Citizens United* is profoundly mistaken. Reasonable disclaimer and disclosure requirements ordinarily affect all candidates and political groups equally; and they are meant to provide objective financial information and to prevent identity fraud by political actors. *Citizens United*, 130 S. Ct. at 914-16. In contrast, Arizona's matching funds system imposes a special burden on traditional candidates and their supporters, which is designed to help disseminate hostile speech – just like the Millionaire's Amendment in *Davis*. If anything, by causing the exercise of First Amendment rights to subsidize hostile speech, Arizona's matching funds provision is more akin to a disclosure requirement of the sort that prompts "threats, harassment or reprisals from either Government officials or private parties," which *Citizens United* certainly did not approve. *Id.*, 130 S. Ct. at 914 (citations and internal quotations removed). Moreover, unlike reasonable disclaimer and disclosure requirements, which are viewpoint neutral, Arizona's matching funds trigger is a content-based speech regulation that disfavors certain speakers. As discussed below, these differences are material and necessitate applying strict

scrutiny to Arizona's matching funds system under the First and Fourteenth Amendments.

A. Strict scrutiny applies to Arizona's matching funds provision under the doctrine of *stare decisis* because, like the Millionaire's Amendment, it imposes a special and potentially significant burden on the exercise of core free speech rights.

Under the doctrine of *stare decisis*, the rationale underpinning an opinion of the Court binds analogous cases unless a "special justification" warrants departing from that rationale. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). In the present case, *stare decisis* compels the conclusion that Arizona's matching funds system is subject to strict scrutiny because, like the Millionaire's Amendment struck down in *Davis*, it imposes a special and potentially significant burden on the exercise of core free speech rights.

In *Davis*, the Court applied strict scrutiny and struck down 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. The Court applied strict scrutiny because the regulation imposed an "unprecedented penalty on any candidate who robustly exercises that First Amendment right." 554 U.S. at 739. Specifically, *Davis* ruled that the Millionaire's Amendment substantially burdened free speech rights by forcing a candidate to choose "between the First Amendment

right to engage in unfettered political speech" and shouldering "a special and potentially significant burden." *Id.* In so ruling, *Davis* underscored that the Millionaire's Amendment caused "the vigorous exercise of the right to use personal funds to finance campaign speech" to produce "fundraising advantages for opponents in the competitive context of electoral politics," which the Court analogized to laws that infringe on free speech rights by forcing speakers "to help disseminate hostile views." *Id.* (citing *Pacific Gas & Elec. Co.,* 475 U.S. at 14).

Although *Davis* applied strict scrutiny under the First Amendment to a "discriminatory" contribution limit trigger, the rationale for its holding applies equally to Arizona's matching funds trigger. *Davis* reached its holding in direct reliance upon *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), which struck down Minnesota's matching funds system. 554 U.S. at 739. The Court used the signal "See" to introduce *Day* as "clearly" supporting the proposition for which it was cited. *Id.*; *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 46 (18th ed. 2006). And in citing *Day*, the Court specifically pinpointed the Eighth Circuit's holding at 34 F.3d at 1359-60, which states:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.

> This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.

Davis even reiterated *Day*'s holding on matching funds parenthetically, noting "a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures." *Id.*, 554 U.S. at 739.

Davis' reference to *Day* was not gratuitous. *Davis* plainly and naturally regarded the contribution limit and matching funds provisions at issue as imposing analogous speech burdens, which require the same level of scrutiny – as did every court of appeals that reached the issue prior to the Ninth Circuit's ruling below. *See* 10-239 Cert. Pet. pp. 32-34. If anything, matching funds impose a far more certain and substantial burden on the exercise of First Amendment rights than did the Millionaire's Amendment. Of necessity, not mere possibility, Arizona's system threatens to bestow "fundraising advantages" for participating candidates consisting of matching taxpayer subsidies when traditional candidates and independent expenditure committees vigorously exercise their First Amendment rights to spend their own money to finance campaign speech. *See* A.R.S. § 16-952(A)-(C). Moreover, neither the Millionaire's Amendment nor matching funds provisions symmetrically relax

government-imposed restrictions on free speech for all candidates competing in the same race. Instead, like the Millionaire's Amendment, matching funds force self-financed traditional candidates and independent expenditure committees to shoulder a special, potentially significant burden if they choose to engage in unfettered campaign fundraising and expenditures. Arizona's matching funds system must therefore be regarded as imposing a substantial burden on free speech that triggers strict scrutiny for the same reasons as did the Millionaire's Amendment. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 243-44 (2nd Cir. 2010) (enjoining Conn. Gen. Stat. §§ 9-713, 9-714 (2009)); *Scott v. Roberts*, 612 F.3d 1279, 1290-91, 1293-94 (11th Cir. 2010) (preliminarily enjoining Fla. Stat. § 106.355 (2009)). No "special justification" exists to depart from the rationale in *Davis* because, as discussed below, *Davis* logically applied settled First Amendment jurisprudence.

B. Strict scrutiny applies to Arizona's matching funds system because it links the exercise of First Amendment rights to the dissemination of hostile speech, thereby deterring and punishing rightful conduct.

In refusing to apply strict scrutiny to Arizona's matching funds system, the Ninth Circuit completely ignored *Davis*' reliance upon *Pacific Gas & Elec. Co.,* 475 U.S. at 14, which held that the First Amendment

is violated by regulations that force citizens "to help disseminate hostile views" when they speak. *Pacific Gas & Elec. Co.* applied strict scrutiny to an effort to require a public utility to include consumer advocacy material in its mailings. The Court held that linking the dissemination of hostile viewpoints to the exercise of First Amendment rights deterred and penalized free speech because the speaker "might well feel compelled to reply or limit its own speech." *Pacific Gas & Elec. Co.*, 475 U.S. at 10-12, 11 n.7, 14 (citing *Miami Herald Publishing v. Tornillo*, 418 U.S. 241, 256-57, 257 n.22, 258 (1974)). The Court further emphasized that such laws should be struck down under the First Amendment based purely on this punitive and deterrent effect, independently from any other consideration, such as the cost or scarcity of publication space. *Id.* Finally, *Pacific Gas & Elec. Co.* held that requiring a speaker "to assist in disseminating" opposing views "necessarily burdens the expression of the disfavored speaker." *Id.* at 15.

Under *Pacific Gas & Elec. Co.*, citizens do not have a right to speak free from rebuttal, but they certainly do have the right to speak freely without being required to assist in the rebuttal of their own speech. This principle of speaker autonomy has its roots in the Court's recognition that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.*

v. Barnette, 319 U.S. 624, 642 (1943). As further explained by the Court in *Wooley v. Maynard*, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. 705, 714 (1977) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). The principle of speaker autonomy thus preserves the dignity to which a free citizen is entitled in our system of ordered liberty. It also recognizes that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988).

