No. 09A1133

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant,

On Renewed Emergency Application to Vacate Appellate Stay Entered by the United States Court of Appeals for the Ninth Circuit

---

DEFENDANT-INTERVENOR-APPELLANT'S RESPONSE TO PLAINTIFFS' RENEWED EMERGENCY APPLICATION TO VACATE APPELLATE STAY AND TO STAY MANDATE BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
PUNEET K. SANDHU
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., Suite 3500
Los Angeles, CA 90071
(213) 683-9100; facsimile: (213) 687-3702
Brad.Phillips@mto.com

Counsel for Defendant-Intervenor
**Counsel of Record*

MONICA YOUN
monica.youn@nyu.edu
ANGELA MIGALLY
angela.migally@nyu.edu
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550

TIMOTHY M. HOGAN
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page

CORPORATE DISCLOSURE STATEMENT

Clean Elections Institute, Inc. has no parent corporations and no publicly held company owns more than 10% of its stock.

INTRODUCTORY STATEMENT

In seeking two forms of extraordinary relief —a stay of the Court of Appeals' mandate and a lifting of that court's stay of the district court's injunction— Plaintiffs effectively ask this Court to enjoin a decade-old law that the panel below unanimously held does not violate the First Amendment. To achieve this extraordinary result, Plaintiffs would have this Court disregard Arizona's history of *quid pro quo* corruption; ignore evidence that neither Plaintiffs' nor others' speech has been chilled by matching funds; upset the settled expectations of candidates who accepted public funding on the assumption that matching funds would be available; deprive Arizona voters of campaign speech; and risk influencing the outcome of Arizona's elections.

This Court should deny the extraordinary relief Plaintiffs seek for four independent reasons.

First, Plaintiffs' application violates Supreme Court Rule 23.3. That rule requires that a stay applicant first seek the relief requested in the court below "[e]xcept in the most extraordinary circumstances." Plaintiffs did not ask the Court of Appeals to stay its mandate, despite the settled procedures for doing so under Federal Rule of Appellate Procedure 41(d). Moreover, Plaintiffs suggest no "extraordinary circumstances" that would excuse their failure to present the request to stay the mandate to the Court of Appeals.

Second, Plaintiffs have not argued, let alone established, that a stay of the mandate is "necessary or appropriate in aid of [the Court's] jurisdiction[]," a

requirement for seeking such a stay under the All Writs Act. 28 U.S.C. § 1651(a).

Third, Plaintiffs have not shown that "the legal rights at issue are 'indisputably clear'" in their favor, another requirement for an All Writs Act stay. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers) (quoting *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972)). Plaintiffs do not and cannot show their right to an injunction against matching funds is "indisputably clear" when an appellate panel unanimously rejected, in a well-reasoned and carefully-written opinion and concurrence, the exact same merits arguments Plaintiffs present in the instant application. In rejecting Plaintiffs' arguments, the Court of Appeals relied on a developed factual record that showed Plaintiffs had not been deterred from speaking by the challenged law, which Arizona adopted in response to a record of caught-on-tape, *quid pro quo* corruption. Far from being in conflict with this Court's decision in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Court of Appeals' opinion relies directly on *Citizens United* in applying intermediate scrutiny to Arizona's matching funds law, a fact that Plaintiffs' application simply ignores. And the Ninth Circuit panel rightly recognized that this Court's decision in *Davis v. FEC*, 128 S.Ct. 2759 (2008), did not, contrary to Plaintiffs' contention, decide the constitutionality of matching funds as part of a scheme of voluntary public financing but instead addressed only the viability of a scheme of discriminatory contribution limits applied to privately-financed candidates.

Fourth, Plaintiffs have not satisfied the stringent standard for

vacating the Court of Appeals' stay of the district court's injunction—*i.e.*, that "the court of appeals [was] demonstrably wrong in its application of accepted standards in deciding the issue of the stay" and that Plaintiffs "may be seriously and irreparably injured by the stay." *Western Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). The appellate court's prediction that Defendants had a likelihood of success on the merits has now been confirmed by a unanimous panel. Moreover, both the district court and the Court of Appeals found no evidence that Plaintiffs' asserted hardship—a chilling effect on speech—in fact results from the challenged law. Thus, vacating the stay of the district court's injunction against matching funds was and is unnecessary to avert any harm to Plaintiffs. On the flip side of the coin, there are now at least two dozen candidates who may not opt out of the public funding system and who undeniably would, along with their constituents, suffer irreparable harm if matching funds were enjoined in the midst of the 2010 elections.

