**Nos. 10-238 and 10-239**

IN THE

# Supreme Court of the United States

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

*Petitioners,*

v.

KEN BENNETT, *ET AL.*,

*Respondents.*

JOHN MCCOMISH, *ET AL.*,

*Petitioners,*

v.

KEN BENNETT, *ET AL.*,

*Respondents.*

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

## BRIEF OF RESPONDENT CLEAN ELECTIONS INSTITUTE, INC.


BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MICHAEL J. MONGAN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

MONICA YOUN
MARK LADOV
MIMI MARZIANI
ELIZABETH KENNEDY
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (646) 292-8333
Facsimile: (212) 463-7308
monica.youn@nyu.edu

Counsel for Respondent Clean Elections Institute, Inc.


February 2011 *Counsel of Record

TIMOTHY M. HOGAN
ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
202 EAST MCDOWELL ROAD
SUITE 153
Phoenix, AZ 85004
Telephone: (602) 258-8850
Facsimile: (602)
thogan@aclpi.org

## QUESTION PRESENTED

The triggered matching funds provision of Arizona's public financing law, Ariz. Rev. Stat. § 16-952, provides candidates who choose to accept public funding, abide by expenditure limits, and forgo private contributions with limited supplemental public funds based on campaign spending by their privately financed opponents and independent expenditure committees. Is this triggered matching funds provision, which serves to combat corruption and expand electoral speech and competition in a viewpoint neutral and fiscally responsible way, constitutional?

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## INTRODUCTION

The triggered matching funds provision of Arizona's Citizens Clean Elections Act is carefully tailored to combat political corruption, enhance political speech, and increase electoral competition in a fiscally responsible way. By assuring publicly funded candidates that they can run viable campaigns even in competitive races, matching funds encourage participation in Arizona's public funding system. *See Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (holding that voluntary public funding of elections "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process"). While candidates who accept public funding agree voluntarily to limit their spending, Arizona's law places no limit on the amount that any privately financed candidate or independent committee may spend. Since the law took effect in 1998, spending by both privately financed candidates and independent committees has risen, electoral competition has increased, and the state has remained free of the corruption scandals that spurred the voters to enact the Clean Elections Act.

Petitioners assert that the Arizona law is subject to strict scrutiny, the standard this Court has applied to laws that directly limit political speech, coerce or compel speech, or discriminate among similarly situated speakers. But a more deferential standard applies to laws, such as this one, that do not directly regulate speech and instead primarily promote First Amendment values, even if those laws may incidentally burden some persons' speech. Thus, for example, in upholding mandatory disclosure of political contributions and expenditures, the Court in

*Buckley* established that regulations that further First Amendment values but which may incidentally burden political speech are constitutional if they are substantially related to a sufficiently important government interest. *Id*. at 64-65. This Court reaffirmed that holding in *Citizens United v. Federal Election Comm'n,*, 130 S.Ct. 876, 914 (2010). Here, the evidence shows that triggered matching funds further the compelling purposes of public funding that this Court recognized in *Buckley*: combating real and apparent corruption and enhancing public discussion and participation in the electoral process, the very foundation of our democracy. *See* 424 U.S. at 92-93, 96. The judgment of the Court of Appeals, upholding Arizona's law, should therefore be affirmed.

In urging reversal, Petitioners rely principally on this Court's decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008). But *Davis* involved an entirely different constitutional question from that presented by Arizona's triggered matching funds provision. Voluntary public funding was not involved, and the Court held the federal law at issue was subject to strict scrutiny because it imposed "discriminatory contribution limits" on two privately financed candidates in the same race. *Id.* at 739-40. No such discriminatory limits exist here. Because Arizona allows candidates to choose voluntarily between two different regulatory regimes—a choice this Court has repeatedly held is permissible under the First Amendment—privately financed and publicly financed candidates are not similarly situated. Moreover, the law at issue in *Davis* could not be justified by the government's interest in combating corruption, *id*. at 740-41, while Arizona's triggered matching funds are important to the state's

effort to remedy Arizona's history of actual and apparent *quid pro quo* corruption without wasting public funds.

If the triggered matching funds provision in Arizona's voluntary public financing law were invalidated, the result would be less (not more) political speech and electoral competition, and the state's compelling interests in combating corruption and enhancing political participation would be undermined.

## STATEMENT OF THE CASE

### I. THE CITIZENS CLEAN ELECTIONS ACT

Arizona's voters passed the Act in 1998 in response to one of the worst state-level corruption scandals in this nation's history. In the early 1990s, a significant number of Arizona's elected officials were caught on tape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (JA 122-43.)[1] "AzScam," as the scandal came to be known, received extensive media coverage and fostered a widespread perception of political corruption in Arizona's government. (JA 122-27, 136-43, 173-77.) Shortly after AzScam garnered headlines, the state's major newspaper reported that

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[1] "JA" refers to the "Joint Appendix" filed with this Court. "PA" refers to the McComish Petitioners' Appendix to their petition for certiorari. "ECF" refers to the electronic filing docket number in the district court. "McComish Pet." refers to the McComish Petitioners' brief on the merits and "AFEC Pet." refers to the Arizona Free Enterprise Club Petitioners' brief on the merits.

100 percent of journalists, 66 percent of legislative staffers, and 42 percent of legislators and lobbyists believed that major contributors received special advantages from legislators. (JA 176.)

AzScam occurred five years into Arizona's initial experiment to combat corruption with contribution limits alone. Ariz. Rev. Stat. § 16-905 (2010) (historical note). AzScam demonstrated that those contribution limits were insufficient, by themselves, to fully prevent actual incidences of *quid pro quo* corruption and the public appearance of corruption in Arizona. In the years following AzScam, the public received yet more evidence that contribution limits alone had not eliminated real and apparent corruption from Arizona politics, as newspaper reports documented further instances of corruption. (JA 214-15.)

Arizona voters passed the Act based on their finding that the purely private "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5) (2010). They adopted the Act 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." Ariz. Rev. Stat. § 16-940(A).

Under the Act, in exchange for agreeing to abide by expenditure limits, forgo potentially corrupting private fundraising, and participate in public debates, qualifying candidates receive public funding for statewide and legislative campaigns. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2). To qualify, candidates must collect a specified number of five-dollar contributions from in-district

constituents to demonstrate that they have a sufficient base of support among voters. Ariz. Rev. Stat. §§ 16-949, 16-950.

The Act is designed to both provide candidates with sufficient resources to run competitive campaigns and avoid wasting limited state funds on non-competitive races. (JA 714-16.) Thus, it provides eligible candidates with a base grant equal to only one-third of the maximum per-candidate funding allotment. If a publicly funded candidate's traditionally funded opponent spends more than the initial base grant on his or her campaign, if independent expenditures are made in opposition to the publicly funded candidate, or if independent expenditures are made in support of that candidate's opponent (regardless of whether the opponent is publicly or privately funded), the publicly-funded candidate receives additional funds up to twice the amount of the initial grant (hereinafter, "matching funds" or "triggered matching funds"). Ariz. Rev. Stat. § 16-952(A), (C)(1)-(2), (E) (2010).

The Act's drafters considered but rejected awarding participating candidates one large lump-sum grant rather than a modest initial grant with the possibility of supplemental funds. After examining the wide disparity of spending in electoral contests, they decided that a one-size-fits-all grant would be either too low to attract candidates facing potentially competitive campaigns or so high that the state's limited resources would be wasted. (JA 714-716.)

Arizona's model has successfully encouraged two-thirds of state candidates to participate in the Clean Elections program. Participants have been drawn from both major parties in roughly equal numbers, as well as several minor parties, and both challengers

and incumbents have participated. (JA 479-529, 755-64; ER 313.) Since the law's enactment, Arizona has experienced a 20 percent increase in the number of contested Senate races, and the percentage of incumbents facing competitive Senate races has increased by 300 percent. (JA 535-36.)

## II. THE ACT DOES NOT IMPOSE ANY SUBSTANTIAL BURDEN ON SPEECH

### A. Candidates' Speech Has Not Been Chilled

Although Petitioners conducted extensive discovery, including from officeholders and candidates, they failed to present any reliable evidence that Arizona's triggered matching funds deter their speech or that of other non-participating candidates. In fact, discovery revealed just the opposite: Petitioners and other traditionally funded candidates did not spend less money on their campaigns because of the availability of matching funds to participating candidates. Indeed, they regularly spent beyond the matching-funds threshold.

For instance, Senator. Robert Burns testified that while running for office he paid no attention to his opponents' receipt or expenditure of matching funds. (JA 433-34.) In 2008, Senator Burns and independent groups supporting him spent freely above the matching funds threshold. (JA 704.) Petitioners McComish, Bouie, and McLain triggered matching funds by exceeding the threshold notwithstanding their knowledge of the Act. (JA 384-85, 545-46; ECF 369-2, 370-2.) Further demonstrating the negligible impact triggered matching funds have on non-participants' spending decisions, Petitioner Martin triggered matching funds for his publicly funded

opponents but testified that he could not recall ever having done so. (JA 574-75, 755.)

