Case Nos. 10-15165 & 10-15166

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Respondents.

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

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND RULES

INTRODUCTION

In 1998, after seeing state legislators caught on tape exchanging campaign contributions for legislative votes, Arizona voters enacted the Citizens' Clean Elections Act (the "Act"). For the last decade, the Act has offered candidates an alternative to the traditional system of raising potentially-corrupting private contributions. In exchange for agreeing to abide by expenditure limits and forego private fundraising, candidates who qualify can receive public funding for their campaigns.

The Act establishes a carefully-calibrated system for disbursing funds to candidates who choose the public-funding option. Initially, publicly-funded candidates receive a base grant equal to one-third of the maximum per-candidate funding. If a traditionally-funded opponent's expenditures exceed that amount, or if the publicly-funded candidate is targeted by independent expenditures, the publicly-funded candidate receives additional matching funds up to 200% of the amount of the initial grant. By giving candidates assurance that they will, in competitive races, have enough funds to run viable campaigns, matching funds encourage participation in the public-funding system, thereby reducing the potential for corruption while increasing the amount of speech in Arizona campaigns.

This appeal concerns a summary judgment decision that enjoined the decade-old matching-funds provisions. Matching funds do not limit either contributions or expenditures. Nevertheless, Plaintiffs contend that matching funds have a chilling effect on Plaintiffs' spending because they give Plaintiffs' electoral opponents the wherewithal to speak more. Even in granting summary judgment for Plaintiffs, the district court correctly recognized that it was "illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs," and the court found no definitive evidence that matching funds in fact deter spending in Arizona. (ER 14). But the district court mistakenly believed that the Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), required it to hold, notwithstanding these findings, that matching funds are subject to strict scrutiny. (ER 15). Misinterpreting the purpose of matching funds, the district court then concluded that matching funds are not narrowly tailored to advance a compelling interest.

The district court erred in two key ways. First, it should not have applied strict scrutiny. The Supreme Court has reserved the demands of strict scrutiny for those campaign-finance laws that severely burden a candidate's funding of campaign speech, such as direct caps on spending and discriminatory contribution limits. By contrast, campaign-finance laws

that only potentially or indirectly may have a deterrent effect on spending, such as disclosure laws, need only survive intermediate scrutiny—*i.e.*, the laws need only have a "substantial relation" to a "sufficiently important" government interest. *Buckley v. Valeo*, 424 U.S. 1, 64 & 66 (1976). The majority view among the Circuit Courts is that matching funds impose *no* cognizable burden on spending because they do not in any way limit non-participants from spending unlimited sums on their campaigns. In Arizona, the evidentiary record confirms that matching funds also have had no perceptible deterrent effect on campaign spending. *Davis* did not require the district court to ignore this reality in Arizona and to embrace an "illogical" result. The *Davis* case arose in the entirely different context of a law that, without furthering any anti-corruption interest, imposed discriminatory contribution limits on two similarly-situated, privately-funded candidates. At most, *Davis* suggests that matching funds could potentially impose an indirect burden, similar to the burden of disclosure laws. But under established law, such an indirect deterrent effect, if it even exists, does not call for strict scrutiny.

Second, the district court erred in holding that matching funds are not narrowly tailored to serve compelling government interests. The district court scrutinized the matching-funds law believing that the purpose of

matching funds is to deter non-participating candidates' personal expenditures, and then held that, because personal expenditures pose no threat of corruption, matching funds do not serve any anti-corruption interest. That misperceives the essential purpose of matching funds in a public-finance system. It is settled that voters have a compelling interest in promoting participation in public funding because it minimizes the potential for corruption from private campaign contributions and lessens the public's perception of corruption. Public-funding systems also facilitate more political speech, by allowing candidates who could not secure funding through traditional means, or who do not wish to run beholden to private donors, to become political candidates nonetheless. Matching funds directly further those established interests by encouraging participation in public funding. In particular, matching funds assure candidates who are considering opting into the public-funding system that, if they face a well-financed opponent or independent-expenditure campaign, they will have the resources needed to respond. Absent the assurance of matching funds, participation in public funding would decline, thereby undermining the Act's effectiveness at reducing corruption and promoting speech. The district court thus erred both in applying strict scrutiny and in concluding that matching funds fail that test. Moreover, there is no question that matching

funds are substantially related to the government's compelling interest in encouraging participation in its public-funding program and thus they easily withstand intermediate scrutiny.

The district court's summary judgment rulings should be reversed. Because the Act's matching-funds provisions are sufficiently tailored to satisfy even strict scrutiny, and certainly intermediate scrutiny, summary judgment should be granted to Defendants. Alternatively, the case should be remanded for further consideration by the district court in light of the appropriate level of scrutiny. *The Lincoln Club of Orange v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2001). At the very least, the case should be remanded for trial of any disputed issues of material fact that remain.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case, in which the underlying Complaint asserts claims under the First Amendment and the Equal Protection Clause of the United States Constitution, pursuant to 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on January 21, 2010 (ER 1),[1] and Defendants and Defendant-Intervenor (collectively, "Defendants") timely filed notices of

[1] "ER" refers to Appellants' Excerpts of Record.

appeal on January 22, 2010. (ER 25-54 & 55-59). *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

A. Whether the district court erred in granting summary judgment for Plaintiffs and Plaintiff-Intervenors on their claims that the Act's matching-funds provision, Ariz. Rev. Stat. §16-952, violates the First Amendment.

B. Whether the district court erred by denying summary judgment for Defendants and Defendant-Intervenor on Plaintiffs' First Amendment and Equal Protection claims.

C. Whether the district court erred in finding that the Act's matching-funds provision burdens Plaintiffs' speech.

D. Whether the district court erred in applying strict scrutiny to the Act's matching-funds provision.

E. Whether the district court erred in holding that the Act's matching-funds provision is not narrowly tailored to achieve a compelling governmental interest.

STATEMENT OF THE CASE

I. Nature Of The Case

This appeal arises from the district court's order granting Plaintiffs' and Plaintiff-Intervenors' motions for summary judgment and denying Defendants' and Defendant-Intervenor's motions for summary judgment.

II. Course Of The Proceedings And Disposition In The Court Below

Plaintiffs filed their Complaint against the Arizona Secretary of State and the members of the Arizona Clean Elections Commission on August 21, 2008. The Complaint seeks to have matching funds declared unconstitutional under the First Amendment and Equal Protection Clause of the United States Constitution.

On August 26, 2008, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. On August 29, 2008, the district court denied Plaintiffs' motion for a temporary restraining order.

The court thereafter permitted intervention by Plaintiff-Intervenors and Defendant-Intervenor. Plaintiff-Intervenors' Complaint in Intervention asserts claims similar to those in Plaintiffs' Complaint.

