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

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply intermediate scrutiny to Arizona's triggered matching funds provision after finding that this provision does not limit campaign expenditures and imposes only a minimal burden on spending, in light of this Court's holdings in *Buckley v. Valeo* and *Citizens United v. FEC* that intermediate scrutiny applies to disclosure laws that do not limit but may place significant burdens on campaign expenditures?

2. Did the Court of Appeals correctly follow *Buckley* in holding that Arizona's triggered matching funds provision survives intermediate scrutiny because it bears a "substantial relation" to Arizona's sufficiently-important interest in combating *quid pro quo* corruption while protecting the public fisc, where the record established that, without triggered matching funds, participation in Arizona's public funding system would drop and the effectiveness of the system at preventing corruption would therefore decline?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Clean Elections Institute, Inc. ("CEI") has no parent company and no publicly held company owns 10 percent or more of CEI.

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INTRODUCTION

Under Arizona's public financing law, candidates who choose public financing are given a small initial grant and may thereafter be entitled to additional public funding that is triggered by contributions to or expenditures by their privately financed opponents and independent political committees ("triggered matching funds").[1] The Court of Appeals held that Arizona's triggered matching funds provision is subject to intermediate scrutiny and is constitutional because it bears a substantial relation to Arizona's important interest in reducing actual and apparent corruption. Neither Petition addresses the Ninth Circuit's rationale for applying intermediate scrutiny or makes any serious argument that Arizona's law does not survive that level of scrutiny.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), and again in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), this Court recognized that disclosure requirements, while capable of discouraging political spending, place no limit on expenditures. Accordingly, in both cases, the Court declined to apply strict scrutiny to assess particular disclosure rules and instead held that intermediate scrutiny is proper. Similarly, the Court of Appeals here correctly

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[1] Triggered matching funds are different in kind from provisions in other systems, such as the presidential primary public financing system, in which public grants are provided to publicly funded candidates based on small contributions *to those candidates themselves*, usually in the form of a one to one or greater ratio, and which are sometimes also referred to as "matching funds."

recognized that, even if triggered matching funds are capable of imposing some minimal strategic burden on Petitioners' spending, *Buckley* and *Citizens United* require application of intermediate scrutiny to this provision. Petitioners do not explain why the Ninth Circuit should have disregarded *Buckley* and *Citizens United* or treated triggered matching funds differently than disclosure requirements.

The Court of Appeals also correctly held that this Court's decision in *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (2008), which struck down a scheme of discriminatory contribution limits in a system of purely private financing, does not control the proper level of scrutiny for Arizona's triggered matching funds provision in an overall scheme that offers public and private fundraising. Petitioners attempt to create a post-*Davis* circuit split on the constitutionality of the Arizona model based on the Second Circuit's decision in *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010) and the Eleventh Circuit's decision in *Scott v. Roberts*, 612 F.3d 1279, 1290-98 (2010). Neither *Scott* nor *Green Party*, however, addressed the constitutionality of a system like the Arizona model. Moreover, the public funding programs at issue in those cases were very different from Arizona's and from each other, in ways that are significant to the constitutional analysis.

In *Scott*, the Eleventh Circuit granted a preliminary injunction against a Florida campaign statute that provided triggered matching funds to candidates who were also permitted to raise the same potentially corrupting private contributions as their fully privately financed opponents. *See Scott*, 612 F.3d at 1290-98. Unlike the Arizona approach, Florida's law did not provide a complete alternative

to private fundraising and its attendant risks of corruption. Rather, Florida supplemented potentially corrupting private contributions with public funds and arguably treated one set of privately financed candidates differently than another set of privately funded candidates. Whatever the merits of such an approach, it is fundamentally different from the model adopted by Arizona voters and upheld by the Ninth Circuit.

The Connecticut law at issue in *Green Party* combined triggered matching funds with an initial grant that, standing alone and without any additional funds, equaled the average amount spent on *competitive* races in previous elections. *See Green Party of Connecticut v. Garfield*, 616 F.2d at 219-21. Connecticut's particular financing structure distinguishes it from the Arizona model of low initial disbursements combined with triggered matching funds as necessary in competitive races. If, as the Second Circuit found, the initial funding amount in Connecticut was sufficient to run a competitive campaign, that might raise questions about whether Connecticut's triggered matching funds: (1) were necessary to encourage participation in public funding, (2) operated to truly expand speech, and (3) were carefully designed to protect the public fisc. No such questions can be raised about the Arizona model.