For all of these reasons, this Court should deny Plaintiffs' application.

BACKGROUND

Plaintiffs' application brushes over the history of *quid pro quo* corruption that led to the passage of the Citizens Clean Elections Act, the carefully-tailored approach of matching funds, and the relevant procedural background of this case.

Five years after Arizona began its experiment with contribution limits but no public funding, Arizona experienced AzScam, one of the worst state-level

corruption scandals in this nation's history. In AzScam, nearly 10 percent of the Arizona legislature was indicted after being caught on tape taking campaign contributions and bribes from an undercover informant as a *quid pro quo* for supporting gambling legislation.

In 1998, after witnessing AzScam and other political corruption scandals, Arizona voters passed the Citizens Clean Elections Act by initiative. Consistent with the history of *quid pro quo* corruption in Arizona, the voters found that the then-existing "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5).

In order to "improve the integrity of Arizona state government . . ., encourage citizen participation in the political process, and . . . promote freedom of speech under the U.S. and Arizona Constitutions," the Act established a voluntary public financing system for statewide and state legislative races in Arizona. Ariz. Rev. Stat. § 16-940(A). Under the Act, candidates may opt into the public-financing system and obtain public funding, conditioned on their refusal of most private contributions, acceptance of campaign spending limits, participation in public debates, and collection of a specified number of five-dollar qualifying contributions to demonstrate a base of support among voters. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2). Because the actual cost of running a competitive campaign depends on many factors that are difficult to assess prior to an election, and in order to encourage sufficient participation by counteracting the fear that a participating candidate will be unable to run a viable campaign in a race featuring

a high-spending opponent or an independent expenditure campaign, the Act provides additional matching funds that are capped at twice the amount of the initial grant. Ariz. Rev. Stat. § 16-952(E). Capped matching funds are given to participating candidates when: (1) a traditionally-funded opponent's expenditures (or, during the general election, a candidate's receipts, less expenditures made during the primary campaign) exceed the participating candidate's initial disbursement amount; (2) an independent expenditure committee makes an expenditure opposed to the participating candidate; or (3) an independent expenditure committee makes an expenditure in support of a participating candidate's opponent. *Id.* § 16-952(A), (C)(1)-(2).

The Clean Elections Act had been in place for almost ten years before Plaintiffs, ideological opponents of public financing of elections, filed the instant litigation and sought a temporary restraining order and preliminary injunction that would have precluded their political opponents from receiving matching funds just a few months before the 2008 general election. On August 29, 2008, the district court rejected Plaintiffs' motion for a TRO. It likewise denied Plaintiffs' motion for a preliminary injunction on October 14, 2008. (Pl. App. Vol. I at 51, 61).

On January 20, 2010, the district court granted Plaintiffs' motions for summary judgment, denied Defendants' motions for summary judgment, enjoined enforcement of the Act's matching-funds provision, Ariz. Rev. Stat. § 16-952, and stayed its injunction for ten days. (Pl. App. Vol. I at 32-33). The court found that Plaintiffs' evidence concerning the alleged burden of the Act was "somewhat

scattered" and "vague" and did not "definitively establish a chilling effect." (*Id.* at 16). The court further found that "the 'burden' created by the Act is that Plaintiffs' speech will lead directly to more speech" and that "it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." (*Id.* at 23). The court nevertheless concluded that this Court's decision in *Davis*, although "it does not answer the precise question now before the [district court]," (*id.* at 22), nevertheless "requires [the district court to] find Plaintiffs have established a cognizable burden." (*Id.* at 24). Misconceiving of the way in which the Act furthers the anti-corruption interest, the district court held that "Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech [with matching funds]." (*Id.* at 26). In light of its holding on Plaintiffs' First Amendment claim, the district court found it unnecessary to address Plaintiffs' equal protection claim. (*Id.* at 28).

Defendants moved for a stay in the Court of Appeals, while Plaintiffs moved to lift the district court's interim stay. On January 29, 2010, a motions panel denied Plaintiffs' motion, (*Id.* at 10), and on February 1, 2010 extended the stay issued by the district court (thus allowing matching funds to remain in effect) pending "further action" by the merits panel assigned to the case. (*Id.* at 2). In the same order, the motions panel set the case for expedited briefing and argument. (*Id.*). Judge Bea, a member of the motions panel but not the merits panel, dissented from the granting of the stay. (*Id.* at 2-7).