Petitioner Murphy conceded at deposition that matching funds never caused him to reject a contribution, and his campaign consultant confirmed that Murphy never stopped fundraising because of matching funds. (JA 410, 594-95.) Murphy could not name any high-propensity donor who would not donate to his campaign due to matching funds. (JA 412.) Petitioner McLain testified that she had never turned down a campaign donation due to matching funds. (JA 416.)

The statistical evidence confirmed that matching funds do not deter spending by privately financed candidates who face publicly funded opponents. Those candidates either spend much less than the matching funds threshold—showing that their decisions to stop spending were based on something other than matching funds—or spend significantly more—showing that they were not deterred by matching funds. (JA 876-77.)

### B. Independent Expenditures Have Not Been Chilled

Petitioners also failed to present any evidence that the Act has chilled independent expenditures. To the contrary, Petitioners' own figures show that, since implementation of the Act, independent expenditures have increased by 253 percent. (JA 284-85.)

Petitioner Freedom Club PAC does not make independent expenditures. Instead, it contributes money to Arizonans for a Sound Economy ("ASE"), which in turn makes independent expenditures. (JA 666.) Matching funds have never prevented the PAC from donating to ASE. (JA 670.) ASE's representative

testified that he does not "recall making a decision not to spend money" because of matching funds. (*Id.*)

Likewise, Petitioner Arizona Taxpayers Action Committee's ("ATAC") representative testified that ATAC has never withheld money from a race because of matching funds. (JA 584.) In fact, the organization's treasurer explained that the reason it did not spend money on campaigns in 2006 and 2008 was that it was unable to raise enough funds to do so and admitted that matching funds did not cause ATAC's financial woes; instead, the group's members simply lacked the time and will to fundraise. (JA 418-25.)

## III. THE LOWER COURT RULINGS

### A. The District Court

On January 20, 2010, the district court entered an order finding that Petitioners' evidence concerning the alleged burden imposed by the Act was "somewhat scattered" and "vague" and did not "definitively establish a chilling effect." *McComish v. Brewer*, No. CV-08-1550-PHX-ROS, 2010 WL 2292213, at *3 (D. Ariz. Jan. 20, 2010). The court noted that "it seems illogical to conclude that [an] Act creating more speech is a constitutionally prohibited 'burden' on [Petitioners]." *Id.* at *7. The district court, mistakenly concluding that it was required to do so by this Court's decision in *Davis*, nonetheless granted summary judgment for Petitioners.

### B. The Court Of Appeals

On May 21, 2010, a three-judge panel of the Court of Appeals unanimously held that Arizona's triggered matching funds provision does not violate the First Amendment. The court held that the Act is subject to

less than strict scrutiny because it "imposes only a minimal burden on First Amendment rights." *McComish v. Bennett*, 611 F.3d 510, 513, 525 (9th Cir. 2010). The court 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 has applied less than strict scrutiny. *Id*. at 525. The court held that the Act is constitutional "because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption [and its] appearance . . . ." *Id*. at 513, 525.

## SUMMARY OF ARGUMENT

Triggered matching funds do not abridge the right of candidates and committees to spend unlimited amounts in Arizona elections. To the contrary, Arizona's carefully-calibrated system of disbursing limited public funds promotes First Amendment values by encouraging more candidates to run, enhancing communication with the electorate, and increasing the number of contested and competitive elections. At the same time, matching funds serve Arizona's compelling interest in reducing the potential for *quid pro quo* corruption by making public financing a realistic alternative to potentially corrupting private contributions.

1. Arizona's law places no cap on the amount Petitioners may spend. Moreover, the record reveals no substantial evidence that matching funds burden candidates' or independent committees' speech. To the contrary, as Petitioners themselves argue, "[i]t is undisputed Petitioners and allied independent expenditure committees, through raising or spending campaign money, collectively triggered tens of thousands of dollars in matching funds to opposing

participating candidates." (McComish Pet. 30.) Petitioners' real complaint thus is not that their speech is chilled, but that Arizona's matching funds system gives their opponents, who are barred from raising private contributions, the financial wherewithal to respond and engage in effective, robust campaign debate. The First Amendment was not designed to protect one-sided campaigns.

Even if there were evidence that matching funds caused some candidates or political committees to alter their spending decisions for strategic reasons, such an incidental effect would not warrant strict scrutiny. This Court has consistently treated direct regulations of political speech differently from regulations that further First Amendment values but which may also have an incidental effect on the amount of money that is spent on political speech. Thus, *Buckley* applied strict scrutiny to FECA's direct limits on spending, but less rigorous scrutiny to contribution limits and disclosure requirements. Similarly, *Citizens United* applied strict scrutiny to BCRA's "outright ban" on corporate spending, but less rigorous scrutiny to requirements that corporations disclose their spending, which "impose no ceiling on campaign-related activities [and] do not prevent anyone from speaking . . . ." 130 S.Ct. at 914 (internal quotation marks omitted). Here, Arizona's matching funds provision places no direct limit on anyone's spending, furthers compelling First Amendment interests, and could have at most an incidental effect on spending by a privately financed candidate or an independent committee.

Petitioners wrongly contend that *Davis* requires application of strict scrutiny. *Davis*, which struck down a discriminatory scheme that subjected

similarly situated, privately financed candidates to asymmetrical contribution limits, does not control the outcome here. Arizona's system does not discriminate between similarly situated candidates but instead affords all candidates a choice between a public and private financing option, each with its own particular set of benefits and burdens. Public funding offers candidates the potential to receive matching funds, but that is counterbalanced by the uncertainty of whether and when such funds will become available, the inability to raise additional private funds, and limits on the amount the participating candidate may spend. There is no question that offering candidates a choice between a public and private financing option is constitutional and not discriminatory. *See Buckley*, 424 U.S. at 57 n.65.

Petitioners also err in attempting to classify Arizona's matching funds as content-based. All candidates, regardless of the content of their speech or the viewpoints they choose to express, are free to choose the public financing option and receive matching funds. The disbursement of those funds does not depend upon the ideas or views expressed; Arizona could simultaneously distribute supplemental funds to candidates with diametrically opposed viewpoints competing in the same race. The forced access cases, *see, e.g.*, *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) ("*PG&E*"), are equally inapplicable. Matching funds do not force Petitioners to express the views of their political opponents in their mailers or campaign ads, and there is no risk that voters would associate the viewpoints of Petitioners with those of their publicly funded opponents.

2. Triggered matching funds are constitutional because they bear a "substantial relation" to a "sufficiently important" government interest. *See Citizens United*, 130 S.Ct. at 914. Arizonans had a compelling interest in remedying the reality and appearance of *quid pro quo* corruption highlighted by the AzScam scandal. The Act, including its matching funds provision, furthers that interest in a direct, substantial, and fiscally responsible way by making public funding a viable alternative to potentially-corrupting private contributions. Moreover, matching funds further the state's anti-corruption interest without limiting anyone's spending and while encouraging more speech and competition in Arizona elections.

The compelling nature of the anti-corruption interest is settled. Arizonans had a particularly vital interest in addressing corruption after it was widely shown in media reports that Arizona legislators had been caught on tape exchanging votes for bribes and campaign contributions. Arizona's public funding system was designed to address this history of *quid pro quo* corruption. Following *Buckley's* recognition that public financing is "a means of eliminating the improper influence of large private contributions," 424 U.S. at 96, the Act's drafters designed a system that would provide sufficient funding to participating candidates without wasting scarce public funds. There is no dispute that, absent matching funds, participation in Arizona's public funding option would decline. By making public financing a viable choice, matching funds have allowed many Arizona candidates—nearly two-thirds of candidates in recent years—to run for office without being dependent on private contributions. In the years since its passage,

Arizona has seen no repeat of the AzScam corruption scandal.

Triggered matching funds do not impermissibly attempt to "level the playing field." This Court's prohibition on leveling prevents government from "restricting" the spending of some candidates in order to equalize the relative resources of others. But matching funds do not *restrict* Petitioners' spending; they only *enhance* the speech of participating candidates, by providing them with public funds to substitute for the private contributions they are barred from accepting, in order to enable them to compete in high-spending races. As under the Presidential public financing system upheld in *Buckley*, all candidates in Arizona are free to choose the system that they believe will maximize their speech.

## ARGUMENT

### I. ARIZONA'S TRIGGERED MATCHING FUNDS PROVISION IS SUBJECT TO LESS THAN STRICT SCRUTINY.

#### A. Triggered Matching Funds Do Not Create A Burden On Speech That Warrants Strict Scrutiny.

Arizona's triggered matching funds "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *See Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003)). Moreover, such funds enhance political speech and enable voters to make more informed choices, by providing additional resources for participating candidates to communicate with the

voters. This Court has consistently held that regulations that impose no direct limits on speech and further First Amendment values, but which may incidentally burden some persons' ability to speak, are subject to less than strict scrutiny. Such regulations need only bear a "substantial relation" to a "sufficiently important" governmental interest. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66); *see McConnell*, 540 U.S. at 231-232. That is the standard the Court should apply to Arizona's triggered matching funds.