On September 1, Plaintiff-Intervenors moved for a preliminary injunction. On September 2, 2008, Plaintiffs filed a similar motion. The district court denied both preliminary injunction motions on October 14,

2008. On June 12, 2009, all parties filed cross motions for summary judgment on all claims.

On January 20, 2010, the district court entered an order granting Plaintiffs' motions for summary judgment, denying Defendants' motions for summary judgment, enjoining enforcement of the Act's matching-funds provision, Ariz. Rev. Stat. § 16-952, and staying the injunction for ten days. The court found that Plaintiffs' evidence concerning the alleged burden of the Act was "somewhat scattered" and "vague" and did not "definitively establish a chilling effect." (ER 7). The court further found that "the 'burden' created by the Act is that Plaintiffs' speech will lead directly to more speech" and that "it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on Plaintiffs." (ER 14). The court nevertheless concluded that the Supreme Court's decision in *Davis*, although "it does not answer the precise question now before the Court," "requires [the district court to] find Plaintiffs have established a cognizable burden." (ER 13, 15). Applying strict scrutiny, the district court held that the Act is not narrowly tailored to serve the State's anti-corruption interest because, although that interest "supports some aspects of the Act, . . . Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech [with

matching funds]." (ER 17). On January 21, 2010, the district court entered judgment for Plaintiffs. (ER 1).

Defendants filed an emergency motion with this Court seeking a stay pending appeal, and, on February 1, 2010, the motions panel granted a stay pending "further action" by the merits panel.

STATEMENT OF FACTS

I. Arizona's Experience With Corruption And The Perception Of Corruption Before Passage Of The Clean Elections Act

Over the last two decades, Arizona voters have taken a cautious and measured approach to addressing the threat of corruption and its deleterious effects on the public's faith in government. In 1986, voters passed Proposition 200, which established Arizona's first contribution limits for state-level campaigns. Ariz. Rev. Stat. Ann. §16-905 (2010) (historical note). Under the contribution limits, individual contributors could give up to $200 per election to legislative candidates and up to $500 per election to statewide candidates.

Five years into Arizona's experiment with contribution limits but without public funding, Arizona voters witnessed one of the worst state-level corruption scandals in this nation's history. The scandal, which came to be known as AzScam, resulted from a police sting operation in which an undercover informant posed as a Nevada businessman seeking to open a

casino in Arizona. 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. (ER 3247-49, 5556-60, 5576-96).

Those articles, with headlines like "Videotapes Show Payoffs" and "Excerpts From Indictment Tell Tale Of Political Deals," described how the videotapes from the sting showed 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." (ER 3247-49, 5576-81). The newspaper reports quoted other legislators caught on tape 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." (ER 5589, 5593).

In depositions in this case, longtime Arizona political observers confirmed the widespread awareness of AzScam among Arizona voters. Russell Smoldon, an Arizona lobbyist, testified that AzScam was "huge" at the time among the public. (ER 5564-65). Former Governor J. Fife Symington likewise acknowledged that AzScam was highly publicized. (ER 5574).

Arizona voters also read that Arizona capitol insiders were concerned about the potential for another AzScam. One report in the *Arizona Daily Star* was titled "AzScam Fallout Is Far From Over, Politicians Say." (ER 5583-85). A separate story in the *Arizona Republic* with the headline, "Survey Says Opinions Vary on State Ethics: 2nd 'AzScam' is 'probable,'" reported that 100% of journalists, 66% of legislative staffers, and at least 42% of legislators and lobbyists surveyed agreed that most major contributors received special advantages from legislators. (ER 5603-5608).

In the years following AzScam, Arizonans were confronted with continued troubling reports about sustained corruption in their state government. Beginning in 1996, *The Arizona Republic* ran a series of front-page articles about "The Invisible Legislature," a phrase the newspaper used to refer to professional lobbyists in the State's capitol. (ER 5610-42). For example, just months before voters adopted the Clean Elections Act, a front-page story in *The Arizona Republic* reported that the Arizona Senate's Republican 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 Democrats." (ER 5641).

II. The Citizens Clean Elections Act

On November 3, 1998, after witnessing widespread corruption notwithstanding the State's contribution limits, and in response to findings that the then-existing "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials," Arizona voters passed the Citizens Clean Elections Act. Ariz. Rev. Stat. § 16-940(B)(5). Louis Hoffman, a citizen drafter of the Act, testified at deposition that AzScam and the perception of corruption among elected officials were factors that led to the Act. (ER 5645-46). Hoffman explained that, in addition to this "goal [of] avoiding the unseemly appearance or actual corruption," the drafters also designed the Act with the goal of "promot[ing] freedom of speech because . . . more candidates would have more opportunity to speak." (ER 5653-54). *See also* Ariz. Rev. Stat. § 16-940(A) (explaining the Act's interests in "improv[ing] the integrity of Arizona state government…, encourag[ing] citizen participation in the political process, and …promot[ing] freedom of speech under the U.S. and Arizona Constitutions.").

The voter-approved Act combats corruption and promotes free speech by establishing a voluntary alternative to the traditional and potentially corrupting system of raising private contributions. Under the Act,

candidates may choose to opt into the public-financing system and obtain public funding, conditioned on their refusal of most private contributions, acceptance of campaign spending limits, participation in public debates, and collection of a specified number of five-dollar qualifying contributions to demonstrate a base of support among voters. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2).

Under the Act, once qualified, participating candidates are eligible to receive a total grant, including potential matching funds, sufficient to enable them to compete in high-spending races. However, because the actual cost of running a competitive campaign depends on many factors that are difficult to assess prior to an election, the drafters devised a flexible grant-distribution system that is adjustable in real time. (ER 5647-52).

All participating candidates are initially given a portion of the total grant amount. To encourage sufficient participation by counteracting the fear that a participating candidate will be unable to run a viable campaign in a race featuring a high-spending opponent or an independent expenditure campaign, the Act provides additional matching funds that are capped at twice the amount of the initial grant. Ariz. Rev. Stat. §16-952(E). Such a system enables the program to meet its speech-enhancing and anti-

corruption goals by encouraging sufficient participation without wasting taxpayer funds on races where the money is not needed.

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

In crafting the Act, the drafters carefully looked at the historical record of candidate expenses in various Arizona electoral races and, based on that data, considered but rejected the possibility of creating a public-financing system with a pre-determined, one-time lump-sum grant. The drafters rejected the lump-sum alternative because its one-size-fits-all approach would result either in underfunding candidates in many competitive races or in wasting public funds and thereby undermining the Act's legitimacy. (ER 5647-52).

III. The Act Has Not Deterred Plaintiffs Or Non-Participating Candidates Generally From Speaking

Despite Plaintiffs' self-serving and ideologically-motivated allegations and declarations insisting that their speech has been "chilled" by matching funds, uncontested record evidence demonstrates that nearly all of the Plaintiffs themselves triggered matching funds by exceeding the matching-funds threshold, spending as much as they pleased notwithstanding their knowledge of the Act. (ER 6-10, 673, 691, 1014, 1029, 1496, 1540, 5692-5752, 5977-78).

One Plaintiff, Senator Burns, testified that he paid no attention to his opponents' receipt or expenditure of matching funds. (ER 5685-86). Burns, who also ran for office prior to the Act, acknowledged that he could not show that his communications with voters had decreased since the Act's adoption.[2] (ER 5687-90). Another Plaintiff, Representative Murphy, conceded that matching funds have never led him to turn away a contribution, and Representative Murphy's campaign consultant testified that Murphy never stopped fundraising for fear of triggering matching funds.

[2] Not only was Burns's spending uninhibited by matching funds, so too was the spending of independent expenditure groups, which triggered $10,543 in matching funds for Burns's participating opponent in the 2008 general election. (ER 1540.) All told, matching funds made $28,250 available for additional dialogue in Burns's 2008 race, without burdening the speech of Burns or of independent-expenditure groups supporting his candidacy. (*Id*.)

