Nos. 10-238 and 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, DEMOCRACY 21, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ARIZONA, PUBLIC CITIZEN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of eight public interest organizations that are interested in campaign finance reform and support public financing programs and other measures to protect the integrity of government.[2]

SUMMARY OF ARGUMENT

Over thirty years ago, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court rejected challenges brought under the First and Fifth Amendments to the presidential public financing system enacted as part of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431, *et seq*. Any attempt to revisit the fundamental constitutionality of public financing would thus require the abandonment of this leading precedent. *See Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (finding that principles of *stare decisis* commanded respect for *Buckley*).

The presidential system upheld in *Buckley* did not include any provisions comparable to the triggered

[1] This brief is filed with the written consent of all parties. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] A description of the *amici curiae* is attached as Appendix A hereto.

matching funds provisions ("trigger provisions"), ARIZ. REV. STAT. § 16-952(A)-(C), challenged in this case. Nevertheless, the legal principles set forth in *Buckley* in its review of the presidential system govern this Court's review of the challenged provisions and compel the conclusion that the trigger provisions of Arizona's Citizens' Clean Elections Act ("Act") are constitutional.

First, like the presidential program reviewed in *Buckley*, the challenged trigger provisions provide a public subsidy to participating candidates, but do not restrict the expenditures made by non-participating candidates or their supporters. Thus, under *Buckley* and this Court's public subsidy jurisprudence, the Act "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93. Strict scrutiny is therefore not warranted.

Second, the challenged trigger provisions are supported by the same governmental interests that were found in *Buckley* to support the presidential system: "eliminating the improper influence of large private contributions" and "relieving . . . candidates from the rigors of soliciting private contributions." *Id.* at 96. The record below – undisputed by petitioners – demonstrates that trigger provisions encourage candidate participation in Arizona's public financing program. By increasing participation, the provisions in turn reduce state candidates' reliance on private contributions and thereby promote the compelling governmental interest in combating actual and apparent corruption.

Finally, contrary to petitioners' assertions, *Davis v. FEC,* 128 S. Ct. 2759 (2008), does not demand a different result. *See* Brief of Petitioners Arizona Free Enterprise Club's Freedom Club PAC, *et al*. ("PAC Br.") at 29-32; Brief for Petitioners McComish, *et al*. ("McComish Br.") at 25, 47-50. The "Millionaire's Amendment" at issue in *Davis* and the trigger provisions at issue here impose burdens on First Amendment activity that are radically different both in kind and in degree, and implicate wholly different governmental interests.

In short, *Buckley* endorsed the presidential public financing system as a speech-enhancing alternative to a system of potentially-corrupting privately-funded campaigns. Petitioners have presented no reason why this Court should not likewise approve Arizona's Act, and affirm the judgment of the Ninth Circuit Court of Appeals below.

ARGUMENT

I. The Presidential Public Financing System and Other Models of Public Financing Without "Trigger Provisions" Are Not at Issue in This Case.

Buckley unequivocally affirmed the constitutionality of public financing. Although the trigger provisions at issue here are also constitutional under the reasoning of *Buckley, see* Section II, *infra,* it is important to highlight that the presidential public

financing system upheld in *Buckley*, and the public financing systems used in a number of state and local jurisdictions, do not contain trigger provisions. Given these differences, *amici* urge this Court to rule in a manner consistent with the relatively narrow focus of this challenge, and to avoid consideration of the constitutionality of public financing programs that are not before the Court.

After *Buckley* broadly endorsed the constitutionality of public financing, numerous public funding programs were enacted at the state and local levels. Today, 23 states provide some manner of public financing in connection to state electoral campaigns. Center for Governmental Studies (CGS), *State Public Financing Charts* (May 2009), *available at* http://www.cgs.org/images/publications/cgs_state_pfc_050409.pdf. In addition, fifteen local jurisdictions, including New York City and Los Angeles, have enacted some form of public financing. CGS, *Local Public Financing Charts* (May 2009), *available at* http://www.cgs.org/images/publications/cgs_local_pfc_050409.pdf.

The proliferation of public financing programs has led to the creation of multiple models for providing public subsidies to electoral campaigns, ranging from tax credits for individuals who make political contributions, to full public financing for state political and judicial campaigns.

One early model for public financing was the presidential system. It is a voluntary program that combines a "matching funds" system for the financing

of presidential primary election campaigns and a "lump sum" grant system for the financing of presidential general election campaigns. *See* 26 U.S.C. § 9001, *et seq*.

In a presidential primary election, candidates who choose to participate qualify for public financing by raising a threshold amount of small contributions in each of twenty states, as well as by agreeing to abide by limits on their campaign expenditures and on their use of personal funds. 424 U.S. at 89-90; *see also* 26 U.S.C. § 9033(b). Once a candidate qualifies, she is eligible to have each private contribution of up to $250 per contributor "matched" on a 1:1 ratio with public funds, up to a maximum aggregate amount that equals half of the spending limit for the primary campaign. 424 U.S. at 89-90; 26 U.S.C. §§ 9034(a), (b). The amount of public funding received by participating candidates is thus based on the amount of matchable contributions they raise, and is wholly unconnected to campaign spending in the race by other candidates or by independent entities. 26 U.S.C. § 9034(a). In the general election, the presidential system provides a "lump sum" grant to each nominee of a major party who chooses to participate. *Id.* § 9004(a).[3] Candidates must agree to forgo private

[3] Minor party or new party presidential nominees can qualify for a partial "lump sum" grant, provided that either their party received at least five percent of the vote in the previous presidential election, or that the nominee receives five percent in the present election. *See* 26 U.S.C. §§ 9004(a)(2)(A), 9004(a)(3).

fundraising and to comply with a spending limit and other restrictions. 424 U.S. at 88. *See also* 26 U.S.C. §§ 9003(b), 9004(d). Funds are released shortly after the party nominating conventions to candidates who meet all eligibility requirements, and again, the size of the grant is unconnected to campaign spending in the race by other candidates or by independent entities. *Id.* §§ 9005(a), 9006(b).