In *Buckley*, the Court considered the constitutionality of the disclosure provisions of the Federal Election Campaign Act ("FECA"), which, like Arizona's triggered matching funds, were triggered by expenditures and contributions above specified amounts. 424 U.S. at 60-64, 74-75, 82. The Court recognized that a speaker might make a strategic choice not to spend money in order to avoid exposure of his political views or activities—a consequence analogous to that alleged here. *Id.* at 64, 68. Accordingly, the Court assumed that disclosure provisions could have a "deterrent effect on the exercise of First Amendment rights [that] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id*. at 65. The disclosure requirements therefore had "the potential for substantially infringing the exercise of First Amendment rights," and "discourage[ing] participation by some citizens in the political process." *Id*. at 66, 83. The Court nevertheless held that, despite this presumed deterrent effect, the burdens of disclosure are less substantial than the burden of a direct expenditure limit because "disclosure requirements impose no ceiling on

campaign-related activities." *Id*. at 64. Requiring disclosure of independent expenditures, the Court held, "is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id*. at 82. Accordingly, the Court did not apply strict scrutiny to FECA's disclosure provisions but instead inquired whether those provisions exhibited a "substantial relation" between a "sufficiently important" governmental interest and "the information required to be disclosed." *Id*. at 64.

The Court recently reaffirmed this analysis in both *Citizens United* and *Davis*. In *Citizens United*, the Court applied strict scrutiny to the "outright ban" on corporate spending contained in the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 441b, 130 S. Ct. at 897-98, but applied less rigorous scrutiny to BCRA's requirements that corporations disclose their spending, 130 S. Ct. at 914. The Court emphasized that BCRA's disclosure requirements further First Amendment values by "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916; *see also Davis*, 554 U.S. at 744 (scrutinizing disclosure provisions of BCRA § 319(b) to determine whether "there [was] 'a relevant correlation' or 'substantial relation' between the government interest and the information required to be disclosed") (quoting *Buckley*, 424 U.S. at 64). *Buckley*, *Citizens United*, and *Davis* squarely refute Petitioners' contention that

*any* burden on expenditures results in strict scrutiny.[2]

Like disclosure provisions, Arizona's matching funds place no limit on spending by either privately financed candidates or independent committees. Indeed, as the record demonstrates, Petitioners have repeatedly exceeded that threshold, as have other privately financed candidates and independent committees. (*See, e.g.,* JA 384-85, 545-56, 691, 704, 755; ECF 369-2, 370-2.)

The most Petitioners can claim is that candidates and committees might make a strategic choice not to spend money in order to avoid triggering matching funds for participating candidates. Similarly, the Court in *Buckley* recognized that a speaker strategically may decide not to spend money to avoid exposure of his political views or activities. 424 U.S. at 64, 68. Both *Buckley* and *Citizens United* make clear that such an incidental effect on speech is not

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[2] This Court has, in other contexts, made similar distinctions between laws that directly regulate speech and those that may only incidentally affect it. Thus, for example, the Court has distinguished between the government's direct regulation of private parties' protected speech, on the one hand, and the government's decision to subsidize some but not all private parties' protected speech. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 475 (1977) (citing *Buckley* to explain that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

sufficient to warrant strict scrutiny. *Buckley*, 424 U.S. at 64; *Citizens United*, 130 S. Ct. at 914.

Triggered matching funds as part of a public financing system should be subject to less than strict scrutiny for the additional reason that, like disclosure provisions, they further First Amendment values. In *Buckley*, this Court made clear that public financing of elections furthers the government's compelling interest in enhancing the amount of speech in American elections. The Court emphasized that the First Amendment was intended to protect and enhance public discussion of issues and candidates:

> "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussion of candidates." This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

*Buckley*, 424 U.S. at 14-15 (citations omitted). The Court held that public financing of elections thus "furthers, not abridges, pertinent First Amendment values," by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id*. at 92-93. Consistent with that principle, Arizona's voters enacted the Clean Elections Act, including matching funds, precisely to "promote freedom of speech under

the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940(A).

The factual record below confirms both that any incidental effect of matching funds is non-existent or minimal and that matching funds enhance political speech and competition. Thus, the record evidence indisputably establishes that spending in Arizona by both non-participating candidates and independent committees has increased significantly since the adoption of matching funds. (JA 916-17; PA 284-85.) Petitioners' own figures establish that, between 1998 and 2006:

- Overall candidate expenditures increased between 29-67% (JA 916-17);
- Overall independent expenditures increased by 253% (PA 284-85);
- Average candidate expenditures increased by 12-40% (JA 916-17); and
- Spending by the top 10% of candidates in the general election increased by 16% (PA 290).

The undisputed evidence further demonstrates that individual candidates' spending is not chilled by matching funds. Statistical analysis by expert Donald Green, Director of the Institute for Social and Policy Studies at Yale University, shows that matching funds do not have an effect on the overall spending of individual privately financed candidates in Arizona. If matching funds actually chilled the spending of privately financed candidates, one would expect the data to show that spending by such candidates who have participating opponents clusters just below the matching funds threshold of $17,918. That is, non-participating candidates would be expected to spend

up to, but not beyond, the threshold. (JA 876-77; ECF 311 at 14.) Instead, Professor Green found that, of the 46 traditionally funded legislative candidates who faced at least one participating opponent in 2006, 39 candidates spent less than $15,000 (almost $3,000 short of the threshold), demonstrating that their expenditure levels were controlled by factors unrelated to matching funds. Six candidates spent well above the threshold, showing that they were not deterred by matching funds. (JA 876-77.)[3]

The anecdotal evidence from Petitioners is consistent with this statistical analysis. As noted above, some Petitioners could not even recall whether they had triggered matching funds in their campaigns, thus implicitly acknowledging the insignificance of such funds to their decisions. (JA 434, 574-75.) The one Petitioner who had run both before and after the Act was adopted could not show that he reduced his spending or communications with voters after matching funds were implemented. (JA 436-38.) Other testimony showed affirmatively that candidates and committees have *not* been deterred

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[3] Petitioners cite their expert, Dr. Primo, for the claim that matching funds cause candidates to alter the timing of spending. (AFEC Pet. at 16). But Primo admitted that, if non-participating candidates postponed their spending in order to delay matching funds, one would expect to see the gap in spending between those non-participating candidates who have participating opponents and those who do not grow as the election nears. (JA 953-54.) But *both* Green *and* Primo found there is no statistically significant evidence of that pattern. (JA 954.)

from spending by matching funds. (*E.g.*, JA 410, 416, 594-95, 670.) Consistent with this evidence, both the district court and the Court of Appeals found that there was not substantial evidence supporting the alleged chilling effect of matching funds.[4] 611 F.3d at 524 ("Plaintiffs have not demonstrated that any chilling effect exists."); 2010 WL 2292213, at *3 ("Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.").

This absence of any evidence of deterrence or chill is fully consistent with what one would expect. Campaign speakers typically believe that their message will be more persuasive to the voters than the messages of their opponents. Thus, they keep spending to disseminate their own messages, even if they realize that such spending will trigger funds for their participating opponents. Matching funds do not "chill" speech because, given a choice between more speech by all candidates or less speech by all candidates—that is, more voter exposure to the various candidates' messages—a rational candidate

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[4] Petitioners improperly rely on declarations that were not part of the summary judgment record but were first submitted in connection with Petitioners' appellate stay applications. (*See* McComish Pet. at 32-34.) *See generally FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) ("[W]e may not rely on the city's affidavit, because it is evidence first introduced to this Court and is not in the record of the proceedings below . . . .") (quotation marks omitted). Even if considered, those declarations do not prove any substantial chilling effect.

who believes in his message will invariably opt for more, not less, speech.

The record evidence demonstrates also that Arizona's public financing scheme has enhanced political speech and competition in Arizona. Since the Act was implemented, overall and average candidate expenditures have increased; overall independent expenditures have increased; and there has been a 20% increase in the number of contested state Senate races and a 300% increase in the percentage of incumbents facing competitive challengers in state Senate races. (JA 535-36.) Triggered matching funds, as part of Arizona's successful voluntary public financing scheme, have both given voters more choices and enabled them to make more informed decisions about the candidates. Where, as here, a regulation places no direct limits on speech and *enhances* participating candidates' speech, enabling

voters to make more and better informed choices, it does not warrant strict scrutiny.[5]

### B. This Court's Decision in *Davis* Does Not Support Strict Scrutiny Of Triggered Matching Funds.

This Court's decision in *Davis* does not require that strict scrutiny be applied to Arizona's triggered matching funds. *Davis* addressed a law, divorced from any public financing program, that resulted in discriminatory contribution limits being applied to two privately financed candidates competing against each other in the same race. No similar issue exists here, where publicly financed and privately financed

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[5] It is, of course, possible that some matching fund program somewhere may operate to deter privately funded speech. But such an "as applied" challenge must await proof of actual deterrence. The possibility of a future as-applied challenge cannot justify Petitioners' broad facial attack against the very concept of triggered matching funds. *See, e.g., Doe v. Reed,* 130 S.Ct. 2811, 2821 (2010) (rejecting facial challenge to public records law where challengers provided only "scant evidence" that disclosure generally violates First Amendment rights); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). The various hypothetical scenarios that Petitioners concoct, (*see e.g.*, AFEC Pet. at 8), do not come close to meeting this burden.

candidates, far from being similarly situated, voluntarily occupy separate campaign financing worlds in which different rules necessarily and constitutionally apply.