In short, *Scott* and *Green Party* did not address the constitutionality of the Arizona model of public funding, in which triggered matching funds are instrumental to protecting the state's limited resources while encouraging participation in a system that reduces both the reality and appearance of *quid pro quo* corruption. Although the three circuits may have employed different reasoning, their holdings are

reconcilable. The Court should deny the petitions and allow states like Arizona to continue to serve as laboratories for innovative campaign finance reforms

STATEMENT OF THE CASE

I. THE CITIZENS' CLEAN ELECTIONS ACT

For over a decade, Arizona's unique voter-enacted Citizens' Clean Elections Act (the "Act") has promoted free speech and helped combat corruption and the appearance of corruption in Arizona government, while protecting the public fisc. The Act offers candidates a carefully tailored public funding alternative to the traditional approach of raising potentially corrupting private contributions.

The Act, which was passed in 1998, is the Arizona electorate's carefully considered response to one of the worst state-level corruption scandals in this nation's history. In the early 1990s, elected officials in Arizona were caught on tape accepting campaign contributions and bribes in exchange for agreeing to support gambling legislation. (ER 3247-49, 5556-60, 5576-96).[2] AzScam, as the scandal came to be known, received widespread coverage, including newspaper headlines like "Videotapes Show Payoffs" and candid quotes from state legislators such as "We all have our prices," "I sold way too cheap," and "There's not an issue in this world I give a [expletive] about." (ER 3247-49, 5576-81). Unsurprisingly, AzScam fostered a widespread perception of political corruption, even among state capitol insiders. Arizona voters, for example, read post-AzScam reports that 100% of journalists, 66% of legislative staffers, and 42% of legislators and lobbyists believed that most major contributors received special advantages from legislators. (ER 5603-5608).

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[2] "ER" refers to "Appellants' Excerpts of Record" filed before the Ninth Circuit.

AzScam occurred five years into Arizona's experiment with a campaign finance system based on contribution limits. Ariz. Rev. Stat. § 16-905 (2010) (historical note). As AzScam demonstrated, those contribution limits proved insufficient, by themselves, to prevent actual incidences of *quid pro quo* corruption and the public appearance of corruption. In the years following AzScam, the public received yet more evidence that contribution limits alone would not prevent improper acts in Arizona. For example, just months before the adoption of 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. (ER 5641).

As the plain language of the Act makes clear, Arizona voters passed the Act in response to their finding that the then-existing "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5) (2010). The Act was intended 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) (2010).

Under the Act, in exchange for agreeing to abide by expenditure limits, forgo potentially corrupting private fundraising, and participate in public debates, candidates who qualify by collecting a specified number of five-dollar contributions (to demonstrate a base of support among voters) can receive public funding for their statewide and state

legislative campaigns. Ariz. Rev. Stat. §§ 16-941, 16-945, 16-946, 16-950, 16-956(A)(2) (2010).

Arizona's model for distributing limited state monies to candidates who choose public funding is innovative and thoughtfully designed. 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. 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, or if the publicly funded candidate is targeted by independent expenditures, the publicly-funded candidate receives additional triggered matching funds up to twice the amount of the initial grant. § 16-952(A), (C)(1)-(2), (E) (2010).

At deposition, 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." (ER 5648). Prior to the Act, over 80% 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. (ER 5649). The Act's drafters faced a dilemma. 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." (ER 5650). 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 work in Arizona. By combining low initial disbursements with the potential to trigger additional 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." (ER 5651).

In short, by assuring candidates that they will have enough funds to run viable campaigns in competitive races, Arizona's model encourages participation in the public-funding system and thereby reduces the potential for *quid pro quo* corruption or its appearance. At the same time, Arizona's approach protects the public fisc against unnecessarily high public-funding grants in races that are not competitive.

II. THE LAWSUIT, DISCOVERY, AND THE LOWER COURT DECISIONS

A. The Complaints

Petitioners are non-participating candidates and independent spenders who are ideologically opposed to public financing in all its forms. Although this Court has long held that public financing "furthers, not abridges, pertinent First Amendment values," *Buckley*, 424 U.S. at 92-93, Petitioners allege that the Act's triggered matching funds provision, which provides additional monies for campaign speech, violates the First Amendment. Petitioners do not and cannot allege that the Act prohibits them from spending as much as they want in support of their campaigns; the Act does not limit expenditures by either non-participating candidates or independent expenditure committees. Petitioners assert instead

that the potential that their spending might trigger matching funds for publicly funded opponents has a chilling effect on their speech. Petitioners allege also that the triggered matching funds provision violates the Equal Protection Clause.

