Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEN BENNETT, et al. and CLEAN ELECTIONS INSTITUTE, INC.,

Appellants,

v.

JOHN MCCOMISH, et al. and DEAN MARTIN, et al.,

Respondents.

On Appeal from the United States District Court
for the District of Arizona
Judge Roslyn Silver
Case No. CV-08-1550-PHX-ROS

APPELLANTS' REPLY BRIEF (CORRECTED)

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INTRODUCTION

The judgment of the district court should be reversed for two independent reasons.

First, Plaintiffs do not dispute that matching funds withstand intermediate scrutiny, which applies here. Plaintiffs' contention that any burden on expenditures, regardless of its severity, requires strict scrutiny is refuted by the Supreme Court's holdings that, while disclosure laws burden expenditures, they are subject to only intermediate scrutiny. Even crediting Plaintiffs' misleading version of the facts, the indirect effect of matching funds is more similar to the effect of disclosure laws than to the effect of a direct spending limit or the discriminatory contribution limits addressed in *Davis v. FEC*, 128 S. Ct. 2759 (2008). This Court should apply intermediate scrutiny and uphold the Act.

Second, matching funds withstand strict scrutiny. Plaintiffs do not contest that public funding serves compelling interests in promoting speech and combating corruption, that Arizona has a compelling interest in encouraging participation in public financing, that matching funds promote such participation, or that the alternative of much larger initial grants was rejected because it would waste money and erode support for public funding. Instead, Plaintiffs mischaracterize the Act's purposes; question whether

Arizona had a sufficient record of corruption, notwithstanding the AzScam corruption scandal and reports of corruption that continued until the Act was passed; and offer implausible and ineffective alternatives to matching funds. None of this shows that the Act is not narrowly tailored to serve Arizona's compelling interests.

ARGUMENT

I. Plaintiffs Mischaracterize The Record

A. The Record Does Not Support Plaintiffs' Claim That Matching Funds Burden Speech

The record evidence cited by Plaintiffs shows they do not, contrary to their claims, "purposefully keep their expenses and fundraising low enough to avoid triggering matching funds . . . ." (PIBR[1] 15.)[2]

Plaintiffs repeatedly cite Dean Martin's testimony to support their claim that matching funds deter spending. (PIBR 15, 17-18.) But Martin's testimony belies that claim: when asked whether he ever triggered matching

[1] This brief refers to Plaintiffs and Plaintiff-Intervenors collectively as "Plaintiffs" and uses the following abbreviations: PBR (Plaintiffs-Appellees' Brief); PIBR (Plaintiff-Intervenors-Appellees' Brief), and AOB (Defendants-Appellants' Opening Brief).

[2] Plaintiffs fail to cite any record evidence that shows Martin is even running for Governor in 2010, let alone that he was coerced into doing so with public funding. (PIBR 17-18 (citing ER 3753 (Martin would be "eligible to run for a second term as *State Treasurer* in 2010" (emphasis added))).

funds, Martin could not even remember doing so, although he did.[3] (ER 1496, 5658.) Martin could not name any high-propensity donor who would not donate to his campaign due to matching funds. (ER 3178.)

Plaintiffs rely on Senator Burns's testimony. (PIBR 16.) But he testified: "I didn't track [my opponent's] expenditures. I'm surprised at the amount. I wasn't aware that . . . they received that amount of money, but I . . . didn't track them." (ER 1783.) Burns testified that he spends whatever is necessary to get out his message to voters, even if this means triggering matching funds. (*Id.*) Plaintiffs claim Burns changed his campaign strategy to avoid triggering matching funds in the 2008 campaign, citing an interrogatory response that pre-dated the 2008 campaign. (PIBR 16, ER 3146-47, 3376.) In fact, Burns triggered more than $17,000 in matching funds in 2008. (ER 3377.)

Plaintiffs claim Rick Murphy was coerced into participating in public funding in one race and stopped raising money to avoid triggering matching

[3] The lone e-mail cited by Plaintiffs-Intervenors for the assertion that Martin "intentionally delayed fundraising to minimize the amount of matching funds" in his 2004 campaign, (PIBR 18), is actually an e-mail sent to a contributor that does not mention matching funds but indicates that Martin "held off having any fundraising receptions . . . until after the Primary" because he faced "only a Democrat challenger in the General Election." (ER 3116.)

funds in another. (PIBR 16-17.) But the testimony of Murphy's campaign consultant, Constantin Querard, squarely contradicts both points. (ER 1635, 5672-73.)

Finally, Plaintiffs claim that Arizona Taxpayers Action Committee ("ATAC") delayed expenditures and engaged in "self-censorship." (PIBR 18-19.) But ATAC's representatives have given, at best, contradictory testimony and declarations about whether matching funds have caused them not to spend money. (PIBR 18-19; ER 512, 3163, 3215-3216, 3225-26.)