*Davis* did not involve the public financing of election campaigns. Instead, *Davis* concerned federal congressional elections, in which all candidates are privately financed and thus similarly situated from a regulatory perspective. As the Court noted, in such a system of purely private fundraising, "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat." *Davis*, 554 U.S. at 728. 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. There is no alternative to the system of private financing, so no congressional candidate is eligible for public funds.

That is not the case when voluntary public financing is available. 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 funds sufficient to run a reasonably competitive campaign. 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, and the inability to raise private contributions. That participating candidates in Arizona are entitled, under specified circumstances, to supplemental funds based on the campaign spending of others, as a partial substitute for the private funds they are prohibited from raising

to respond to their competitors, is merely one additional difference in the regulatory regimes between which all candidates may choose.

The constitutionality of candidates' 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*. In short, under public financing, 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*, 554 U.S. at 728.

This critical difference between a system of purely private financing and a system that includes a public funding option is essential to understanding the reach of the *Davis* decision. *Davis* concerned the constitutionality of BCRA's Section 319(a), which 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." *Davis*, 554 U.S. at 729. Specifically, Section 319(a) provided that, once a privately funded candidate spent more than $350,000 of personal funds on his or her campaign, 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(s)*. 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 *Davis* Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id*. at 739; *see also id*. ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . . .")

*Davis* did not turn, as Petitioners suggest, on a First Amendment "chilling" effect. The Court's opinion neither uses that term nor cites any of this Court's precedents explaining the "chilling effect" doctrine. Instead, the *Davis* Court repeatedly emphasized that the First Amendment defect in § 319(a) was that it imposed "discriminatory" and "asymmetrical" regulations. *See* 554 U.S. at 729 ("asymmetrical regulatory scheme"; "asymmetrical limits"); 730 ("asymmetrical limits"); 739 ("discriminatory fundraising limitations"); 740 ("discriminatory contribution limits"); 740 n.7 ("asymmetrical contribution scheme"); 741 ("asymmetrical limits"); 744 ("asymmetrical contribution limits"). The Court held further that these discriminatory limits imposed an "unprecedented penalty" on the self-financed candidate for choosing to exercise his constitutional right to spend his own money on his campaign. *Id*. at 739.

That the Court's holding in *Davis* turned specifically on the discriminatory nature of the triggered contribution limits, not merely the fact that a self-financed candidate's spending triggered a benefit to his opponent, is underscored by the Court's repeated statements that, if personal spending by a

candidate above a threshold resulted in an increase in *every candidate's* contribution limits, the result would be constitutional—that is, it would neither be "discriminatory" nor impose an impermissible "penalty." *See id*. at 737 ("If § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail."); *id.* ("[I]f § 319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits."); 738 ("Section 319(a) . . . does not raise the contribution limits across the board. Rather, it raises the limits only for the non-self-financing candidate . . . ."). If spending above the threshold had triggered an across-the-board increase in contribution limits, such an increase would presumably create a strategic choice for the self-financed candidate similar to that presented by Arizona's triggered matching funds: Would it be better for him to spend more, allowing his opponent to raise money in larger increments, or to stop spending? But the Court explicitly stated that such an across-the-board increase, because it would not be discriminatory, would be constitutional. Thus, it was the *discriminatory* nature of the contribution limits that warranted strict scrutiny in *Davis*, not the mere fact that a candidate's personal spending might "trigger" some benefit to opponents that could, in turn, create a strategic choice for the self-financed candidate.[6]

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[6] Petitioners' argument for analogizing *Davis* to this case relies heavily on the *Davis* Court's "see" citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), an Eighth Circuit decision striking down a Minnesota law that increased expenditure limits and public subsidies for candidates who were opposed by

Under Arizona's law, there are no "discriminatory" or "asymmetrical" limits comparable to those in

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independent expenditures. In stark contrast to the evidence in this case, however, the record evidence in *Day* showed that the intent and actual effect of Minnesota's provision was to suppress independent expenditures rather than to increase participation in a public funding system. *See Day*, 34 F.3d at 1360-61 & n.4. Indeed, the Eighth Circuit later explained that, in *Day*, the state's asserted interest in encouraging candidate participation appeared to be "contrived for the purposes of this litigation," since "candidate participation in the public financing scheme was approaching 100 percent when the challenged provision was enacted." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996) (citing *Day*, 34 F.3d at 1361).

Moreover, *Davis* cited *Day* only for the proposition that Section 319(a) imposed a "potentially significant burden," *Davis*, 554 U.S. at 739, and did not adopt the entirety of the *Day* court's reasoning. Even if *Davis*'s "see" citation to *Day* means that this Court believed that Minnesota's law imposed a "potentially significant burden," that burden is certainly no more substantial than the burden that this Court assumed might accompany compelled disclosure: "the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Because this Court has repeatedly held that the potentially significant burden of compelled disclosure requires less than strict scrutiny, Petitioners' contention that *Davis*'s brief citation to *Day* calls for strict scrutiny of all trigger provisions, regardless of their actual effects, is meritless.

*Davis*. Unlike the two privately financed candidates in *Davis*, a privately financed candidate and a publicly financed candidate are not "similarly situated." Privately financed candidates may raise private contributions, spend their personal money, and spend unlimited amounts on their campaigns. Participating candidates may not raise private contributions, may not accept money from their political party, may not spend their personal money, and are subject to spending limits. The availability and timing of triggered matching funds are not within the participating candidate's control. Moreover, supplemental funds are capped at a maximum of 200 percent of the initial grant. Privately financed candidates, by contrast, retain full control over their fundraising and spending and have no spending limit. Thus, participating candidates always face the risk that their privately financed opponents will substantially outspend them. This Court has repeatedly held that such differential regulatory treatment of privately financed and publicly funded candidates is permissible, so long as the choice between the two regulatory regimes is voluntary. *See Buckley*, 424 U.S. at 97; *Republican National Committee v. Federal Election Comm'n*, 487 F.Supp. 280, 283-286 (S.D.N.Y. 1980), *affirmed*, 445 U.S. 955 (1980). Nothing in *Davis* casts doubt on this reasoning—indeed, the Court in *Davis* took pains to reaffirm *Buckley*'s holding that "a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures." *Davis*, 554 U.S. at 739-40.[7]

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[7] If a State established two regulatory regimes that were so different that candidates were effectively

The fact that in some instances, as in *Davis*, one privately financed candidate may have more personal wealth than another privately financed candidate, does not mean they are not similarly situated for purposes of assessing, from a constitutional perspective, whether differential regulation of them is "discriminatory" or "asymmetrical." Certainly, the government could not decide to provide public subsidies only to those candidates with a net worth of less than $1 million, any more than it could provide such subsidies to challengers but not incumbents (who are thought to have inherent electoral advantages). Neither pair of candidates is "similarly situated" in a purely practical sense, but they, like the candidates in *Davis*, must be considered similarly situated for purposes of constitutional analysis. *Cf. Davis*, 554 U.S. at 742 ("Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name."). Not so for a privately financed candidate and a publicly financed candidate, who may, under *Buckley* and *RNC*, be

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coerced into choosing the public financing option, that circumstance might create a constitutional issue separate from the one that is raised in these cases. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."). No such claim is at issue here, and it would in any event be meritless, particularly given that more than one-third of candidates in Arizona choose not to elect public funding.

subjected to different regulatory regimes based on their different choices about how to fund their campaigns.

Petitioners suggest that Arizona's matching funds present privately financed candidates with a choice analogous to the one created by BCRA § 319(a). But the choice imposed by § 319(a) was qualitatively different. Under § 319(a), candidates were required by the government to choose between two restrictions on campaign-related activities: (1) a limit on their personal spending or (2) discriminatory contribution limits. 554 U.S. at 739-40. Neither of these options, standing alone, could constitutionally be imposed on the candidate. This is not, as Petitioners suggest, merely a choice between "two poor alternatives" (AFEC Pet. 30), but a choice between two *unconstitutional* alternatives.

In Arizona, by contrast, a candidate's initial choice is between receiving public funds and voluntarily abiding by a spending limit, or remaining free to spend unlimited amounts. *Buckley* confirms the constitutionality of that choice. 424 U.S. at 57 n.65. Because the provision of public funds to a candidate's opponent is not itself unconstitutional, unlike discriminatory contribution limits, the choice here is unlike the one presented in *Davis*.