B. Triggered Matching Funds Have Not Chilled Speech

Despite having access to both incumbent officeholders and candidates in Arizona and having conducted extensive discovery, Petitioners did not uncover evidence of any chilling effect from triggered matching funds during the decade that they have been in effect. In fact, discovery revealed that Petitioners and other traditionally funded candidates did not spend less money on their campaigns because of triggered matching funds. Rather, they regularly exceeded the triggered matching funds threshold. For instance, Senator Robert Burns[3] testified that while running for office he paid no attention to his opponents' receipt or expenditure of triggered matching funds. (ER 5687-90.) In 2008, Senator Burns and independent groups spent freely above the threshold for triggering matching funds for his opponents, resulting in $28,250 of triggered matching funds to finance additional speech. (ER 1540.) Representative Richard Murphy conceded at deposition that triggered matching funds never led him to turn away a contribution, and his campaign consultant testified that Murphy never stopped

[3] Senator Burns was a Plaintiff-Intervenor below. According to Petitioners, because Senator Burns is not running for re-election, he is not a Petitioner in this case.

fundraising out of fear of triggering matching funds. (ER 1554, 1635.)[4]

Expert Donald Green, Director of the Institute for Social and Policy Studies at Yale, found that triggered matching funds do not have an effect on candidate spending in Arizona. Professor Green reported that spending by traditionally funded candidates with participating opponents does not cluster just below the triggering threshold of $17,918, which is the spending pattern that would be expected if triggered matching funds had actually chilled their spending—that is, non-participating candidates would be expected to spend up to, but not beyond, the triggering threshold. (ER 5905, 5920.) Rather, of the 46 traditionally funded legislative candidates who faced a 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 triggered matching funds; and 6 candidates spent well above the threshold, showing that they were not deterred by triggered matching funds. (*Id*.) Only one candidate spent between $15,000 and $26,000. (*Id*.) In sum, the factual and expert evidence in this case revealed that triggered matching funds do not in fact suppress candidate spending in Arizona.

Based on the extensive factual record developed during discovery, Petitioners and Respondents filed

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[4] As noted below, the Court of Appeals' opinion identifies extensive additional record evidence that established that the triggered matching funds had no chilling effect on Petitioners' speech. *McComish v. Bennett*, 611 F.3d 510, 517-19 (9th Cir. 2010).

four separate cross motions for summary judgment, which were accompanied by 23 declarations and over 4,500 pages of evidentiary submissions. These motions sought judgment on Petitioners' First Amendment and Equal Protection claims.

C. The District Court's Summary Judgment Findings And Ruling

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." (ER 7.) The court further found that the Act's supposed "burden" was "that [Petitioners'] speech will lead directly to more speech." As the court correctly noted, "it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on [Petitioners]." (ER 14.)

The district court nonetheless concluded that this Court's decision in *Davis*, although it did "not answer the precise question" raised by the Petitioners, "require[d] [the district court to] find [Petitioners] 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 of Arizona'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 triggered matching funds]." (ER 17.)

While it reached the merits of Petitioners' First Amendment claim, finding in favor of the Petitioners, the district court declined to decide the merits of Petitioners' Equal Protection claim. On January 21,

2010, the district court entered judgment for Petitioners.

D. The Court Of Appeals' Findings And Ruling

Respondents appealed the district court's grant of summary judgment for Petitioners to the United States Court of Appeals for the Ninth Circuit. On May 21, 2010, after considering the parties' written and oral submissions, and the over 6,300-page record, the court unanimously held that Arizona's triggered matching funds provision does not violate the First Amendment. The panel's thorough and carefully reasoned 31-page decision included a separate concurrence by Judge Kleinfeld.

The principal opinion found that the Act should be subject to intermediate, not strict, scrutiny because it "imposes only a minimal burden on First Amendment rights." *McComish*, 611 F.3d at 513, 525. The court then found that the Act "survives intermediate scrutiny because it bears a substantial relation to the State's important interest in reducing *quid pro quo* political corruption [and the] appearance of *quid pro quo* corruption to the electorate . . ." *Id*.

In reaching its conclusion that the Act imposes only a minimal burden on speech, the Court of Appeals "agree[d] with the district court's observation that 'Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.'" *Id*. at 517-18. The Court of Appeals also pointed to specific instances in the record where, for example, Plaintiffs had testified that they had been willing to trigger matching funds in previous elections, could not recall whether they had triggered matching funds, or had their testimony contradicted by their own campaign consultants. *Id*. at 518-519.