Various states and localities have enacted programs that track the presidential system in whole or part. A number of states, for instance, "match" the private contributions raised by qualifying primary election candidates in a manner analogous to the presidential primary election model. These jurisdictions include Maryland, Massachusetts, Michigan and New Jersey. M.D. CODE ANN., [ELECTIONS] § 15-106; MASS. GEN. LAWS ch. 55C, § 5; MICH. COMP. LAWS § 169.264; N.J. STAT. ANN. § 19:44A-33. Some jurisdictions provide "lump sum" grants to qualifying general election candidates in a manner analogous to the presidential general election model. Examples include Hawaii, Michigan, Minnesota and Wisconsin. HAW. REV. STAT. § 11-425, -428; MICH. COMP. LAWS § 169.265; MINN. STAT. § 10A.31; WIS. STAT. § 11.50. None of these programs includes trigger funds provisions like those challenged in this case.

In contrast to the presidential system, a number of other states have adopted a "Clean Elections" model that provides full public financing to both primary and general election campaigns in a manner analogous to the Act challenged here. Candidates

qualify for grants by initially raising a threshold number of small private contributions and agreeing to both forgo any additional private fundraising and comply with spending limits. Arizona, Connecticut, Maine, New Mexico and North Carolina have adopted such public financing systems for some or all of their state office elections. ARIZ. REV. STAT. §§ 16-940 to -961; CONN. GEN. STAT. §§ 9-700 to -741; 21-A ME. REV. STAT. §§ 1121-1128; N.M. STAT. ANN. §§ 1-19A-2 to -17; N.C. GEN. STAT. §§ 163-278.61 to -.70. In some cases, these systems include trigger provisions, like the Arizona provisions challenged here, that disburse to a participating candidate supplemental public funds in the event the participant faces large expenditures by a privately-financed opponent or an independent expenditure group. *See* ARIZ. REV. STAT. § 16-952.

Public financing systems thus vary in how funds are distributed (match *versus* grant), and in the types of grants made (lump sum grant *versus* grant supplemented by trigger funds). The type of trigger provision at issue here is not a component of all public financing systems. Any decision in this case must accordingly take heed of the broad variety of models that are used for the public financing of electoral campaigns, and make the necessary distinctions between public financing systems that use trigger grants, such as the Arizona law at issue here, and those that do not.

II. The Trigger Provisions of Arizona's Public Financing Program Are Constitutional.

In *Buckley*, this Court emphatically rejected a First Amendment challenge to the presidential public financing system.

Although a trigger provision was not reviewed in *Buckley*, the First Amendment principles set forth in *Buckley* govern this Court's review of the trigger provisions here. *Buckley* stands for two propositions. First, electoral subsidies do not "*abridge*" speech within the meaning of the First Amendment, but rather *enhance* speech. 424 U.S. at 92-93. Second, public financing serves the compelling governmental interest in preventing the political corruption often endemic to elections that rely on private financing. *Id*. at 96. Applied to this case, these foundational principles compel the conclusion that the Arizona trigger provisions are constitutional.[4]

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[4] This conclusion has also been the holding of many of the lower courts that have reviewed "triggered" subsidy schemes comparable to the law challenged here. *North Carolina Right to Life Comm. v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997). *Cf. Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). *But see Green Party of Conn. v. Garfield*, 616 F.3d 213 (2nd Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010).

A. The Constitutionality of Public Financing Was Affirmed in *Buckley v. Valeo* and *Republican National Committee v. FEC.*

In *Buckley*, this Court found that the presidential public financing system was consistent with both the First Amendment and with principles of equal protection. Four years later, this Court again affirmed the constitutionality of the presidential system in *Republican National Committee (RNC) v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

Buckley considered two interrelated challenges to Subtitle H of the Internal Revenue Code, 26 U.S.C. § 9001, *et seq*.: first, a claim that "public financing of election campaigns, however meritorious, violates the First Amendment," and second, an equal protection claim brought under the Fifth Amendment that the qualifying criteria for public financing discriminated against minor party candidates. 424 U.S. at 92, 93-104.

In its consideration of the First Amendment challenge, the Court first dismissed the allegation that the presidential system burdened rights protected by the First Amendment. It noted that the First Amendment provided that "Congress shall make no law . . . *abridging* the freedom of speech, or of the press," but found that the presidential system was a measure "*not to abridge*, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the

electoral process, goals vital to a self-governing people." *Id.* at 92-93 (emphasis added). The Court accordingly concluded that public financing did not impose *any* encumbrance on free speech. *Id.* at 93; *see also McComish v. Bennett,* 611 F.3d 510, 521 (9th Cir. 2010) ("[T]he public financing of elections itself does not create any burden on speech.").

Buckley also recognized that the presidential system represented but one example of a long-standing governmental policy to support First Amendment activities through public subsidies:

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127 (internal citations omitted). The Court thus emphasized that governmental subsidies were presumptively constitutional because they "enhanced" speech instead of diminishing it.

In rejecting the separate claim that the qualifying criteria for public financing "invidiously discriminated" against minor party candidates, *id*. at 93, the Court found that the presidential system was enacted "in furtherance of sufficiently important governmental interests," *id.* at 95-96. It explained:

> It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. In addition, . . . Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions.

Id. at 96 (internal citations omitted). The Court concluded that the government's interest both in combating actual and apparent corruption and in protecting candidates from the pressures of fundraising outweighed any "discrimination" worked by the minor party candidate qualifying criteria. *Id*. at 99.

In *RNC,* the three-judge district court revisited *Buckley* and rejected the claim that the presidential system violated the First Amendment rights of either candidates or their supporters by conditioning eligibility for public funds upon candidates' compliance with expenditure limits. 487 F. Supp. at 283-84.

In its holding, the panel rejected the notion that public funding was burdensome, noting that "the conditions imposed by Congress upon receipt of public campaign financing do not infringe upon the First

Amendment rights of candidates." *Id.* at 285. It further explained that the presidential system "merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding." *Id.* at 285.

