No. 10-238

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *ET AL.*, *Petitioners*,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, CITIZENS UNITED, CITIZENS UNITED FOUNDATION, U.S. JUSTICE FOUNDATION, ARIZONA STATE CHAPTER OF THE ASSOCIATION OF PHYSICIANS AND SURGEONS, INSTITUTE ON THE CONSTITUTION, DOWNSIZEDC.ORG, INC., DOWNSIZE DC FOUNDATION, CAMPAIGN FOR LIBERTY, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, POLICY ANALYSIS CENTER, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, CONSTITUTION PARTY NATIONAL COMMITTEE, AND PUBLIC ADVOCATE OF THE UNTIED STATES IN SUPPORT OF PETITIONERS

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January 20, 2011

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc. ("GOA") (www.gunowners.org) was incorporated in California in 1976, and is exempt from federal income tax under IRC section 501(c)(4). GOA is a citizens' lobby to protect and defend the Second Amendment.

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia in 1983, and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). GOF is an educational and legal defense organization defending the Second Amendment.

Citizens United ("CU") (www.citizensunited.org) was incorporated in 1988 in Virginia and is exempt from federal tax under IRC section 501(c)(4). CU is an organization dedicated to restoring our government to citizens' control through a combination of education, advocacy, and grass roots organization

Citizens United Foundation ("CUF") (www.citizensunitedfoundation.com) was established in 1992 in Virginia, and is exempt from federal income tax under IRC section 501(c)(3). CUF is a non-partisan, non-profit research and education foundation, dedicated to informing the American

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[1] It is hereby certified that the parties have consented to the filing of this brief, as counsel for all parties have filed blanket consents, that no counsel for a party authored this brief in whole or in part, and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

people about public policy issues which relate to traditional American values.

U.S. Justice Foundation ("USJF") (www.usjf.net) was incorporated in California in 1979, and is exempt from federal income tax under IRC section 501(c)(3). USJF is a nonprofit public interest, legal action organization dedicated to instruct, inform and educate the public on, and to litigate, significant legal issues confronting America.

Arizona State Chapter of the American Association of Physicians and Surgeons ("AAPS") (www.aapsonline.org) was incorporated in Arizona in 1993, and is exempt from federal income tax under IRC section 501(c)(6). AAPS is a non-partisan professional association of physicians in all types of practices and specialties in Arizona, dedicated to preserving and promoting the practice of private medicine.

Institute on the Constitution (www.iotconline.com) is an unincorporated educational association established in Maryland in 2000, intended to reconnect Americans to the history of the American Republic and to their heritage of freedom under law.

DownsizeDC.org, Inc. ("DDC") (www.downsizedc.org) was incorporated in Virginia in 2001, and is exempt from federal income taxation under IRC section 501(c)(4). DDC is an educational organization primarily educating both citizens and legislatures in favor of legislation and legal reform.

Downsize DC Foundation ("DDCF") (www.downsizedcfoundation.org) was incorporated in Virginia in 2000, and is exempt from federal income taxation under IRC section 501(c)(3). DDCF is a public charity whose mission is to foster human progress by reducing state coercion.

Campaign for Liberty ("CFL") (www.campaignforliberty.com) was incorporated in Delaware in 2008 and is exempt from federal income taxation under IRC section 501(c)(4). CFL is dedicated primarily to educating the American citizenry on important issues of public policy, including raising public awareness of the actions of public officials.

Conservative Legal Defense and Education Fund ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia in 1982, and is exempt from federal income taxation under IRC section 501(c)(3). CLDEF is dedicated to the correct construction, interpretation, and application of the law.

Policy Analysis Center ("PAC") was established in 1994 in Virginia and is exempt from federal income taxation under IRC section 501(c)(3). PAC promotes the concepts of limited government, personal freedom, and respect for the individual, private property, and privacy.

The Lincoln Institute for Research and Education ("Lincoln") (www.lincolnreview.com) was incorporated in the District of Columbia in 1978, and is exempt from federal income tax under IRC section

501(c)(3). Lincoln focuses primarily on public policy issues that impact the lives of black middle Americans.

Constitution Party National Committee ("CNPC") (www.constitutionparty.com) is a qualified national party committee, incorporated in the Commonwealth of Pennsylvania in 2001, and exempt from federal income tax under IRC section 527. CNPC is organized, operated, and dedicated to attempting to influence the selection, nomination, election, or appointment of individuals to federal, state, and local public office.