B. Plaintiffs Misidentify The Act's Purposes

Plaintiffs cite an unsigned, undated, and unauthenticated document for the proposition that matching funds were designed to discourage spending. (PIBR 10 (citing ER 5081)). Even if otherwise admissible, the document is irrelevant because it was drafted *after* the Act went into effect and thus was not considered by either the voters or the drafters. (ER 5081 (referring to candidates for the 2004 election, six years after the Act was passed)).

C. Plaintiffs Inaccurately Portray Public Perception

Plaintiffs' contention that Arizonans have a negative view of Clean Elections relies on a single article published during this litigation, which featured Plaintiffs' counsel and Plaintiff Bouie. (PBR 11-12; ER 5295,

5299-5300.) Notably, even this article states that "[Clean Elections] is clearly popular with both voters and politicians." (ER 5286.) This confirms the analysis (cited by Plaintiffs) that found "two-thirds of high-efficacy voters are familiar" with Clean Elections and, among them, "support for continuing the program is very widespread, with 85 percent calling the program important to the voters of the state." (PIBR 12 (citing the analysis); ER 3873.)

D. Plaintiffs Mischaracterize Expert Testimony

1. Professor Green

Donald Green, Director of Yale's Institution for Social and Policy Studies, did not "concede that the whole point of the matching funds trigger is to diminish the so called arms race" or that the Act violates the First Amendment. (PBR 9; PIBR 12.) Rather, Green explained that, because a traditional candidate knows *exactly* "how much a [participating opponent] will spend"—not more than three times the initial grant—the traditional candidate can determine how much he must raise to guarantee outspending his opponent. (ER 3029-30, 3032.) Matching funds thus "dramatically reduce . . . the uncertainty associated with how much one's opponent will spend," which can lead to an unnecessary "arms race" of spiraling

fundraising. (ER 3030.) Green, who is not a lawyer, acknowledged that, *if* "the kind of speech that would make a difference in an election" were "thwarted, then there would be a material violation" of the First Amendment. (ER 3744.) But he found "evidence for the null hypothesis"—that matching funds have "no effect"—and thus saw "no grounds [for finding] that a material violation has occurred." (*Id*.)

Plaintiffs still do not dispute Green's finding that, in 2006, spending by non-participating candidates who had publicly-financed opponents did not cluster just below the matching-funds threshold—contrary to what would be expected if matching funds deterred spending. In the face of that finding, Plaintiffs now speculate non-participants purposely choose to spend thousands less than the matching-funds threshold to avoid any risk that independent spending would, combined with the candidate's spending, exceed the threshold. (PBR 39-40 n.6.) None of the cited evidence supports this speculation.

2. Professor Mayer

Plaintiffs wrongly claim that Kenneth Mayer, Professor of Political Science at the University of Wisconsin-Madison, "acknowledged that matching funds are not an essential component of a public financing

scheme." (PIBR 21.) Mayer acknowledged that some public-financing systems do not include matching funds. That, however, does not answer the question whether an effective public-financing system in Arizona requires matching funds.[4] Mayer explained that, to "have any meaningful effect," a public financing system must have (1) "adequate grants" and (2) "some mechanism that protects the candidates who participate so that they don't fear that they . . . wouldn't remain competitive with a candidate who outspent them by a significant amount." (ER 1946.) That is exactly what Arizona's system of matching funds provides.

3. Plaintiffs' Experts

Plaintiffs' expert, David Primo, admitted that, if (as he hypothesized) non-participating candidates postpone their spending in order to delay triggering matching funds, one would expect to see the gap in spending between those non-participating candidates who have participating opponents and those who do not grow as the election nears. (ER 1724.)

[4] Mayer explained that Minnesota has nearly universal participation in its partial public financing system due to its political culture. (ER 1947.) But *partial* public financing is not an equally effective alternative to Arizona's *full* public-financing system, because it allows participating candidates to raise potentially-corrupting private contributions and would, as the drafters found, undermine the Act's purposes. (ER 5652.)

But, as *both* Green *and* Primo found, there is no statistically significant evidence of this pattern. (ER 1724-25.)

Plaintiffs portray the analysis of their expert, Marcus Osborn, as superior to Green's and Mayer's because Osborn considered both quantitative and qualitative evidence. (PBR 38.) His only quantitative evidence, however, was Dr. Primo's flawed report. (ER 5147-48, 5128-29.) Osborn's qualitative analysis consists of his improperly assuming the role of an advocate reciting Plaintiffs' self-serving declarations and deposition testimony. (ER 5138-5145.) Osborn trumpets the article *Gaming Arizona: Public Money and Shifting Candidate Strategies* as finding that "every non-participating candidate [surveyed] felt constrained by the matching funds component." (ER 5131-33.) But that finding, like much of the article, was based on interviews with just four self-selected non-participating candidates. (ER 5178, 5181 n.6 (indicating that, of sixteen interviewees, twelve were participating candidates)).

II. Plaintiffs Misstate The Standard Of Review

Plaintiffs wrongly contend that this Court should defer to the district court's factual and evidentiary findings. But *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003), upon which Plaintiffs rely, sets forth

the standard governing review of *preliminary injunction* orders, not summary judgment orders. This Court reviews a district court's grant of summary judgment *de novo*. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1035 (9th Cir. 2007).