Without first having asked the merits panel for relief, Plaintiffs filed

an emergency application to vacate the motion panel's temporary stay with this Court. On February 16, 2010, this Court denied the application to lift the temporary stay without prejudice to renewal on June 1, 2010 or once the Court of Appeals had issued its decision on the merits, whichever was earlier. (Pl. App. Vol. IV at 426).

On May 21, 2010, a separate merits panel issued a thorough and carefully-reasoned 31-page opinion, with a separate concurrence by Judge Kleinfeld, unanimously holding that the matching funds provision does not violate the First Amendment. The principal opinion found that the Act "imposes only a minimal burden on First Amendment rights" and "survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption." (Slip op. at 7325; Pl. App. Vol. IV at 392). The Court of Appeals "agree[d] with the district court's observation that 'Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act'" (Slip op. at 7332, Pl. App. Vol. IV at 399) and pointed to specific instances where, for example, Plaintiffs had testified that they had been willing to trigger matching funds in previous elections, could not recall whether they had triggered matching funds, or had their testimony contradicted by their own campaign consultants (Slip op. at 7333-34; Pl. App. Vol. IV at 400-01). The Court of Appeals held that the "burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*" to which this Court had applied intermediate scrutiny. (Slip op. at 7345; Pl. App. Vol. IV at

412). The court also considered at length and rejected Plaintiffs' contention that *Davis*, a case about discriminatory contribution limits, decided the fate of matching funds. (Slip op. at 7337-42; Pl. App. Vol. IV at 404-09). Applying heightened scrutiny, the Court of Appeals found that matching funds bore a substantial relation to Arizona's interest in combating its "long history of *quid pro quo* corruption" and the "appearance of *quid pro quo* corruption to the electorate." (Slip op. at 7346; Pl. App. Vol. IV at 413). The principal opinion declined to reach the equal protection claim in the first instance and remanded the case to the district court for further proceedings. (Slip op. at 7349; Pl. App. Vol. IV at 416)

Judge Kleinfeld concurred. He reasoned that the Act "imposes no limitations whatsoever on a candidate's speech" and found that *Davis* was "easily distinguished." (Slip op. at 7349, 7353; Pl. App. Vol. IV at 416, 420). Thus, Judge Kleinfeld concluded that it was unnecessary to apply even intermediate scrutiny to the Act. (Slip op. at 7351; Pl. App. Vol. IV at 418).

On May 25, 2010, Plaintiffs filed the instant application seeking a stay of the Court of Appeals' mandate and a lifting of the Ninth Circuit motion panel's stay of the district court's injunction pending further action by the merits panel. Plaintiffs did not file a request with the Court of Appeals to stay its mandate and did not explain in their application to this Court why they failed to do so.

ARGUMENT

I. TO OBTAIN THE RELIEF THEY SEEK, PLAINTIFFS MUST SATISFY THE STRINGENT STANDARDS BOTH FOR STAYING THE MANDATE UNDER THE ALL WRITS ACT AND FOR VACATEUR OF AN APPELLATE STAY

This Court should deny Plaintiffs' application because they have not demonstrated entitlement to the extraordinary relief they seek—effectively an injunction halting, in the middle of an election cycle, the functional operation of a public campaign finance system that has existed in the State of Arizona for over a decade.

To obtain this relief, Plaintiffs must establish *both* (1) that this Court should stay the Court of Appeals' mandate pursuant to the All Writs Act *and* (2) that the Court of Appeals should not have stayed the district court's order enjoining the matching funds provision. If this Court denies Plaintiffs' motion to stay the mandate, Plaintiffs' motion to vacate the Court of Appeals' stay order is moot. This is because once the mandate issues the district court's judgment enjoining matching funds, which the Court of Appeals unanimously reversed, will cease to have any effect, as will the stay of that judgment. Conversely, were this Court to stay the mandate while leaving the appellate stay in place, matching funds would remain in effect. In short, only if this Court both stays the mandate and vacates the stay will Plaintiffs get the injunctive relief they seek.

That Plaintiffs must succeed in persuading this Court both to stay the mandate and to lift the appellate stay is important because the standards for the two forms of relief differ. As we explain below, Plaintiffs have not satisfied either

standard.

II. THE COURT SHOULD DENY PLAINTIFFS' APPLICATION TO STAY THE MANDATE

A. Plaintiffs' Application Fails To Comply With Supreme Court Rule 23

Plaintiffs' application for a stay of the Court of Appeals' mandate is procedurally improper. Supreme Court Rule 23.3 mandates that, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." *Id.* (emphasis added).