Public Advocate of the United States (www.publicadvocateusa.org) was incorporated in the District of Columbia in 1981, and is exempt from federal income tax under IRC section 501(c)(4). PA is an educational, advocacy organization, informing the citizenry on important public policy issues and dedicated to the conviction that political decisions should begin and end with the best interests of American families and communities in mind.

These *amici curiae* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, to inform and educate the public on important issues of national concern, such as the construction of state and federal constitutions and statutes related to the right of citizens to bear arms, and related issues.

In the past, each of the *amici* has conducted research on issues involving the U.S. Constitution, and

each has filed *amicus curiae* briefs in other federal litigation involving such issues, including *amicus curiae* briefs to this Court.

It is hoped that the perspective of the *amici curiae* on the issues in the present case will be of assistance to the Court.

SUMMARY OF ARGUMENT

The court below assumed that, because this Court found in Buckley v. Valeo that the public financing system for presidential election campaigns was compatible with the First Amendment, the public financing system of Arizona's Citizens Clean Elections Act was equally compatible. The court was mistaken. Buckley approved a public financing scheme funded fully by a taxpayer's voluntary check-off system. Arizona's public financing system receives a majority of its funds from a 10 percent assessment on civil penalties and criminal fines paid by individual "law breakers."

In Buckley this Court took special note of the fact that the contributions to the presidential campaign fund were wholly voluntary and, therefore, did not implicate the First Amendment because "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." That is not true of the Arizona public financing scheme which singles out a discrete class of persons — those liable to pay a civil penalty or criminal fine — and imposes a special assessment for the sole purpose of

raising funds to support campaigns for elective office in the state.

From the nation's founding, it has been a well-settled principle of First Amendment jurisprudence that the government cannot compel a man to furnish a contribution of money to support opinions of others. The Arizona public financing scheme does just that, to the prejudice of the petitioners and, therefore, the Citizens Clean Elections Act is an abridgment of the privileges and immunities guarantee of Fourteenth Amendment.

The court below also assumed that the Buckley Court found that the system of financing presidential elections furthered and enlarged, rather than abridged, First Amendment values. A careful review of Buckley on this point reveals, however, a deeply flawed opinion — one that not only disregarded the discriminatory bias favoring major party candidates, but one that was based on a constitutional premise recently discredited by this Court in Citizens United v. FEC. In Citizens United, this Court reaffirmed that the First Amendment is based upon the premise that the people are sovereign — that the government is accountable to the people, not the people to the government.

Public financing of campaigns for elective office generally, and the Arizona public financing system in particular, require licensure by the government of candidates and accountability to the government for campaign expenditures, thereby undermining the sovereignty of the people. Additionally, the Arizona

public financing system is specifically designed to "level the playing field" among candidates, a purpose thoroughly discredited by the decision in Citizens United, which overruled Austin v. Michigan State Chamber of Commerce. Entry into the marketplace of ideas, as secured by the First Amendment, limits the power of government not only from keeping speakers out of that marketplace, but subsidizing their entry into that market.

The people's sovereignty over market entry is deeply imbedded in American political and legal history. By establishing its system of public financing, the Arizona Citizens Clean Election Act abridges petitioners' privileges and immunities in violation of the Fourteenth Amendment.

ARGUMENT

I. THE PUBLIC FINANCING SYSTEM APPROVED IN BUCKLEY V. VALEO DOES NOT GOVERN THIS CASE.

The court below assumed that Buckley v. Valeo, 424 U.S. 1 (1976), resolved the question as to whether the Arizona system of public financing of campaigns for election to public office was compatible with the First and Fourteenth Amendments. *See* McComish v. Bennett, 605 F.3d 720, 730-31 (9th Cir, 2010). The court of appeals premised its decision upon the proposition that, since the Buckley Court found that "the public financing scheme" for presidential elections was constitutional, then "the public financing of elections **itself** does **not** create any **burden** on

speech." *Id.* (emphasis added). Having concluded that Buckley reigns, the court below dismissed in one paragraph the petitioners' claim that the constitutionality of the "matching funds" provision of the Arizona public financing scheme was governed by the standard of strict scrutiny applied by this Court in Citizens United v. FEC, 558 U.S. ___, 130 S.Ct. ___, 175 L. Ed. 2d 753 (2010) and in Davis v. FEC, 554 U.S. 724 (2008), as the Arizona law was said to have placed only a "minimal burden on fully protected speech." *See* McComish, 605 F.3d at 731-35.