Even if the public financing system did impose a burden on speech, the district court found that any burden was outweighed by the congressional plan "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id*. (quoting *Buckley*, 424 U.S. at 91). The panel emphasized the anti-corruption effects of the program, recognizing that "[i]f the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Id.* at 284. The court also emphasized that Congress had found that public financing would "'eliminate reliance on large private contributions' and on the implicit obligations to private contributors that may arise from such reliance. . . ." *Id*. (quoting S. REP. NO. 93-689 (1974), at *5-6). This Court summarily affirmed. 445 U.S. 955 (1980).

Thus, both *Buckley* and *RNC* made clear that public financing does not constitute a burden on the First Amendment rights of either candidates or their supporters, and in any event, is justified by the "vital" governmental interests in combating actual and apparent corruption and freeing candidates from the pressures of private fundraising.

B. Reviewed Under the Standards Set Forth in *Buckley*, the Trigger Provisions Are Constitutional.

1. Because the Release of Trigger Funds Does Not Impose *Any* Cognizable Burden on Petitioners' Exercise of their First Amendment Rights, Strict Scrutiny Is Inapplicable.

The Court of Appeals recognized that the trigger provisions do not impose any direct restrictions on petitioners' fundraising or expenditures. 611 F.3d at 525 ("The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures."). Instead, according to the majority opinion, the trigger provisions at most create "*potential* chilling effects" on petitioners' campaign activities. *Id*. at 524 (emphasis added). Analogizing the potential effects of the trigger provisions to the incidental burdens imposed by campaign finance disclosure requirements, the majority accordingly reviewed the challenged provisions under "exacting," but not strict, scrutiny. Judge Kleinfeld, in his

concurrence, argued that not even heightened scrutiny should apply. 611 F.3d at 528 ("Because the challenged scheme imposes no contribution or spending limits, *it does not restrict speech at all*, so I cannot see why heightened scrutiny would apply.") (emphasis added).

The Ninth Circuit's rejection of strict scrutiny was correct. Indeed, the relevant legal authority suggests that the release of trigger funds does not constitute a cognizable burden on First Amendment rights at all. *Buckley* stressed that public financing for electoral campaigns simply does not "abridge" speech within the meaning of the First Amendment. And this Court's jurisprudence on public subsidies makes clear that a subsidy for First Amendment activities is subject to strict scrutiny only when it discriminates on the basis of content or viewpoint, neither of which the Arizona law does. *See* Section II.B.1.b, *infra*. There is thus no basis for petitioners' claim that strict scrutiny applies.

a. The Challenged Trigger Provisions Do Not Represent a Direct Restraint on Speech.

The challenged trigger provisions do not directly restrict, limit or regulate either the contributions raised or the expenditures made by petitioners. They instead function as a mechanism for determining when, and in what amounts, public funds are released to participating candidates.

The trigger provisions thus stand in stark contrast to the types of campaign finance regulations that have drawn strict scrutiny review from this Court in the past, namely *direct* restrictions on expenditures:

- *Buckley* applied strict scrutiny to strike down a $1,000 *limit* on independent expenditures "relative to a clearly identified candidate during a calendar year." 424 U.S. 42-45.
- *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985), applied strict scrutiny to strike down a $1,000 *limit* on the expenditures of political committees to support the campaign of a presidential candidate participating in the public financing system.
- *FEC v. Wisconsin Right to Life, Inc. (WRTL),* 551 U.S. 449, 482 (2007), applied strict scrutiny to partially invalidate the federal *ban* on the expenditure of corporate and union treasury funds for "electioneering communications."
- *Citizens United v. FEC,* 130 S. Ct. 876 (2010), applied strict scrutiny to strike down the federal *ban* on the expenditure of corporate treasury funds for independent expenditures. *Id.* at 898.

In their attempt to characterize the challenged provisions as "de facto limits" on their expenditures, PAC Br. at 24, petitioners thus gloss over the fact that the only laws this Court has deemed "expenditure restrictions" subject to strict scrutiny have been *direct*

limits on an entity's spending. In this case, by contrast, there are no such direct restrictions on petitioners' spending. They are free to raise and spend as much as they want.

The application of strict scrutiny to the triggered subsidy here would therefore represent a major break from this Court's campaign finance jurisprudence, which has hitherto subjected only direct restrictions on campaign spending and fundraising to strict scrutiny review.[5]

b. The Indirect "Chilling Effect" of the Trigger Provisions Alleged by Petitioners Does Not Constitute a Cognizable Burden on Speech.

Petitioners concede that the challenged provisions impose no "overt restrictions" on the amount of

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[5] Indeed, in determining the applicable level of scrutiny, the Court of Appeals may have overstated the impact of the trigger provisions when it compared them to "the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*." 611 F.3d at 525. Disclosure rules impose *direct* reporting, record-keeping and administrative burdens on regulated parties. *See, e.g.*, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-55 (1986) (discussing the administrative obligations entailed in disclosure); *see also* 2 U.S.C. §§ 434(c), (f); 441d. But the release of a subsidy to a participating candidate imposes no direct burdens on non-participating candidates, not even the relatively minimal obligations associated with reporting or disclaimer requirements. The Court of Appeals' application of exacting scrutiny is thus more stringent than this Court's past campaign finance precedents would require. *Compare Buckley*, 424 U.S. 92-93.

speech in which they can engage. PAC Br. 27-28. Nevertheless, petitioners maintain that the release of public funds to participating candidates on the basis of petitioners' expenditures creates an *indirect* chill on their speech so severe that strict scrutiny is warranted.