(ER 1554, 1635). Uncontroverted testimony likewise demonstrates that the independent-expenditure-committee Plaintiffs have not been deterred from making expenditures that triggered matching funds. (ER 1557-59, 1563-64, 1567-73). In short, Plaintiffs' self-serving and ideologically-motivated claims that matching funds have burdened their speech are flatly contradicted by the evidence.

Plaintiffs' practice of exceeding the matching-funds threshold is consistent with the spending patterns of non-participating Arizona candidates generally. As Professor Donald P. Green, Director of the Yale Institution for Social and Policy Studies, found, spending by non-participating candidates with participating opponents does not cluster just below the matching-funds threshold. If Plaintiffs' theory that matching funds create a drag on speech had any merit, they and other non-participating candidates with participating opponents should have spent *up to but not beyond* the matching-funds threshold of $17,918 (for 2006 legislative races), to avoid triggering matching funds. Professor Green's analysis of expenditures in the 2006 elections revealed no such clustering of spending just below the trigger threshold. Instead, he found that, of the 46 non-participating legislative candidates who faced a participating opponent in 2006 and who could trigger matching funds by spending more than

$17,918, *only one* spent between $15,000 and $26,000. (ER 5905, 5920).[3] Thirty-nine candidates spent less than $15,000 (showing that their expenditures levels were controlled by factors unrelated to matching funds) and 6 candidates spent well above the threshold (showing that they were not deterred by matching funds). (*Id.*). In short, as the district court recognized, the available data provides no evidence that the Act or its matching-funds provisions have suppressed spending. (ER 6-7).

Plaintiffs' numbers also demonstrate that there is no evidence of clustering around the threshold. Plaintiffs themselves contend that in 2006 non-participating candidates facing at least one participating opponent in the primary spent $27,278.35 on average, an amount almost $10,000 over the matching-funds threshold. (ER 2529, 1805-06). This spending pattern confirms that Plaintiffs' asserted "chilling effect" does not exist and that the Act has not caused candidates to curtail their spending.

IV. The Act Has Resulted In An Increase In Campaign Spending And Participation In Arizona Elections

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court noted that public funding "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the

[3] Plaintiff-Intervenors do not dispute this fact and Plaintiffs did not submit any contrary evidence. (ER 1768, 2448-50).

electoral process." *Id*. at 92-93 (emphasis added). Over thirty years later, Arizona's experience with public funding confirms this observation.

Contrary to Plaintiffs' claims that Arizona's public-funding system has placed a drag on political speech, the uncontroverted factual record demonstrates that Arizona has, since the adoption of the Act in 1998, experienced an increase in both the number of candidates running for elected office and the amount of money being spent in Arizona elections.

As the district court found (ER 6), and as Plaintiffs have conceded (ER 1805-06, 2525-27), there is no dispute that candidate and independent expenditure committee spending has increased since the Act was adopted. Even accepting the statistics Plaintiffs offered in the district court proceedings, between 1998 and 2006, overall candidate expenditures increased between 29-67%, overall independent expenditures increased by 253%, average candidate expenditures increased by 12-40%, and spending by the top 10% of candidates in the general election increased by 16%. (ER 1805-06, 2523, 2527-29).

Public funding in Arizona also furthers speech by enabling more candidates to run for office. Absent public funding, candidates lacking personal wealth or access to wealthy contributors are deterred from running

for office. As Plaintiff-Intervenor Dean Martin testified when asked if it is more difficult for challengers than incumbents to raise money:

> Oh yes. Much harder . . . Because you've got an existing legislator who can and did threaten other people that he would remember if they supported the challenger in the upcoming legislative session. And so a lot of people said, hey, I like you, but you know, I can't cross this guy because I think he's going to win . . ..

(ER 5662-63).

By providing an alternative source of funding, the Act allows more candidates to run for office. Defendant's expert, Professor Kenneth Mayer, a University of Wisconsin political scientist, has documented a 20% increase in the number of contested state Senate races and a 300% increase in the percentage of incumbents running in competitive state Senate races since the Act was adopted. (ER 6234.21). An experienced political consultant similarly testified that more candidates were able to run for office and the amount of political dialogue in Arizona has increased because of the availability of public financing. (ER 5669-70).

The record contains specific examples of candidates who were able to run for office because of the Act's funding alternative. One such candidate is Rick Murphy, a plaintiff in this action who accepted public funding in 2004 when he first ran for the state legislature. Constantin Querard, Murphy's consultant, testified that Murphy could not have successfully run

for office in 2004 without public funding. (ER 5672-73). Similarly, Declarant Meg Burton Cahill stated that the availability of public funding allowed her to successfully run for the state legislature against two powerful incumbents. (ER 5675-79).

V. Matching Funds Promote Participation In The Act's Public-Funding System

Under the traditional private-fundraising model, candidates have the option to tap private donors or their political parties' extensive fundraising networks to respond quickly to unanticipated attacks by high-spending opponents or organizations making independent expenditures. Participation in a public-funding program requires candidates to surrender those options, and candidates must instead rely on the state to provide sufficient funds as a substitute for the candidate's ability to engage in defensive private fundraising. To induce candidates to give up this option, Arizona—like North Carolina and Maine—provides candidates with assurance that they will not be helpless to respond if they face a high-spending opponent or hostile independent-expenditure campaign. (ER 5647-52).

State Senator Meg Burton Cahill and other candidates and office-holders have stated that the availability of matching funds was a "critical factor" in their decision to participate in the Clean Elections program. (ER 5675-79, 6235-49). According to Senator Cahill, her district, District

17, is one of the most competitive districts in Arizona, making it a prime target for independent expenditures. (ER 5677). Without matching funds, Senator Cahill stated that she and other participating candidates would be unable to respond to false or misleading attacks by independent groups, run a competitive campaign, or effectively communicate with the electorate. (*Id.*). Campaign consultant Constantin Querard similarly testified that, absent matching funds, participation in the clean-election system would decline. (ER 5668). Even Commissioner Lori Daniels, an 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 probably would stop or would put a real damper on that." (ER 1479).[4]

Without matching funds, candidates who opted to accept public financing for their campaigns would enter the political arena with their hands tied, rendering them helpless targets for unexpected attacks. This is an untenable position for most candidates to accept, and as a result, in the absence of matching funds, participation in the Clean Elections system

[4] That individuals who are ideologically opposed to the Act see matching funds as central to candidate participation demonstrates that Plaintiffs hope to use their lawsuit challenging the matching-funds provision to destroy the viability of the entirety of Arizona's public-financing system. Thus, it is clear that even Plaintiffs see matching funds as inextricably intertwined with the Act.

would undoubtedly fall off. This decreased participation would in turn significantly hamper the Act's ability to achieve its anti-corruption and speech-promotion goals.

SUMMARY OF ARGUMENT

The district court's summary judgment decision rested on two fundamental errors.