On petition to this Court, petitioners appear to have assumed *sub silentio* that there is nothing *per se* unconstitutional with the public financing of election campaigns, as they have limited their constitutional attack to the "matching fund" provisions of the Arizona law. Thus, the candidate petitioners have argued that it is "the punitive linkage between the exercise of First Amendment rights and the issuance of public financing to political opponents [which] distinguishes Arizona's matching funds system from the public financing system upheld in [Buckley]." Brief of Petitioners McComish, *et al.* (hereinafter "Cand. Pet."), pp. 57-58. Similarly, the independent group petitioners have asserted that "[b]y operation of the Matching Funds Provision, the Act does far more than simply provide funding resources to candidates who wish to minimize or eliminate their reliance on private funds, as did the public financing system at issue in *Buckley*." Brief of Petitioners Arizona Free Enterprise Club's Freedom Club PAC (hereinafter "PAC Pet."), p. 39.

While these *amici* agree with petitioners' constitutional analysis insofar as it goes, they believe that the Arizona public financing scheme is unconstitutional to its core, and that the court below erred in its analysis of its matching fund provisions, because it mistakenly relied upon Buckley for the proposition that public financing of elections generally, and thus, the Arizona public financing system specifically, does not "**itself** ... create any burden on speech." *See* McComish, 605 F.3d at 730-31 (emphasis added).

A. Buckley Permits Only Voluntarily-Funded Public Financing of Elections.

The Buckley Court approved a public financing system exclusively funded by taxpayers who were permitted, but not compelled, to designate that one dollar (or two dollars on a joint return) of their federal income tax liability be deposited for use by qualified candidates and parties in campaigns for election to the office of President of the United States. *See id.*, 424 U.S. at 86. The Buckley plaintiffs objected to this "dollar check-off provision" because it did not "permit taxpayers to designate particular candidates or parties as recipients of their money." *Id.*, 424 U.S. at 91. The Court dismissed this objection on the ground that the taxpayer's decision was, in effect, "like any other appropriation from the general revenue" and that the plaintiffs' objection was no different from that of any taxpayer who might object to a particular use of monies appropriated by Congress. *Id.*

In a footnote, the Buckley Court emphasized that the voluntary check-off system "involves **no compulsion** upon individuals to finance" anyone's presidential campaign, but "is simply a means by which Congress determines the amount of its appropriation." *Id.*, 424 U.S. 91 n.124 (emphasis added). By emphasizing this distinction between the voluntary funding scheme before it, and one with a compulsory feature, the Buckley Court signaled that the constitutionality of an involuntarily-funded system would be decidedly different, because the latter would compel individuals "to finance the dissemination of ideas with which they disagree." *Id.* Indeed, just a year after Buckley, and consistent with the position stated therein, this Court ruled unconstitutional a law "compelling certain individuals to pay subsidies for speech to which they object." *See* United States v. United Foods, Inc., 533 U.S. 405, 410 (2001), citing the landmark case of Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

B. A Ten Percent Surcharge on Civil Penalties and Criminal Fines Unconstitutionally Funds the Arizona Public Financing System.

Unlike the presidential campaign fund approved in Buckley, the system of public financing of elections in Arizona is only partially funded by a voluntary check-off and tax credit scheme. Instead, the system gets a majority (53 percent) of its funds from a 10 percent surcharge on "every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses and any civil penalty imposed and collected

for a civil traffic violation, and fine, penalty, or forfeiture for a violation of the motor vehicle statutes, for any local ordinance relating to the stopping, standing or operation of a vehicle or for a violation of the game and fish statutes in Title 17."[2] *See* Ariz. Rev. Stat. § 16-954(C). *See also* Arizona's Citizens Clean Elections Commission ("CCEC"), "Funding," http://www.azcleanelections.gov/about-us/funding.aspx.

Thus, unlike the scheme in Buckley, the Arizona public financing system is not funded exclusively by general tax revenues as voluntarily designated by state taxpayers. Rather, the Arizona scheme extracts a majority of its funds from direct assessments upon individuals adjudicated guilty of specified criminal or civil behavior. And the very purpose of such assessments is to help provide "**full public funding** to qualified candidates who agree to abide by [CCEC] guidelines." *See, e.g.,* CCEC Press Release (Nov. 18, 2010) ("The Commission does not receive any funding from the state legislature.").

Prior to Buckley, the Supreme Court wrestled with two cases involving statutes that compelled certain classes of individuals to pay dues, a portion of which were being used to promote causes opposed by some dues payers. In dissent in International Machinists v. Street, 367 U.S. 740 (1961), Justice Hugo Black squarely addressed a hypothetical situation not unlike the instant case:

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[2] Ariz. Rev. Stat. § 12-116.01.