The Court of Appeals held that the "burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*" to which this Court had applied intermediate scrutiny. *Id*. at 525. The Court of Appeals also considered at length and rejected Plaintiffs' contention that *Davis*, a case about discriminatory contribution limits, decided the fate of triggered matching funds. *Id*. at 521-524.

The principal opinion declined to reach the Equal Protection claim in the first instance and remanded the case to the district court for further proceedings. *Id*. at 527.

In his concurring opinion, Judge Kleinfeld reasoned that the Act "imposes no limitations whatsoever on a candidate's speech" and found that *Davis* was "easily distinguished." *Id*. at 527. Thus, Judge Kleinfeld concluded that it was unnecessary to apply even intermediate scrutiny to the Act. *Id*. at 529.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY APPLIED WELL-ESTABLISHED LAW IN HOLDING THAT ARIZONA'S TRIGGERED MATCHING FUNDS PROVISION WITHSTANDS INTERMEDIATE SCRUTINY

A. The Court Of Appeals Followed *Buckley* and *Citizens United* In Applying Intermediate Scrutiny

The Court of Appeals' decision is faithful to this Court's existing precedents regarding campaign finance regulation. Although Petitioners essentially ignore this fact, the Court of Appeals squarely relied on this Court's decisions in *Buckley* and *Citizens United* in holding that triggered matching funds are

subject to intermediate scrutiny. *McComish*, 611 F.3d at 524-25. Application of strict scrutiny here, which Petitioners urge, would create inconsistency—namely, that different levels of scrutiny would be applied to laws with similar First Amendment effects. The Court of Appeals correctly rejected this incoherent approach to campaign finance law.

Triggered matching funds indisputably place no ceiling on campaign spending. Petitioners and other non-participating candidates and independent expenditure committees in Arizona remain free to spend as much as they choose in order to advocate their positions.

The most Petitioners can and do 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. But neither the district court nor the Court of Appeals found evidence supporting the supposed chilling effect of the triggered matching funds—that candidates or committees actually make that choice in the real world. 611 F.3d at 524 ("Plaintiffs have not demonstrated that any chilling effect exists."); Pet. App. at 54 ("Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act.").[5]

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[5] Presumably, there was no evidence of any chilling effect because a speaker would not be deterred by matching funds unless he believed his message was less persuasive than his opponent's. If he believes his message is *more* persuasive, he (like voters) should always prefer more speech by both candidates over less speech by both.

Nevertheless, giving Petitioners the benefit of the doubt, the Court of Appeals assumed that the potential but unproven chilling effect of triggered matching funds imposed a minimal burden on spending. *McComish*, 611 F.3d at 525. Based on the level of scrutiny that this Court had consistently applied to campaign finance disclosure and disclaimer provisions, which may impose minimal burdens similar to those assumed to flow from triggered matching funds, the Court of Appeals concluded that triggered matching funds are subject to intermediate scrutiny.

In so holding, the Court of Appeals correctly applied this Court's campaign finance doctrine. This Court has held that contribution and expenditure disclosure requirements, which may burden or deter speech, are subject to intermediate scrutiny. *Buckley*, 424 U.S. at 64-68, 80-81; *Citizens United*, 130 S. Ct. at 914. In considering the constitutionality of the Federal Election Campaign Act's ("FECA's") disclosure provisions, this Court in *Buckley* assumed that such provisions might 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," and that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 65, 66. The Court nevertheless held that the burdens of disclosure are lesser in magnitude to the burden of an expenditure limit because "disclosure requirements impose no ceiling on campaign-related activities." *Id*. at 64. Accordingly, the Court applied intermediate scrutiny, inquiring into whether FECA's disclosure provisions exhibited a "substantial relation between"

a "sufficiently important" governmental interest "and the information required to be disclosed." *Id*. Although Petitioners contend that *any* burden on expenditures (no matter how slight) results in strict scrutiny, that contention is squarely refuted by the *Buckley* Court's application of intermediate, not strict, scrutiny to FECA's disclosure provisions with respect to expenditures. *Id*. at 80.