But the trigger provisions are no more than a release mechanism for a state subsidy. This Court has not previously held that the *indirect* effect of a public subsidy program on the speech of those persons who are not subsidized represents a cognizable burden under the First Amendment, at least absent content- or viewpoint-based discrimination or the imposition of an unconstitutional condition. *See*, *e.g.*, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *National Endowment for the Arts (NEA) v. Finley*, 524 U.S. 569 (1998). *Cf. Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). Certainly this Court has not held that a subsidy that was not content-based or viewpoint-based imposes such an onerous burden on speech as to require strict scrutiny.[6]

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[6] This Court has recognized that public financing is one example of a constitutional public subsidy scheme. *See Regan*, 461 U.S. at 549 (noting that *Buckley* upheld the presidential public financing system as a permissible subsidy without applying strict scrutiny); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 241 (2000) (noting that *Buckley* "rejected a challenge to a congressional program providing viewpoint neutral subsidies to all Presidential candidates") (Souter, J., concurring).

As discussed above, *Buckley* emphasized that the public subsidies provided by the presidential public financing system "further[ ], not abridge[ ], pertinent First Amendment values." 424 U.S. at 93. The Court thus indicated that the presidential public financing system does not represent a burden on speech at all. Accordingly, the *Buckley* Court "rejected First Amendment and equal protection challenges to this [system] without applying strict scrutiny." *Regan*, 461 U.S. at 549 (citing *Buckley*, 424 U.S. at 93-108).

To apply strict scrutiny to the challenged provisions here would controvert not only *Buckley* but also a long line of this Court's precedents that have upheld a broad range of governmental subsidies of speech under the First Amendment. As noted by *Buckley*, "[o]ur statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." 424 U.S. at 93 n.127 (internal citations omitted). And this Court has consistently granted the government more latitude when it *subsidizes* the First Amendment activities of private parties, than when it imposes affirmative *restrictions* on the speech of such parties. *See*, *e.g.*, *NEA*, 524 U.S. at 587-88 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech . . . at stake."); *Regan*, 461 U.S. at 550

(contrasting restrictions on speech "when the State attempts to impose its will by force of law" with the "governmental provision of subsidies" where the state's "power to encourage actions deemed to be in the public interest is necessarily far broader") (internal quotations omitted). *Cf. Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") (quotations omitted).

Further, this Court has not adopted the view that the government's failure to subsidize a person's speech, or alternatively, the government's decision to subsidize the speech of a person's competitors, constitutes an unconstitutional "chill" on that person's speech, absent viewpoint discrimination. *See, e.g., McComish*, 611 F.3d at 529 ("There is no First Amendment right to make one's opponent speak less nor is there a First Amendment right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.") (Kleinfeld, J., concurring).

This principle is well illustrated by the *NEA* decision. There, the Court found that a statute requiring the NEA to take into consideration standards of "decency and respect for diverse beliefs and values of the American public" when judging grant applications was consistent with the First Amendment. 524 U.S. at 576. The statute had been passed in response to several controversial works of art that had been

funded by the NEA. As highlighted by the dissent, the fact that such decency standards had the "potential to chill individual thought and expression" of the "makers or exhibitors of potentially controversial art" did not render the subsidy scheme unconstitutional in the eyes of the majority. *See* 524 U.S. at 621 (Souter, J., dissenting). Indeed, two Justices believed that even a subsidy scheme that discriminated on the basis of viewpoint would not "abridge" speech within the meaning of the First Amendment. *Id*. at 595-96 (Scalia, J., and Thomas, J., concurring); *see also id.* at 599 ("I regard the distinction between 'abridging' speech and funding it as a fundamental divide, on this side of which *the First Amendment is inapplicable*. . . . The Government, I think, may allocate both competitive and noncompetitive funding ad libitum, insofar as the First Amendment is concerned.") (emphasis added).

Similarly, in *Regan*, this Court found no unconstitutional burden in the fact that Congress chose to selectively subsidize the lobbying of veteran's organizations by allowing them, but not section 501(c)(3) organizations, to accept tax-deductible contributions for lobbying. 461 U.S. at 550-51. Although this subsidy discriminated between different 501(c) organizations based on the interests they represented, the Court found that it did not warrant strict scrutiny review because it was viewpoint neutral, *i.e.*, it was "not intended to suppress any ideas," nor was there "any demonstration that it had that effect." *Id*. at 548. *See also Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (finding that Arkansas' exemption of print

media from general sales tax applicable to television cable and satellite media did not warrant heighted review as it did not "threaten[ ] to suppress the expression of particular ideas or viewpoints").

Arizona's subsidy scheme is not as restrictive as those considered in *NEA* and *Regan*. First, unlike the limited subsidy programs in those two cases, public funds in Arizona – and by extension, "trigger funds" – are equally available to all candidates. The petitioner candidates voluntarily chose not to join the public financing program. Their subsequent complaint that their opponents' receipt of public funds "chills" their own speech is therefore even less persuasive than the complaints asserted by the plaintiffs in *NEA* and *Regan*, because here, petitioners could have had full access to the state subsidy simply by choosing to accept it.

Furthermore, unlike the tax subsidy that was available only to veteran's groups in *Regan*, the Act does not in any way discriminate between different candidates on the basis of their identity or the interests they represent. And unlike *NEA*, the Act does not set any particular content standards for the speech that is eligible for subsidization: any candidate meeting the fundraising qualifying criteria is eligible for public financing in Arizona, regardless of the content or viewpoints of the candidate's intended speech.

To be sure, instead of issuing subsidies on the basis of content standards or other qualification criteria, the Arizona program releases trigger funds

based on the aggregate spending or fundraising by, or on behalf of, non-participating candidates. However, it is unclear why this release mechanism would be any more burdensome than the standards employed in *Regan* and *NEA*. The trigger provisions do not coerce any content or disfavor any viewpoint. They merely provide that petitioners' campaign activity, in certain circumstances, will give rise to a response.

Furthermore, the open structure of Arizona's program further undercuts any claim that the trigger provisions are somehow uniquely coercive. Even assuming *arguendo* that linking a subsidy to contributions or expenditures creates "potential chilling effects," *see* 611 F.3d at 524, here Arizona has made this "potentially chilling" subsidy available to all qualifying candidates. Unlike the plaintiffs in *Regan* or *NEA*, petitioner candidates had a *choice* regarding whether to accept the public subsidy. Their strategic decision to decline public funding reflects their assessment that any "chill" created by the trigger provisions would be outweighed by the benefits of private fundraising. It would be absurd to argue that Arizona's triggered subsidy scheme warrants stricter review than other subsidy schemes when the petitioner candidates, unlike the *Regan* or *NEA* plaintiffs, voluntarily chose to reject the offered subsidy because they determined it to be a competitive disadvantage.