> Probably **no one would suggest that Congress could, without violating th[e] [First] Amendment, pass a law taxing workers ... to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes.** Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause that he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write, and worship as they wish, not as the Government commands. [*Id.*, 367 U.S. at 788 (Black, J., dissenting) (emphasis added).]

In the same year in the similar case of Lathrop v. Donahue, 367 U.S. 820 (1961), Justice William O. Douglas joined Justice Black to condemn a law that (a) singled out a class of people (lawyers) as "somehow different from other people" (*id.* at 875 (Black, J., dissenting)), and (b) compelled members of that class to "pay[] dues to support activities that are offensive to him" (*id.* at 878 (Douglas, J., dissenting)), as violating "the First Amendment ... strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority." *Id.* at 885 (Douglas, J., dissenting).

Although these were dissenting views, they prompted the Buckley Court to observe that the constitutionality of the public financing of presidential

election campaigns would be quite different if compulsorily funded. Buckley, 424 U.S. at 91 n.124. One year later, in Abood, the Supreme Court sided with Justices Black and Douglas, ruling that a class of persons cannot be singled out and "compelled to make ... contributions for political purposes [without] work[ing] ... an infringement of their constitutional rights." Abood, 431 U.S. at 234. Since Abood, this Court has never wavered from this established principle. Thus, there is simply no government interest, compelling or otherwise, that can trump the constitutional principle prohibiting any law that compels individuals to subsidize speech with which they disagree. As Justice Kennedy recently explained in United Foods:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it [the government] favors.... [*Id.*, 533 U.S. at 411.]

Yet, the Arizona Citizens Clean Elections Act does just that. It punitively targets a discrete class of persons — "those that break the law"[3] — to pay into

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[3] *See* CCEC, "Funding," *supra* (**I hear people say that this program is nothing more than 'tax dollars for politicians.' Is this true?** No. The candidates who apply for clean election funding do not receive money from the general fund. The only tax dollars they receive come from individuals who voluntarily donate to the Commission and from *those that break the law*.) (Bold original; italics added).

the so-called "citizens clean elections fund,"[4] the state's preferred way for the funding of election campaigns. *See* Ariz. Rev. Stat. § 16-940(A) ("Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.") And it is the CCEC — not "those who break the law" — that decides which candidates are "qualified" to receive funding by initially agreeing to abide by CCEC guidelines. Ariz. Admin. Rule, § R2-20-104(C). *See also* CCEC Press Release (Nov. 18, 2010).

Those persons who are compelled to fund the Arizona public financing system are not the only ones harmed by the compulsory nature of the system. Petitioners, like all those who choose not to participate in the public financing system, are not only prejudiced by the "matching funds" provisions, as they have so ably demonstrated,[5] but their campaigns are placed under an official cloud of suspicion. The Findings and Declarations provision of the Act,[6] coupled with the several provisions identifying the "clean elections fund,"[7] gives rise to the obvious inference that those candidates who rely on private funding for their campaigns are, by statutory definition, "unclean." Indeed, on its official website the CCEC promotes that

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[4] *See* Ariz. Rev. Stat. § 16-950(A).

[5] *See, e.g.,* Cand. Pet., pp. 55-58; PAC Pet., pp. 4-8.

[6] Ariz. Rev. Stat. § 16-940.

[7] *See, e.g.,* Ariz. Rev. Stat. §§ 16-950(B), (D), and (E); 16-951(A); and 16-954(B).

public perception. For example, the CCEC has posed the question: "**Has Clean Elections been successful in increasing the number of 'participating' candidates?"** To which, CCEC has answered:

> Yes. The percentage of people running as participating candidates rather than as traditional candidates has increased every election cycle. In 2000 only 26% of the primary candidates ran using **clean elections funding**. In 2008 participation increased to 65%. [CCEC, "Funding," *supra* (emphasis added).]

By using an unconstitutional means of obtaining funds to make the public financing system work, the Arizona Citizens Clean Elections Act injures petitioners' exercise of their own constitutional rights. Additionally, the means chosen may never be directly challenged by those subject to the 10 percent surcharge. Thus, petitioners have standing not only to contest those provisions that directly chill their First Amendment rights, but also to contest the unconstitutional means of compelling others to support candidacies and ideas with which they disagree. *See* Secretary of State of Maryland v. Joseph H. Munson, Co., 467 U.S. 947, 956 (1984).

C. The Arizona Act Unconstitutionally Abridges Petitioners' Privileges and Immunities in Violation of the Fourteenth Amendment.