Plaintiffs have not sought a stay of the mandate from the Court of Appeals, and they have not explained to this Court what "extraordinary circumstances" justify their bypassing established procedural avenues for obtaining relief. *See* Fed. R. App. P. 41 (setting forth the procedure governing motions seeking to stay a mandate). Plaintiffs' failure to explain why their circumstances are "extraordinary" is fatal to Plaintiffs' application. *See* Sup. Ct. R. 23.3 (requiring that "[a]n application for a stay shall set out with particularity why the relief sought is not available from any other court or judge"). In light of these procedural defects alone, this Court should deny Plaintiffs' application.

B. Plaintiffs Have Not Satisfied The All Writs Act Standard For Staying The Court Of Appeals' Mandate

Because Plaintiffs seek to stay a non-final judgment for the purpose of enjoining an operative state statute, they must satisfy the stringent standard for

obtaining relief under the All Writs Act.[1] *See* 28 U.S.C. § 1651(a); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission,* 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (where a stay applicant challenges a non-final judgment, and in so doing substantively seeks an injunction, the applicant must satisfy the standard for relief under the All Writs Act).

To obtain relief under the All Writs Act, Plaintiffs would have to establish that "(1) [the relief they seek] is 'necessary or appropriate in aid of [the Supreme Court's] jurisdictio[n],' and (2) the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting*, 507 U.S. at 1301 (quoting 28 U.S.C. § 1651(a) and *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers)). By design, this standard is difficult to satisfy for "[t]he Circuit Justice's injunctive power is to be used sparingly and only in the most critical and exigent circumstances." *Ohio Citizens*, 479 U.S. at 1312 (internal citations and quotations omitted).

While Plaintiffs recognize that this Court could stay the mandate only if it did so under the All Writs Act (Pl. Applic. at 3), Plaintiffs have not addressed

---

[1] The Ninth Circuit's order reversed the district court's erroneous judgment for Plaintiffs on their First Amendment claims and remanded the action for further proceedings on Plaintiffs' equal protection claim. Accordingly, the Ninth Circuit's order does not represent a "final judgment." If the Ninth Circuit's decision were a final judgment, which it is not, this Court would review Plaintiffs' application under 28 U.S.C. § 2101(f). Plaintiffs also fail, however, to meet the stringent standard for a stay to issue under § 2101(f). They have not demonstrated a reasonable probability that certiorari will be granted, and, as explained in subsection II below, they have not shown either a significant possibility that the judgment below will be reversed or a likelihood of irreparable harm. *Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) ("[B]efore issuance of a § 2101(f) stay is appropriate[, t]here must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed.") .

the particular requirements for the issuance of an All Writs Act stay. That alone requires the denial of Plaintiffs' application. *See Ohio Citizens*, 479 U.S. at 1312 ("I will not consider counsel to have asked for such extraordinary relief where, as here, he has neither specifically requested it nor addressed the peculiar requirements for its issuance. The application for stay is denied."); *see also* Sup. Ct. R. 23.3 (an application for a stay "shall set out specific reasons why a stay is justified").

Independently, this Court should deny Plaintiffs' application to stay the mandate because Plaintiffs have not demonstrated and cannot demonstrate that their request meets either of the two requirements necessary to obtain relief under the All Writs Act.

1. Plaintiffs Fail To Show That A Stay Of The Mandate Is Necessary Or Appropriate In Aid Of This Court's Jurisdiction

First, the stay Plaintiffs seek is not "necessary or appropriate in aid of [this Court's] jurisdiction[ ]." 28 U.S.C. § 1651(a). The continued enforcement and implementation of Arizona's matching funds provision will in no way strip this Court of its jurisdiction to decide the issues presented by this case on appeal, if it chooses to do so. For this reason alone, Plaintiffs' application should be denied. *See Turner Broadcasting*, 507 U.S. at 1301 (denying an application to enjoin enforcement of certain provisions of the Cable Television Consumer Protection and Competition Act of 1992 under the All Writs Act because implementation of those provisions of the Act would in no way strip the Supreme Court of its jurisdiction to decide the merits of any appeal).

2. Plaintiffs Have Not Shown That The Merits Of The Case Are Indisputably Clear In Their Favor

Second, because Plaintiffs have not and cannot show a likelihood of success on the merits of their First Amendment claim, they cannot establish that the purported legal rights they seek to vindicate through their application are "indisputably clear" in their favor. *Turner Broadcasting*, 507 U.S. at 1301.

The Ninth Circuit's decision was unanimous and is consistent with this Court's precedent, including *Buckley*, *Citizens United*, and *Davis*. Moreover, the decision is based in large part on evidence with regard to Arizona's particular circumstances, including both the state's experience of widespread political corruption leading up to passage of the Act and the absence of evidence that the matching funds provision has, over the 12 years since its enactment, had any significant chilling effect on speech.