Contrary to Petitioners' contention, no "unbalanced playing field" arises from Arizona's matching funds. Participating candidates are prohibited from raising private contributions and are subject to spending limits. Matching funds are provided to such candidates merely as a substitute for their ability to raise private contributions, *see Buckley*, 424 U.S. at 96 n.129 (public financing "substitutes public funding for what the parties could raise privately"), and only

if their privately financed opponents raise or spend beyond the original spending limit (or if independent committees spend above certain amounts). Even then, the maximum a participating candidate may receive is 200 percent of the original spending limit, while their privately financed opponents may raise and spend unlimited amounts. To be viable, publicly financed candidates must, like their privately financed opponents, have the ability to respond to escalating spending by their opponents or by outside groups, and matching funds enable Arizona to provide this ability in a manner sensitive to the demands of the public fisc.[8] Such responsive speech is part and parcel of the normal back-and-forth of healthy electoral competition, and no First Amendment injury results merely because such responses may be funded through public subsidies that permissibly substitute for private fundraising.

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[8] While Petitioners contend that average participating candidate spending "grossly exceeds" spending by privately funded candidates, McComish Pet. 67-68, their statistics are misleading because they conveniently both include hopeless privately financed candidates who raised and spent little or no money (JA 895-912) and, for at least part of their analysis, exclude privately funded candidates who spent more than $70,000. (PA 292).

### C. Triggered Matching Funds Are Not Subject To Strict Scrutiny On The Basis That They Are Content-Based Or Disfavor Certain Speakers.

Petitioners' argument that Arizona's matching funds are subject to strict scrutiny because they are content-based or disfavor certain speakers is incorrect and is refuted by this Court's First Amendment precedents.

In *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), this Court held that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* Thus, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id*. at 643. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id*.

The Court in *Turner* expressly rejected "the view that all regulations distinguishing between speakers warrant strict scrutiny." *Id*. at 657. Instead, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Id.* at 658. Thus, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id*.

*Turner* demonstrates that Arizona's matching funds provision is not subject to strict scrutiny on the

ground that it is content- or speaker-based. The grant of matching funds does not turn on the ideas or views expressed in speech by a candidate or other speaker. Instead, it turns on whether a particular candidate has chosen to participate in Arizona's public financing program and whether that candidate needs supplemental public funding as a substitute for the private contributions she might otherwise raise. Matching funds are available to all participating candidates, entirely without regard to their political affiliations, their viewpoints, or the ideas they intend to express. *See id.* at 645 (holding that cable television "must-carry" rules were subject to only intermediate scrutiny because the burdens and privileges created by the rules were unrelated to the substance of the messages contained in any programming). In *Turner*, the cable television must-carry rules distinguished between speakers, but "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry." *Id*. at 645; *see also id.* ("burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers"); *id*. at 648 ("The provisions . . . benefit all full power broadcasters irrespective of the nature of their programming."). Here, similarly, Arizona's matching fund provision distinguishes between speakers based only upon the manner in which they choose to finance their campaigns, and not upon the messages they intend to convey. To the extent there is any burden, it extends to all privately financed candidates and independent committees regardless of the specific ideas or views they express,

and it benefits all publicly financed candidates regardless of the substance of their messages.[9]

Indeed, Arizona might provide matching funds to a "pro-life" Republican in one race, and the same day provide matching funds to a "pro-choice" Democrat in another race. Arizona might even provide matching funds to two publicly funded candidates *in the same race but with opposing viewpoints*. [10] Similarly,

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[9] *Turner* also reinforces the principle that the First Amendment favors regulations that "facilitate and enlarge public discussion and participation," *Buckley*, 424 U.S. at 92-93, even where they could impose an incidental burden on speech. The Court recognized that must-carry rules "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," and "reduc[e] the number of channels for which they can compete," *Turner*, 512 U.S. at 643-44, 645. The Court nevertheless upheld the rules because they ensured access to "an important source of information to many Americans" that "has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997).

[10] Moreover, whether matching funds are triggered by an independent expenditure does not turn on whether the candidate supported by that expenditure is a participating or a privately financed candidate. In either situation, participating candidates in the race (other than one who is supported by the expenditure) are entitled to triggered matching funds. Ariz. Rev. Stat. § 16-952.

Arizona might, on the same day and in the same race, provide matching funds based on an advertisement from a political action committee formed by a corporation and an advertisement, expressing a diametrically opposed viewpoint, from one formed by a union. Such a system would truly be an odd and ineffectual vehicle for suppressing particular ideas or disfavoring particular speakers.

In fact, by offering a viable alternative mode of funding, the Act has enhanced the ability of candidates to express *any and all* viewpoints in Arizona elections. *See* Ariz. Rev. Stat. § 16-940; (JA 535-36; 591). Thus, Arizona's matching funds create absolutely no risk that the government will drive certain ideas or viewpoints from the marketplace. *See Davenport v. Washington Educ. Assoc.*, 551 U.S. 177, 188 (2007) (holding that "strict scrutiny is unwarranted" for a content-based regulation unless it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" and that "it is well established that the government can make content-based distinctions when it subsidizes speech"). Quite the opposite: the effect of public financing has been more speech across the political spectrum and more competition in Arizona's elections.

Triggered matching funds are not "content-based" merely because they are provided only when expenditures are made in support of or opposition to a political candidate and cost more than a certain amount. Any contrary argument is refuted by this Court's decision in *Citizens United*. One of the disclosure laws upheld there, 2 U.S.C. § 434(f), required disclosure only when expenditures exceeded $10,000 for certain advertisements made shortly

before an election that "refer[] to a clearly identified candidate for federal office." Thus, that law's disclosure requirements are triggered only if an advertisement refers to a political candidate and costs more than a certain amount. Petitioners' position here would have required that Section 434(f) be subjected to strict scrutiny. That the *Citizens United* Court applied less than strict scrutiny to Section 434(f) demonstrates that strict scrutiny similarly does not apply here.

Petitioners argue that "traditional candidates are being targeted and punished as disfavored speakers" because they do not receive triggered matching funds when independent expenditure committees spend money in opposition to them or in support of their publicly funded opponents. (McComish Pet. 59-60.) But traditional candidates, unlike participating candidates, remain free to raise private contributions and spend unlimited amounts of money in order to respond to such independent expenditures. They have the opportunity to opt into Arizona's public funding system, but they voluntarily decide it is preferable to raise private contributions and spend unlimited amounts rather than being subject to a spending limit and only potentially eligible for matching funds. Again, Arizona has absolutely no control over which candidates choose public funding and which do not, making the triggered matching funds system a peculiarly irrational means of targeting "disfavored" speakers.

Petitioners further argue that the triggered matching funds provision is "concerned with the communicative impact of the regulated speech," because the Citizens Clean Election Commission ("CCEC") must assess whether an independent

expenditure supports or opposes a particular candidate. (McComish Pet. 59.) But, in doing so, the CCEC uses the standard formulated by the plurality in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), for use in application of BCRA § 203: whether "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 469-470; *see* Ariz. Rev. Stat. § 16-901.01(A) (defining "expressly advocates" to mean words such as "vote for" or "elect" and "words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates"). If that standard is sufficiently clear to defeat a facial constitutional challenge in a situation where, as in *Wisconsin Right to Life*, a speaker risks felony prosecution if his advertisement falls within the standard, it suffices even more clearly here, where the consequence of an advertisement's falling within the standard is neither a criminal nor civil penalty against the speaker but merely the provision of supplemental funds to someone else.[11]

### D. This Court's Forced-Access Cases Are Inapplicable.

Petitioners rely extensively but mistakenly on *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). These "forced access"

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[11] Because the CCEC uses the *WRTL* standard, Petitioners are wrong when they suggest that, if an independent committee "just promotes the issues the group was founded to advance," matching funds will be triggered. (AFEC Pet. at 38-39.)

cases are inapplicable here because the Arizona system does not force privately financed candidates or independent committees to associate with any participating candidate's views or to use their property to subsidize or otherwise assist in the dissemination of those views.

In *PG&E*, the Court addressed an order that required a utility to distribute, *at its expense and in its envelopes*, speech by persons or groups "who disagree with [the utility's] views … and who oppose [it] in Commission proceedings." *Id*. at 13. The plurality held the order unconstitutional both because it discriminated based on viewpoint, *id*. at 14 ("access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests"), and because it "impermissibly require[d] [the utility] to associate with speech with which [it] may disagree," *id*. at 15. Repeatedly, the plurality stressed that the utility was being required to use its own resources and property to disseminate a viewpoint with which it disagreed. *E.g.*, *id*. at 17 ("The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees.") (emphasis in original). This Court's decision in *Miami Herald* is to similar effect. *See* 418 U.S. at 257 (characterizing right-of-reply statute as mandating "government-enforced access" to the newspaper's property); *see also PG&E*, 475 U.S. at 10 (explaining that right-of-reply statute was held unconstitutional in *Miami Herald* because "the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the

newspaper disagreed, to use the newspaper's facilities to spread their own message").[12]

Neither prong of the *PG&E* plurality's reasoning has any application here. Arizona's triggered matching funds provision does not discriminate in any way based on viewpoint. *See Turner*, 512 U.S. at 654-655 (distinguishing *PG&E* and *Tornillo* on the ground that the regulations challenged in those cases turned on the particular messages being expressed). Moreover, neither privately funded candidates nor independent committees are forced to associate with any participating candidate's views or use their property to assist in the dissemination of those views. Even assuming that voters knew that a publicly funded candidate had received triggered matching funds (which is unlikely), there is no possibility that such voters, upon hearing messages promulgated by a publicly funded candidate, would infer that an opponent or independent committee was somehow associated with or endorsed those views. *Cf. Turner*, 512 U.S. at 655 ("there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator").