Both Abood and Keller v. State Bar of California, 496 U.S. 1 (1990), traced the "no compulsion" principle to the earliest days of America's founding. Preeminent among those earliest authorities were James Madison and Thomas Jefferson. *See* Abood, 431 U.S. at 234 n.31 and Keller, 496 U.S. at 10. Indeed, it was Jefferson who supplied the memorable phraseology of the right, one oft-repeated not only by this Court, but even by "[t]he Senate Watergate Committee [which] recommended that Congress stay away from public financing of presidential campaigns"[8]:

> Thomas Jefferson believed "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." The Committee's opposition is based like Jefferson's upon the fundamental need to protect the voluntary right of individual citizens to express themselves politically as guaranteed by the First Amendment. [*Id*.]

Jefferson based his belief on the twofold premise that "Almighty God hath created the mind free" and that even the "holy author of our religion, who being Lord of body and mind, yet chose not to propagate it by

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[8] John Samples, The Fallacy of Campaign Finance Reform 185 (U. Chi. Press: 2006).

coercions on either."[9] Thus, Jefferson concluded "that the opinions of men are not the object of civil government, nor under its jurisdiction."[10] *Id.*

In his great "Memorial and Remonstrance Against Religious Assessments," James Madison explained that this limit upon civil power was based upon the "fundamental and undeniable truth" that every man was accountable only to "the Creator" for his "opinions."[11] This duty, he asserted, was "precedent, both in order of time and in degree of obligation, to the claims of Civil Society." *Id.* Therefore, Madison continued, it was the duty of "every man who becomes a member of any particular Civil Society, do it with a saving allegiance to the Universal Sovereign." *Id.* Thus, Madison concluded "that Religion," that is, those duties owed exclusively to the Creator, "is wholly exempt from [the] cognizance" of any "free Government constituted by "[t]he People." *Id.*, ¶¶ 1-2.

To secure this freedom, the People of the United States, by the amendment process prescribed in Article

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[9] Thomas Jefferson, "A Bill for Establishing Religious Freedom" (June 12, 1779), reprinted in 5 Founders Constitution, p. 77 (P. Kurland & R. Lerner, eds., U. Chi. Press: (1987).

[10] The no-compulsion principle applies to all opinions, not just religious ones, and thus, "prohibit[s] a State from compelling any individual to affirm his belief in God ... or to associate with a political party...." Abood, 431 U.S. at 235.

[11] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 Founders Constitution, *supra*, at 82, ¶ 1.

V of the Constitution, ratified the First Amendment linking the freedom of religion to the freedoms of speech, press, assembly, and petition, and thereby secured to the People of the United States the "privilege and immunity" from any action of the federal government that would compel support of the propagation of opinions — religious, scientific, political, or otherwise. To further secure this freedom, the People of the United States adopted the Fourteenth Amendment to prohibit the States from abridging this privilege and immunity of United States citizenship in that the right not to be compelled to support the opinions of others, religious, political, or otherwise, lay at the very foundation of a republican form of government. The Arizona Citizens Clean Election Act betrays this principle.

II. THE BUCKLEY RATIONALE FOR PUBLIC FINANCING OF ELECTION CAMPAIGNS IS FLAWED AND DISCREDITED.

In support of its opinion that the Arizona Citizens Clean Elections Act is constitutional, the court below relied on the Buckley Court's statement that:

> [T]he public financing scheme in that case was "a congressional effort, 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. Thus [it] **furthers**, **not abridges**, pertinent First Amendment values." [McComish, 605 F.3d at 731 (emphasis added).]

However, the Buckley Court provided not one concrete illustration to demonstrate that the presidential fund "furthered" rather than "abridge[d] ... First Amendment values." *See* Buckley, 424 U.S. at 92-93. Similarly, the Buckley Court failed to show how any of the operational features of the presidential campaign financing scheme would "facilitate and enlarge public discussion and participation in the electoral process." *Id.* To the contrary, Chief Justice Burger and Justice Rehnquist, both of whom dissented from the Buckley ruling, convincingly demonstrated that the presidential fund was structured to hinder and restrict — not to further, facilitate and enlarge — the public debate concerning the election of the president. *Id.*, 424 U.S. at 249-52 (Burger, C.J., concurring and dissenting); 424 U.S. at 290-94 (Rehnquist, J., concurring and dissenting).

A. The Buckley Rationale for Public Financing Is Fundamentally Flawed.

The Buckley majority found that one of Congress' goals in establishing the public funding of presidential campaigns was "to free candidates from the rigors of fundraisers." Buckley, 424 U.S. at 91. In the pursuit of that goal, the Court found it perfectly permissible for Congress to:

- "[R]egard[] public financing as an appropriate means of relieving **major-party** Presidential candidates from the rigors of soliciting private contributions." [*Id.*, 424 U.S. at 96 (emphasis added).]