For over three decades, this Court has reaffirmed that campaign finance laws that do not cap spending but may nevertheless cause a party to strategically choose not to make expenditures is subject to intermediate, rather than strict, scrutiny. *See Citizens United*, 130 S. Ct. at 914. Just last term in *Citizens United*, this Court subjected the Bipartisan Campaign Reform Act's ("BCRA's") disclaimer and disclosure provisions concerning expenditures to intermediate scrutiny. *Id*. *Citizens United* reasoned that "[d]isclaimer 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.'" *Id*. (quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003)).

Here, the Court of Appeals correctly relied on *Buckley* and *Citizens United* in selecting intermediate scrutiny:

> In this case, as in *Buckley* and *Citizens United,* the burden that Plaintiffs allege is merely a theoretical chilling effect on donors who might dislike the statutory result of making a contribution or candidates who may seek a tactical advantage related to the release or timing of matching funds. The matching funds provision does not actually prevent anyone from speaking in the first place or cap campaign

> expenditures. Also, as in *Buckley* and *Citizens United*, there is no evidence that any Plaintiff has actually suffered the consequence they allege the Act imposes. We conclude that the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United.* Following the Supreme Court's precedents in those cases, because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies.

611 F.3d at 525.

Petitioners do not challenge the Court of Appeals' reliance on *Citizens United* and *Buckley* or its well-reasoned analogy between the burden of disclosure laws and the assumed burden of triggered matching funds. Because, as explained below, Petitioners make no serious attempt to argue that Arizona's triggered matching funds provision fails intermediate scrutiny, their petitions should be denied.

B. The Court of Appeals Correctly Interpreted *Davis* As A Case About Discriminatory Contribution Limits Which Did Not Resolve The Constitutionality Of Arizona's Triggered Matching Funds Provision

Overlooking the Court of Appeal's reasoning, Petitioners urge this Court to apply strict scrutiny based on Petitioners' reading of *Davis*. McComish Pet. at 32-35; Freedom Club PAC Pet. at 29-34. The Court of Appeals appropriately rejected Petitioners' misinterpretation of *Davis*.

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*, 128 S. Ct. at 2766. Specifically, Section 319(a) provided that, once a privately funded candidate spent more than $350,000 of personal funds on his or her campaign[6] in any particular race, 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 rather than other private funds, *Davis* concluded that the law resulted in an "unprecedented penalty" that was subject to strict scrutiny and unsupported by any compelling interest. *Id*. at 2771.

Davis is properly understood as a case about the unconstitutionality of a particular type of penalty—an "asymmetrical" and "discriminatory" contribution limit that treated similarly situated, privately funded candidates differently merely because of one's personally funded expenditures. *Davis* did not involve either public funding or triggered matching funds; and the *Davis* Court therefore did not examine whether triggered matching funds within a public funding program burden spending. Accordingly, *Davis* provides no guidance on the extent of any burden posed by trigger provisions, the appropriate level of scrutiny a court should use to assess such

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[6] This amount was subject to certain adjustments.

provisions, or the compelling anti-corruption interests served by public financing schemes.[7]

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[7] 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 that struck down a Minnesota law that increased expenditure limits and public subsidies for candidates who were opposed by 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 expressly explained that, in *Day*, the state's asserted interest in incentivizing 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* in *dicta* only for the proposition that Section 319(a) imposed a "potentially significant burden." *Davis*, 128 S. Ct. at 2772. "In so citing *Day*, *Davis* did not affirm or adopt the Eighth Circuit's approach." *McComish*, 611 F.3d at 523 n.9. 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

The Court of Appeals appropriately held that *Davis*'s analysis of discriminatory contribution limits in a purely private financing scheme does not determine the appropriate level of scrutiny for a system of voluntary public financing with triggered matching funds. *McComish*, 611 F.3d at 521-23. Arizona's system does not discriminate among similarly situated candidates. Instead, Arizona offers all candidates an initial choice between two systems of financing, each with its own particular set of regulatory benefits and burdens. It is true, of course, that Arizona offers triggered matching funds only to publicly financed candidates; but it does so because only these candidates are precluded from raising additional private funds in competitive races. As *Buckley* held, and as the Court of Appeals recognized, when candidates are given a choice between a public and private financing option, the government need not subsidize candidates who choose a system of unlimited private fundraising and spending. *Buckley*, 424 U.S. at 97; *McComish*, 611 F.3d at 522.

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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 intermediate, rather 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.

C. The Court Of Appeals Appropriately Held That Arizona's Triggered Matching Funds Withstand Intermediate Scrutiny Because They Further The State's Compelling Anti-Corruption Interest

The Court of Appeals' determination that triggered matching funds survive under intermediate scrutiny was faithful to this Court's campaign finance doctrine. *See McComish*, 611 F.3d at 525-27.