First, the district court erred in holding that *Davis* requires that strict scrutiny be applied to the Act's matching-funds provision. A campaign-finance regulation is subject to strict scrutiny only if it severely burdens fully-protected speech—for example, if it directly bans expenditures or attaches the "unprecedented penalty" of "discriminatory" contribution limits to the act of spending personal funds. *See Davis*, 128 S. Ct. at 2771; *Citizens United v. FEC*, __ S. Ct. __, 2010 WL 183856 at *51 (2010); *Lincoln Club*, 292 F.3d at 938. Where a campaign-finance regulation may only indirectly deter some candidates from spending, as the Court has assumed to be the case with disclosure laws, intermediate scrutiny applies, and the courts ask whether the law has a "substantial relation" to a "sufficiently important" government interest. *Citizens United*, 2010 WL 183856 at *37.

The burden imposed on non-participating candidates by matching funds, if there is any burden at all, much more closely resembles the indirect burden created by disclosure laws than the direct burden of a ban on spending or discriminatory contribution limits. Indeed, precisely because matching funds do not directly limit non-participating candidates' expenditures, the majority view among the circuit courts is that matching funds do not burden spending at all. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008). The factual record below confirms that matching funds do not even indirectly deter expenditures: Non-participating candidates and independent expenditure committees, including Plaintiffs, regularly spend above the threshold for triggering matching funds. *Davis* cannot be interpreted to reach the question whether matching funds in a public-financing system impose a severe burden on spending that warrants strict scrutiny.

Second, the district court erred in applying strict scrutiny because it overlooked the actual purpose of matching funds: to serve the state's compelling interest in encouraging participation in its public-financing system. It has been settled since *Buckley* that public financing furthers two

compelling interests: promoting free speech and combating corruption and its appearance. 424 U.S. at 92-93, 96. Federal courts have thus regularly found that the government has a compelling interest in encouraging participation in a public-funding system. *See, e.g.*, *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996).

Arizona's provision of matching funds is crucial to promoting participation in its public-financing system, and certainly has a "substantial relation" to that goal. Absent matching funds, "candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent." *Daggett*, 205 F.3d at 469. Even opponents of public funding testified that participation in public financing "probably would stop" if matching funds were eliminated. (ER 1479).

Arizonans experimented with and considered the alternatives suggested by Plaintiffs—contribution limits alone or a lump-sum approach to public funding—and justifiably rejected them. Contribution limits had failed to prevent scandals like AzScam or subsequent reports of improprieties. The Act's drafters examined a lump-sum alternative but concluded that, because of 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 district court did not disagree with any of those points. Instead, it struck down the Act's matching-funds provision only because, the court found, Arizona has no compelling interest in discouraging non-participating candidates from spending personal funds. In so holding, the district court confused the alleged and unproven burden of matching funds (deterring non-participants' expenditures) with the distinct issue of whether any such burden is justified by a compelling interest. Matching funds serve the State's compelling anti-corruption interest, not by discouraging spending (even assuming they have that effect), but by promoting participation in the public-funding alternative that reduces the potential for corruption while providing the electorate with more speech from candidates who would otherwise not run and from candidates who would otherwise be unable to respond to attacks. For those reasons, Arizona's matching-funds provision is narrowly tailored to serve the state's compelling interests and is undeniably substantially related to those interests. Defendants are entitled to summary judgment.

STANDARD OF REVIEW

The district court's rulings on Plaintiffs' and Defendants' summary judgment motions are subject to *de novo* review by this Court. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 602 (9th Cir. 2005); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 962 (9th Cir. 2006) (*en banc*). The Court must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *KP Permanent Make-Up, Inc.*, 498 F.3d at 602.

ARGUMENT

I. The District Court Erred In Applying Strict Scrutiny To Matching Funds

A. Strict Scrutiny Does Not Apply To Campaign-Finance Laws Unless Those Laws Severely Burden Fully Protected Speech

The district court's apparent belief that any potential burden which is triggered by the making of expenditures requires strict scrutiny—no matter how minimal, indirect, or incidental the effect may be—conflicts with settled precedent.

This Court has squarely held that strict scrutiny applies only to campaign-finance laws that place a "severe burden" on expenditures, such as

a direct cap on spending. *Lincoln Club*, 292 F.3d at 938. In *Lincoln Club*, this Court considered what level of scrutiny should apply to a campaign-finance ordinance that directly limited both contributions to and expenditures by independent-expenditure committees:

> [T]he level of constitutional scrutiny that we apply to a statutory restriction on political speech and associational freedoms is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue. If the Ordinance places a severe burden on fully protected speech and associational freedoms, we apply strict scrutiny. If the Ordinance places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the First Amendment, we apply a lower level of constitutional scrutiny.

Id. (internal citations omitted).

This Court's approach is consistent with the Supreme Court's recent opinions in *Buckley* and *Citizens United*, which addressed the constitutionality of statutes that required disclosure once an entity made expenditures above a certain threshold. In considering the constitutionality of the Federal Election Campaign Act's ("FECA's") disclosure provisions, the *Buckley* Court assumed that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights" and "will deter some individuals who otherwise might contribute." *Buckley*, 424 U.S. at 66, 68. *Buckley*, however, did not apply strict scrutiny to FECA's

disclosure provisions. Instead, it inquired whether those provisions exhibited a "substantial relation between" a "sufficiently important" governmental interest "and the information required to be disclosed." *Id*. at 64. In applying this intermediate level of scrutiny, the Court recognized that the burdens of disclosure are not equivalent in magnitude to the burden of an 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.

The Supreme Court recently reaffirmed the appropriateness of applying intermediate scrutiny to campaign-finance laws that may indirectly burden campaign expenditures. In *Citizens United*, the Court upheld the Bipartisan Campaign Reform Act's ("BCRA's") disclaimer and disclosure provisions. *Citizens United*, 2010 WL 183856 at *37. BCRA's disclaimer provision required, among other things, that a televised electioneering communication include a statement that "____ is responsible for the content of this advertising," while its disclosure provision compelled those spending above $10,000 on electioneering communications to report their

expenditures to the Federal Election Commission. As in *Buckley*, the *Citizens United* Court found that:

> Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Id. at *5 (internal citations and quotations omitted).

Citizens United, *Buckley*, and *Lincoln Club* thus precluded the district court from taking the leap of logic from the assumption that matching funds may indirectly burden spending to the conclusion that strict scrutiny applies. Instead, the issue is whether any burden associated with matching funds, assuming one exists at all, is closer in kind to the indirect burden of disclosure laws or to the severe burden of a direct limit on expenditures. If matching funds are like a direct expenditure limit, strict scrutiny is warranted. But if matching funds only have effects comparable in severity to disclosure requirements, intermediate scrutiny applies and matching funds need only have a "substantial relation" to the government's interest in encouraging participation in its public-funding program.

B. Because Matching Funds Do Not Severely Burden Expenditures, They Are Not Subject To Strict Scrutiny

Matching funds are not expenditure limits. Plaintiffs may choose to exceed the threshold for triggering matching funds and as the record demonstrates have done so repeatedly in the past. (*See supra* Statement of Facts, Section III). As is true with disclosure laws, matching funds "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 2010 WL 183856 at *37; *see also Daggett*, 205 F.3d at 464 (holding that Maine's matching-funds provision "in no way limits . . . the amount of money one can spend"); *Leake*, 524 F.3d at 437 (finding that under North Carolina's matching-funds provision privately-funded candidates and independent-expenditure committees "remain free to raise and spend as much money . . . as they desire").