Of course, the government does not always require "citizens to confess by word or act their faith" in what they do not believe. Instead, as evidenced by the regime in *Pacific Gas & Elec. Co.*, governments often use more indirect methods to achieve the same outcome. Such efforts are properly rebuffed by the recognition that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). In response to the creativity of regulatory efforts, the Court has properly applied the principle of speaker autonomy to a variety of contexts in which citizens have been directly or indirectly compelled to help disseminate hostile speech. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001) (striking down a federal law that used mandatory fees paid by mushroom growers to

subsidize private speech to which they were opposed, where speech was the central purpose of the regulatory regime).

By forcing citizens to choose between silence or promoting people and ideas they oppose, a regulatory regime that links the exercise of First Amendment rights to the dissemination of hostile ideas "inescapably 'dampens the vigor and limits the variety of public debate.'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)). Such regimes strike at the heart of free speech because, by imposing negative consequences on the exercise of First Amendment rights, they clearly create the "potential" for "self-censorship" that is "abhorrent to the First Amendment." *Cf. Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 318 (1979). Forcing candidates and their supporters to choose between silence and assisting in the dissemination of hostile speech also runs afoul of the doctrine of unconstitutional conditions. *See generally Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996) (holding under the modern doctrine of unconstitutional conditions "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights") (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The Court quite properly applies strict scrutiny to regulatory regimes that violate these principles based on the longstanding recognition:

> The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936) (citation omitted).

Strict scrutiny applies to Arizona's matching funds system because it burdens the exercise of First Amendment rights in essentially the same way as the regulatory scheme struck down in *Pacific Gas & Elec. Co.* Like the regulatory regime in *Pacific Gas & Elec. Co.*, Arizona's matching funds system compels traditional candidates and their supporters to help disseminate hostile speech through their exercise of First Amendment rights. Traditional candidates and their supporters are required to assist in the dissemination of the hostile views because it is their very own campaign financing activities that cause the distribution of matching funds to their political opponents. In fact, when traditional candidates and allied independent expenditure committees raise or spend campaign money close to or above a certain threshold, Arizona's law literally requires them to file trigger reports that lead directly to the disbursement of checks to their political opponents. 10-239 PA312-13; JA272-73; A.R.S. §§ 16-941(B)(2), (D), 952(A), (B), 958(A), (B), (D), (E), 959, 961(G), (H).

Although Arizona's matching funds system conscripts labor, and the regulatory system in *Pacific Gas & Elec. Co.* commandeered property, both systems presume to force citizens to help disseminate hostile views as a consequence and condition of exercising their First Amendment rights. Just as the law in *Pacific Gas & Elec. Co.* forced a public utility to give consumer advocates a free ride in its mailings, Arizona's matching funds regime throws a yoke around the necks of traditional candidates and their supporters, requiring them to advance the campaigns of their political opponents alongside their own. Arizona's matching funds system thus deters and penalizes the exercise of First Amendment rights just like the regulation at issue in *Pacific Gas & Elec. Co.* *See* Jason Bradley Kay and Jack McDaniel Sawyer, *The Constitutionality of "Rescue Fund Triggers" in North Carolina's Judicial Campaign Reform Act*, 2 First Amend. L. Rev. 267, 283-85 (Spring 2004).

It is an understatement to say that traditional candidates and independent expenditure committees "might well feel compelled" to limit their fundraising and expenditures to avoid triggering matching funds. *Cf. Pacific Gas & Elec. Co.*, 475 U.S. at 11 n.7. An interview of a traditional candidate, which was reported in *Gaming Arizona*, provides a better account of the feeling provoked by matching funds: "Every dollar I spend over the threshold starts feeding the alligator trying to eat me." JA364. Expert witness Dr. Marcus Osborn reviewed all of the evidence in the record and similarly found:

> First time candidates, veteran candidates, sophisticated independent expenditure committees and even a member of the CCEC all confirmed in their interviews or testimony that the matching funds component of the Clean Election[s] Act created a drag or "chilling effect" on their campaign fundraising and expenditures that tended to restrict and delay campaign fundraising and spending.

10-239 PA231. This chilling effect arises because the "matching funds component impose[s] a significant 'cost,' or competitive disadvantage, on traditional candidates with respect to raising and spending money that would not exist in a world without matching funds." 10-239 PA253. Not surprisingly, it is undisputed that campaign consultants ordinarily counsel their clients to minimize matching funds' competitive cost by delaying or refraining from campaign fundraising and spending. 10-239 PA252-54, 328-29; JA927-28(¶101), 1003-04. Correspondingly, CCEC enforcement proceedings are replete with allegations that traditional candidates deliberately delayed or avoided filing reports that could have triggered matching funds. JA880-82, 887. And measurements of campaign spending in Arizona since 1998 show: 1) per capita growth of independent expenditure spending in Arizona lagged per capita growth of PAC spending nationally by at least 33% between 1998 and 2006; and 2) average per capita expenditures in Arizona by traditional legislative candidates of major

parties declined 6% in real terms between 1998 and 2006. 10-239 PA285-86, 290.

Strict scrutiny must be applied to Arizona's matching funds system because applying a lower level of scrutiny is utterly inconsistent with core constitutional principles. The negative consequences visited on traditional candidates and their supporters by matching funds' "multiplier effect" are clearly more onerous than the burdens the government is generally prohibited from imposing on the choices of individuals and groups when they exercise their First Amendment rights. *Compare* 10-239 PA247-49, 311-14, 325-26, 328-29; JA295, 1010-12, 1014-15, 1023-25 *with Rutan*, 497 U.S. at 76 & 76 n.8 (observing, despite the choice to seek public employment, "the First Amendment . . . protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial *as failing to hold a birthday party* for a public employee . . . when intended to punish her for exercising her free speech rights'") (citation omitted; emphasis added). In the context of competitive electoral politics, in which one candidate's gain is another's loss, the threat of matching funds is similar to the threat of a fine for raising or spending campaign money beyond a "spending limit." *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 335-36 (1995) (striking down a law that imposed a $100 fine for anonymously distributing campaign literature)

Indeed, the punitive linkage between the exercise of First Amendment rights and the issuance of public

financing to political opponents is what distinguishes Arizona's matching funds system from the public financing system upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976). By disregarding *Davis*' reliance on *Pacific Gas & Elec. Co.*, the Ninth Circuit thus mistakenly equated Arizona's punitive matching funds system with non-punitive public financing regimes. To vindicate free speech, that mistake must be corrected by applying strict scrutiny.