In applying intermediate scrutiny, this Court has asked whether the challenged law bears a "substantial relation" or "relevant correlation" to a "sufficiently important" governmental interest. *See Buckley*, 424 U.S. at 64; *accord Citizens United*, 130 S. Ct. at 914. There is no doubt that combating corruption qualifies as a "sufficiently important" interest. *Buckley*, 424 U.S. at 66. Indeed, *Buckley* expressly found that "[it] cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id*. at 96.[8]

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[8] The Court of Appeals correctly recognized that "one of the principal purposes of the Act was to reduce *quid pro quo* corruption." *McComish*, 611 F.3d at 515-16. Neither petition challenges this finding. Ignoring *Buckley's* recognition that public financing furthers this anti-corruption interest, Petitioners spend much of their briefs arguing that one purpose of public financing is to "level the playing field." McComish Pet. at 29-30. But Arizona's law does not impermissibly "level the playing field" by restricting some candidates' spending. Instead, as contemplated

Thus, the only element of the intermediate scrutiny analysis not resolved directly by this Court's precedent is whether triggered matching funds bear a "substantial relation" or "relevant correlation" to

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by the *Buckley* Court, it "substitutes public funding for what the parties would raise privately." 424 U.S. at 96, n.129. Under a system of private financing, a candidate who engaged in high levels of expenditures would expect her opponent to respond with renewed levels of fundraising. The Arizona Act simply provides publicly financed candidates—who have chosen to forgo private contributions—a similar ability to run a viable campaign against privately financed candidates, although the publicly financed candidate is still subject to an absolute spending cap. This Court has specifically held that a public financing system may constitutionally provide participating candidates the "enhancement of opportunity to communicate with the electorate." *Buckley*, 424 U.S. at 95. This Court in *Davis* rejected only "[t]he argument that a candidate's speech may be *restricted* in order to 'level electoral opportunities' . . . ." *Davis*, 128 S.Ct. at 2773 (emphasis added). Nothing in this Court's precedents suggests that the First Amendment requires that a publicly financed candidate be unable to engage in the responsive speech that a privately financed candidate would undertake as a matter of course. To be viable, publicly financed candidates must have the ability to respond to escalating spending by her opponent or by outside groups, and triggered matching funds enable the state to provide this ability in a manner sensitive to the demands of the public fisc.

public funding's furtherance of the state's crucial anti-corruption interests. *See Buckley*, 424 U.S. at 64.

Here, the record evidence confirms that triggered matching funds incentivize participation in Arizona's public-funding system, thereby furthering the State's recognized interest in combating corruption and its appearance. As the Court of Appeals correctly reasoned,

> 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. The Court of Appeals' common-sense conclusion that, absent triggered matching funds, participation in public financing would drop was based on undisputed evidence. Specifically, participating candidates, a veteran political consultant, and a firm opponent of Arizona's public-financing system all testified that, absent triggered matching funds, participation in Arizona's public funding program would decline. (E.R. 1479, 5668, 5675-79, 6235-49.)

Petitioners' only argument for striking down triggered matching funds under intermediate scrutiny (raised in a footnote in just one of the petitions) ignores Arizona's actual experience with campaign finance regulations. McComish Pet. at 31 n.1. The McComish Petitioners assert, without analysis, that Arizona's "private campaign financing is already stringently regulated." *Id*. To the extent Petitioners mean to suggest that Arizona's contribution limits are sufficient to protect against corruption, they overlook that Arizona had

contribution limits in place five years before it experienced the AzScam corruption scandal. Ariz. Rev. Stat. § 16-905 (historical and statutory note); *McComish*, 611 F.3d at 514 ("Even with these campaign contribution limits in place, Arizona experienced a series of massive political corruption scandals.").

Fortunately, the First Amendment does not require Arizona to revert to a system that was rife with corruption. Because there is no substantial question that triggered matching funds survive intermediate scrutiny, the Court should deny the Petitions.[9]

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[9] This Court could also deny the petitions on the basis that triggered matching funds are constitutional even under strict scrutiny. Although the Ninth Circuit found it unnecessary to reach this issue, this Court has already held that public funding furthers anti-corruption interests, *Buckley*, 424 U.S. at 96, which qualify as "compelling." *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"). The evidence below established that Arizona had no less restrictive alternative to a public funding system with matching funds. A contribution-limits-only approach had already failed in Arizona, and alternative financing schemes were considered and justifiably rejected as not well-tailored and wasteful. *See* Ariz. Rev. Stat. §16-905 (2010) (historical note). (*See also* E.R. 3247-49, 5556-60, 5576-96, 5603-08, 5641, 5647-52.) In short, Arizona's matching funds are narrowly tailored to serve a compelling interest.