Moreover, there is no support for Plaintiffs' argument that the district court implicitly sustained Plaintiffs' evidentiary objections by not ruling on them; the cases Plaintiffs rely upon involve circumstances where a court's failure to rule was interpreted as implicitly *overruling* an evidentiary objection or as *denying* other non-evidentiary motions. (*See* PBR 23-24.) If anything, the district court's failure to rule on an evidentiary objection amounts to an implicit overruling of the objection. *See Vinson v. Thomas*, 288 F.3d 1145, 1152 & n.8 (9th Cir. 2002) (considering evidence on appeal subject to an unresolved evidentiary objection at the district court level).

III. Matching Funds Are Not Subject To Strict Scrutiny

A. Plaintiffs' Argument For Strict Scrutiny Cannot Be Reconciled With *Citizens United* Or *Buckley*

Plaintiffs are wrong that *Citizens United* and *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), require that strict scrutiny be applied to any law that burdens expenditures regardless of the severity of the burden. (PIBR 42-44.) In both *Citizens United* and *Buckley*, the Supreme Court found that

disclosure laws burden expenditures. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66, 68 (1976). If Plaintiffs' position were correct, the Court would necessarily have applied strict scrutiny to disclosure regulations. But the Court instead applied intermediate scrutiny, because disclosure laws—like matching funds—"impose no ceiling" on expenditures. *Citizens United*, 130 S. Ct. at 914; *Buckley*, 424 U.S. at 64, 66, 68.

Beaumont did not even address the appropriate level of scrutiny for laws that burden expenditures. Instead, *Beaumont* held that intermediate scrutiny applied to a *contribution* restriction regardless of whether that restriction limited or banned contributions. *Id*. at 161.

Citizens United likewise disposes of Plaintiffs' contention that matching funds must be subject to strict scrutiny on the ground that they are content-based. Plaintiffs characterize matching funds as content-based because they are provided "only when" expenditures are made, in their words, "(i) about a political race, (ii) against a publicly funded opponent,[5] and (iii) above a certain point." (PIBR 45.) But one of the disclosure laws

[5] Plaintiffs' description is inaccurate; independent expenditures in favor of a publicly-financed candidate may also trigger matching funds to that candidate's participating opponents. A.R.S. § 16-952(C)(3).

upheld in *Citizens United*, 2 U.S.C. § 434(f), required disclosure only when expenditures exceeded $10,000 for certain advertisements made shortly before an election that "refer[] to a clearly identified candidate for federal office." Thus, that law's disclosure requirements were triggered only if the advertisement is (1) about a political campaign, (2) about a particular type of candidate, and (3) spending exceeds a monetary threshold. Plaintiffs' position would require that section 434(f) be subjected to strict scrutiny on the ground that it is content-based. That the *Citizens United* court applied intermediate, rather than strict, scrutiny shows Plaintiffs' understanding of the law is wrong. *Citizens United*, 130 S. Ct. at 914; *see also Davenport v. Washington Educ. Assoc.*, 551 U.S. 177, 188 (2007) (holding that "strict scrutiny is unwarranted" for a content-based regulation unless it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" and that "it is well established that the government can make content-based distinctions when it subsidizes speech").

Arizona's matching funds create absolutely no risk that the government will drive certain ideas or viewpoints from the marketplace. Matching funds are available to all qualified candidates, entirely without

regard to their political viewpoints or the ideas they intend to express. Arizona might provide matching funds to a candidate with one viewpoint in race A, and the same day provide matching funds to a candidate with the opposite viewpoint in race B. Indeed, Arizona might provide matching funds to two candidates *in the same race but with opposing viewpoints*. By offering a viable alternative mode of funding, the Act has enhanced the ability of candidates to express *any and all* viewpoints in Arizona elections. *See* A.R.S. § 16-940; ER 5669-70, 6234.21.

B. Plaintiffs' Attempts To Distinguish Disclosure Laws From Matching Funds Are Unpersuasive

Plaintiffs contend that disclosure laws and matching funds differ because matching funds become available only once a non-participant's contributions or expenditures exceed a monetary threshold. (PBR 43-44.) But that does not distinguish matching funds from disclosure laws—*Citizens United* applied intermediate scrutiny to a disclosure requirement that was triggered only after a candidate spent more than $10,000.[6] 130 S. Ct. at 914.

[6] Contrary to Plaintiffs' claims, (PBR 44), *Lincoln Club* held that intermediate scrutiny, not strict scrutiny, applied to a limit on contributions to independent expenditure committees. 292 F.3d at 938. *Lincoln Club* applied strict scrutiny to a provision that prohibited the recipient of an excessive contribution from making any independent expenditures at all. *Id*. Unlike *Lincoln Club's* expenditure ban, the Act does not subject non-

Plaintiffs argue strict scrutiny should apply to matching funds because the burden of disclosure laws is indirect whereas the purpose of the Act, they assert, was to restrict speech. (PIBR 47.) The argument fails for two reasons. First, the applicable level of scrutiny turns not on a campaign finance law's purposes, but on the severity of the burden that it imposes. *See Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2001). Second, the voters' and drafters' purpose in passing the Act was not to restrict spending by non-participants or independent expenditure committees, but to enhance the speech of participating candidates and protect against corruption.[7] *See* A.R.S. § 16-940; *see also* ER 5653-54, 5647-52 (testimony of the Act's lead drafter explaining that overall purposes

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participating candidates or independent expenditure committees to civil and criminal penalties for exceeding the matching-funds threshold. *See id.* at 935.