The burden that Plaintiffs allege here is indistinguishable from the burden that the Supreme Court has assumed is imposed by disclosure laws: a "deterrent effect on the exercise of First Amendment rights." *Buckley*, 424 U.S. at 65. Under Plaintiffs' theory, a speaker may strategically decide not to spend assuming that an opponent's responsive speech will be more effective than his own. Similarly, the *Buckley* Court recognized that a speaker strategically may decide not to spend money to avoid exposure of his political views or activities. *Id*. at 64, 68. But *Buckley* and *Citizens*

United make clear that this deterrent effect, even if it exists, requires application of only intermediate, not strict, scrutiny. *Id.* at 64; *Citizens United*, 2010 WL 183856 at *37.

The factual record below confirms that any indirect deterrent effect of matching funds is non-existent or minimal at most. It is, for example, undisputed that spending by non-participating candidates has not clustered just below the matching-funds threshold, as one would expect if matching funds deterred non-participants from spending above the matching-funds threshold. (ER 5905, 5920). As the district court found, "[i]t is undisputed that campaign spending has increased since the Act's passage," and "Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act." (ER 6-7). Some Plaintiffs could not even recall whether they had triggered matching funds in their campaigns, thus implicitly acknowledging the insignificance of matching funds to their decisions. (ER 5658). The one Plaintiff 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. (ER 5687-90).

In sum, well-established law and the record below preclude application of strict scrutiny. As both the First and Fourth Circuits have

correctly held, matching funds impose no cognizable burden. *See Leake*, 524 F.3d at 437-38; *Daggett*, 205 F.3d at 464. Indeed, the "provision of matching funds is likely to result in more, not less, speech." *Leake*, 524 F.3d at 438. But even if some indirect burden results from matching funds, similar to the potential deterrent effect of disclosure laws, the district court erred in applying strict, rather than intermediate, scrutiny.

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

The district court wrongly concluded that *Davis* required it to apply strict scrutiny to Arizona's matching-funds provision. The *Davis* case arose in the very different context of federal congressional elections where "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat." *Davis*, 128 S. Ct. at 2765. That baseline is key and distinguishes the congressional system for regulating campaign financing from the campaign-finance laws applicable in presidential races and in Arizona state-level campaigns. In congressional campaigns, all candidates are subject to the same contribution limits, *see* 2 U.S.C. § 441a(a)(1), and the same disclosure requirements, *see* 2 U.S.C. § 434. Congressional candidates are not eligible to receive the public funding that is available to candidates for President, *see* 2 U.S.C. § 441a(b), 26 U.S.C. § 9001 et seq, or

for Arizona state office, *see* A.R.S. § 16-951, 952, nor is there any alternative to the system of private financing. In short, all congressional candidates are similarly situated from a regulatory perspective.

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

The constitutionality of this voluntary choice between public and private financing is well settled. *See id*. at 57 n.65. In *Buckley*, the Court held that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id*. This holding followed naturally from the Court's recognition that public funding

"furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process." *Id*. at 92-93 (emphasis added). In short, it is a constitutionally-acceptable approach to offer all candidates the alternatives of public and private funding where, depending on the choices made by individual candidates in a particular race, "the same restrictions" may not "apply to all the competitors for a seat." *See Davis*, 128 S. Ct. at 2765.

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

otherwise similarly-situated candidates to "asymmetrical" and "discriminatory" fundraising limitations just because one candidate chose to spend personal funds, the Court concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id*. at 2771.

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

personal expenditures resulted in "the activation of a scheme of *discriminatory* contribution limits." *Davis*, 128 S. Ct. at 2772 (emphasis added).

Plaintiffs rely heavily on the *Davis* court's "*see*" citation to *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). That citation immediately followed the Court's statement that, under section 319(a), privately-funded candidates may choose to rely on personal monies "but they must shoulder a special and potentially significant burden." *Davis*, 128 S. Ct. at 2772.

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

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

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

In short, nothing in *Davis* requires this Court to subject Arizona's matching-funds provision to strict scrutiny. Indeed, because *Davis* neither disapproved of *Daggett* or *Leake* nor discussed the merits of *Day*, the better view is that *Davis* left undisturbed the prevailing view among the circuit courts that matching funds impose no cognizable First Amendment burden. This Court has held that "[i]t is unlikely in the extreme that the Supreme Court intended by [a] single sentence to overrule *sub silentio* years of decisional law." *United States v. Fonseca-Caro*, 114 F.3d 906, 907 (9th Cir. 1997). It is even less likely such an intention would be communicated through a single "*see*" citation. But even if *Davis* is understood as having associated matching funds with a potential burden, that interpretation should only lead to application of intermediate scrutiny. As we explain below, Arizona's matching-funds provision easily survives intermediate scrutiny and should withstand even strict scrutiny.

II. The Matching-Funds Provisions Are Narrowly Tailored To Serve The State's Compelling Interest In Encouraging Participation In The Act's Public-Financing System, Thereby Both Facilitating Political Speech And Combating The Reality And Appearance Of Corruption

Even if Plaintiffs could show that the matching-funds provisions of the Act substantially burden their speech, which they have not and cannot, their First Amendment claim would fail. It is well settled both that public financing of election campaigns serves the government's compelling interests in facilitating political speech and combating the reality and appearance of corruption and that encouraging participation in public funding is itself therefore a compelling government interest. The Act's matching-funds provisions are crucial to encouraging participation by candidates in a viable system of public financing in Arizona: without matching funds, either (1) candidates would be offered too little public money to enable them to run in competitive races, while being prohibited from raising private contributions, or (2) the State would be forced to waste vast sums on unnecessarily large initial grants to candidates in non-competitive races. The Act is therefore narrowly tailored to further the State's compelling interests in facilitating political speech and combating corruption. The district court, in holding that the Act fails strict scrutiny, simply ignored the fact that matching funds are a crucial part of Arizona's

public-financing program (*see* ER 17-18) and therefore failed to recognize that, as such, they serve these well-established compelling government interests.

A. Arizona Has A Compelling Interest In Encouraging Participation In Its Public-Financing System

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld public financing of Presidential elections. In doing so, the Court made clear that public financing of elections furthers the government's compelling interests in enhancing the amount of speech in American elections and in combating corruption and the appearance of corruption.

The *Buckley* Court eloquently emphasized that the First Amendment was intended to protect and enhance public discussion of issues and candidates:

> "[T]here 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 (emphasis added); *accord Leake*, 524 F.3d at 436 (quoting *Buckley*, 424 U.S. at 92-93).

The *Buckley* Court also affirmed the government's interest in combating the actual and apparent corruption which arise from a system of private election financing:

> 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.").

The *Buckley* Court emphatically 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 introduction of limits on the size of contributions, public financing further serves the anti-corruption interest by "relieving . . . candidates from the rigors of soliciting private contributions." *Id*;[5] *see also Daggett*, 205 F.3d at 471 (public-funding results in "the assurance that contributors will not have the opportunity to seek special access" and "the avoidance of any appearance of corruption"); *Leake*, 524 F.3d at 440-41 ("the state's public financing system . . . is designed to promote the state's anti-corruption goals").

It is beyond dispute that the government's anti-corruption interest is a compelling one. *See Buckley*, 424 U.S. at 25-27; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) (referencing the Government's

[5] This refutes the suggestion made below by Plaintiffs that the mere existence of contribution limits makes public financing unnecessary to the State's compelling interests in facilitating speech and combating corruption.