II. THIS IS NEITHER THE RIGHT VEHICLE NOR THE RIGHT TIME FOR THIS COURT TO RESOLVE ANY APPARENT CONFLICT AMONG THE CIRCUITS.

A. There Are Significant Differences Among The Various State Laws That May Directly Affect The Constitutional Analysis.

As explained above, the Ninth Circuit's decision is entirely consistent with and supported by this Court's decisions in *Buckley*, *Davis*, and *Citizens United.* Because Arizona's triggered matching funds provision places no limit on expenditures—unlike the spending limits struck down in *Buckley*; does not discriminate among similarly situated candidates—unlike the law struck down in *Davis*; and places at most an indirect burden on campaign spending—like the disclosure provisions upheld in *Citizens United*—it is subject to intermediate scrutiny. Because there is a substantial relationship between the law and a sufficiently important state interest, it is constitutional.

Petitioners contend that the Court should grant certiorari because, they assert, there is an irreconcilable split among the circuits with respect to application of this Court's decisions in *Davis* and *Citizens United* to state triggered matching funds laws. Petitioners are correct that three Courts of Appeal have recently rendered decisions on the merits of particular trigger provisions in the public funding programs of three different states. To the extent that there may be some differences among the Circuits, however, those differences do not warrant review by this Court.

The public funding laws at issue in the three Circuit court decisions relied upon by Petitioners are,

however, distinct in ways that are relevant to the constitutional analysis.[10] Each has a different mix of benefits and burdens that must be taken into account when assessing both the severity of any First Amendment burden posed by triggered matching funds and the extent to which those provisions advance each state's interests.

The Florida law addressed in *Scott* allows candidates who choose to accept public funding to

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[10] Prior to *Davis*, three federal circuit courts had ruled that public financing trigger provisions pass constitutional muster. *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 490 (2008); *Daggett v. Comm'n on Gov't'l Ethics*, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel,* 101 F.3d at 1552. The First Circuit recently denied an emergency motion for an injunction pending appeal in a case involving a challenge to parts of Maine's campaign finance law, including its matching funds provision. *Respect Maine PAC v. McKee*, No. 10-2119, slip. op. at 3-4 (1st Cir. Oct. 5, 2010). The Court of Appeals held that the plaintiffs had not established that they would suffer an immediate injury, that an injunction issued just weeks before the election would cause "chaos," and that any emergency was of the plaintiffs' making because they had waited until late in the election cycle to bring their suit. *Id*. The Court of Appeals stated that it "cannot forecast what our ultimate judgment on the merits will be" and that the plaintiffs' challenges to Maine's election laws "will require careful analysis, on a fully developed record." *Id*. at 3.

continue to raise private contributions in the same amounts as candidates who do not choose public funding. *Scott*, 612 F.3d at 1285 ("Participating candidates remain subject to the $500 cap on campaign contributions from persons or committees . . . ."). By contrast, in Arizona, once they qualify for and elect public funding, participating candidates are prohibited from accepting private contributions. *McComish*, 611 F.3d at 516. ("If a candidate opts to participate in the public financing system, she or he agrees to forfeit her or his right to fund her or his campaign with private contributions.").

This difference could be significant to the constitutional analysis for at least two reasons. First, under Florida's law, participating and non-participating candidates may be considered more alike from a regulatory perspective than Arizona candidates: both may accept private contributions in the same amounts, like the two types of candidates in *Davis* but unlike the two types in Arizona. Other regulatory differences between the two types of candidates—such as eligibility for triggered matching funds—might, under *Davis*, therefore justifiably be more closely examined in Florida than in Arizona. *See Scott*, 612 F.3d at 1291 ("*Davis* concerned a discriminatory contribution system").

Second, because participating candidates in Florida may continue to raise private contributions *in the same amounts as other candidates*, it may be less obvious that Florida's public funding law—as opposed to Arizona's, which eliminates private contributions to participating candidates—is carefully tailored to further the state's interest in combating actual and apparent corruption. Indeed, the Eleventh Circuit emphasized its skepticism, at the preliminary injunction stage, with respect to precisely this issue.