[7] Plaintiffs' reliance on *NAACP v. Alabama*, 357 U.S. 449 (1958), is misplaced. In finding that disclosure laws impose a burden on speech and applying intermediate scrutiny, *Buckley* followed *NAACP*. 424 U.S. at 66. The Court reached different results in the two cases, not because of the intent of the two disclosure laws or because the Court selected different levels of scrutiny, but rather based on its conclusions about whether the two laws served sufficiently important government interests. *Compare NAACP*, 357 U.S. at 463 (finding that there was no "interest . . . sufficient to justify the deterrent effect" on speech), *with Buckley*, 424 U.S. at 66-67 (holding that disclosure requirements serve multiple sufficiently important government interests).

of the Act included "promot[ing] freedom of speech" and "avoid[ing] the unseemly appearance or actual corruption . . . that had occurred in actual cases, like AzScam" while the specific purposes of matching funds were: (1) "to allow candidates to participate in the [public funding] without . . . fear that they . . . could easily be outspent"; (2) to avoid "millions of dollars of wasted Arizona money" that would result from a lump sum approach; (3) to allow "more speech and more ability for people to get out their message"; and (4) to further the "overall purpose of the Act" in allowing candidates not to rely on private funds).

C. *Davis* Does Not Address Whether Matching Funds Impose A Severe Burden That Justifies Strict Scrutiny

Davis is about similarly-situated candidates' being subjected to "discriminatory" contribution limits. In an effort to force this case into that box, Plaintiffs characterize matching funds as "asymmetrical" (but not "discriminatory") because they are provided only to participating candidates. (PBR 29-30.) But the notion that treating participating candidates and traditional candidates differently is unconstitutional is squarely refuted by *Buckley*. There, the Court upheld, without applying strict scrutiny, precisely such a system, which "condition[ed] acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."

424 U.S. at 57 n.65.[8] In short, the district court was justified in being "unable to conceive of how an award of matching funds 'discriminates' against [Plaintiff]."[9] (ER 7.)

In any event, any claim that mere lack of "symmetry" between a public funding law's treatment of differently-situated publicly and privately-financed candidates renders the law unconstitutional is squarely refuted by existing authority. Courts have held that a "'state *need not be completely neutral* on the matter of public financing'[,] . . . that a public financing scheme *need not achieve an 'exact balance'* between benefits and

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[8] Plaintiffs' policy disagreements with the Act do not render it asymmetrical. The Legislature amended the Act to take into account the estimated costs of non-participants' fundraising. A.R.S. § 16-952(A) and Historical and Statutory Notes regarding the 2007 amendment by Ch. 277. Plaintiffs have no evidence of the "typical" fundraising costs for non-participants and no testimony that the Legislature's choice of 6% was unreasonable; indeed, some non-participants have incurred no costs in connection with fundraising events. (ER 1041, 1263, 1056.)

That matching funds may sometimes be triggered for more than one publicly-funded opponent does not render the law discriminatory. If the rule were otherwise, a non-participant would quickly outspend each of her participating opponents in a multi-candidate race, creating a true asymmetry.

[9] While Plaintiffs claim that participants *on average* outspend non-participants, their comparison is misleading. Plaintiffs conveniently exclude non-participants who spend more than $70,000 from the average (ER 2529) while they conveniently include hopeless non-participating candidates who raise and spend little or no money. (*See* ER 2659-66.)

detriments," and that public funding systems thus violate the First Amendment only if the benefits of public funding "'stray *beyond the pale*'" and "'creat[e] *disparities so profound that they become impermissibly coercive*.'" *Daggett v. Comm'n on Govt'l Ethics and Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000) (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38-39 (1st Cir. 1993)). Here, undisputed record evidence establishes that candidates, including Plaintiffs, can and do choose to run privately-financed campaigns in Arizona. In fact, one in three candidates still opted for private financing in the 2008 primary and general elections. (ER 5763.)

Plaintiffs' contention that *Davis's* citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), resolves this case is also wrong. Plaintiffs fail to explain how that citation either (1) determines the severity of any burden imposed by matching funds (*Davis* cites *Day* for only the proposition that Section 319(a) imposed a "potentially significant burden"); or (2) resolves the issue whether matching funds are appropriately tailored to serve sufficiently important government interests. (*See* AOB 36-37.)