- "[P]rovid[e] both **major parties full funding** and **all other parties** only a percentage of the major-party entitlement." [*Id.,* 424 U.S. at 98 (emphasis added).]

These provisions, and others like them, prompted Justice Rehnquist to write in dissent:

> Congress, of course, does have an interest in not "funding hopeless candidacies with large sums of public money...." But Congress ... has done a good deal more than that. It has **enshrined** the **Republican and Democratic Parties** in a **permanently preferred position**, and has established requirements for funding minor-party and independent candidates to which the major parties are not subject. [*Id.*, 424 U.S. at 293 (Rehnquist, J., concurring and dissenting) (emphasis added).]

Chief Justice Burger agreed, "see[ing] grave risks in legislation, **enacted by incumbents** of the major political parties, which distinctly disadvantages minor parties or independent candidacies." *Id.*, 424 U.S. at 251 (Burger, C.J., concurring and dissenting) (emphasis added).

As superficial and inadequate as the Buckley Court's First Amendment analysis was, Chief Justice Burger found an even more fundamental flaw in its treatment of the constitutionality of the public financing of elections. The Court simply did not address the question of first impression as to whether any public financing system — not just the one before the Court — could be tailored in such a way to be compatible

with the First Amendment. The Chief Justice faulted his colleagues for "treat[ing] this **novel** public financing of political activity as simply another congressional appropriation whose validity is 'necessary and proper' to Congress' power to regulate and reform elections and primaries."[12] Buckley, 424 U.S. at 247 (Burger, C.J., concurring and dissenting)

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[12] Actually, the Buckley Court relied primarily on the General Welfare Clause, as "enlarge[d] by the Necessary and Proper Clause." *See id.*, 424 U.S. at 90. And it was the Court's "expansive" view of the General Welfare Clause that enabled the Court to justify Congress in establishing a system of "public financing of Presidential elections as a means to reform the electoral process." *Id.* To reach that conclusion, the Court ruled that the General Welfare Clause empowered Congress to "legislat[e] for the 'general welfare,'" a proposition that had been rejected in United States v. Butler, 297 U.S. 1 (1936). Indeed, if Congress were so empowered, there would have been no need for the long list of enumerated powers in Article I, Section 8 of the Constitution, the General Welfare Clause having endowed the Congress with plenary power over the welfare of the whole nation. Even the Commerce Clause would be placed into a constitutional wayside if Congress had the power "to promote the general welfare." The Court's misstatement and misuse of the General Welfare Clause is especially egregious when applied to legislation the purpose of which is to "reform the electoral process" with respect to the selection of the President. Article II, Section 1 specifically vests in the state legislature the "manner" by which the president is selected, and limits the authority of Congress to setting only the "time." In McPherson v. Blacker, 146 U.S. 1 (1892), the Supreme Court ruled that the "manner" by which presidential electors are selected "belong[s] exclusively to the states under the Constitution of the United States." *Id.* at 35. In short, in its haste to justify public financing of presidential elections, the Buckley Court played fast and loose, not only in disregard of the constitutional text, but of its own precedents.

(emphasis added). Thus, the Chief Justice faulted the majority:

> for not adequately analyzing and meeting head on the issue **whether public financial assistance to the private political activity of individual citizens and parties is a legitimate expenditure of public funds**. [Buckley, 424 U.S. at 248 (Burger, C.J., concurring and dissenting) (emphasis added).]

As if answering his own question, the Chief Justice recounted Senator Howard Baker's contention that there was "something politically **incestuous** about Government financing" the political debate. *Id.* (emphasis added). And then in a burst of insight, the Chief Justice put his finger on the constitutional pulse: that there is a jurisdictional divide that — like the separation of church and state — prohibits government financial subsidies of the "political dialogue of the people — the process which begets the Government itself." *Id.* After all, as would be the case if the Government subsidized the church, with Government financing comes control and surveillance, inspections and audits, and with them — the loss of freedom itself. *Id.*, 424 U.S. at 249-50. Indeed, instead of the Government answering to the people, under any kind of public financing scheme, the people answer to the government.

Under the First Amendment, the relationship is just the opposite. In Citizens United, this Court reaffirmed the that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials

accountable to the people." *Id.*, 175 L. Ed. 2d at 781. It also vindicated the views of three dissenting justices (in United States v. Automobile Workers, 352 U.S. 567, 593 (1957)) who declared that a ban on independent expenditures undermined the sovereignty of the people: "The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *Id.* at 785.