Plaintiffs make essentially two arguments with respect to the merits of the Ninth Circuit's decision, both of which are wrong.

a. The Act Is Supported By The State's Compelling Interest In Combating Actual and Apparent Corruption

Plaintiffs argue that "*Citizens United* forecloses the claim that the matching funds trigger provision is supported by a compelling state interest." (Pl. Applic. at 10). As an initial matter, this argument is immaterial, because it wrongly assumes that the Act is subject to strict, rather than intermediate, scrutiny and that a compelling interest is therefore required. Notably, Plaintiffs nowhere even mention, far less take issue with, the Ninth Circuit's conclusion that "the burden

created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*" and the Act is therefore subject to intermediate scrutiny. (Slip op. at 7345; Pl. App. Vol. IV at 412 ("[T]he burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign expenditures.")).[2]

In any event, *Citizens United* in fact confirms that Arizona has a compelling interest in combating corruption and its appearance, which, as the Ninth Circuit held, is one of the principal purposes of the Act. (Slip op. at 7329; Pl. App. Vol. IV at 396; *see also* slip op. at 7347; Pl. App. Vol. IV at 414 ("the Act is aimed at reducing corruption among participating candidates"); *Citizens United*, 130 S.Ct. at 908-11 (discussing the government's interest in combating actual and apparent corruption); *Davis,* 128 S.Ct. at 2773 (noting "the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance

---

[2] Plaintiffs rely on Judge Bea's analogy, in his dissent from the Ninth Circuit motions panel's stay order, to poker: "Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for the opponent." (Pl. Applic. at 5 (quoting Pl. App. Vol. I at 4)). In fact, of course, if the poker player believes that he has the better hand, it absolutely makes sense for him to make that bet; it would not make sense only if he believed he had the worse hand. Similarly, if a candidate believes that her message is more appealing to voters than that of her opponent, it makes strategic sense for her to spend money disseminating that message, even if it means that her opponent's less appealing message may also get additional exposure; it would make strategic sense for her to stop speaking (and thereby prevent her opponent from speaking further) only if she believes that more speech by both will benefit her opponent—in other words, that her opponent's message is the more appealing one. The evidence, of course, demonstrates that candidates do not in fact stop spending as a result of matching funds; that is perhaps the unsurprising result of the belief by most, if not all, candidates that their message—not their opponents'—is more appealing and that more speech rather than less will therefore benefit

thereof") (quoting *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment)); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring) ("The Court also recognized . . . that the Government has a compelling interest in prevention of corruption and the appearance of corruption." (internal quotations and citations omitted)).

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 attempt to twist this into a purportedly impermissible purpose to "level the playing field," because the Act seeks to give participating candidates sufficient funds to compete against privately-funded candidates. But in order to be a feasible alternative to private fundraising, voluntary public financing systems—with or without matching funds—must always provide sufficient money for participating candidates to compete; otherwise, 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 system that this Court upheld because it "facilitate[s] and enlarge[s] public discussion and participation in the electoral process" and "furthers, not abridges, pertinent First Amendment values." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

The Act was enacted expressly to combat actual and apparent

---

them.

corruption. As the Ninth Circuit recounted, there is substantial evidence in the record of extensive *quid pro corruption* in Arizona politics leading up to the passage of the Act. (Slip op. at 7325-7327; Pl. App. Vol. IV at 392-94 ("[Defendants] introduced ample evidence indicating that when the Act was adopted, voters were aware of, and concerned about, continuing and repeated political corruption in Arizona.")). The first stated purpose of the law is to "create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special interest money." Ariz. Rev. Stat. § 16-940. 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." Ariz. Rev. Stat. § 16-940(B)(1). In *Citizens United*, this 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." Ariz. Rev. Stat. § 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.[3]

[3] Contrary to Plaintiffs' suggestion, legislation need not expressly discuss previous political scandals, use the words "*quid pro quo*," or recite specific examples of "cash-for-votes" to serve the compelling anti-corruption interest. (*See* Pl. Applic. at 12). Congress used no such words or examples when it enacted FECA, upheld in *Buckley*, or BCRA, upheld in *McConnell v. FEC*, 540 U.S. 93 (2003). Plaintiffs claim that the Act's identification of undue influence of "special interest money" 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

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 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.