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[12] In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), cited by Petitioners, the Court struck down a federal statute that mandated assessments on handlers of fresh mushrooms to fund advertising, because the statute compelled companies to pay *their own money* to subsidize speech with which they disagreed, by a group to which they were required to belong. *Id*. at 408, 410-413. Nothing remotely similar exists here.

*PG&E* and *Miami Herald* might be relevant here if the Clean Elections Act required non-participating candidates or independent committees to pay for promulgation of those messages themselves or to include publicly funded candidates' messages in their own campaign communications. But the Act requires no such thing.

## II. BY COMBATING CORRUPTION AND PROMOTING COMMUNICATION WITH THE ELECTORATE, ARIZONA'S TRIGGERED MATCHING FUNDS FURTHER COMPELLING INTERESTS

To survive the relevant level of scrutiny, Arizona's matching funds provision must bear a "substantial relation" to a "sufficiently important" government interest. *See Citizens United*, 130 S.Ct. at 914; *Buckley*, 424 U.S. at 64. The law does more than that. It directly promotes an interest this Court has found compelling—the anti-corruption interest—by making public financing a viable alternative to potentially corrupting private contributions. Moreover, matching funds further First Amendment values that this Court has deemed "vital" by providing candidates with more funding for campaign speech, promoting more contested and competitive elections, and freeing candidates from the rigors of private fundraising.

### A. Triggered Matching Funds Serve Arizona's Compelling Anti-Corruption Interest

#### 1. Arizona Has A Compelling Interest In Combating Corruption

This Court established over three decades ago that the government's interest in avoiding both the reality

and appearance of *quid pro quo* corruption like that seen in AzScam is both "sufficiently important" and "compelling." In upholding the disclosure provisions of FECA, *Buckley* held that the government had a "sufficiently important" interest in "deter[ring] corruption and avoid[ing] the appearance of corruption." 424 U.S. at 66-67. *Buckley* eloquently explained the government's vital interest in deterring corruption from private campaign contributions:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. . . . To the extent that large contributions are given to secure a *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

*Id*. at 26-27 (citations omitted); *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

More recently, the Court has stated that the government's anti-corruption interest is not only "sufficiently important" but "compelling" as well. *See Davis*, 554 U.S. at 741 (noting "the interests the Court has recognized as compelling, i.e., the prevention of corruption or the appearance thereof") (quoting *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) (referencing the Government's "compelling state interest in avoiding . . . corruption"); *Federal Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"); *Federal Election Comm'n 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)); *see also Citizens United*, 130 S.Ct. at 908-10 (discussing government's interest in preventing corruption and the appearance of corruption).

Arizonans had a particularly compelling interest in addressing the problem of real and apparent corruption in politics. In the early 1990s, the AzScam scandal broke. Newspaper reports from the time recount Phoenix police officers videotaping Arizona legislators accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (JA 122-161.) Those articles, with headlines such as "Videotapes Show Payoffs" and "Excerpts From Indictment Tell Tale Of Political Deals," described legislators stuffing tens of thousands of dollars into gym bags while making comments like "I sold way too cheap," "We all have

our prices," and "There's not an issue in this world I give a [expletive] about." (JA 121-161.) The newspaper reports quoted other legislators cynically acknowledging, "My favorite line is, 'What's in it for me?'" and "I like the good life, and I'm trying to position myself so that I can live the good life and have more money." (JA 146-147.) Accompanying these newspaper reports, the evidentiary record contains the depositions of an Arizona lobbyist and a former Arizona Governor who testified, respectively, that AzScam was "huge" at the time among the public and was highly publicized. (JA 588, 600.) Shortly after AzScam grabbed headlines, the state's major newspaper reported that 100 percent of journalists, 66 percent of legislative staffers, and 42 percent of legislators and lobbyists surveyed believed that most major contributors received special advantages from legislators. (JA 176.) The *Arizona Daily Star* ran an article entitled "AzScam Fallout Is Far From Over, Politicians Say." (JA 167.)

In the years following AzScam, troubling accounts of corruption in Arizona state government persisted. Just months before voters adopted the Act, *The Arizona Republic* reported in a front-page story that the Arizona Senate's President had "assigned the state's most powerful lobbyists to raise money for specific candidates" and had "warned . . . lobbyists that they [would] suffer political retribution in the next session of the Legislature if they raise[d] money" for the opposing party. (JA 214-15.) As the Court of Appeals aptly summarized the evidence, "[t]he record demonstrates that Arizona has a long history of *quid pro quo* corruption." *McComish*, 611 F.3d at 525.

In light of this history of corruption and scandal, the sufficiency and compelling nature of Arizona's

interest in preventing real and apparent corruption are undeniable. *See Nixon*, 528 U.S. at 393-394 (single legislator's declaration, newspaper accounts, and voters' passage of the statute easily sufficient to establish compelling anti-corruption interest).

### 2. Triggered Matching Funds Further Arizona's Anti-Corruption Interest

Spurred by these scandals, Arizona voters enacted a public financing system that directly furthers the government's compelling interest by reducing candidates' reliance on private contributions, enhancing political debate, and increasing the competitiveness of elections.

That public financing serves the anti-corruption interest has been well-established since *Buckley*. There, in considering the constitutionality of the Presidential public financing system, this Court held that "[it] cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions" furthers the government's anti-corruption interest. *Buckley*, 424 U.S. at 96. Moreover, the Court specifically emphasized that, given the simultaneous introduction of limits on the size of contributions, public financing, which serves as "a substitute for private contributions," furthers the anti-corruption interest by "relieving . . . candidates from the rigors of soliciting private contributions." *Id*. at 96, 99; *see also Republican Nat. Comm. v. Federal Election Comm'n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980), *aff'd* 445 U.S. 955 (1980) ("If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that

might have existed as a result of a privately financed campaign.").[13]

Of course, in a voluntary public financing system, some candidates will choose to rely on private contributions rather than public funding. But the record establishes that public financing also deters corruption among privately financed candidates by improving the competitiveness of Arizona elections. Dr. Green explained that "lack of electoral accountability is one of the most important determinants of corruption in politics" because it turns incumbents into "reliable long-term trading partners" and reduces the likelihood that *quid pro quo* arrangements will be exposed. (JA 964-65). By allowing more candidates to run for office, Arizona's system of public funding and triggered matching funds reduces the likelihood that incumbents will be unopposed and insulated from electoral competition. As noted, Arizona experienced a 20 percent increase in the number of contested state Senate races and a 300 percent increase in the percentage of incumbents running in competitive state Senate races since the

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[13] In arguing that contribution limits suffice to eliminate any concern about corruption, Petitioners rely heavily on the views of their expert. (McComish Pet. at 71.) Dr. Green examined the expert's statistical analysis and found it "deeply flawed," noting that it made an "elementary mistake" that precluded any reliable statistical interpretation of the expert's data. (JA 750-52.)

Act was adopted.[14] (JA 535-36.) In other words, the pro-competitive effect has been felt especially in districts where incumbents, who frequently are able to amass war chests, may previously have deterred strong opponents from challenging them. By increasing competition and subjecting candidates and officeholders to heightened public accountability, Arizona's system serves the anti-corruption interest in ways similar to disclosure laws. *See Buckley*, 424 U.S. at 67 ("disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity").

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[14] Contrary to Petitioners' suggestions, *see*, *e.g.*, AFEC Pet. 42, the Act and its matching funds provision cannot be characterized as incumbent-protection measures. *Cf. McConnell v. Federal Election Comm'n*, 540 U.S. 93, 249 (2003) (Scalia, J. concurring in part and dissenting in part) ("the present legislation *targets* for prohibition certain categories of speech that are particularly harmful to incumbents"). Indeed, Arizona voters enacted public financing after incumbent legislators refused to do so. Petitioners tout the fact that a legislative committee rejected public financing. (McComish Pet. at 70-71.) Yet the record contains no evidence that this was due to anything other than incumbent self-interest. (JA 121.) As Petitioner Martin candidly admitted, it is "[m]uch harder" for challengers to raise money than it is for incumbents. Martin recounted his own experience of witnessing an "existing legislator . . . threaten other people that he would remember if they supported the challenger . . . ." (JA 576.)

Because public financing serves the anti-corruption interest, federal courts have repeatedly found that states have a compelling interest in encouraging participation by candidates in their systems of public financing of elections. *See, e.g., Rosenstiel*, 101 F.3d at 1553 (holding that "the State has a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (same); *Wilkinson v. Jones*, 876 F.Supp. 916, 928 (W.D. Ky. 1995) (same).