Thus, the Citzens United Court found that the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the salient political issues of our day." *Id.* at 772. And this Court was appalled by the Federal Election Commission's adoption of "568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." *Id.* at 778. In short, as a practical matter, the Citizens United Court found that "given the complexity of the regulations and the deference courts show to administrative determinations," speakers feel compelled to "ask a governmental agency for prior permission to speak," and thus, the FEC exercises "power analogous to licensing laws implemented in 16th- and 17th-century England, laws and government practices of the sort that the First Amendment was drawn to prohibit." *Id.* at 779. *See* Brief for Appellants Congressman Ron Paul, *et al.*, pp. 32-39 (http://www.lawandfreedom.com/site/election/PaulApp.pdf) in McConnell v. FEC, 540 U.S. 93 (2003).

B. The Arizona Public Financing Scheme Is Antithetical to First Amendment Principles.

In Citizens United, this Court announced that the First Amendment was "[p]remised on mistrust of government power" (*id.*, 175 L. Ed. 2d at 782) and, quoting Davis, added that "it is dangerous business for Congress to use the election laws to influence the voters' choices," when the Constitution "confers upon voters, not Congress, the power to choose Members of the House of Representatives." Citizens United, 175 L. Ed. 2d at 789. On these two premises, Citizens United overruled Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), and that part of McConnell v. FEC, 540 U.S. 93 (2003), relying on Austin.

Austin had been based upon opposite constitutional premises. Instead of mistrusting government power, the Austin Court mistrusted the power of private entities in the marketplace. *See* Citizens United, 175 L. Ed. 2d at 787. Instead of keeping a wary eye on the dangers of government regulation, the Austin Court focused on undoing the "unfair advantage" that some private entities had in the marketplace. *See* Citizens United, 175 L. Ed. 2d at 788. Instead of ensuring that the government remains accountable to the people, the Austin Court favored silencing the voice of millions of people seeking to hold their government accountable to them. *See* Citizens United, 175 L. Ed. 2d 191-92.

In this case, the Arizona Citizens Clean Elections Act purports to "promote freedom of speech under the

U.S. and Arizona Constitutions." But the Arizona law rests on the discredited premises of Austin. *See* Ariz. Rev. Stat. § 16-940(A) and (B). As both groups of petitioners point out in their briefs, the Arizona law rests upon the premise — rejected even in Buckley[13] — that the government has a legitimate interest to intervene into the marketplace of ideas to "level the playing field." *See* Cand. Pet., pp. 63-66; PAC Pet., pp. 8-12. But Citizens United put a halt to any such collectivist purpose, ruling that the First Amendment protects an "open marketplace" where "ideas 'may compete' ... 'without government interference.'" *Id*., 175 L. Ed. 2d at 792. Indeed, Citizens United reaffirmed the First Amendment's "'uninhibited marketplace of ideas,'"[14] rooted in the long-standing recognition of America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964).[15]

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[13] *See* Citizens United, 175 L. Ed. 2d at 789.

[14] *Id.*, 175 L. Ed. 2d at 779.

[15] *Accord* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea.").

The Arizona law commits the state to quite a different marketplace, one that is designed to be "nicer" — more "issue-oriented," "less negative" — user-friendly safe for the faint-hearted, secure in the knowledge that they have no responsibility to raise funds to support their campaign. *See* Ariz. Rev. Stat. § 16-940(A).

To attain this ideal of civility and security in political discourse, a candidate must first get a license[16] from the CCEC demonstrating that he is entitled to public funds. *See* Ariz. Rev. Stat. § 16-947. But with public funds comes government surveillance and control. At the time of "certification," the candidate becomes oath-bound to the CCEC (a) to "use all Clean Elections funding for direct campaign purposes only" and (b) to assume "the burden of proving that expenditures made by or on behalf of the candidate are for direct campaign purposes." 2 Ariz. Admin. Code § R2-20-104(C)(1) and (5). Additionally, the candidate swears an oath to keep and furnish all records required by the CCEC and permit CCEC to conduct audits and examinations. 2 Ariz. Admin. Code § R2-20-104(6) and (7). Such participating candidates are subject to civil penalties and even forfeiture of office. Ariz. Rev. Stat. § 16-942.