Plaintiffs argue, as the district court held, that the Act cannot have an anti-corruption purpose because matching funds are provided based on campaign expenditures by self-financed candidates and independent expenditure committees, "which pose no threat of *quid pro quo* corruption under *Citizens United* and *Davis*." (Pl. Applic. at 12-13). The Ninth Circuit's answer to this argument is eloquent and captures the fundamental way in which matching funds, as part of a public funding program, are crucial to furthering the State's anti-corruption interest:

> The district court [and Plaintiffs] misapprehended how the Act functions to reduce corruption. It assumed that the Act works by reducing nonparticipating candidates' incentive to fundraise private contributions, thereby reducing the appearance of corruption among

---

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."

> nonparticipating candidates. Thus, it concluded that the Act did not further an anticorruption interest by providing matching funds to participating candidates triggered by non-participating candidates' making contributions to their own campaigns from their own private funds. In doing so, it relied on the Court's holding that "discouraging use of personal funds [] disserves the anticorruption interest." *Davis*, 128 S.Ct.. at 2773.
>
> The fact is, however that the Act is aimed at reducing corruption among participating candidates. The relevant inquiry thus is whether matching funds bear a substantial relation to reducing corruption among participating candidates. . . .
>
> Viewing the Act from this perspective, it is clear that the Act's anticorruption interest is further promoted by high participation in the program. The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption . . . .
>
> It is not relevant under this analysis what the source of a nonparticipating candidate's campaign contributions is when he or she triggers matching funds. In order to promote participation in the program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*.

(Slip op. at 7346-48; Pl. App. Vol. IV at 413-15 (emphasis in original)).

b. This Court's Decision In *Davis* Does Not Require The Application of Strict Scrutiny To The Act

Plaintiffs argue that the Ninth Circuit's decision is inconsistent with this Court's decision in *Davis*. In fact, for the reasons explained by the Ninth Circuit, *Davis* does not in any way undermine that court's reasoning.

As the Ninth Circuit held, "[t]he regulatory framework the Supreme Court examined in *Davis* is different from the one we confront under the Act." (Slip op. at 7339; Pl. App. Vol. IV at 406). *Davis* arose in the context of federal congressional elections where, "[u]nder the usual circumstances, the same

restrictions apply to all the competitors for a seat." *Davis*, 128 S.Ct. at 2765. That baseline is key and distinguishes the congressional system for regulating campaign financing from the campaign-finance laws applicable in presidential races and Arizona state-level campaigns. In congressional campaigns, all candidates are subject to the same contribution limits, *see* 2 U.S.C. § 441a(a)(1), and the same disclosure requirements, *see* 2 U.S.C. § 434. Congressional candidates are not eligible to receive the public funding that is available to candidates for President, *see* 2 U.S.C. § 441a(b), 26 U.S.C. § 9001 et seq, or for Arizona state office, *see* Ariz. Rev. Stat. § 16-951, 952, and there is no alternative to the system of private financing. In short, all congressional candidates are similarly situated from a regulatory perspective.

That is not the case under the Presidential public-funding system or under the Clean Elections Act. Under public-funding systems, all candidates begin their campaigns by choosing between one of two financing options, each with its own particular set of benefits and burdens. Candidates who choose public funding receive certain benefits, including a "release from the rigors of fundraising, the assurance that contributors will not have an opportunity to seek special access, and the avoidance of any appearance of corruption." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 471 (1st Cir. 2000). But publicly-funded candidates also "suffer a countervailing denial [because] acceptance of public financing entails voluntary acceptance of an expenditure ceiling." *Buckley*, 424 U.S. at 95.

The constitutionality of this voluntary choice between public and private financing is well settled. *See id.* at 57 n.65. In *Buckley*, the Court held that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* This holding followed naturally from the Court's recognition that public funding "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process." *Id.* at 92-93. In short, it is a constitutionally-acceptable approach to offer all candidates the alternatives of public and private funding where, depending on the choices made by individual candidates in a particular race, "the same restrictions" may not "apply to all the competitors for a seat." *See Davis*, 128 S.Ct. at 2765.