C. Strict scrutiny applies because Arizona's matching funds system imposes a content-based speech regulation that discriminates against disfavored speakers.

In *Citizens United*, 130 S. Ct. at 899, the Court firmly declared that the First Amendment stands against campaign finance regulations that discriminate against disfavored speakers. *Id.* (observing "speech restrictions based on the identity of the speaker are all too often simply a means to control content"). Moreover, laws that link the exercise of First Amendment rights by specific speakers to the dissemination of hostile speech imply there is something intrinsically suspect or unfair about the speaker's communication that requires the government to intercede and provide a platform to an opposing speaker or opposing point of view. *Pac. Gas & Elec. Co.*, 475 U.S. at 12-15 (citing *Tornillo*, 418 U.S. at 256); *cf. Tornillo*, 418 U.S. at 258 (holding government control over editorial process implies power to make determinations of fairness). This regulatory

judgment is not speaker or viewpoint neutral; it discriminates against disfavored speakers and engages in impermissible content-based speech regulation. *Id*. Accordingly, strict scrutiny must be applied to Arizona's matching funds system. *See generally Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 641-42 (1994) (observing "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous [strict] scrutiny [as content-based speech regulation]") (citations omitted).

The content-based nature of Arizona's discriminatory system is most clearly revealed by the one-sided triggering of matching funds from independent expenditures. Independent expenditure committees will *never* trigger matching funds when they spend money on a message that *opposes* any traditional candidate. A.R.S. § 16-952(c). Thus, in order to enforce Arizona's matching funds trigger provisions, the CCEC must assess whether the content of campaign speech by an independent expenditure committee opposes a traditional candidate. This overtly content-based assessment is obviously "concerned with the communicative impact of the regulated speech." *Turner Broadcasting Sys., Inc.*, 512 U.S. at 658.

The speaker discrimination entailed by Arizona's matching funds system is also manifest. Traditional candidates, and not participating candidates, face the

threat of matching funds. A.R.S. § 16-952(A), (B). This is despite the fact that a portion of the financing raised and spent by participating candidates can originate from private campaign financing and matching funds triggered by independent expenditures. A.R.S. §§ 16-945, 952(C)(1)(3). Even if traditional and participating candidates were somehow distinct classes for purposes of First Amendment analysis, it is important to underscore that, even within their respective class, campaign speech is not treated the same way. The system requires the campaign financing of traditional candidates to enable rebuttal speech by competing participating candidates. It does not, however, require the campaign financing of participating candidates to enable rebuttal speech by competing participating candidates. Because Arizona's system treats similar speech differently, both inside and outside of candidate classes, an inference is warranted that traditional candidates are being targeted and punished as disfavored speakers. *Cf. Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (holding selective treatment of similar speech underscores that the law's purpose in enacting the law was to target and punish a disfavored speaker); *id*. at 542 (Scalia, J., concurring).

The targeting of traditional candidates and independent expenditure committees for special speech burdens is not viewpoint neutral. Matching funds target expenditures that convey a viewpoint that

would tend to enhance a traditional candidate's electoral prospects relative to a competing participating candidate. This arises in the context of a regulatory system that decries the "influence of special interest money" and promises "Clean Elections" through "clean campaign funding." A.R.S. §§ 16-940(A), 951. The system's concern with the communicative impact of the speech it regulates is further evidenced by its prediction, "Campaigns will become more issue oriented and less negative." A.R.S. § 16-940(A). The CCEC has even surveyed the relative "credibility" of participating and traditional candidates as a performance measurement. JA315.

By virtue of its titling, purpose, administration and effect, Arizona's matching funds system "is value laden, content-based speech suppression." *Cf. Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting). Like the "equal time" regulation in *Tornillo* and the consumer advocacy mandate in *Pacific Gas & Elec. Co.*, Arizona's system unavoidably conveys the message that the government will not allow speech benefitting traditional candidates to stand on its own because it is "dirty." Strict scrutiny applies to Arizona's matching funds system under the First and Fourteenth Amendments because it targets disfavored speakers for content-based speech regulation. *Day*, 34 F.3d at 1360 (citing *Burson v. Freeman*, 112 S.Ct. 1846, 1850 (1992)).

II. ARIZONA'S MATCHING FUNDS SYSTEM FAILS STRICT SCRUTINY BECAUSE IT CANNOT EVEN WITHSTAND INTERMEDIATE SCRUTINY.

Arizona's matching funds system cannot possibly withstand *Buckley*'s intermediate test of "exacting scrutiny," much less strict scrutiny, because it is needless, counterproductive and chiefly advances impermissible purposes. *Buckley*'s test is more rigorous than the heightened scrutiny triggered by content-neutral speech regulations and regulations affecting non-speech conduct that is closely related to speech. *Buckley*, after all, rejected applying the tests of *United States v. O'Brien*, 391 U.S. 367 (1968), and *Cox v. Louisiana*, 579 U.S. 559 (1965), to contribution limits as insufficiently rigorous. *Buckley*, 424 U.S. at 16-18. Thus, a speech regulation that would fail the test applied in *O'Brien* and *Cox*, or their progeny, should also fail *Buckley*'s intermediate scrutiny test. Therefore, Arizona's matching funds system should be struck down unless Respondents prove: 1) it furthers an important governmental interest, 2) the governmental interest it serves is unrelated to suppressing free expression, and 3) it does not burden substantially more speech than is essential to further the government's interests. *Turner Broadcasting Sys. Inc.*, 512 U.S. at 662, 665 (holding government bears the burden of proof under *O'Brien* scrutiny and the law will satisfy intermediate scrutiny only if "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

suppression of free expression; and . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests'") (quoting *O'Brien*, 391 U.S. at 377; *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

Respondents cannot carry their burden of proof. Arizona's system is not "unrelated" to the suppression of free expression because it burdens campaign fundraising and spending chiefly to equalize electoral opportunities among candidates. For this reason alone, the system fails intermediate scrutiny. Arizona's matching funds system also fails intermediate scrutiny because it does not further any important government interest, is not "closely drawn" to meet its objectives, and, therefore, "disproportionately" burdens First Amendment rights. *Cf. Randall*, 548 U.S. at 253, 255, 261-62.

A. Arizona's matching funds system impermissibly burdens the exercise of First Amendment rights chiefly to equalize electoral opportunities, resources and influence.