Perhaps anticipating this argument, petitioners make the claim that the trigger provisions indeed discriminate on the basis of viewpoint because funds

are only released when independent expenditures *oppose* a participant or *support* a privately-financed candidate. McComish Br. at 59. But "opposition" to a participant does not express any "viewpoint" because there are no viewpoint-based criteria for participation in the Arizona program in the first place. Viewpoint-based discrimination is found "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *see Rosenberger*, 515 U.S. 829, or where "governmental provision of subsidies" is "aim[ed] at the suppression of dangerous ideas," *see Regan*, 461 U.S. 550 (internal quotations omitted). Here, the trigger provisions were not enacted in opposition to any particular "motivating ideology" or for the suppression of any "dangerous ideas." Trigger funds are made available regardless of the views expressed in campaign speech. A participating candidate could either be *for* or *against* gun control, and in either case, he would receive trigger funds if he faced independent spending that exceeded the statutory thresholds. The inverse is also true. An independent group could either be *for* or *against* gun control, and if its spending exceeded the applicable threshold in an election, trigger funds would be released to any affected participating candidates regardless of the group's substantive viewpoint.

Petitioners also complain that trigger funds are viewpoint-based because, by subsidizing only the speech of participants, the Act implies that "speech benefitting traditional candidates" is inferior or "dirty." McComish Br. at 61. In essence, petitioners

claim that the grant of a subsidy in itself conveys a governmental preference for the "viewpoint" of those who agree to accept the subsidy. But if the mere grant of a subsidy, without more, constituted viewpoint discrimination, then all public subsidy schemes would suffer from this constitutional defect. Clearly, this is not the case nor, under *Buckley* or this Court's public subsidy jurisprudence, could it be.

Petitioners have cited no case in which this Court has found that the subsidization of speech on a viewpoint-neutral basis constitutes an indirect burden on First Amendment activity so onerous that strict scrutiny is required. There is thus no basis for petitioners' contention that the grant of a subsidy to their political opponents demands strict scrutiny.

c. *Davis* Does Not Justify a Break From This Precedent.

Against the weight of this case law, petitioners counter that *Davis* nevertheless requires the application of strict scrutiny to the challenged provisions. It does not.

In *Davis*, the Supreme Court reviewed the Millionaire's Amendment, a "scheme of discriminatory contribution limits," that not only *directly* restricted the fundraising of self-financed congressional candidates, but did so on a *discriminatory* basis. *See* 128 S. Ct. at 2772; Bipartisan Campaign Reform Act (BCRA) § 319(a). If a congressional candidate spent over $350,000 of her personal funds to support her

campaign, the Millionaire's Amendment tripled the contribution limit for any candidates in her race who did not spend a comparable amount of personal wealth. Section 319(a) thus forced the self-financed candidate to operate under a contribution limit that was three times lower than that of her conventionally-financed opponents. *Id.* at 2766-67.

The *Davis* decision is distinguishable from the instant case in two respects. First, and most fundamentally, the Millionaire's Amendment enforced a *direct* limit on contributions to self-financed candidates. Here, by contrast, the trigger provisions did not directly restrict either the contributions to or the expenditures by petitioner candidates. *See McComish*, 611 F.3d at 530 ("*Davis* has to be distinguished because the scheme in that case affected contribution limits and this scheme does not.") (Kleinfeld, J., concurring). Instead, as discussed above, the challenged provisions merely release supplemental public funds to participating candidates. As a subsidy scheme instead of a direct restriction, the Act is subject to more deferential review.

Second, the Millionaire's Amendment not only retained a direct limit on the speech of self-financed candidates, but also created a scheme of contribution limits that was "asymmetric" and "discriminatory." The *Davis* Court repeatedly stressed that "if § 319(a)'s elevated contribution limits applied *across the board*," *i.e.*, if the contribution limit was symmetrical, then "[plaintiff] would not have any basis for challenging those limits." *Id.* at 2771 (emphasis

added); *see also id.* at 2770. Hence, it was only the asymmetrical nature of the regulation that gave rise to constitutional concerns. Here, by contrast, there is no comparable issue of discrimination.

The Millionaire's Amendment applied to congressional races in which the candidates were similarly situated from a regulatory perspective: all candidates were privately financed and operating under the same federal campaign finance regime. *See* 128 S. Ct. at 2765 ("Under the usual circumstances, the same restrictions apply to all the competitors for a seat."). When a candidate self-financed his campaign, the Millionaire's Amendment triggered "discriminatory fundraising limitations" and effectively superimposed an "asymmetrical regulatory scheme" onto an otherwise unitary regulatory regime. *Id*. at 2766, 2772.

Here, because publicly-funded and privately-financed candidates voluntarily elect different regulatory programs *ab initio*, they are not similarly situated. Indeed, participating candidates choose a far more restrictive campaign finance regime – one that includes spending limits and stringent limitations on private fundraising – than do candidates who choose to privately finance their campaigns. *See* ARIZ. REV. STAT. §§ 16-941, -945. That only participants receive trigger funds is therefore not "discrimination"; it is simply the result of the candidates' voluntary decisions to compete in different regulatory programs.

Buckley affirms the permissibility of creating two different financing regimes. The Court there found no

constitutional requirement that all candidates be treated identically in terms of voluntary public financing, recognizing that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98. Thus, under *Buckley*, no constitutional burden arises from treating participating and non-participating candidates differently because the differential treatment is entirely due to the fact that the candidates are not similarly situated.

In sum, because the trigger provisions do not directly restrict petitioners nor discriminate between similarly-situated candidates, *Davis* does not govern here.

d. The "Compelled Access" Cases Cited by Petitioners Do Not Apply.

In their final attempt to find support for strict scrutiny, petitioners resort to this Court's decisions in *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Because both cases turned on "compelled access," however, neither is relevant to this case.