This critical difference between a system of purely private financing and a system with optional public funding is essential to understanding the reach of the *Davis* decision. In *Davis*, the challenged law, Section 319(a) of BCRA, replaced the normal rule in congressional elections—that all candidates in privately-funded congressional elections are subject to the same contribution limits—with "a new, asymmetrical regulatory scheme." *Id.* at 2766. In particular, Section 319(a) provided that, once one of two or more privately-funded candidates in a race spent more than $350,000 of personal funds on his campaign (subject to certain adjustments), the initial contribution limits were tripled and the limits on coordinated party/candidate expenditures were eliminated entirely—*but only for*

that privately-financed candidate's privately-financed opponent. Because Section 319(a) thus subjected otherwise similarly-situated candidates to "asymmetrical" and "discriminatory" fundraising limitations just because one candidate chose to spend personal funds, the Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id.* at 2771. Indeed, as the Ninth Circuit noted, the *Davis* Court stated that, had the federal law "simply raised the contribution limits for all candidates, Davis' argument would plainly fail." (Slip op. at 7339; Pl. App. Vol. IV at 406 (quoting *Davis*, 128 S.Ct.. at 2770)); *see also Davis*, 128 S.Ct. at 2771 ("[I]f § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits.").

Unlike BCRA Section 319(a), Arizona's public-funding system does not include a system of "discriminatory contribution limits" in which a self-financed candidate is penalized *vis-à-vis* his similarly-situated, privately-financed opponent for making personal expenditures. Instead, consistent with *Buckley's* affirmation of the constitutionality of the Presidential public-funding system, the Act offers all candidates a choice between two entirely different systems of financing, each with its own particular set of regulatory benefits and burdens. Because *Buckley* makes clear that the participants in the public-funded and private-financing alternatives need not receive the same benefits, the Act is not "discriminatory" or "asymmetrical" merely because only publicly-funded candidates receive matching funds. *See Buckley*, 424 U.S. at 57 n.65. Indeed, the *Davis* Court expressly

distinguished the discriminatory regulatory burden of Section 319(a) from the Presidential public-financing system it had upheld in *Buckley*, because under Section 319(a), unlike the public-financing system, a candidate's personal expenditures resulted in "the activation of a scheme of *discriminatory* contribution limits." *Davis,* 128 S.Ct. at 2772 (emphasis added).

Plaintiffs rely heavily on the *Davis* Court's "*see*" citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). That citation immediately followed the Court's statement that, under section 319(a), privately-funded candidates may choose to rely on personal monies "but they must shoulder a special and potentially significant burden." *Davis*, 128 S.Ct. at 2772. As the Ninth Circuit held, this "*see*" citation cannot bear the weight of Plaintiffs' constitutional attack on the Act.

At most, this "*see*" citation to *Day* suggests that matching funds pose a "potentially significant burden." *Id.* A burden of potential significance, however, is certainly no more substantial than the burden that the Court assumed might accompany compelled disclosure: "the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Because the Court has repeatedly held that the potentially significant burden of compelled disclosure requires intermediate, not strict, scrutiny, Plaintiffs' contention that *Davis's* brief citation to *Day* calls for strict scrutiny of matching-funds provisions is meritless.

Davis did not rely on *Day* for the proposition that Section 319(a) is subject to strict scrutiny. Nor did *Davis* suggest that Section 319(a) and matching funds impose burdens of similar severity. To the contrary, the *Davis* Court, plainly

aware of the Minnesota matching-funds provision at issue in *Day*, labeled Section 319(a)'s "discriminatory" and "asymmetrical" contribution limits an "*unprecedented* penalty." *Davis*, 128 S.Ct. at 2771 (emphasis added).

In short, nothing in *Davis* requires that Arizona's matching-funds provision be subjected to strict scrutiny.[4]

While the unanimous Circuit Court panel was correct that matching funds do not violate the First Amendment, even if there were room for disagreement, that there *could be* differing opinions among the Justices on the merits of Plaintiffs' case demonstrates that the law is not "indisputably clear" in Plaintiffs' favor. *See Brown v. Gilmore*, 533 U.S. 1301 (2001) (Rehnquist, C.J.) (declining to enjoin a statute under the All Writs Act without "attempting to predict the views of my colleagues as to the ultimate merit" of the applicants' First Amendment claim because "the position is less than indisputable"). Thus, because Plaintiffs have not and cannot show that the law is "indisputably clear" in their favor, this Court should not stay the Court of Appeals' mandate.

III. THIS COURT SHOULD DENY PLAINTIFFS' MOTION TO VACATE THE APPELLATE STAY OF THE DISTRICT COURT'S INJUNCTION

As explained above, if this Court denies Plaintiffs' motion to stay the mandate (as it should), Plaintiffs' motion to vacate the Court of Appeals' stay order should be denied as moot. If this Court does decide to reach the merits of Plaintiffs'

---

[4] Plaintiffs rely also on the *Davis* Court's "*cf.*" citation to *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), in which the Court struck down a law that require[d] [the speaker] to use its property . . . to distribute the message of another"—*i.e.*, a utility was required to include the views of a consumer group in its billing envelopes. *See id.* at 17-18 (plurality opinion). *Pacific Gas & Electric* might be relevant if the Act required non-participating candidates to include their opponent's message in their own advertisements. But the Act requires no such thing.

motion to vacate the stay, it should deny that motion because Plaintiffs have failed to show that the appellate court's application of the stay factors was "demonstrably wrong" and that they will be "seriously and irreparably injured by the stay." *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) ("[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay."); *Western Airlines, Inc.*, 480 U.S. at 1305 (same).