By addressing what would otherwise be a powerful disincentive to participation in public funding, matching funds directly serve the government's compelling anti-corruption interest. As the Court of Appeals explained:

> A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption. If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections.

*McComish*, 611 F.3d at 527; *see also Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) ("in view of the initial moderate allowance, without the matching funds, even though they are limited in amount, candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent").

The record abounds with evidence that participation in Arizona's public funding system would decline absent matching funds. Numerous

participating candidates testified that the potential availability of matching funds played a key role in their decision to accept public funding. (JA 386-88, 439-43, 540-44.) A veteran Arizona campaign consultant testified that, without matching funds, participation in Clean Elections would fall. (JA 590-91.) Defendants' expert examined various public-financing systems and concluded that matching funds such as Arizona's are key to encouraging candidate participation in public financing. (JA 537-39.) Even a staunch opponent of publicly-funded elections testified that "we all are aware that if matching funds go away, the chance of candidates running as Clean Elections [candidates] probably would stop or would put a real damper on that." [15] (JA 638.) Unsurprisingly, Petitioners failed to present any evidence that participation rates in Arizona's public financing system would remain at current levels if matching funds were eliminated.

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[15] Petitioners rely throughout their brief on the testimony of Citizens Clean Election Commissioner Lori Daniels. The significance of her testimony, however, is undermined by the fact that she is a long-standing opponent of public financing in all its forms. (*See* JA 638 ("I don't believe in publicly funding elections. I'm not an advocate of this in any way, shape or form.").) Commissioner Daniels was a plaintiff in a lawsuit raising virtually identical claims to those raised by Petitioners here. *See Association of American Physicians & Surgeons v. Brewer*, 486 F.3d 586, 589 (9th Cir. 2007) (identifying Lori Daniels as a candidate who was a plaintiff in the action but who did not appeal).

In short, triggered matching funds directly further Arizona's compelling anti-corruption interest by making public financing a viable alternative to private fundraising, enhancing political debate, and increasing the competitiveness of elections. Triggered matching funds thus bear a "substantial relation" to a "sufficiently important" government interest and are constitutional. *See Citizens United*, 130 S.Ct. at 914; *see also Turner*, 512 U.S. at 662; *Buckley*, 424 U.S. at 64.

### 3. Petitioners' Proposed Alternatives Do Not Cast Doubt On The Constitutionality Of Triggered Matching Funds

Petitioners have proposed two alternatives to Arizona's system of triggered matching funds: (1) eliminating public financing entirely and relying solely on contribution limits; and (2) replacing matching funds with a higher initial grant of public funds (the "lump-sum alternative").

Because matching funds are not subject to the narrow tailoring requirement of strict scrutiny, Petitioners' suggested alternatives are inconsequential. To survive, triggered matching funds need only meet the "substantial relation" requirement, which this Court has never suggested contains a least-restrictive-alternative component.

To the contrary, this Court has indicated that the "substantial relation" test is significantly less searching than narrow tailoring. In rejecting the contention that FECA's disclosure thresholds were too low, *Buckley* stated that little evidence existed that Congress "focused carefully on the appropriate" thresholds. 424 U.S. at 83. Nevertheless, the Court

declined to second-guess these "necessarily . . . judgmental decision[s]," agreed with the lower court that "reasonable latitude [must be given] the legislature as to where to draw the line," and upheld FECA's disclosure thresholds because they were not "wholly without rationality." *Buckley*, 424 U.S. at 83.

*Buckley's* deferential approach to examining FECA's disclosure thresholds cannot be squared with the view that the "substantial relation" requirement is equivalent to narrow tailoring or incorporates a least-restrictive-alternative requirement. Based on *Buckley* and its progeny, lower courts have rejected attempts to conflate the "substantial relation" requirement with strict scrutiny. *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (2008) (holding that, under the "substantial relation" test, "the state need not show that the Act achieves its purposes in the least restrictive manner possible"); *Daggett*, 205 F.3d at 466 (holding that, under the "substantial relation" test, determinations about the appropriate threshold for disclosure "will be deferred to unless 'wholly without rationality.'" (quoting *Buckley*, 424 U.S. at 83)).

This distinction between strict scrutiny and the "substantial relation" test not only is well-grounded in precedent but also reflects a common sense approach to First Amendment campaign finance doctrine. Campaign finance laws that this Court has subjected to strict scrutiny impose far greater and more certain burdens on First Amendment rights than do regulations that this Court has analyzed under lesser forms of scrutiny. When the government adopts restrictions that directly limit speech, coerce or compel speech, or discriminate among similarly

situated candidates, it should have to justify its chosen remedy as the least restrictive means of achieving a compelling interest. But where voters instead attempt to address documented instances of *quid pro quo* corruption and enhance political speech and competition through means that at worst have an incidental effect on spending, they should have much greater leeway in making reasonable judgments among competing alternatives.

In any event, the record demonstrates that Arizonans chose the best alternative for their State in light of its historical experience and the widely-varying costs of Arizona campaigns. In the narrow tailoring context, this Court has indicated that less restrictive alternatives must be "plausible" and cannot be "ineffective." *See Ashcroft v. ACLU*, 542 U.S. 656, 665, 669-70 (2004); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). The record showed that neither alternative suggested by Petitioners satisfies this standard.

Arizonans experimented with contribution limits, but, by themselves, such limits failed to prevent scandals like AzScam or subsequent reports of improprieties. Limits on contributions to state

legislative candidates[16] had been in place *five years before* AzScam occurred. Moreover, a series of articles in the State's largest newspaper informed the public that lobbyists and elected officials regularly undermined the effectiveness of contribution limits through the practice of bundling—*i.e.*, by having lobbyists collect donations from multiple contributors such that the lobbyists received credit for amounts far greater than the contribution limit.[17] (JA 178-96.)

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[16] The limit for contributions to state legislative candidates was $200 in 1991. That limit has been periodically adjusted by the state legislature and is also subject to biennial adjustments by the Secretary of State to account for changes in the consumer price index. In 2009-2010, this contribution limit was $410, which is 28% higher in real dollars than the limit in place at the time of AzScam. *See* Ariz. Rev. Stat. § 16-905 & historical note.

[17] Petitioners characterize the collection of $5 qualifying contributions by campaign volunteers from voters in the candidate's district as "bundling." Unsurprisingly, Petitioners have adduced no evidence that the act of soliciting $5 contributions has ever resulted in actual or apparent *quid pro quo* corruption. As Dr. Green explained, because most anyone can collect $5 contributions, but only a select few can raise tens of thousands of dollars through the bundling of private contributions, the potential for participating candidates to incur debts to those who collect $5 contributions "does not compare" to the likelihood that privately financed candidates will become beholden to high-dollar bundlers. (JA 959-60.)

Arizona voters understandably concluded that restoring the integrity of the State's political system required supplementing contribution limits.

Petitioners' contention that contribution limits are a substitute for a system of public financing is also undermined by *Buckley*. There, this Court upheld both FECA's contribution limits and its simultaneously enacted system of public funding for Presidential elections. Far from viewing contribution limits as a sufficient replacement for public financing, this Court found that public financing complemented contribution limits by "relieving . . . candidates from the rigors of soliciting private contributions." 424 U.S. at 97.

The Act's drafters also examined the lump-sum alternative suggested by Petitioners. They rejected this approach because, given the widely-varying costs of campaigns in Arizona, a one-size-fits-all amount would be either too low to attract candidates facing potentially competitive campaigns or so high that the state's limited resources would be wasted. The lead drafter of the Act explained the rationale behind Arizona's carefully calibrated procedure for distributing scarce public funds. As he testified, in Arizona there was a "wide disparity . . . in the amount of money that was spent on various races." (JA 714.) Prior to the Act, over 80 percent of Arizona's legislative districts were uncontested or uncompetitive. In those districts, candidates tended to spend $10,000 or less. But, in a handful of competitive districts, average expenditures were three times that amount. (JA 715.) If all candidates received only $10,000 in public funding, it would be "too easy to outspend the Clean Elections candidate and no one would run as a Clean Elections

candidate." (JA 716.) On the other hand, if all candidates were given $30,000 in public funding, "there would be millions of dollars of wasted Arizona money." (*Id*.) Thus, a one-size-fits-all approach would not fit the political or budgetary realities in Arizona. By combining low initial disbursements with the potential for limited matching funds, the Act's drafters developed a system that "allow[ed] us to set the bar at the low amounts that would be needed for the bulk of campaigning, and yet allow it to flow upwards [when] there was a competitive race in which the candidate was opposing a well-funded opponent." (*Id.*)

Over the last decade, the calibrated funding mechanism chosen by the drafters and approved by the voters has satisfied these objectives. Because it provides sufficient funds to mount a competitive campaign, Arizona's public financing option is a viable alternative to private financing. In fact, two-thirds of candidates now run as participating candidates and thus are protected from the corrupting potential of private contributions. At the same time, Arizona has avoided wasting large sums of public funds. In 2006, for example, if Arizona had been forced to switch to a system in which the initial disbursement amount was tripled to offset the loss of matching funds, Arizona would have spent 132 percent more than it actually expended with matching funds in place. (ECF 309-15.)