The principal justification for matching funds offered by the Ninth Circuit is that it ensures participants in public financing will be "viable candidates in their elections" and that the State will be able to allocate "funding among races of varying levels of competitiveness without having to make qualitative

evaluations of which candidates are more 'deserving' of funding." 10-239 PA38. Saying that Arizona's matching funds system aims to ensure candidates will be "viable" in their elections and receive funding in proportion to "competitiveness" is just another way of saying that the regulation aims to equalize electoral opportunities, resources and influence. *Scott*, 612 F.3d at 1293 (observing "[a]t bottom, the Florida public campaign financing system appears primarily to advantage candidates with little money or who exercise restraint in fundraising . . . the system levels the electoral playing field, and that purpose is constitutionally problematic"). Whatever rhetoric is used – "leveling the playing field," ensuring participating candidates are "viable," reducing special interest "influence" – a campaign finance regulation that is chiefly interested in leveling electoral opportunities cannot withstand intermediate scrutiny, much less strict scrutiny, when it burdens core political speech. *Davis*, 554 U.S. at 740 n.7 ("the chief interest proffered in support of the asymmetrical contribution scheme – leveling electoral opportunities – cannot justify the infringement of First Amendment interests").

As observed in *Citizens United*, "*Buckley* rejected the premise that the government has an interest 'in equaling the relative ability of individuals and groups to influence the outcome of elections.'" 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48-49). Empowering the government to intervene in the marketplace of ideas in this way is irreconcilable with the First

Amendment's fundamental "mistrust of governmental power." *Id.* at 898. For this reason, a state's effort to control some voices in order to "enhance the relative voices" of less influential speakers "contradicts basic tenets of First Amendment jurisprudence." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (internal quotations and citations omitted). The purpose of equalizing electoral opportunities, resources or influence is simply "antithetical" to the goals of the First Amendment. *Davis*, 554 U.S. at 742 (quoting *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting)); *see also Citizens United*, 130 S. Ct. at 904-05. Consequently, a regulation that burdens free speech chiefly for the purpose of equalizing electoral opportunities cannot withstand any level of heightened scrutiny. *Davis*, for example, struck down reporting and disclosure requirements for self-financed candidates because they chiefly served the electoral equalizing purposes of the Millionaire's Amendment, even though they only triggered intermediate scrutiny. 554 U.S. at 744. These principles compel the conclusion that Arizona's matching funds system cannot possibly survive intermediate scrutiny.

The Clean Elections Act declares on its face that it seeks to protect "the voices and influence of the vast majority of Arizona citizens" and to encourage qualified candidates to run for office "who lack personal wealth or access to special-interest funding." A.R.S. § 16-940(A). It describes matching funds as "equalizing funds" and "[e]qual funding of candidates." A.R.S. § 16-952; *CCEC Admin. Rules*, R2-20-113.

Matching funds, in turn, correspondingly target independent expenditure committees and self-financed candidates, whose campaign spending poses no threat of *quid pro quo* corruption under *Citizens United*, 130 S. Ct. at 913, and *Davis*, 554 U.S. at 740-41. A.R.S. § 16-952(A)-(C). And Arizona's matching funds provision does not go dormant if the State runs out of money with which to subsidize political campaigns. Instead, A.R.S. § 16-954(F) ensures that the provisions serve to lift contribution and spending limits in order to allow participating candidates to accept and spend *private* campaign donations. The goal of equalizing electoral opportunities thereby overrides the goal of eliminating private campaign financing when the two conflict. This feature alone compels the conclusion that the *chief* interest of Arizona's matching funds system is to equalize electoral opportunities, resources and influence. That conclusion is confirmed by the voluminous admissions of Respondents and proponents of the Clean Elections Act. 10-239 PA186-87; JA95, 106, 107, 109, 110, 213, 228-29, 236, 240, 248, 257, 263-64, 308, 457, 809-54, 885.

As declared emphatically by a leading proponent of Clean Elections: "Clean Elections is NOT about public funding. It's about spending limits, getting rid of special interests, and leveling the playing field." JA213 (emphasis in original). For that very reason, Arizona's matching funds system must be struck down under the First and Fourteenth Amendments, regardless of the level of heightened scrutiny applied.

B. Arizona's matching funds system imposes a disproportionate burden on speech.

Even if "leveling the playing field" were an important government objective for campaign finance regulations, Arizona's matching funds system goes well beyond merely enabling participating candidates to run competitive campaigns. The average amount spent by participating candidates grossly exceeds the average amount spent by competing traditional candidates – participating candidates spend, on average, as much as 136% more than traditional candidates. 10-239 PA290-92. Moreover, in contests between major party candidates, the one-sided award of matching funds for independent expenditures benefits participating candidates most *when they need it least* – major party participating candidates spend 50% more than modestly-financed major party traditional candidates. 10-239 PA292. The one-sided award of matching funds for independent expenditures gives participating candidates a huge advantage over traditional candidates, whose campaigns typically are not advanced as effectively by uncoordinated expenditures. 10-239 PA193-94, 248, 313-15, 327-28; JA287-89, 1024-25. Moreover, the fundraising cost savings and "multiplier effect" of matching funds ensure that participating candidates as a class will be able to swamp the campaign fundraising and expenditures of most traditional candidates, which strongly discourages traditional candidates from raising or spending campaign money. 10-239 PA247-49, 311-14,

325-26, 328-29; JA295, 639-42, 1010-12, 1014-15, 1023-25.

In short, Arizona's matching funds system gives a lopsided competitive advantage to participating candidates when they face all but the most extremely well-financed traditional candidates. 10-239 PA246-47, 249-50, 318. The associated speech burden is quite literally disproportionate to what is reasonably necessary to encourage participation in public financing, much less to compete successfully against traditional candidates. The disproportionality of matching funds is further underscored by the fact that encouraging participation in public financing does not advance anticorruption purposes in Arizona's highly regulated campaign finance system.

1. Matching funds do not further anticorruption purposes in Arizona's already highly regulated campaign finance system.

According to the Ninth Circuit, the prevention of actual or apparent *quid pro quo* corruption through encouraging participation in public financing is the government interest furthered by Arizona's matching funds system. 10-239 PA38. The court of appeals reasoned, "The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption." 10-239 PA37. But within a system that already prohibits large campaign contributions and

imposes extensive disclosure requirements, matching funds simply cannot further advance anticorruption purposes – not even by promoting participation in public financing.

As observed in *Randall*, 548 U.S. at 250-51, Arizona already has among the lowest contribution limits in the nation. In fact, Arizona was ranked in 2005 as having the most stringent contribution limits and the 5th most stringent overall campaign finance disclosure system in the nation. 10-239 PA264-66; Record 325-9(10). Adjusted for inflation, the contribution limits for individual contributions to legislative and statewide candidates in the 2010 election cycle were $410 and $840, respectively. *See* A.R.S. §§ 16-905(A)(1), 941(B)(1); Arizona Office of the Secretary of State, 2009-10 Contribution Limits, http://www.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm. Arizona's campaign financing regulations remain among the most stringent in the nation. JA679-702; Record 325-10(2-13). In this context, it is implausible to claim that anticorruption purposes are advanced by participation in public financing, much less by matching funds.