"compelling state interest in avoiding . . . corruption"); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (identifying "preventing corruption or the appearance of corruption" as "compelling government interests"); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring) ("The Court also recognized . . . that the Government has a compelling interest in prevention of corruption and the appearance of corruption." (internal quotations and citations omitted)). Indeed, the Supreme Court reaffirmed the government's compelling interest in combating real and apparent corruption in its most recent campaign-finance decisions. *See Citizens United*, 2010 WL 183856 at *30-31 (discussing government's interest in preventing corruption and the appearance of corruption); *Davis*, 128 S. Ct. at 2773 (noting "the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof") (quoting *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment)).

Consistent with these principles, 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 ("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) (holding that "the state possesses a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption," and finding that interest to be "compelling"); *Wilkinson v. Jones*, 876 F.Supp. 916, 928 (W.D. Ky. 1995) ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts.").[6]

B. Arizona Enacted The Clean Elections Act To Facilitate Political Speech And Combat Corruption

Arizona voters passed the Citizens Clean Elections Act to serve precisely the compelling purposes of public financing that the Supreme Court identified in *Buckley*. In the Act, the voters expressly found that "our

[6] The record in *Day* contained no evidence that the matching funds provision at issue had been enacted to serve any state interest. There, the Eighth Circuit held that Minnesota's matching-funds provisions did not serve the anti-corruption interest, because "candidate participation in public campaign financing [was] nearing 100% *before* enactment of [matching funds], [so that] the interest, no matter how compelling in the abstract, is not legitimate." *Day*, 34 F.3d at 1361. The court therefore did not address whether, in different circumstances, matching funds would be narrowly tailored to achieve that compelling interest. The Eighth Circuit subsequently held that a state does have "a compelling interest in stimulating candidate participation in its public financing scheme." *Rosenstiel*, 101 F.3d at 1553.

current [entirely private] election-financing system . . . [u]ndermines public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5); *see Buckley*, 424 U.S. at 26-27 ("Under a system of private financing of elections . . . the integrity of our system of representative democracy is undermined."). The voters declared that their purposes in passing the Act were, among other things, to "promote freedom of speech under the U.S. and Arizona Constitutions" and to "improve the integrity of Arizona state government." Ariz. Rev. Stat. § 16-940(A); *see Buckley*, 424 U.S. at 92-93 (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"); *id*. at 96 (public financing "eliminat[es] the improper influence of large private contributions").

Arizona voters' concern about corruption and the appearance of corruption in the State's politics was certainly legitimate. As explained in detail above, *see supra* at 9-11, AzScam and the subsequent reports of legislative leaders' threatening lobbyists with retribution for failing to support the leadership's chosen candidates proved that the potential for corruption and a perception of corruption under Arizona's private financing regime was real. *See Nixon*, 528 U.S. at 390-395 (finding Missouri voters'

concerns about real and apparent corruption legitimate based on similar circumstances); *Montana Right to Life Assoc. v. Eddleman*, 343 F.3d 1085, 1093 (9th Cir. 2003) (same regarding Montana); *Daggett*, 205 F.3d at 456-458 (same regarding Maine); *see also Buckley*, 424 U.S. at 27 (because corruption can "never be reliably ascertained," all that was required is that the threat not be "illusory").

Moreover, Arizona voters justifiably concluded that contribution limits alone were not sufficient to combat this real and apparent corruption. The $200 limits on individual contributions to state legislative candidates had been in place *five years before* AzScam occurred. The *Arizona Republic*'s "The Invisible Legislature" series fostered public understanding that lobbyists and elected officials regularly circumvented contribution limits through the practice of bundling. Having given contribution limits twelve years to succeed, Arizona voters understandably concluded that restoring the integrity of the State's political system required more.

Plaintiffs have argued that the voters' purpose in passing the Act was only to "level the playing field," which Plaintiffs assert is impermissible. Plaintiff's premise is flatly contradicted by the statements of purpose in the Act, which make clear that it was intended to facilitate free speech and protect the integrity of Arizona politics. In any event, Plaintiffs falsely

equate public funding and matching funds with "leveling the playing field" in the sense that purpose has been rejected by the Supreme Court. What the Supreme Court has identified as "wholly foreign to the First Amendment" is only "the concept that government may *restrict* the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49 (emphasis added); *see also Citizens United*, 2010 WL 183856 at *25 (quoting *Buckley*); *Davis*, 128 S. Ct. at 2773 ("the notion that the government has a legitimate interest in *restricting* the quantity of speech to equalize the relative influence of speakers on elections [is antithetical to the First Amendment]") (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting)) (emphasis added).[7] Nowhere has the Court held that it is impermissible for government to *enhance* the speech of some candidates, by providing public funding, simply because that may result in raising those candidates' voices relative to the

[7] In *Davis*, BCRA Section 319(a), unlike Arizona's matching-funds provisions, directly restricted the speech of candidates who used personal funds for their campaigns, relative to other candidates, by subjecting them to discriminatorily lower contribution limits under certain circumstances. *See Davis*, 128 S. Ct. at 2771 ("[candidates] subject[ed] to discriminatory fundraising limitations"); *id*. at 2772 (candidates burdened by "a scheme of discriminatory contribution limits"). Arizona's matching-funds provisions, although they enhance the ability of participating candidates to speak, leave non-participating candidates free to raise and spend unlimited amounts on speech.

voices of privately-funded candidates. Indeed, if that were impermissible, all public funding of elections would presumably be unconstitutional, a conclusion that is foreclosed by *Buckley*.

C. Arizona's Matching-Funds Provisions Are Narrowly Tailored To Encourage Participation In Public Financing

1. Matching Funds Enable Arizona To Encourage Candidates To Participate In Public Funding Without Wasting Public Funds

Both the evidence in this case and judicial precedent demonstrate that the Act's matching-funds provisions are crucial to the success of Arizona's public-funding scheme. The matching-funds provisions allow Arizona to provide sufficient funding to all participating candidates without wasting vast amounts of taxpayer money.

In *Buckley*, the Supreme Court acknowledged that Congress, in enacting the Presidential public-financing system, had substantial interests in not wasting public funds and in protecting the public fisc. Thus, the Court upheld, against an Equal Protection challenge, Congress's "withholding of public assistance from candidates without significant public support" based on "Congress' interest in not funding hopeless candidacies with large sums of public money." *Buckley*, 424 U.S. at 96; *see also id*. at 103 (noting that "a range of formulations [of eligibility for public funds] would sufficiently protect the public fisc").

As explained in detail above, Arizona's public-financing system is carefully designed to protect Arizona's public fisc and not waste taxpayer funds, while at the same time providing sufficient incentives for candidates to participate. First, the Act offers public grants only to those candidates who demonstrate a base of public support by collecting a sufficient number of five-dollar qualifying contributions. Ariz. Rev. Stat. §§ 16-946, 16-950. Second, because the actual cost of running a campaign will depend on many factors difficult to anticipate prior to an election, the Act creates a flexible grant-distribution system that is adjustable as the campaign progresses. All participating candidates receive a portion of the potential total grant of public funds as an initial grant; thereafter, they become eligible for additional public funds, up to twice the amount of the initial grant, based on actual expenditures and contributions by and in support of the participating candidate's opponents. *Id.* § 952.