Plaintiffs argue that it is inconsequential that they were not deterred from spending above the matching-funds threshold because the plaintiff in

Davis was also not deterred from exceeding Section 319(a)'s trigger threshold. (PBR 40-41.) But that only confirms that *Davis* applied strict scrutiny to Section 319(a) because it subjected candidates who exercised their right to make personal expenditures to the "unprecedented penalty" of "discriminatory fundraising limitations," *Davis*, 128 S. Ct. at 2771, *not* because it purportedly deterred speech.

Finally, Plaintiffs attempt to minimize the significance of *Davis*'s distinction between Section 319(a) and the public-financing system upheld in *Buckley*, arguing that the problem with Section 319(a), as compared to a public-funding system, was that it "offered the self-financing candidate two choices, both bad." (PIBR 35.) But Plaintiffs fail to identify the two choices in *Davis*, and for good reason—they squarely distinguish that case from this one: "a candidate who wishes to exercise that right [to make unlimited personal expenditures] has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of *discriminatory contribution limits*." *Davis*, 128 S. Ct. at 2772 (emphasis added). *Davis* held that the choice imposed by Section 319(a) was impermissible because that statute required a candidate to abide by either expenditure limits or discriminatory contribution limits,

both of which are unconstitutional. In contrast, as *Buckley* established and *Davis* reconfirmed, providing public subsidies to candidates who agree to abide by expenditure limits and denying them to those who do not is constitutionally permissible.

D. The Forced-Access Cases Are Inapplicable

Plaintiffs cite cases that struck down laws that "require[d] [the speaker] to use its property . . . to distribute the message of another"—*i.e.*, a utility required to include the views of a consumer group in its billing envelopes, a newspaper forced to print the message of a candidate whom the newspaper had criticized, parade organizers compelled to allow groups they opposed into their parade, and a newspaper required to rehire staff who wanted to change its editorial policies. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 17-18 (1986) (plurality opinion); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995); *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 958-66 (9th Cir. 2010). Those cases might be relevant if the Act required non-participating

candidates to include their opponent's message in their own advertisements.[10] But the Act requires no such thing.

In sum, the Act is subject to intermediate scrutiny, and Plaintiffs do not dispute it meets that test. The Court need not go on further to uphold the Act.

IV. Matching Funds Satisfy Strict Scrutiny

A. Matching Funds Serve The State's Compelling Interests In Promoting Speech And Combating Corruption

1. The Act Was Enacted To Enhance Speech And Combat Corruption

The core purpose and effect of the Act is to provide public funding to candidates to enable them to run election campaigns—to enhance speech and political participation while combating the threat of potentially-corrupting private contributions. Plaintiffs twist this into a purportedly

[10] The footnote in *Pacific Gas* cited by Plaintiffs does not save their strained analogy to the forced-access cases. (*See* PIBR 38 n.18 (citing *Pacific Gas*, 475 U.S. at 12 n.7)). That footnote merely found it inconsequential that the utility company in *Pacific Gas* was required only to include its opponents' views in its billing envelopes while the newspaper in *Miami Herald* was required actually to print its opponents' messages. *Pacific Gas*, 475 U.S. at 12 n.7. Because matching funds do not require a non-participant or independent expenditure committee to include an opponent's views in their campaign message, *in any manner*, neither *Pacific Gas* nor *Miami Herald* has any significance here.

impermissible purpose to "level the playing field," because the Act seeks to give participating candidates sufficient funds to compete against privately-funded candidates. That is always true of public financing—with or without matching funds—because, unless government provides enough money for participating candidates to compete, the offer of public funding is an empty gesture. Thus, if a purpose to provide sufficient funding to run a competitive campaign rendered public funding unconstitutional, *all* meaningful public financing laws would be invalid (including the Presidential public financing upheld in *Buckley*).

In fact, the Supreme Court has upheld public financing and rejected only "[t]he argument that a candidate's speech may be *restricted* in order to 'level electoral opportunities' . . . ." *Davis*, 128 S. Ct. at 2773. The Court has never said that government may not *enhance* the speech of candidates who elect public financing (and agree to forego private contributions) to roughly "level the playing field"—or at least give publicly-financed candidates a chance to be in the game. To the contrary, the Court has held that, by doing just that, public financing "facilitate[s] and enlarge[s] public discussion and participation in the electoral process" and "furthers, not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 92-93.

The Act was enacted also to combat actual and apparent corruption. The Act's first finding is that existing law "[a]llows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction." A.R.S. § 16-940(B)(1). In *Citizens United*, the Court reaffirmed that reducing direct private contributions protects against the reality or appearance of corruption. 130 S. Ct. at 908. Moreover, the Act finds public funding is needed because the then-existing private-funding system "[u]ndermines public confidence in the integrity of public officials." A.R.S. § 16-940(B)(5). This echoes the *Buckley* Court's finding that "a system of private financing of elections" can undermine "the integrity of our system of representative democracy" and that "public financing [is] a means of eliminating the improper influence of large private contributions." *Buckley*, 424 U.S. at 26-27, 96.