Such rules and regulations as these demonstrate the utter incompatibility of Arizona's public financing

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[16] According to Citizens United, such a license requirement imposed "at the outset" of the speech process would be invalid. *Id.*, 175 L. Ed. 2d at 780, citing Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002).

system of election campaigns. Although candidates are not required to participate in the system, they are nonetheless subject to reporting requirements that, as petitioners demonstrate in their briefs, have a serious chilling effect upon the campaign speech of such nonparticipating candidates. Under a public financing system such as Arizona's, even those candidates not licensed by CCEC must file reports of their fund raising activities, and thereby are accountable to the CCEC. *See* Ariz. Rev. Stat. § 16-952.

C. The Arizona Act Unconstitutionally Abridges Petitioners' Privileges and Immunities in Violation of the Fourteenth Amendment.

The express purpose of Arizona's Citizens Clean Elections Act is to amass public funds and inject those funds into the free marketplace of political campaigns, thereby "diminishing the influence of special-interest money," on the one hand, and "encourag[ing] citizen participation in the political process," on the other. *See* Ariz. Rev. Stat. § 16-940(A). Had the Act chosen to accomplish this purpose by restricting access to the market by "special interests," there would be no question that the Act would be unconstitutional. Even Buckley rejected the "'concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.'" *See* Citizens United, 175 L. Ed. 2d at 788. The question raised by the Arizona law is whether the government may enhance "the voice of others," not by a direct restriction of some, but by a subsidy to those whom the government believes to be economically challenged.

According to Citizens United, it is not the restrictive means by which voices may be equalized in the political marketplace that is forbidden by First Amendment principles, it is "the **premise** that the Government has an interest 'in **equalizing** the relative ability of individuals and groups to influence the outcome of elections." *Id.*, 175 L. Ed. 2d at 789 (emphasis added). Under this view, it does not matter whether the regulation at issue excludes some speakers, or limits them in some way more than others, or whether the regulation is designed to enhance entry into the political marketplace by the government's providing them with the economic wherewithal to compete. To have freedom of speech, there must be freedom from government intrusion not only with respect to the content and identity of the speech and speaker, but freedom from government intrusion in the economic aspect of the marketplace of ideas. *See generally* Citizens United, 175 L. Ed. 2d at 788-89.

As Citizens United ruled, the First Amendment is premised upon the proposition that "[f]actions should be checked by **permitting** them all to speak..., and by entrusting the people to judge what is true and what is false." *Id.*, 175 L. Ed. 2d at 792 (emphasis added). In such a free market regime, there is no room for entrusting the Government with power to **enable** factions to enter the market, it is enough that the government is forbidden from keeping any faction out. That is the fundamental principle vindicated in Citizens United — it is the people, not the government who is the sovereign of the political marketplace, with respect not only to content of the communications, but

with respect to the communicators, themselves: "All speakers, including individuals and the media, use money **amassed** from the **economic marketplace** to fund their speech." *Id.*, 175 L. Ed. 2d at 789 (emphasis added).

As Citizens United points out, "[a]t the founding, speech was open, comprehensive, and vital to **society's definition of itself**; there were no limits on the sources of speech and knowledge." *Id.*, 175 L. Ed. 2d at 791 (emphasis added). As was true of the no-compulsion principle discussed in Part I, popular sovereignty in the marketplace was succinctly stated by Thomas Jefferson in his Bill for Establishing Religious Freedom:

> That to suffer the Civil Magistrate **to intrude his powers** into the field of **opinion** ... is a dangerous fallacy ... because he ... will make his own opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with his own: That it is time enough for the **rightful purposes of civil government** for its officers to interfere when principles break out into **overt acts** against the peace and good order: And finally that **truth** is great and **will prevail if left to herself**. [*Id.*, reprinted in 5 Founders Constitution, p. 77 (emphasis added).]

The Arizona Act does just the opposite. It assumes that unless the government actively subsidizes the electoral marketplace, "truth" does not stand a chance against "special-interests," "negative [ads]," and

"incumbents." As John Samples has argued in The Fallacy of Campaign Finance:

> Progressives are rather clear about who speaks falsely: the economically powerful and wealthy, who promote views that distort the political process. They expect that repressing conservative views will advance nonconservative views, leading in the end to different outcomes and policy making. We should not be surprised to find two leading political theorists arguing that deliberate democracy requires taxpayer financing of campaigns, which would then cause a redistribution of wealth from the advantaged to the disadvantaged. [*Id.* at p. 72.]

The First Amendment, however, does not embrace the modern progressive view, but the Madisonian view of a republican form of government as set forth in *Federalist No. 10*. *See id.* at pp. 26-31. *See also* Citizens United, 175 L. Ed. 2d at 792.

The Arizona Act betrays the principle of popular sovereignty over the political marketplace and, thereby, abridges petitioners' privileges and immunities in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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January 20, 2011