In *Pacific Gas*, the Court reviewed a state commission ruling that required a utility company to disseminate in its billing materials literature from certain outside groups that opposed the company in

commission proceedings. The Court held that the ruling violated the First Amendment because it created a government-enforced right of access to the utility company's billing envelope for certain speakers based on their viewpoint, and thereby forced the utility company "to associate with speech with which [the company] may disagree." 475 U.S. at 15. Similarly, in *Tornillo*, the Court struck down a "right-of-reply statute" that required a newspaper to provide a political candidate with free space *in its pages* to respond to any newspaper editorials criticizing the personal character of the candidate. 418 U.S. at 244-45.

Here, by contrast, the trigger provisions do not grant participating candidates any "right of access" to petitioners' property, funds or communications for the purpose of disseminating the participants' speech. Indeed, petitioners do not claim otherwise. Instead, they simply assert that "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." McComish Br. at 54 (emphasis added).

But this argument misrepresents what the Court in *Pacific Gas* meant when it criticized the commission's order compelling the utility company to "*help* disseminate hostile views." 475 U.S. at 14 (emphasis added). The Court made clear that the constitutional violation was forcing the company "to *use its property*

– the billing envelopes – to distribute the message of another." *Id.* at 17-18 (emphasis added). Moreover, the *Pacific Gas* Court explicitly distinguished governmental subsidy programs – *including the presidential public financing system reviewed in Buckley* – that distributed governmental subsidies without the "help" of compelled access to the property of a private party. It noted that unlike "the fundamentally content-neutral subsidies that we sustained in *Buckley* and *Regan*," "the Commission's order identifies a favored speaker based on the identity of the interests that [the speaker] may represent and forces the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *See id.* at 15-16 (citing *Buckley*, 424 U.S. at 97-105; *Regan*, 461 U.S. at 546-50) (internal quotations omitted). In making this distinction, the Court therefore affirmed that taxpayer-funded subsidy schemes that do not rely on a "right of access" to another speaker's property or communications do not raise First Amendment concerns.

2. Like the Public Financing System Upheld in *Buckley*, the Trigger Provisions Advance the Compelling Governmental Interest in Preventing Corruption and the Appearance of Corruption.

Because the challenged trigger provisions are viewpoint-neutral, and do not impose any constitutionally-cognizable burdens on speech, there is some

question as to whether the provisions should be subjected even to exacting scrutiny. But even if the provisions are reviewed under this standard, *see McComish*, 611 F.3d at 525, they nevertheless are constitutional because they bear a "substantial relation" to a "sufficiently important" governmental interest. *See Citizens United*, 130 S. Ct. at 914. *Buckley* affirms that the challenged trigger provisions further the compelling governmental interest in combating corruption and the appearance of corruption in state elections.

a. The Trigger Provisions Encourage Participation in the Arizona Public Financing Program and Thereby Prevent Actual and Apparent Corruption in State Elections.

Buckley made clear that public financing serves multiple "vital" interests, including "reduc[ing] the deleterious influence of large contributions on our political process," "facilitat[ing] communication by candidates with the electorate," and "free[ing] candidates from the rigors of fundraising." 424 U.S. at 91.

Prime among the interests served by public financing is the prevention of actual and apparent political corruption. The *Buckley* Court noted explicitly that public financing was "a means of eliminating the improper influence of large private contributions." *Id.* at 96. This principle has been reaffirmed by numerous lower courts in their review of federal or

state public financing programs. *See*, *e.g*., *Leake*, 524 F.3d at 440-41 (finding that state's public financing system "is designed to promote the state's anti-corruption goals"); *Daggett*, 205 F.3d at 471 (holding that public financing provides "the assurance that contributors will not have an opportunity to seek special access, and the avoidance of any appearance of corruption"); *RNC*, 487 F. Supp. at 284.

From *Buckley*'s holding that public financing furthers the prevention of corruption, it follows that those components of a public financing program that further the program's viability are substantially related to this compelling anti-corruption purpose. More specifically, "[b]ecause *Buckley* held that public financing of elections furthers First Amendment values," "states may structure [public financing programs] in a manner which will encourage candidate participation in them." *See McComish*, 611 F.3d at 526. The trigger provisions of Arizona's program do just this. They provide assurance to participating candidates that they will have the resources to respond to high spending by their privately-financed opponents or by outside groups. Without such assurance, candidates might be reluctant to participate in a system of public financing and spending limits because of a well-grounded concern that they would be competitively disadvantaged by doing so. By thus facilitating candidates' participation in Arizona's program, the trigger provisions reduce candidates' reliance on private contributions and thereby advance the compelling governmental interest in preventing

corruption or the appearance of corruption. At the very least, high participation rates in the program and the corresponding reduction in the number of campaigns reliant on private money reduces or eliminates the *appearance* that campaign contributions buy influence or increased access to elected officials.

Petitioners put forward various arguments in an effort to obscure the clear applicability of *Buckley* to this case, and by extension, the relevance of the government's anti-corruption interest. *See* PAC Br. at 35-43. None of these arguments have merit.

First, petitioners claim that unlike the presidential system in *Buckley*, the true intent of the Arizona program was to "level the playing field" and to "achieve equality among speakers." PAC Br. at 36. But petitioners' attempt to characterize the intent of the Act as primarily or exclusively related to "leveling the playing field" is factually inaccurate. The record makes clear that the anti-corruption goals of the Act were prominent in literature promoting the ballot initiative and that corruption concerns were paramount in the minds of the initiative voters. *See McComish*, 611 F.3d at 514-16; Brief of Respondent Clean Elections Institute at 3-5, 42-44. Indeed, the voter information pamphlet for the initiative, which petitioners concede is dispositive, *see* PAC Br. at 37 n.9, stated explicitly that the Act "would change Arizona's 'reputation [as] a state rife with corruption and the abuse of money in politics . . . [and] restore confidence in our political system.'" 611 F.3d at 515 (quoting Ballot Propositions Publicity Pamphlet for

1998 Arizona General Election, at *88). It was thus reasonable for the Court of Appeals to conclude that "one of the principal purposes of the Act was to reduce quid pro quo corruption." *Id*. at 516. Against the weight of this evidence, petitioners offer only a collection of out-of-context quotations from various activists for the initiative to demonstrate its purported "equalizing" purpose – and resort to highlighting a statement on the Citizens Clean Election Commission's website posted over a decade *after* passage of the voter initiative. PAC Br. at 9-11.