In deciding to stay the district court's order, the Court of Appeals was governed by Federal Rule of Appellate Procedure 8(a), under which courts consider four factors in deciding whether to stay a lower-court's order: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

In this case, there is no indication that the Court of Appeals ignored these accepted standards or applied them in a "demonstrably wrong" manner.

A. Defendants Had A Likelihood Of Success On The Merits

First, not only did Defendants have a likelihood of success on the

merits, but we now know that Defendants in fact succeeded on the merits. Indeed, all three members of the merits panel agreed with Defendants that matching funds do not violate the First Amendment. Accordingly, there can be no question that the Court of Appeals correctly determined that Defendants had a likelihood of success on the merits when evaluating their stay application.

B. The Balance Of The Hardships And The Public Interest Tipped Decidedly In Favor Of Defendants

Moreover, the balance of hardships and the public interest tipped strongly in favor of a limited stay pending further action by the merits panel (and coupled with expedited briefing and argument) for at least two reasons.

First, Plaintiffs faced no risk of suffering any harm from the stay that was imposed. As both the district court and the Court of Appeals merits panel found, Plaintiffs lacked any compelling evidence that their speech in fact had been chilled by matching funds. Plaintiffs thus could not and cannot establish that they will be "seriously and irreparably injured by the stay" or that the Court of Appeals was "demonstrably wrong" in its analysis of the balance of hardship. *See Coleman,* 424 U.S. at 1304.

Second, and in stark contrast to the lack of harm to Plaintiffs, candidates who had chosen to participate in the public funding system on the expectation that matching funds would be available had and have a high likelihood of suffering harm if the matching funds provision were enjoined just months before early voting for the 2010 primary election begins.

At the time the district court stayed its own injunction and the motions

panel extended that stay, the evidence showed that, as a practical matter, candidates could no longer opt out of the public funding system because it was too late to begin raising the private funds that would be needed to mount a competitive campaign.

Today, it is not only practically impossible for publicly-funded candidates to switch course, but it is legally impossible for over two dozen candidates as well. To date, 26 candidates have received public funds and thus may not opt out of the public funding program. (Defendants' App. at 4). An additional 129 candidates have filed paperwork with the Clean Elections Commission indicating their intent to run with public funds and thus have not raised the private funds that would be needed to mount a traditionally-financed campaign. (*Id.*).

If matching funds were enjoined, participating candidates could not spend any more than the base level of funding that they have received. In other words, they would lose the right to two-thirds of the funding they potentially could have received under the status quo. As the district court found in staying its own injunction four months ago, "[i]nvalidating matching funds changes the entire election landscape." (Pl. App. Vol. 1 at 31).

An injunction against matching funds not only would deprive participating candidates of funds they expected when they agreed to forego private fundraising and abide by voluntary spending limits, but also would reduce the amount of information available to voters by leaving publicly-funded candidates with less money to spend to communicate their message. Even worse, an injunction

against matching funds could alter the outcome of Arizona's 2010 elections. Recognizing that their publicly-funded opponents were hamstrung by the injunction, non-participating candidates and committees would undoubtedly respond by flooding the airwaves and mailboxes with attack ads, which likely would go unanswered.

In short, the Court of Appeals was entirely justified in concluding that a limited stay of the district court's injunction was warranted to avoid or lessen the risk of judicial interference in the electoral process. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief. . . . In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.").

Accordingly, the balance of the hardships and the public interest weighed decidedly in favor of the Court of Appeals' decision to extend the stay pending further action by the merits panel. At the very least, Plaintiffs have failed to show that the Court of Appeals' extension of the stay was "demonstrably wrong," a prerequisite to obtaining the relief they seek through their application.

CONCLUSION

For all the foregoing reasons, Defendant-Intervenor Clean Elections Institute, Inc. respectfully submits that Plaintiffs' emergency application should be denied.

Respectfully Submitted,

Bradley S. Phillips /ESN

BRADLEY S. PHILLIPS

Counsel For Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE,
INC.