This structure is essential to the success of Arizona's public-financing program. Without it, the State would have to either (1) give *all* participating candidates at the outset enough money to run a competitive campaign in *any* race, even though, in most races, that amount would be unnecessary, thereby wasting public funds and threatening the legitimacy of public financing in the public's eyes; or (2) provide only an initial grant (without matching

funds) that would certainly be insufficient in competitive races, such that a participating candidate would risk being drastically outspent by opponents or outside groups and unable to respond to attacks, thereby dramatically suppressing participation and likely causing some potential candidates not to run at all.[8]

The First Circuit, addressing Maine's similar public-financing structure, wrote, in language equally applicable here:

> [I]n view of the initial moderate allowance, without the matching funds, even though they are limited in amount [as in Arizona, up to twice the initial grant], candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent. As the State explained, *the matching funds provision allows it to effectively dispense limited resources while allowing participating candidates to respond in debates where the most debate is generated.*

[8] The importance of making matching funds available based on independent expenditures either opposing a participating candidate or supporting her opponent has been made even more clear by the Supreme Court's recent decision in *Citizens United*, in which the Court held that independent spending by corporations to influence elections may not be restricted. A candidate who faces the prospect of unlimited corporate spending for her opponent or against her will be very unlikely to accept a limited grant of public funds if there is no prospect of matching funds based on at least some part of that corporate spending. *See Daggett*, 205 F.3d at 469-70 ("if the state structured public funding with a blind eye to independent expenditures, such expenditures would be capable of defeating the state's goal of distributing roughly proportionate funding, albeit with a limit, to publicly funded candidates").

Daggett, 205 F.3d at 469 (emphasis added); *see also Rosenstiel*, 101 F.3d at 1551 & 1554 (finding that the triggering of a waiver of the expenditure limit for publicly-funded candidates was "simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit," and that "[a]bsent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program").

The evidence in this case indisputably supports these conclusions. The alternative of providing an initial lump-sum grant, without matching funds, was considered and rejected by the Act's drafters precisely because its one-size-fits-all approach would result in either underfunding candidates or wasting money and would destroy the system's credibility. (ER 5647-52). Numerous participating candidates have testified that matching funds played a key role in their decision to accept public funding. (ER 5674-79, 6235-45). A veteran Arizona campaign consultant testified that, absent matching funds, participation in Arizona's clean elections system would decline. (ER 5668). 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." (ER 1479). And Defendants' expert, Professor Mayer of the University of Wisconsin, examined various public-financing systems and concluded that matching funds such as Arizona's are key to encouraging candidate participation in public financing. (ER 6234.22).

Plaintiffs have presented no contrary evidence. They have not shown that Arizona could afford or would enact a public-financing system that provided all participating candidates with initial grants large enough to fund competitive campaigns. They have not shown that participation in Arizona's public-financing system would not decline significantly in the absence of matching funds. It is therefore undisputed that the Act's matching-funds provisions are crucial to participation in Arizona's public-financing system. Accordingly, they are narrowly tailored to serve the State's compelling interest in encouraging such participation.

2. The District Court's Rationale For Striking Down Matching Funds Is Mistaken

The district court recognized that the "anticorruption interest supports some aspects of the Act," (ER 17), and struck matching funds down only because, the court wrongly concluded, the State's compelling anti-corruption interest is not served by providing matching funds based on "a candidate's expenditure of personal funds." (ER 17-18). The district court relied

principally on statements by the Supreme Court in *Davis* that "reliance on personal funds *reduces* the threat of corruption" and that "discouraging use of personal funds disserves the anticorruption interest." (*Id.* (quoting *Davis*, 128 S. Ct. at 2773)). Based on these statements, the district court held that matching funds were not narrowly tailored to serve the anti-corruption interest. (*Id*. at 18.) The court's reasoning ignores the crucial difference between this case and *Davis*—public funding—and fundamentally misconstrues the relationship between public funding, including matching funds, and the anti-corruption interest.

Public funding and matching funds in particular do not serve the anti-corruption interest by discouraging *non-participating* candidates from raising contributions or spending their personal funds (assuming that matching funds do that at all, which Defendants dispute). Rather, public funding, including matching funds, serves the anti-corruption interest because it relieves *participating* candidates from the need to raise private contributions by giving them sufficient money to communicate with voters and run competitive campaigns without such contributions. Public funding and matching funds serve this anti-corruption interest equally regardless of whether a participating candidate faces other candidates who are financed with private contributions or candidates who are self-financed. Either way,

the publicly-financed candidate need not raise private contributions, thereby reducing the potential for either actual or apparent corruption.

Moreover, the Act's matching funds do not, contrary to the implication of the district court's quotation from *Davis*, "disserve[ ] the anticorruption interest." Under the Millionaire's Amendment at issue in *Davis*, the discriminatory contribution limits could be triggered *only* by excess spending of a candidate's *personal* funds, not by the raising or spending of contributed funds. Thus, by raising potentially corrupting outside contributions instead of relying on personal funds, a candidate would avoid triggering Section 319(a)'s discriminatory contribution scheme. In that sense, Section 319(a), at least theoretically, could disserve the anti-corruption interest by giving candidates an incentive to raise outside contributions rather than spending personal funds. *See Buckley*, 424 U.S. at 53 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed").[9]

[9] Exactly the same may be said of *public* funds as of personal funds: "the use of [public] funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *See Buckley*, 424 U.S. at 53.

Under the Arizona Citizens Clean Elections Act, however, if a candidate's expenditure of personal funds would trigger matching funds, that same candidate's expenditure of funds raised from outside contributors would trigger exactly the same matching funds. There is no benefit to a candidate from spending contributed funds rather than spending personal funds. Thus, unlike Section 319(a) at issue in *Davis*, the Act's matching-funds provisions do not provide any incentive for a candidate to raise potentially corrupting outside contributions rather than spending her personal funds, and those provisions therefore do not "disserve[ ] the anticorruption interest." *See Davis*, 128 S. Ct. at 2773. In short, the district court erred in holding that matching funds are not narrowly tailored to serve a compelling interest.

3. Plaintiffs' Argument That the Act Is Not Narrowly Tailored Because It Is Purportedly Subject To "Gaming Strategies" Is Meritless

Plaintiffs have argued that the Act is not narrowly tailored because, they claim, matching funds could enable participating candidates to engage in "gaming strategies" that would disadvantage their non-participating opponents. The argument is meritless.

First, Plaintiffs speculate about a strategy, so-called "reverse targeting," whereby independent-expenditure committees might generate

matching funds for a candidate they favor by running advertisements that appear to support, but in fact harm, the candidate they oppose. But Plaintiffs 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 through such a reverse-targeting strategy or even that advertisements were motivated by such a strategy. (*See also* ER 675 (stating that matching funds were not issued in two instances where Plaintiffs have claimed reverse targeting occurred)).

Second, Plaintiffs relied on the purported opportunity for participating and non-participating candidates in multi-seat primary elections to engage in "teaming strategies," whereby those candidates would coordinate their expenditures to generate matching funds for the participating member of the "team," to the disadvantage of a non-participating candidate who is not a team member. Plaintiffs cited two instances in which, they claimed, such a teaming strategy had been employed for the 2008 election.