Contrary to Plaintiffs' suggestion, legislation need not use the words "*quid pro quo*" or recite specific examples of "cash-for-votes" to serve the compelling anti-corruption interest. Congress used no such words or examples when it enacted FECA, upheld in *Buckley*, or BCRA, upheld in *McConnell*. The only evidence of corruption cited in *Buckley* were "abuses uncovered after the 1972 election" that had been discussed by the D.C.

Circuit, none of which were "cash-for-votes" *quid pro quo* transactions. *See Buckley*, 424 U.S. at 27 n.28 (citing 519 F.2d 821, 839-840 & nn.36-38 (D.C. Cir. 1975)); *see also McConnell v. FEC*, 540 U.S. 93, 119-120 & nn.5 & 6 (2003). The *McConnell* Court upheld restrictions on soft-money contributions based on an anti-corruption rationale without explicit evidence of "cash-for votes" *quid pro quo* corruption. *See* 540 U.S. at 149-153.[11]

Citizens United is not to the contrary. There, the Court addressed only regulation of independent expenditures, not a regulation (such as public funding) designed to address actual and apparent corruption created by private contributions to candidates. Even in that limited context, the Court held only that "[a]n outright ban on corporate political speech during the critical preelection period" was "asymmetrical to preventing *quid pro quo* corruption." 130 S. Ct. at 911. The Court recognized that "dispel[ling] either the appearance or the reality of [improper influences from

[11] Plaintiffs claim that the Act's identification of undue influence of "wealthy special interests" as a reason for enacting public funding somehow shows that the Legislature did *not* have an anti-corruption purpose. The opposite is true. In *McConnell*, the Court upheld BCRA as "the most recent federal enactment designed 'to purge national politics of what was conceived to be the pernicious influence of "big money" campaign contributions.'" 540 U.S. at 115. Indeed, Title I of BCRA, upheld by the Court based on the anti-corruption rationale, is entitled, "Reduction of Special Interest Influence."

independent expenditures]" is a legitimate legislative goal. *Id*. But, the Court held, a "categorical ban[] on speech" is "not a permissible remedy." *Id*. Here, the Act addresses the corrupting influence of private contributions, and no "categorical ban on speech" is at issue.

2. There Is Sufficient Evidence That Arizona Has An Anti-Corruption Interest

Plaintiffs contend there is insufficient evidence that actual or apparent corruption is a concern in Arizona. (*See* PBR 54, PIBR 57-58.) They complain that the extraordinary AzScam scandal—in which both the reality and appearance of *quid pro quo* corruption were rampant—took place in the early 1990s and that Defendants rely on newspaper articles. Both complaints are meritless.

AzScam occurred only seven years before the Act was passed; Plaintiffs simply did not bring this constitutional challenge until years later. Moreover, Plaintiffs ignore articles in *The Arizona Republic* in 1996 *through 1998*—the year that the Act was passed—describing "The Invisible Legislature," in which lobbyists and legislators exchanged contributions for influence. (*See* AOB 11.) Those articles appeared and the incidents described occurred well *after* the enactment in 1993 of the "sweeping

campaign finance reforms" which Plaintiffs wrongly speculate might have eliminated actual and apparent corruption from Arizona. (*See* PBR 56.)

The evidence here easily suffices to sustain the Act. The *Buckley* Court found Congress had a compelling interest in combating corruption because the evidence "demonstrate[s] that the problem [of corruption] is *not an illusory one*." 424 U.S. at 27; *see also Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093 (9th Cir. 2003) (Montana's anti-corruption interest "is neither illusory [nor] conjectural"). In *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), the Court rejected the plaintiffs' argument that Missouri had "fail[ed] to justify the invocation of [the anti-corruption] interests with empirical evidence … ." *Id*. at 390-391. The Court held that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised," and "*Buckley* [decided 24 years earlier] demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id*. at 391; *see also McConnell*, 540 U.S. at 144 (same). The *Shrink Missouri* Court held, based on a single legislator's declaration, "newspaper accounts," and voters'

passage of the statute, that it was "not … a close call" whether Missouri had satisfied its evidentiary burden. 528 U.S. at 393-394.

This Court need not rely on the 1976 *Buckley* decision to conclude Arizona's anti-corruption interest is "neither novel nor implausible." In 2003, the Supreme Court reaffirmed that large contributions have a corrupting influence and give rise to the appearance of corruption. *See McConnell*, 540 U.S. at 145 ("Both common sense and the ample record in these cases confirm Congress' belief that they do."). Even before *McConnell*, this Court relied on newspaper reports and polling data from 1981 and 1982, more than a decade before Montana passed its campaign-finance statute, in holding that Montana had presented sufficient evidence of its anti-corruption interest to sustain that law. *Montana Right to Life Ass'n*, 343 F.3d at 1088, 1093. Here, the AzScam scandal and "The Invisible Legislature" reports occurred much closer to the passage of the Clean Elections Act. Arizona's interest in combating actual and apparent corruption was neither illusory nor conjectural.[12]

[12] Plaintiffs rely on a quotation from an academic article to the effect that "the [evidentiary] fit … must be tight, relevant, and real." (PIBR 58, citing D. Schultz, "Proving Political Corruption, etc.," 18 *Rev. Litig.* 86, 113 (1999)). The author provides no citation whatsoever for this proposition,

3. Plaintiffs' Contention That Matching Funds Themselves Result In Corruption Is Meritless And Irrelevant

Plaintiffs wrongly contend that matching funds do not serve the State's anti-corruption interest because they may be subject to corrupting abuses. (*See* PBR 47-51.)