Bluntly stated, when low contribution limits are combined with disclosure requirements requiring the reporting of all campaign contributions and expenditures, it is a very high risk proposition for traditional candidates to spend illegally large contributions in support of their campaigns. Elected officials who are susceptible to *quid pro quo* corruption are not likely to accept bribes in order to spend those bribes on

their *campaign*. They may very well trade legislative favors for cash, but their motivation will be the all-cash purchase of a summer home on Lake Tahoe, not financing their next campaign. There is no reason to believe publicly-financed candidates are less susceptible than traditional candidates to the lure of a gym bag of cash. *Buckley* never held that public financing serves anticorruption purposes in a regulatory context in which large contributions are *already* prohibited by law and in which private campaign financing is *already* comprehensively disclosed and regulated.

Public financing, after all, is not a magic wand. It does not transform participating politicians into angels. Far from it.[2] Studies of Arizona's stringently regulated campaign finance environment have shown there is no significant difference in interest group influence or legislative voting patterns between traditional and participating candidates based on sources or amounts of campaign financing. 10-239 PA258-59; JA462-64; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(11:3-25, 12-14), 325-8(2-21). Likewise, in 1991, a bipartisan task force rejected public financing as a remedy for the outright bribery that was involved in AzScam; instead, it recommended closing loopholes in Arizona's regulatory regime to

[2] Participating candidates are routinely accused of, and occasionally prosecuted for, accepting illegal in-kind contributions, violating contribution limits, and committing perjury, among other shenanigans. JA298-99, 325-29, 883-94; Record 327(4-6, 19-20), 325-4(8-22), 329-6(7-8), 330-4(2-4).

ensure that all campaign contributions and expenditures were fully disclosed. JA116-21; Record 352(2-6). Since then, there have been no actual or apparent *quid pro quo* corruption scandals in Arizona arising from private campaign contributions.

According to expert witness Dr. Osborn, Arizona's contribution limits are sufficiently low and its disclosure requirements sufficiently extensive to prevent private contributions from having any significant influence on candidates. 10-239 PA109, 255-75; JA462-64, 474; Record 143-6(6-7), 144-4(18-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Public financing in general, and Arizona's matching funds in particular, do nothing that could further prevent actual or apparent corruption in Arizona's electoral system. *Id.* There is no reason to believe Arizona's matching funds system furthers any anticorruption purpose, even assuming that it plays a role in increasing participation in public financing. If anything, Arizona's matching funds system is counterproductive to advancing anticorruption purposes to the very extent that low contribution limits and extensive campaign finance disclosure requirements serve anticorruption purposes.

2. Through rampant gaming, Arizona's matching funds provisions enable large, undisclosed campaign contributions.

In assessing whether campaign finance regulations advance government interests, the Court has

considered how gamesmanship could undermine or circumvent their effectiveness. *Buckley*, 424 U.S. at 45, 61, 62 & 62 n.71. Such considerations reveal that matching funds fail intermediate scrutiny because they are not closely drawn to furthering anticorruption purposes.

Arizona's matching funds system generally treats traditional and participating candidates as if they were competing even when they are not. This feature has led to significant gaming of the system. 10-239 PA270-75, 331-33; Record 145-1(25-29, 31-33, 38-43:1-22), 145-8(7:19-25, 8:1-23), 327(4-6, 18, 19); 329-5(7). Individuals, for example, can deliberately run as candidates in the same race as one or more preferred participating candidates in order to trigger matching funds to participating candidates. 10-239 PA210-22, 271-72, 314-15, 319. Self-financed traditional candidate, Sam George, for example, triggered nearly $1,000,000 in matching funds to Democratic participating candidates, Paul Newman and Sandra Kennedy, to support a coordinated "Solar Team" campaign for three seats on the Arizona Corporation Commission during the 2008 election. 10-239 PA199, 200, 202-05, 211-12, 214-15, 218-22, 272; JA928-29(¶133); Record 33-2(25-26), 145-3(11:24-25, 12-13:1-14), 145-6(11:22-25, 12, 13:1-4, 16:10-24); 145-8(14:17-24, 18-24).

Significantly, Solar Team-member Sam George was a consultant to the proponents of the Clean Elections ballot measure; and the Solar Team website stated that Sam George "helped write and pass" the Clean Elections Act. Record 145-3(18); 145-6(2:14-25,

3:1-25, 12:22-25, 13:1-4). A cynic might suspect Arizona's matching funds system was designed to be gamed. If so, the secret is out. Respondent Commissioner Daniels testified that she repeatedly heard plans for a similar conspiracy among Republican candidates running for Corporation Commission. Record 332(19:19-25, 20-30:1-2).

Additionally, even without running for office, individuals and special interests can contribute to traditional candidates deliberately to trigger matching funds to their favored participating candidate. 10-239 PA271-72. Corporation Commissioner Paul Newman testified that this is what the energy industry appeared to do during the 2008 election cycle when he heard that Republicans were running a "team" of traditional and participating candidates for Corporation Commission. 10-239 PA200-02, 205-08. This scam multiplies the value of moneys given or spent to support a traditional candidate.

Finally, individuals and special interests can engage in "reverse targeting" to trigger matching funds to preferred participating candidates. 10-239 PA274-75, 331-33, 336; JA652. "Reverse targeting" is a common campaign tactic that describes an advertisement that appears to support a candidate, but which is actually ineffective or deliberately designed to undermine that candidate because of the likely adverse reaction of the audience to the message it conveys. *Id.* Actual or apparent examples of "reverse targeting" during the 2008 election cycle included a blast email in which a gay rights organization

seemingly advocated the election of a socially conservative candidate, as well as signs that appeared to support various candidates with messages such as "they promised to raise taxes help them keep the promise," "help them to support illegals," and "support open borders." 10-239 PA274-75, 314-16, 331-33, 336; JA382-83, 547, 563, 649-52; Record 329-6(2), 329-7(10-13, 17-21, 27-28), 332(36:8-21, 51-57:1-9, 59:6-24, 60:6-13), 332-2(1-3), 332-3(2-6), 332-4(1-3). Arizona's matching funds system encourages "reverse targeting" because a participating candidate's supporters may wish to circumvent contribution limits and disclosure requirements by triggering matching funds to their preferred participating candidate through an ineffective or harmful advertisement made to appear as though it supported a competing candidate. 10-239 PA274-75; JA652.