The Court of Appeals, like the Act's drafters, justifiably concluded that the lump sum approach was not a realistic alternative to triggered matching funds:

> [I]f the Act were to raise the amount of its lump-sum grants and do away with matching funds

> altogether, it would make the Act prohibitively expensive and spell its doom. By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of competitiveness without having to make qualitative evaluations of which candidates are more "deserving" of funding beyond the base amounts provided to all publicly-funded candidates. The State must walk a fine line between providing too much and too little funding to participating candidates, and we cannot conclude that the Act's matching funds provision has failed in this effort.

611 F.3d at 527.

Neither the Act's drafters nor the Court of Appeals erred in concluding that Arizonans could take account of fiscal and political realities in designing a workable public financing system that would not waste "large sums of public money." *See Buckley*, 424 U.S. at 96.

### B. Arizona's Triggered Matching Funds Promote First Amendment Values Without Impermissibly Attempting To Level The Playing Field.

#### 1. Triggered Matching Funds Encourage More Speech in Arizona Elections.

Arizona has a vital interest in encouraging more speech that informs the electorate of candidates' views and qualifications for public office. The Act and its matching funds provision, like the First Amendment, "rest[] on the assumption that the

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *See Associated Press v. United States*, 326 U.S. 1, 19 (1945). This Court has consistently recognized that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner*, 512 U.S. at 663; *see also Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000) (recognizing the "important and substantial purposes" of "facilitat[ing] a wide range of speech"). Indeed, in upholding the presidential public financing system, the *Buckley* Court reaffirmed that "[l]egislation to enhance these First Amendment values is the rule, not the exception." 424 U.S. at 93 n.127 (citing as examples aid to public broadcasting, preferential postal rates, and antitrust exemptions for newspapers) (internal citation and quotation omitted).[18]

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[18] The *Buckley* Court's invocation of these First Amendment precedents places public financing squarely within a line of cases upholding governmental subsidies designed to "provid[e] financial assistance to the exercise of free speech." *Buckley*, 424 U.S. at 93 n.127. This Court has repeatedly reaffirmed that government furthers the speech-enhancing values of the First Amendment when it "'expends funds to encourage a diversity of views from private speakers.'" *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2986 n.13 (2010) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995)); *see also Turner*, 512 U.S. at

Arizona's triggered matching funds provision promotes First Amendment values by enhancing the quantity and diversity of information available to the electorate. In *Buckley*, this Court stated that public financing of elections "furthers, not abridges, pertinent First Amendment values," by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, *goals vital to a self-governing people*." 424 U.S. at 92-93 (emphasis added). Matching funds, like public financing more generally, advance First Amendment values in a number of ways. Most obviously, matching funds increase the amount of money available to participating candidates. Those funds in turn can be used to finance campaign ads, mailers, and events—more speech that informs the electorate of the candidate's views and qualifications for public office. By providing candidates with resources, matching funds help promote the "uninhibited, robust, and wide-open" debate that the First Amendment was intended to encourage. *Buckley*, 424 U.S. at 93 n.27 (internal citation and quotation omitted). Matching funds also make public financing viable, and in doing so, allow candidates to run who otherwise would not, thereby producing more contested and competitive races. Moreover, the voluntary nature of Arizona's system ensures that matching funds will promote, rather than restrict, political speech. "Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the

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663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").

candidate's view, it will enhance the candidate's powers of communication and association." *Republican National Comm.*, 487 F. Supp. at 285.

Further, a viable public funding system frees candidates from the burdens of private fundraising and therefore gives them more time to concentrate on public business and to communicate with the electorate. *See Buckley*, 424 U.S. at 96 (recognizing "public financing as an appropriate means of relieving . . . candidates from the rigors of soliciting private contributions").

The record evidence indisputably establishes that speech has in fact increased in Arizona since the adoption of the Act in 1998. Between 1998 and 2006, political spending and competition in Arizona increased in a number of important ways: independent expenditures rose by a massive 253% (PA 284-85); overall candidate expenditures increased between 29 and 67 percent and average candidate expenditures increased between 12 and 40 percent (JA 916-17); general election spending by the top 10 percent of candidates increased by 16 percent (PA 290); and the percentage of incumbents facing serious challengers increased significantly (JA 335-36).

The result is that voters hear more information about more candidates in more vigorously contested campaigns. This cannot be what the First Amendment was intended to prevent.

### 2. Triggered Matching Funds Do Not Restrict Petitioners' Spending And Thus Do Not Impermissibly Level The Playing Field

Petitioners argue incorrectly that triggered matching funds are intended to "level the playing field" in the same manner as expenditure limits or Section 319(a) of the BCRA. What the Court said in *Buckley* and reiterated in *Davis*, however, is only that "the interest in equalizing the financial resources of candidates" does not provide a "justification for *restricting*" candidates' spending or speech. *Davis*, 554 U.S. at 741 (quoting *Buckley*, 424 U.S. at 56-57) (emphasis added); *see also id*. ("the interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections' cannot support a *cap* on expenditures . . . as 'the concept that government may *restrict* the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'") (quoting *Buckley*, 424 U.S. at 48-49) (emphases added); *id*. at 741-42 ("The argument that a candidate's speech may be *restricted* in order to 'level electoral opportunities' has ominous implications . . . .") (emphasis added). Thus, in *Buckley*, it was impermissible for the government to restrict candidates' spending in an effort to equalize resources; and, in *Davis*, it was impermissible to attempt to equalize candidates' resources by restricting the fundraising of some more severely than that of others.

Arizona's law does not seek to equalize candidates' resources by restricting any candidates' fundraising or spending. Instead, as contemplated by *Buckley*, it "substitutes public funding for what the parties

would privately raise." 424 U.S. at 96 n.129. This Court has never held that government may not *enhance* the speech of candidates who elect public financing and forgo private contributions, by providing them with funds sufficient to run competitive campaigns, while not placing restrictions on non-participating candidates' freedom to raise and spend unlimited amounts of money. To the contrary, this Court upheld just such a system in *Buckley* and summarily affirmed its constitutionality four years later. *See Republican National Comm.*, 487 F.Supp. at 283-286. Like Arizona's triggered matching funds, the Presidential public financing system upheld in these two decisions is intended to enhance the speech of publicly financed candidates and enable them to run competitive campaigns. By doing so, both Arizona's system and the federal system encourage participation in public funding and further the government's compelling interests, without running afoul of the Court's holding that government may not "level the playing field" by restricting some candidates' financial resources.

### 3. The Act Has Served Its Purposes Of Promoting Free Speech And Reducing The Potential For Corruption

Ironically, Petitioners assert that some participants in Arizona's political system have used triggered matching funds strategically to *increase* spending in favor of their preferred candidates—a phenomenon Petitioners label "gaming." This Court has never held that a campaign finance system must be 100 percent fool-proof against circumvention in order to further the government's anti-corruption interest; it has instead afforded lawmakers the flexibility to craft

solutions that address circumvention strategies as they arise. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 223-24 (2003) (upholding most provisions of BCRA while recognizing that further reforms would likely be enacted to address new campaign-finance strategies that would arise in response to BCRA); *Buckley*, 424 U.S. at 105 ("a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)) (internal quotations omitted)).

In any event, documented instances of actual gaming are either non-existent or isolated. Petitioners, for example, have submitted no evidence that, in the decade that matching funds have been in place, an independent committee has ever succeeded in triggering matching funds for a participating candidate that it favors by running an advertisement that appears to support, but in fact harms, the candidate it opposes. Petitioners have cited two instances where a so-called "teaming" strategy was employed to increase spending. But since those isolated incidences occurred, the agency charged with

enforcing the Act has adopted regulations that preclude this practice from occurring in the future.[19]

## CONCLUSION

Arizona's triggered matching funds provision does not place a substantial burden on political speech, and it directly furthers the state's compelling interests in combating corruption and enhancing electoral debate and competition. The judgment of the Court of Appeals should accordingly be affirmed.

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[19] The Citizens Clean Elections Commission ("CCEC") adopted amendments to its rules that prohibit matching funds being generated through coordination among participating and non-participating candidates, thereby precluding use of a teaming strategy. *See* CCEC Rules R2-20-113(A)(1), (B), (F), and R2-20-702(C)(7) (collectively, "the Amended Rules"). For example, under the Amended Rules, the CCEC must decline to issue matching funds "on account of expenditures by or contributions to the non-participating candidate with whom the participating candidate made [a] joint expenditure." CCEC Rule R2-20-113(F). Further, the Amended Rules preclude a participating candidate from making "[a] joint campaign expenditure with a nonparticipating candidate who has previously triggered matching funds for the participating candidate . . . ." CCEC Rule R2-20-702(C)(7).

BRADLEY S. PHILLIPS*
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
MICHAEL J. MONGAN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
brad.phillips@mto.com

Counsel for Clean Elections Institute, Inc.

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