First, Plaintiffs complain that bundling of $5 qualifying contributions results in corruption, PBR 48, while simultaneously arguing that a system that allows bundling of *larger* contributions eliminates entirely both the appearance and reality of corruption, *id*. 57. In fact, given the $5 limit and that even those small contributions must come from individuals within a candidate's district, there is little distinction between "bundling" of such contributions and gathering of nomination petition *signatures* by grassroots organizers. Both are prerequisites to becoming eligible for thousands of dollars in public funds. Plaintiffs have, however, presented no evidence that such grassroots organizing activity creates either actual or apparent corruption.

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and Defendants are aware of none.

Second, Plaintiffs assert that matching funds are subject to various gaming strategies.[13] The State has already adopted regulations that address the principal strategies about which Plaintiffs complained in the district court—coordinated expenditures designed to trigger matching funds for certain candidates. (*See* AOB 55-56.) Plaintiffs now resort to absurd examples of potential manipulations. Plaintiffs assert that someone could run as a privately-financed candidate "*solely* to trigger matching funds" for a participating candidate in the same race. (PBR 48.) Not surprisingly, Plaintiffs offer no evidence that has occurred. Similarly, Plaintiffs suggest that independent expenditure committees might trigger matching funds for a participating candidate they *support* by giving or spending money in support of candidates they *oppose* through so-called "reverse targeting." Plaintiffs present no evidence that this inherently implausible strategy has ever led to a disbursement of matching funds.[14]

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[13] Plaintiffs' "gaming" argument relies largely on the analysis of Plaintiffs' counsel's intern who reviewed excerpts of the Commission's business records—selected by Plaintiffs' counsel—for evidence of certain key words that would tend to support Plaintiffs' case. (ER 3250-3252, 3255.) Most of the cited evidence does not relate to "gaming" at all and indicates the CCEC effectively enforces the Act. (ER 3313, 3316, 3322-24 (describing enforcement activities unrelated to "gaming")).

[14] The Center for Competitive Politics ("CCP") has lodged a proposed

In any event, legislation designed to address corruption need not be perfect. The *McConnell* Court found candidates and donors exploited loopholes in federal contribution laws in ways that could result in corruption. 540 U.S. at 145-154. The Court did not suggest that those existing laws were therefore unconstitutional. That, however, is where Plaintiffs' argument here leads—to a rule that, if a campaign reform law leaves open any avenues for corrupting influence, it must be deemed not to serve the government's anti-corruption interest. That is not the law. *See Buckley*, 424 U.S. at 105 (holding that "a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind") (internal quotations and citations omitted).

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amicus curiae brief, in which it cites two self-serving studies of its own in support of the propositions that Clean Elections programs yield no anti-corruption benefits and do not reduce government spending. As explained in detail by Dr. Green, both studies are fundamentally flawed and do not support the propositions for which they are cited. (ER 1728-1730.) Having reviewed CCP's proposed brief, Appellant Clean Elections Institute, Inc. hereby withdraws its opposition to the filing of that brief and its request for time in which to respond to it.

B. Matching Funds Are The Least Restrictive Means To Further The State's Compelling Interests

1. The Matching Funds Provision Is Not Overinclusive

Plaintiffs contend that the Act is "fatally overinclusive" because matching funds are triggered by independent expenditures and candidates' personal spending, which the Supreme Court has said do not themselves carry any corrupting potential. The district court adopted the same mistaken argument, except that court relied on only matching funds based on spending of personal funds. (ER 17-18.) Either way, the argument is wrong. (*See* AOB 51-54.)

The way in which public funding and matching funds serve the anti-corruption interest is not by discouraging non-participating candidates from spending their personal funds or independent expenditure committees from spending money (assuming that matching funds do that, which the evidence shows they do not). Rather, they serve the anti-corruption interest by relieving participating candidates from the need to raise private contributions. They do so equally regardless of whether a participating candidate faces opponents who are privately financed, self-financed, or supported by independent expenditure committees. In any of these situations, the publicly-financed candidate need not raise private

contributions, thereby reducing the potential for either actual or apparent corruption.

If a publicly-funded candidate could not receive matching funds based on personal or independent spending, she would be unable to compete because she would have no means to raise sufficient money to respond to expenditures either by a self-funded opponent or by independent expenditure committees. Unlike a privately-financed candidate, the participating candidate would be barred from raising additional private contributions to respond to either type of expenditure. Faced with an inability to respond to a self-funded candidate or an independent-expenditure committee, candidates would choose private over public funding—thereby increasing the potential for corruption—or simply decide not to run at all—thereby reducing speech.