Arizona's matching funds system thus enables political actors to leverage public campaign financing to generate the functional equivalent of unlimited and undisclosed private campaign contributions. 10-239 PA270-75; JA465-73; Record 321(12:13-17, 13:1). But unlike an honest effort to deregulate campaign financing, Arizona's system is premised on deceptively using the public's money to reach the same result. Whether Sam George-style gaming is intended or not, the Phoenix New Times' depiction of Clean Elections as Mr. Clean covered in grime is apt. *See* JA731. By incentivizing gaming tactics that undermine the integrity of the electoral system, matching funds throw sand in the gears of regulations that are more closely

connected to furthering anticorruption purposes. 10-239 PA109-12. Because it is counterproductive, Arizona's matching funds system cannot be regarded as "closely drawn" to serving anticorruption purposes. A closer look at Arizona's version of public financing also calls into question the assumption that encouraging participation in that system is "closely drawn" to furthering anticorruption purposes.

3. Encouraging participation in Arizona's version of public financing does not shield against actual or apparent *quid pro quo* corruption stemming from large campaign contributions.

The Ninth Circuit was mistaken in asserting that "[i]n exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors." 10-239 PA36. In order to qualify for public financing, participating candidates are required to raise hundreds or even thousands of individual $5 campaign contributions. A.R.S. §§ 16-946, 950. Participating candidates are also allowed to raise thousands or even tens of thousands of dollars in private seed money, which are called "early contributions." A.R.S. § 16-945. Individual "volunteers" are permitted to bundle the entire number of qualifying contributions a candidate may need to access Clean Elections. Record 330(16:16-23), 330-1(5), 330-3(2:10-25). In fact, the private campaign contributions participating candidates are allowed to receive are routinely bundled by individuals and

organizations to make it easier to qualify for public financing – advertisements by the CCEC even encourage volunteers to collect $5 contributions for candidates. 10-239 PA267-69; JA86-87, 661, 883; Record 145-2(10:11-21), 145-4(26), 332(61:7-25, 62:1-25, 63:1-25). Participating candidates are fully aware that their access to tens of thousands or even millions of dollars of public financing is provided by private individuals, organizations and lobbyists who are able to bundle these private contributions; hence the real value of these private contributions, when bundled, far exceeds their face value. 10-239 PA268-69. At the same time, because their access to sources and amounts of private campaign financing is more restricted than traditional candidates, and the time in which they have to qualify for public financing is short, participating candidates are actually more beholden to bundlers than are traditional candidates. *Id.*

Additionally, through its highly paid contract lobbyist, the CCEC has lobbied to block legislative action that threatened its existence, including amendments to the Act that were feared would make it more likely that voters would repeal Clean Elections. 10-239 PA259-64, 270; JA929-31(¶¶190, 191, 195), 935-36(¶84); Record 329-3(1-34), 329-4(1-13). The CCEC lobbies lawmakers despite the fact that it has the regulatory power to oust elected officials from office and also wields broad discretion over the issuance and amount of matching funds. 10-239 PA260-63.

For example, when confronted with unreported expenditures or contributions, the CCEC awards matching funds without any guiding step-by-step written standards. 10-239 PA262-63; JA602-10, 626-33, 652-59; Record 329(19:15-23, 20:1-2), 330(11:4-11, 13:1-23, 18:4-16). To assess the cost of unreported expenditures or contributions, the CCEC relies upon statements given by interested candidates and vendors without any concern about or procedures for controlling bias. Record 329(12:4-9), 330(18:17-25, 19:1-4, 25:9-15). Moreover, in assessing whether an unreported expenditure constitutes express advocacy or "reverse targeting," the CCEC does not investigate or determine whether voters in the affected district would actually react favorably or unfavorably to the message conveyed. Record 330(23:2-11). Tens of thousands of dollars in matching funds have been awarded or denied based on essentially subjective judgment calls. *Compare* Record 330(20:21-24, 21:3-17) *with* JA300-01, 322-24.

Given such broad discretion, the CCEC is in a position where it could easily indulge favoritism and abuse its powers. In fact, there is a long history of accusations against the CCEC for bias and favoritism in its regulatory and funding decisions. JA303, 305-07, 352-53, 888, 890-91; Record 326-3(5-6, 9-10), 327(14-15, 19-21). The most significant scandal involved allegations that the CCEC deliberately targeted gubernatorial candidate Matt Salmon with frivolous enforcement proceedings. JA291-92, 330-31, 890-91; Record 327(18).

Against this backdrop, Dr. Osborn opined that the CCEC's lobbying of lawmakers it both funds and regulates risks creating an appearance of *quid pro quo* corruption, if that appearance is posited to arise from financial influence over candidates. 10-239 PA259-64. Dr. Osborn is not alone.[3] The fact that the CCEC hired a contract lobbyist caused the Phoenix New Times to remark:

> [T]hat means the very commission that was supposed to reduce the role of powerful lobbyists has now hired a powerful lobbyist of its own – to lobby the very lawmakers dependent on the commission for financing. They call this reform?

Record 325-4(22).

Arizona's very unusual version of public financing clearly does not share the prophylactic anticorruption characteristics of the system upheld in *Buckley*. Instead, it replicates and augments all of the purportedly corrupting aspects of unregulated private campaign financing. Given these dynamics, there is no reason to conclude that participation in Arizona's system of public financing shields against the influence of large contributions, or their functional equivalent, more effectively than the rigorous regulatory

[3] The cold record cannot hide Executive Director Lang's obvious discomfort with the questions that are naturally raised by the CCEC's practice of lobbying the very legislators it funds and regulates. *See* JA450-56.

system Arizona already applies to private campaign financing. Respondent Commissioner Daniels agreed in her deposition testimony:

> Q. The bottom line is that the Clean Elections system and its method of qualifying candidates for access to public financing is not more likely to reduce corruption or the appearance of corruption than the traditional way of fund-raising?
>
> . . .
>
> A. I've publicly stated that, so that's not anything I wouldn't agree with. I have publicly stated that I don't think that Clean Elections or traditional elections takes the dirty politics out of it. It is what it is when it's dirty, and when it's not, then it's what it's supposed to be.
>
> Q. And so if one of the purposes of the Clean Elections Act is to reduce the degree of corruption or the appearance of corruption that exists under a traditional fund-raising system, it's not going to achieve that purpose?
>
> . . .
>
> A. I do agree.

JA661-62.