Since then, 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). To the extent teaming strategies could have created any issue about the tailoring of the Act, the Amended Rules fully address that issue.

But even without the Amended Rules, the Act is narrowly tailored to advance Arizona's compelling interests. The Supreme Court has never held that a campaign-finance system must be 100% 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. FEC*, 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). As the Court explained in *Buckley*,

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that 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.

424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)) (internal citations and quotations omitted)).

In sum, the evidence shows that Arizona's Clean Elections system has achieved its goals. Since the passage of the Act, campaign speech in Arizona has increased; for example, the percentage of state Senate incumbents facing a competitive election nearly tripled, and fewer races go uncontested. (ER 6234.21). Nearly two-thirds of Arizona candidates now run as participating candidates who may "vote [their] conscience[s]" once elected without feeling beholden to those who financed their campaigns, (ER 5671), and who are relieved of the need to raise private contributions. *See generally Buckley*, 424 U.S. at 92-96 (discussing the anti-corruption effects of public financing). Importantly, the State has not experienced the repeat of a drastic political pay-to-play scandal such as the AzScam scandal which prompted passage of the Act.

D. Matching Funds Easily Satisfy Intermediate Scrutiny

The district court's analysis of the Act's tailoring was doubly wrong, for it both mistakenly adopted narrow tailoring as the relevant standard and then incorrectly determined that the standard was not met. For the same reasons matching funds are narrowly tailored, they easily satisfy the tailoring requirement of intermediate scrutiny[10]—*i.e.*, that there be a "substantial relation" or "relevant correlation" between matching funds and a "sufficiently important"[11] government interest. *See Citizens United*, 2010 WL 183856 at * 37; *Buckley*, 424 U.S. at 64.

Moreover, even if matching funds failed narrow tailoring, which they do not, they easily satisfy the tailoring requirement of intermediate scrutiny. The Supreme Court has indicated that the "substantial relation" test is substantially less searching than narrow tailoring. For example, even when it appears the law may have a speech-burdening "result that [was] hardly . . . intended" and where there is no evidence that the enacting body "focused

[10] If the Court determines that matching funds withstand strict scrutiny, it need not decide what level of scrutiny should apply since under either intermediate or strict scrutiny, the law would be constitutional. *See Nat'l Assoc. of Mfrs. v. Taylor*, 582 F.3d 1, 11, 20 (D.C. Cir. 2009).

[11] Of course, the government's compelling interests in combating corruption and its appearance and providing the electorate with more information about candidates have also been identified as "sufficiently important" interests. *See Buckley*, 424 U.S. at 66.

carefully on the appropriate" thresholds, the Court has declined to second-guess these "necessarily . . . judgmental decision[s]." *Buckley*, 424 U.S. at 83. "Because narrow tailoring is not required" under the "substantial relation" test, "the state need not show that the Act achieves its purposes in the least restrictive manner possible." *Leake*, 524 F.3d at 439. As this Court recently said in applying the "substantial relation" test, "[t]he question . . . becomes whether [the challenged law] is '*wholly without rationality*.'" *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (emphasis added) (quoting *Buckley*, 424 U.S. at 83) (striking down disclosure law as applied to *de minimis* in-kind expenditures in a ballot measure campaign because the insignificant public interest in the information did not justify the burden of requiring disclosure); *see also 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)).

Plaintiffs have offered no evidence or argument that matching funds are "wholly without rationality" as a means to serve the settled interest in encouraging participation in public financing. As detailed above, the testimony of experts, candidates, and political consultants and the First

Circuit's opinion in *Daggett* all recognize that matching funds promote candidate participation in the public-funding option. Plaintiffs' claim that there is a lump-sum alternative (or any other alternative for that matter) to matching funds—a claim that fails for lack of evidence for purposes of narrow tailoring—simply has no viability as a matter of law under the "substantial relation" test. *See Leake*, 524 F.3d at 439. Thus, even if a factual issue existed sufficient to preclude summary judgment for Defendants under a narrow-tailoring test, which it does not, summary judgment is still warranted for Defendants under the "substantial relation" test of intermediate scrutiny.

III. Matching Funds Do Not Violate The Equal Protection Clause

Plaintiffs' equal-protection challenge to matching funds fails as a matter of law. Although the district court did not decide Plaintiffs' equal-protection challenge, it expressed skepticism about Plaintiffs' claims that they suffer discrimination by way of matching funds. (ER 7 ("The Court is unable to conceive of how an award of matching funds 'discriminates' against [Plaintiff]"); *id.* at 8 ("Discrimination in a general sense requires that two individuals or groups be treated differently by the government. [Plaintiffs] have not explained how they have been legally disfavored by the government in comparison to participating candidates.")

The district court's skepticism comports with established law rejecting virtually identical challenges.[12] In *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993), the First Circuit aptly explained why providing a choice between two campaign-finance options, each with its own particular set of benefits and burdens, does not give rise to an equal-protection claim:

> First, the statute does not impose unequal treatment but gives candidates an authentic choice. Second, the statute treats candidates differently on the basis of their actions rather than their beliefs—actions which, as we have seen, possess differing implications for the integrity and effectiveness of the electoral process. The equal protection clause does not interdict such classifications.

Id. at 40 n. 17; *see also Buckley*, 424 U.S. at 95 (upholding against equal-protection attack a system that actually excluded minority party candidates); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (rejecting equal-protection challenge to election law and observing that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike").

Plaintiffs' equal-protection challenge must fail for the same reasons. When one candidate chooses to accept public financing, he or she is no longer similarly situated to a candidate who chooses private financing, and

[12] Of course, the fact that matching funds are narrowly tailored to serve at least two compelling interests, as discussed above, provides an independent basis for rejecting Plaintiffs' equal-protection challenge.

no constitutional concerns are raised by treating the differently-situated candidates differently. To hold otherwise would conflict with the Supreme Court's longstanding holding that the government may impose differing restrictions on candidates depending on whether they choose to accept public funding. *See Buckley*, 424 U.S. at 57 n. 65 (The legislature "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. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.").

CONCLUSION

The district court erred in granting summary judgment to Plaintiffs and denying summary judgment to Defendants. Even under strict scrutiny, there is no genuine issue of material fact that matching funds are narrowly tailored to serve a compelling government interest; alternatively, under the appropriate intermediate level of scrutiny, there is no genuine dispute that matching funds satisfy the "substantial relation" test. Accordingly, this Court should reverse and remand with instructions to the district court to enter summary judgment in Defendants favor. Alternatively, the Court should reverse and remand for consideration of the summary judgment

motions in light of the appropriate intermediate level of scrutiny. *See Lincoln Club*, 292 F.3d at 934 (reversing grant of summary judgment and remanding the case to the district court for further consideration in light of the appropriate level of scrutiny). At the very least, the Court should reverse the grant of summary judgment and remand for trial of any genuine issues of material fact that the Court concludes prevent it from granting summary judgment in Defendants' favor.

DATED: March 17, 2010

Respectfully submitted,

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DATED: March 17, 2010

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STATEMENT OF RELATED CASES

Appellants are not aware of any related cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached corrected opening brief is proportionately spaced, has a typeface of 14 points, and contains 12,781 words.

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