Plaintiffs argue there is a categorical rule that, because the State may not directly prohibit or limit independent expenditures, it may not justify "burdening" independent expenditures based on their "ancillary" benefit to public funding and the anti-corruption interest. Even assuming that matching funds burden independent expenditures, the argument is meritless. In *Citizens United*, the Supreme Court recognized that the disclaimer and disclosure provisions of BCRA burden independent expenditures. 130 S. Ct.

at 914. But the Court upheld those burdensome provisions because they "impose no ceiling on campaign-related activities," "do not prevent anyone from speaking," and "provid[e] the electorate with information about the sources of election-related spending." *Id*. Here, similarly, matching funds impose no ceiling on expenditures, do not prevent anyone from speaking, encourage candidates to participate in public financing, and ensure that the public knows precisely the source of participating candidates' funding.

The cases cited by Plaintiffs involved either direct prohibitions of protected speech, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 473-475 (2007) (rejecting argument that "protected speech may be banned as a means to ban unprotected speech") (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)); *Free Speech Coalition*, 535 U.S. at 254-255; *Stanley v. Georgia*, 394 U.S. 557, 567-568 (1969), or regulations of protected speech that the courts concluded went beyond what was necessary to serve the government's "ancillary" interest, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-353 (1995); *ACLU of Nevada v. Heller*, 378 F.3d 979, 1000 (9th Cir. 2004). Here, there is no direct prohibition of any speech; the issue is whether the matching funds provisions are sufficiently tailored to serve the State's anti-corruption

interest. There is no categorical rule that they cannot be justified on that basis.

2. There Is No Plausible, Less Restrictive, And Effective Alternative

As Plaintiffs argue, "*[i]f a less restrictive alternative would serve the Government's purpose*, the legislature [or voters] must use that alternative." *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). When a "plausible, less restrictive alternative is offered," the government must show that "the alternative will be ineffective to achieve its goals." *Id*. at 816.[15] None of the alternatives offered by Plaintiffs is either plausible or effective.

First, Plaintiffs suggest Arizona could eliminate public financing altogether, relying on "robust contribution disclosure requirements and low contribution limits." (PBR 57.) They argue that those are "adequate . . . to prevent undue interest group influence based on lawful contributions, and any associated risk of actual or apparent *quid pro quo* corruption." *Id*. That assertion ignores that, when AzScam occurred and "The Invisible

[15] Plaintiffs argue the government bears the burden of showing that purportedly less restrictive alternatives are "implausible," citing *Reno v. ACLU*, 521 U.S. 844, 876-877 (1997), and *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989). (*See* PBR 57.) Those decisions do not say that, at the pages cited or elsewhere.

Legislature" series was published, Arizona *had* both disclosure requirements and contribution limits. It further ignores that federal and most states' laws have disclosure requirements and contribution limits; Defendants submit that the Court may take judicial notice of the implausibility of any notion that those regulations have eliminated all legitimate concerns about actual or apparent corruption in American politics.[16]

Second, Plaintiffs suggest that Arizona could eliminate matching funds and provide "lump sum public financing" to all qualifying candidates. Plaintiffs have not, however, shown that the lump sum alternative is plausible. In 2006, Arizona provided $9.4 million in public funding, including both initial disbursements and matching funds. (ER 5751.) If Arizona had instead moved to a lump sum approach in which the initial disbursement amount was tripled to offset the loss of matching funds, Arizona would have spent $21.9 million. (ER 5733-51.) Plaintiffs have not suggested plausible ways in which Arizona would either raise additional revenue or cut spending to support that 132% increase in required funding.

[16] The fact that, after the district court twice indicated that it considered matching funds to be unconstitutional, the CCEC asked the legislature to consider possible alternative funding mechanisms does not establish that those alternatives are either less restrictive or effective to serve the State's interests.

Plaintiffs' own brief illustrates the implausibility—indeed, absurdity—of the lump sum alternative. Recognizing that the lump sum alternative would result in a vast waste of public money, Plaintiffs suggest that the State "requir[e] participating candidates to seek *preapproval* for expenditures" or "repay public financing that they cannot *justify* spending, perhaps secured by posting collateral or a bond." (PBR 58.) Thus, in the name of the First Amendment, Plaintiffs suggest that the CCEC—or some other censor—decide whether a particular candidate's political speech is "justified," either before ("no, you cannot pay for that ad") or after ("sorry, you have to refund the money you spent on that one") the fact. Defendants submit that such a regulation would fail First Amendment analysis instantaneously. Requiring that participating candidates "post[] collateral or a bond" would defeat the purpose of public financing, because candidates (other than wealthy ones, who rarely accept public funding) would need to raise potentially-corrupting private contributions in order to obtain the collateral or bond.

CONCLUSION

Defendants respectfully request that this Court reverse and remand with instructions to the district court to enter summary judgment in Defendants' favor.

DATED: March 17, 2010

Respectfully submitted,

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DATED: March 17, 2010

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached corrected reply brief is proportionately spaced, has a typeface of 14 points, and contains 6981 words.

Dated: March 17, 2010 By: /s/ Bradley S. Phillips
BRADLEY S. PHILLIPS