In short, Arizona's matching funds system cannot be regarded as "closely drawn" to serving anticorruption purposes by encouraging participation in Clean Elections. Of necessity, matching funds impose a

"disproportionate" burden on the exercise of First Amendment rights. Thus, Arizona's matching funds system fails intermediate scrutiny under the First and Fourteenth Amendments. *Randall*, 548 U.S. at 253, 255, 261-62. Therefore, it cannot possibly withstand strict scrutiny.[4]

III. ARIZONA'S MATCHING FUNDS SYSTEM CANNOT WITHSTAND STRICT SCRUTINY BECAUSE IT DOES NOT DIRECTLY SERVE ANTICORRUPTION PURPOSES IN THE LEAST RESTRICTIVE MANNER.

For a regulation to be regarded as narrowly tailored under strict scrutiny, the government must prove that it actually advances a threatened compelling state interest by directly remedying the underlying problem. *Wisconsin Right to Life, Inc.*, 551 U.S. at 465-66. The government must also prove the challenged regulation is the least restrictive means of remedying the targeted problem. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 824 (2000). Respondents cannot possibly carry this burden of proof.

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[4] If, in response to the foregoing arguments, Respondents repeat their insistent claim in the lower courts that the Clean Elections system cannot function as it was intended without matching funds, then the Court should regard A.R.S. § 16-952 as nonseverable and strike down the entire system under the First and Fourteenth Amendments. *See Randall*, 548 U.S. at 262.

A. Arizona's matching funds system does not *directly* prevent actual or apparent *quid pro quo* corruption.

The same reasons that require striking down Arizona's matching funds system under intermediate scrutiny justify striking down the system under strict scrutiny. But even if one could conclude, as did the Ninth Circuit, that Arizona's matching funds system is somehow substantially, proportionately and efficaciously connected to advancing anticorruption purposes, it is clear that the connection is not *direct*. At most, the connection between Arizona's matching funds trigger and anticorruption purposes is an indirect one – it effectuates a scheme of public financing that is asserted to shield participating candidates from the need to accept private campaign contributions, which, in turn, is asserted to shield candidates from actual or apparent *quid pro quo* corruption associated with accepting "large contributions." *Buckley*, 424 U.S. at 26-27, 32, 56; 10-239 PA36-38. This asserted indirect connection between Arizona's matching funds trigger and anticorruption purposes parallels the indirect connection between issue advocacy regulation and anticorruption purposes, which did not withstand strict scrutiny in *Wisconsin Right to Life*.

Wisconsin Right to Life, 551 U.S. at 478, refused to countenance the argument that limitations on issue advocacy are justified to effectuate limitations on express advocacy, which are justified as a means of effectuating contribution limits. Declaring "enough is

enough," the Court rejected efforts to connect the regulation of protected speech to anticorruption purposes under strict scrutiny by way of such "prophylaxis upon prophylaxis" reasoning. *Id.* Instead, *Wisconsin Right to Life* requires "each application" of a regulatory regime that triggers strict scrutiny to be *directly* supported by a compelling state interest. *Id.* *Wisconsin Right to Life* recognized that the First Amendment prohibits the government from burdening core political speech in the name of reaching unprotected speech (or conduct) as a corollary of overbreadth doctrine. *Id.* at 479 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech"); *Buckley*, 424 U.S. at 44 (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"). As underscored in the concurring opinion, "We have rejected the 'can't-make-an-omelet-without-breaking-eggs' approach to the First Amendment, even for the infinitely less important (and less protected) speech category of virtual child pornography." *Wisconsin Right to Life*, 551 U.S. at 494 (Scalia, J., concurring).

Wisconsin Right to Life's rationale applies equally here. Just as issue advocacy regulations impose a substantial speech burden that is distinct from express advocacy regulations, Arizona's matching funds imposes a substantial burden on fully protected free speech rights that is entirely distinct from any speech

burden that might be intrinsic to maintaining a system of public financing. Unlike lump sum public financing alone, matching funds pointedly cause traditional candidates and independent expenditure committees to disseminate hostile speech as a consequence and condition of exercising First Amendment rights. Therefore, any anticorruption rationale that may justify public financing cannot justify the speech burden imposed by Arizona's matching funds trigger; just as the anticorruption purpose of express advocacy regulations cannot justify the speech burden of issue advocacy regulations. Instead, to withstand strict scrutiny, the distinct speech burden imposed by Arizona's matching funds must be independently justified as directly serving anticorruption purposes. Because Arizona's matching funds system does not *directly* serve anticorruption purposes, it cannot withstand strict scrutiny under *Wisconsin Right to Life*.

B. Arizona's matching funds system is not the least restrictive means of remedying any asserted problem of actual or apparent *quid pro quo* corruption.

Even if Arizona's matching funds system were somehow shown to be the most effective means of directly preventing actual or apparent *quid pro quo* corruption, a law is the least restrictive means of remedying an asserted harm *only if* it is the least drastic remedy, not overbroad, and no more restrictive than necessary. *Ill. State Bd. of Elections v.*

Socialist Workers Party, 440 U.S. 173, 185 (1979). The government's chosen means of regulation is not the least restrictive when there are reasonably effective less restrictive alternatives to the government's chosen means of regulation, and the government has not shown them to be implausible. *Playboy Entertainment Group, Inc.*, 529 U.S. at 813, 824 ("[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act"); *Reno v. ACLU*, 521 U.S. 844, 876-79 (1997); *Florida Star v. B.J.F.*, 491 U.S. 524, 538-41 (1989). In the present case, Arizona's system fails to meet any of these requisites of narrow tailoring.

First of all, the Court should take judicial notice of the elephant in the room: matching funds are obviously more burdensome than lump sum public financing. Lump sum public financing does not cause the exercise of First Amendment rights by traditional candidates and their supporters to help disseminate hostile speech. It cannot possibly have the punitive and deterrent effect that matching funds do. And if existing amounts of lump sum public financing are inadequate to draw participation from candidates, it only takes a simple legislative act to increase those

amounts.[5] The CCEC has already helped draft model legislation to double the base amount of public financing. JA936(¶117); Record 331-1(19). There is no reason to incur the unintended (or intended) consequences of the complex regulatory apparatus entailed by matching funds.