In any event, even if petitioners had compiled a more persuasive record regarding the primacy of the "equalizing" rationale, the premise upon which their legal argument relies is faulty: the possibility that the Act was perceived by some voters as advancing multiple governmental goals does not somehow nullify the anti-corruption purpose and effect of the Act. As the Court of Appeals noted, "[v]oters are motivated by varied and conflicting motivations" and the exact extent to which they were motivated by corruption concerns "cannot be precisely determined." 611 F.3d at 515-16. Even assuming that "leveling the playing field" was an ancillary motivation of some initiative voters, that does not obviate the clear anti-corruption purpose behind the Act. This purpose was explicit in the initiative literature and further reinforced by Arizona's history of corruption scandals against which the public debate was conducted. This Court has recognized that a majority vote for a campaign finance measure where there is public

awareness of political corruption is evidence that voters were motivated by their perception of corruption. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000). Even if Arizona voters were exposed to multiple policy arguments for public financing, this does not undercut *Buckley*'s affirmation that public financing programs, like Arizona's system, are justified by compelling anti-corruption interests.

Second, petitioners attempt to distinguish *Buckley* by noting that the presidential system did not include trigger provisions, arguing that this distinction indicates that the triggers are an improper "prophylactic" measure. McComish Br. at 81-83; PAC Br. at 53-55. As discussed in Section I, the observation that the presidential public financing system does not have triggers is correct. But it does not follow that the trigger provisions are therefore merely prophylactic to the Act's anti-corruption objective.

The record is replete with testimony indicating that the trigger provisions encourage participation in Arizona's program. *See* Clean Elections Br. at 47-48 (citing Joint Appendix 386-88, 439-43, 540-44, 590-91). Petitioners neither dispute this point nor offer evidence to the contrary. And measures, such as the trigger provisions, to ensure participation in the program are directly related to the government's anti-corruption interest because, as the Court of Appeals found, "[a] public financing system with no participants does nothing to reduce the existence or appearance of quid pro quo corruption." 611 U.S. at 527.

Petitioners nonetheless assert that the connection between the triggers and the Act's anti-corruption goals is "indirect" and comparable to the "indirect connection between issue advocacy regulation and anticorruption purposes, which did not withstand strict scrutiny in *Wisconsin Right To Life*." McComish Br. at 81. But the problem with the corporate funding restriction rejected in *WRTL* as an impermissible "prophylaxis-upon-prophylaxis" measure was not that it was "indirect," but rather that it was overbroad – that it covered issue speech as well as express advocacy. *See* 551 U.S. at 479; *see also* 2 U.S.C. § 441b(b)(2). Here, however, the trigger provisions cannot be construed as "overbroad." They do not "restrict" a broader category of speech in an attempt to prevent circumvention of a narrower campaign finance restriction; they do not directly "restrict" speech at all. *See* Section II.B.1.a, *supra*. Nor does the Act with trigger provisions regulate any *more* speech than the Act would regulate if it lacked trigger provisions, or if it utilized another mechanism to release public funds to participating candidates, such as lump sum payments.

Lastly, this Court should also reject petitioners' novel theory that "within a system that already prohibits large campaign contributions and imposes extensive disclosure requirements," public financing "simply cannot further advance anticorruption purposes." McComish Br. at 68-69. This theory runs directly counter to the *Buckley* and *RNC* decisions. The presidential public financing system was also

enacted in a regulatory system that already included contribution limits and comprehensive disclosure, and yet this Court squarely held that public financing promoted the government's anti-corruption goals. 424 U.S. at 96-97.

Indeed, the *Buckley* Court recognized that there was always the potential for corruption "[u]nder a system of private financing of elections" because "a candidate lacking immense personal or family wealth *must* depend on financial contributions from others to provide the resources necessary to conduct a successful campaign." 424 U.S. at 26 (emphasis added). And "[t]o the extent that large contributions are given to secure a quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. Public financing thus furthers compelling state interests precisely because it "eliminates the improper influence of large private contributions" that is often endemic to such a system. *Id.* at 96. This insight was also part of the legislative findings supporting the presidential system. Congress rejected the argument that "reporting and disclosure rules combined with limits on contributions provide sufficient reform," and instead found that "[t]he only way in which Congress can eliminate reliance on large private contributions and still ensure adequate presentation to the electorate of opposing viewpoints of competing candidates is through comprehensive public financing." S. REP. NO. 93-689 (1974), at *4.

b. *Davis v. FEC* Is Inapplicable Because the Millionaire's Amendment Did Not Serve Anti-Corruption Goals.

The tenuous relevance of *Davis* to this case is further undercut by the fact that the Millionaire's Amendment and public financing programs have been found to implicate different governmental interests. The Millionaire's Amendment was found in *Davis* to advance no legitimate governmental interest, while public financing was found by the *Buckley* Court to advance the "vital" governmental interest in preventing political corruption.

In *Davis*, the government attempted to justify a "scheme of discriminatory contribution limits" on the twin grounds that the limits prevented corruption and "leveled the playing field" between self-financed and conventionally-financed congressional candidates. The Court first rejected the asserted anti-corruption goal: invoking *Buckley*, it reasoned that because a candidate's "reliance on personal funds *reduces* the threat of corruption," 128 S. Ct. at 2773, the Millionaire's Amendment, by discouraging the use of personal funds, undermines the anti-corruption interest. Indeed, by tripling the contribution limits for conventionally-financed candidates, the Millionaire's Amendment would allow yet larger contributions and increase the potential for *quid pro quo* arrangements. The Court also rejected the government's alternative argument that the Millionaire's Amendment limits "were justified because they 'level

electoral opportunities for candidates of different personal wealth,'" finding that the Court's prior decisions "provide no support for the proposition that this is a legitimate government objective." *Id*.

By contrast, *Buckley* makes clear that public financing serves to prevent corruption and the appearance of corruption, as well as to insulate candidates from the pressures of private fundraising. 424 U.S. at 93. Hence, whereas the Millionaire's Amendment, in the view of the Court, did not advance the governmental interest in preventing corruption because it increased the size of allowable private contributions for certain candidates and discouraged the non-corrupting expenditure of personal funds, public financing programs further the compelling governmental interest of "reduc[ing] the deleterious influence of large contributions on our political process." 424 U.S. at 93.

In an attempt to salvage the applicability of *Davis* to public financing, petitioners have labored to uncover a clandestine "equalizing rationale" behind the Act. *See* Section II.B.2.a, *supra*. But in so doing, they misapprehend the very nature of what the Court in the past has considered an impermissible attempt to "level the playing field." *See*, *e.g.*, McComish Br. at 63-64 (arguing that adjusting public funds grants to ensure that participants are "viable" is tantamount to "equalizing" electoral influence). In *Buckley,* the Court was concerned about expenditure restrictions and other state attempts to "equaliz[e] the relative ability of individuals and groups to influence the

outcome of elections" in an electoral system that relied entirely on private financing. 424 U.S. at 48. Here, however, by enacting trigger provisions, Arizona is not equalizing the resources of candidates competing in the same privately-financed electoral system; instead, the state is providing that candidates who have chosen to operate in a different type of electoral system – a publicly-financed system – have adequate funds to communicate with the electorate and respond to their political opponents. In short, Arizona is not leveling the playing field between similarly-situated privately-financed candidates, but rather is ensuring that candidates operating in two different systems are competitive and can engage in meaningful debate.

The permissibility of Arizona's dual campaign finance system is underscored by the fact that the constitutional concerns that informed this Court's rejection of past "equalizing" restrictions are not present here. In *Buckley*, the Court feared that in a system of privately-financed elections, expenditure limits or other attempts to equalize resources would by necessity discriminate against those with wealth or fundraising prowess. *See also Davis*, 128 S. Ct. at 2773 (finding that BCRA § 319(a) attempted "to reduce the natural advantage that wealthy individuals possess in campaigns for federal office"). As *Buckley* noted, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." 424 U.S. at 49.

But in a system of *mixed* private and public financing, calibrating public funds grants through trigger provisions does not discriminate against privately-financed candidates who, after all, were free to accept public funds themselves. Participating candidates and privately-financed candidates are not similarly-situated: they have voluntarily chosen two different funding systems.

Also inapplicable here is the *Buckley* Court's concern that equalizing measures, such as the $1,000 limit on independent expenditures invalidated there, would "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id*. at 19. But far from constraining free speech, the trigger provisions *enhance* political speech and debate. By providing optional subsidies to all qualifying candidates regardless of their identity, beliefs or viewpoints, the Act "assure[s] a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest . . . thrive[s]." *Id.* at 93 n.127 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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APPENDIX A

The following groups constitute the *amici curiae* who submit the foregoing brief:

- **The Campaign Legal Center** (CLC) is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in FEC rulemaking and advisory opinion proceedings and files complaints with the FEC to ensure that the agency is properly enforcing federal election laws. The CLC has participated as an *amicus curiae* in a broad range of campaign finance cases, including in the district court proceedings in the instant case.
- **Citizens for Responsibility and Ethics in Washington** (CREW) is a non-profit 501(c)(3) organization dedicated to promoting ethics and accountability in government and public life by targeting government officials – regardless of party affiliation – who sacrifice the common good to special interests. CREW advances its mission using a combination of research, litigation and media outreach.
- **Democracy 21** is a non-profit, non-partisan policy organization that works to ensure the integrity of our democracy. It supports campaign finance and other political reforms and conducts public education efforts to accomplish these goals, participates in litigation

involving the constitutionality and interpretation of campaign finance laws and works to ensure that campaign finance laws are effectively and properly enforced and implemented.

- **The League of Women Voters of the United States** is a non-partisan, community-based organization that encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and national levels.

- **League of Women Voters of Arizona** is a non-partisan, community-based organization that encourages the informed and active participation of citizens in government, and influences public policy through education and advocacy. The League (Arizona) helped draft the ballot initiative connected to Arizona's Citizens' Clean Elections Act and advocated for its enactment by state voters. It

continues to advocate before the state legislature to protect and strengthen the Act.

- **New Jersey Appleseed Public Interest Law Center** ("NJ Appleseed") is a non-profit corporation established to provide legal advocacy on behalf of New Jersey residents in matters raising significant public policy issues. The Center was initially authorized by the faculty of Rutgers Law School-Newark to develop and expand the reach of public interest law and education in the State. Since 1998, the Center has been affiliated with Appleseed, a national public interest organizing project created by alumni of Harvard Law School. NJ Appleseed currently focuses its work on health care reform, election reform, government and corporate accountability issues, and environmental and public health issues. Pursuant to its election reform project, NJ Appleseed has worked with and has represented community groups that have sought to establish state and local clean campaign programs.

- **Public Citizen, Inc.**, a national government-reform and consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws fostering an open, accountable and responsive government and protecting consumers, workers, and the public. Public Citizen has long advocated campaign finance

laws that combat the appearance and reality of corruption of public officials, including laws providing public financing for candidates on the national and state levels. Public Citizen lawyers often appear as counsel in litigation involving campaign finance issues, and Public Citizen itself frequently participates in such litigation as *amicus curiae*.

- **The Sierra Club** is a national non-profit organization of approximately 600,000 members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Club's particular interest in this case and the issues which the case concerns stem from the Club's interests in improving the quality of publicly-elected officials by reducing the undue influence of money in elections and by reducing campaign solicitation efforts so that elected officials can better serve their constituents and the environment.