In fact, given the grossly disproportionate funding received by participating candidates in Arizona's matching funds system, it is more likely that the existing system makes public financing more expensive than would lump sum public financing. Respondents have never explained why they could not promote reasonable husbandry of public funds by requiring participating candidates to repay what they cannot justify spending, perhaps secured by posting collateral or a bond. Another alternative is to establish a strong deterrent by prosecuting gross abuses –

[5] In contrast to the Ninth Circuit's naked assertion that doing "away with matching funds altogether" would make public financing "prohibitively expensive and spell its doom," (10-239 PA38), the CCEC recently announced that it returned $20 million to the general fund and has returned a total of $64 million to the general fund since 2003. Press Release, *CCEC Gives $20 Million to Arizona's General Fund*, http://www.azcleanelections.gov/2009-2010-docs/Commission_Gives_to_General_Fund_2010.sflb.ashx. Moreover, despite being limited to their initial lump sum of public financing, which is about one third of the total amount they could have obtained with triggered matching funds, about half of the major party winners in the 2010 primary election were participating candidates. *See* 2010 Candidate Listing with Funding Amounts, http://www.azcleanelections.gov/2009-2010-docs/Candidate_Listing.sflb.ashx.

as the CCEC did several years ago when self-described Libertarians spent $100,000 in clean campaign funds to party at local nightclubs. JA327-28, 293, 889-91; Record 325-4(8).

Secondly, all by themselves, Arizona's existing contribution limits and extensive disclosure requirements are adequate to prevent actual and apparent *quid pro quo* corruption stemming from private campaign financing. 10-239 PA255-59, 264-70; JA462-64, 474; Record 143-6(6-7), 144-4(20-21), 144-5(1-3, 7), 145-1(36:13-25, 37:1-20). Simply maintaining or tweaking those regulations by providing for additional disclosure requirements is a plausible, less restrictive alternative to Arizona's matching funds system. 10-239 PA264-70. In this context, the speech burden imposed by matching funds is overkill, especially in view of the feasible alternative of lump sum public financing. Arizona's system thus fails the test of narrow tailoring required by strict scrutiny under the First and Fourteenth Amendments, and must be struck down.[6]

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[6] The Court may also affirm the district court's judgment based on the determination that the evidence offered by Respondents, to which Petitioners objected and moved to strike, was implicitly stricken from the record. *Compare* JA968-70; Record 348(1:23-28, 2-37), 357(6-31) *with* 290(1-9), JA732-54, 856-77, 939-65). This is because Petitioners' motion to strike Respondents' evidence was merged by local rule and actual practice into their summary judgment filings. *Compare* D. Ariz. L.R.Civ. 7.2(m)(2) *with* Record 348(1:23-28, 2:1-16). The district court's decision to grant the entirety of Petitioners' motions for summary

(Continued on following page)

CONCLUSION

In both *Pacific Gas & Elec. Co.* and *Davis*, the Court struck down regulatory schemes that punished and deterred the exercise of First Amendment rights by imposing the risk of disseminating hostile speech on those who would engage in free speech. In *Citizens United*, the Court integrated disapproval of influence equalization with the longstanding principle that government may not devise regulatory schemes that prohibit or burden free speech by disfavored groups to balance electoral opportunities.

Contrary to *Citizens United* and *Davis*, Arizona's matching funds system is expressly premised on the goal of equalizing electoral opportunities, resources and disproportionate influence among competing candidates and interest groups. Arizona's matching

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judgment and to deny the entirety of Respondents' motions should, therefore, be construed as implicitly reaching evidentiary rulings in favor of Petitioners and against Respondents. *Cf. Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.), *cert. denied*, 493 U.S. 869 (1989). The case relied upon by the Ninth Circuit for the determination that explicit evidentiary rulings were required to exclude any evidence from the record, namely *Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002), is inapposite because there is no indication that the parties in *Vinson* were required to merge their evidentiary motions with their summary judgment filings; and the case did not grapple with the doctrine of implicit rulings. The Ninth Circuit erred because it should have applied an abuse of discretion standard and sustained the district court's implicit evidentiary rulings based on the reasoning contained in Petitioners' motion to strike. *Cf. G.E. v. Joiner*, 522 U.S. 136, 142-43 (1997).

funds system is designed to level and swamp the resources of traditional candidates and their supporters, including self-financed candidates, third party contributors and independent expenditure committees. Contrary to *Davis*, Arizona's system ensures the robust exercise of First Amendment rights by traditional candidates and allied independent expenditure committees will trigger lopsided fundraising advantages for participating candidates. And contrary to both *Davis* and *Pacific Gas & Elec. Co.*, matching funds force the exercise of First Amendment rights by traditional candidates and their supporters to help disseminate hostile speech by opposing publicly-financed candidates. No anticorruption purpose is served by the substantial burdens placed by Arizona's matching funds trigger on the exercise of First Amendment rights. Respondents simply cannot carry their burden of proving that the mechanism is closely drawn or narrowly tailored to preventing actual or apparent *quid pro quo* corruption.

If the Ninth Circuit's grievous error upholding Arizona's system were not corrected, the foundational principle that government must not be trusted when it meddles in the open marketplace of political ideas will be undone. State and federal governments will be free to shape that marketplace to produce whatever outcome they desire through a combination of triggered campaign subsidies, low contribution limits and strict disclosure requirements. If millionaire candidates, corporations, unions or ordinary citizens are deemed to have disproportionate influence on the

political debate through their campaign contributions or expenditures, the government will be free to lavish millions of dollars on their political opponents, while maintaining low contribution limits and strict disclosure requirements, to neutralize that influence. 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 *Buckley*, *Pacific Gas & Elec. Co.*, *Randall*, *Wisconsin Right to Life*, *Davis*, and *Citizens United* never come down. And while courts puzzle over particular iterations of such regulatory schemes and statistical expositions on the magnitude of their burdens, political candidates and their supporters will no longer have uninhibited freedom to project their ideas to the public. Freedom of speech will be abridged.

Indeed, the regulatory push to force speakers to trigger rebuttal speech subsidies combined with the political pull to expand the scope of such regulation to avoid the appearance of disfavoring particular speakers or viewpoints naturally leads to the expansion of such regulatory regimes to encompass all speakers and all forms of speech. Allowing matching funds to burden core political speech thus lays the groundwork for the government to restructure the *entire* marketplace of ideas.

A fork in the road taken by our Republic thus approaches yet again. But this time, the choice is clear. Fiscally-engineered censorship must not stand.

The Court should reverse the Ninth Circuit's decision to uphold Arizona's matching funds system, affirm the district court's permanent injunction on A.R.S. § 16-952, and award reasonable fees and costs on appeal to Petitioners. To fully protect First Amendment rights, and to preserve judicial economy, the Court should also consider granting reasonable ancillary relief, such as enjoining reporting requirements that chiefly serve to effectuate triggered matching funds. *See, e.g.*, A.R.S. §§ 16-941(B)(2), (D), 958(A), (B), (D), (E), 959, 961(G), (H). And if Respondents contend that matching funds are integral to Arizona's Clean Elections system, the Court should refuse to sever A.R.S. § 16-952.

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