See Scott, 612 F.3d at 1292 ("The parties have not sufficiently explained how the Florida public financing system furthers the anticorruption interest [because, other than limiting expenditures and providing public money,] the system enables candidates who run campaigns that are indistinguishable from the campaigns of nonparticipants . . . ."); 1293 ("The limit on general campaign expenditures . . . does not appear to enable candidates who are, or who may be perceived as being, less corrupt than their nonparticipating peers . . . [E]very candidate for public office, whether participating or not, is subject to a $500 limit on campaign contributions."); 1294 ("Florida could encourage participation to virtually the same degree that it maintains it currently does by doing no more than releasing participating candidates from the expenditure ceiling.").

By contrast, as the Ninth Circuit found after full discovery and summary judgment briefing, because Arizona's law largely prohibits participating candidates from accepting private contributions, there is no doubt that it furthers the state's interest in reducing actual and apparent corruption. *See McComish*, 611 F.3d at 526 ("In exchange for public funding, participating candidates relinquish their right to raise campaign contributions from private donors. They therefore have both reduced opportunities and reduced incentives to trade legislative favors for financial favors."); *id*. ("The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution

and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.").

Connecticut's public funding law is also different from Arizona's in a way that is potentially significant to the constitutional analysis of the triggered matching funds. While Connecticut's law prohibits participating candidates from accepting private contributions, it provides participating candidates with "full" public grants once they have qualified. *Green Party*, 616 F.2d at 220-21. The district court and the Second Circuit in *Green Party* found that those initial, full public grants were "'based on the average expenditures in the most competitive races.'" *Green Party*, 616 F.2d at 240 (quoting *Green Party of Connecticut v. Garfield*, 648 F. Supp. 2d 298, 338 (D. Conn. 2009)); *see also id.* at 240 ("It is true that the CEP's grant amounts and expenditure limits were based on historic expenditures in *competitive* districts") (emphasis in original). In the 2008 election cycle, no privately financed candidate's spending reached the threshold for triggering matching funds in Connecticut, confirming that publicly funded candidates in Connecticut had sufficient funding to finance competitive campaigns even without any additional funds. *Green Party*, 648 F. Supp. 2d at 415-44 (expenditure tables). The Connecticut Legislature apparently decided that it could afford to provide participating candidates at the outset with initial, "full" grants that would enable them to run competitive campaigns in just about any race, without regard to additional triggered matching funds.

By contrast, Arizona's electorate took an approach that is much more fiscally conservative. As explained above, Arizona initially provides a participating candidate with only *one-third* (1/3) of a "full" public

grant—the amount presumptively needed to run a competitive campaign, at least in many districts. Arizona then uses triggered matching funds, based on actual events during the campaign, to calibrate the overall public grant to the competitiveness of the campaign. Arizona uses actual contributions and spending as a proxy for the competitiveness of a particular race, and it then adjusts its public grants in dynamic fashion (using triggered matching funds) accordingly, in order to ensure that participating candidates can run competitive campaigns while not wasting public money. *See McComish*, 611 F.3d at 527 ("By linking the amount of public funding in individual races to the amount of money being spent in these races, [Arizona] 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.").

This difference between Connecticut's and Arizona's laws is relevant to the constitutional analysis for three reasons. First, if, as the district court in *Green Party* found, under Connecticut's law almost all participating candidates would have sufficient money from their initial grants alone to run competitive campaigns, there may be reason to scrutinize the legislative purpose behind triggered matching funds more carefully than where, as in Arizona, it is beyond doubt that triggered matching funds are necessary to assure candidates that, if they elect public financing, they will have enough money to run a competitive campaign. *See id.* at 526 ("In order to promote participation in [Arizona's] program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that

participating candidates will be able to mount competitive campaigns . . . .") Second, if a participating candidate has already been given presumptively sufficient funds for a competitive campaign, providing her with more public money based on others' spending might be viewed as less essential for enabling responsive speech and therefore advancing First Amendment values. This is unlike Arizona where, as the Ninth Circuit found, triggered matching funds were necessary to enable responsive speech. *See* 611 F.3d at 524 ("The essence of [Petitioners'] claim is . . . that the speech of their opponents has been enabled. We agree . . . that . . . the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources." (internal quotations and citations omitted)). Third, if, as the district court in *Green Party* found, Connecticut's initial grants give candidates *more* money than they historically could have raised or spent, Connecticut would have a weaker argument than Arizona that its triggered matching funds provision works to protect the public fisc. *See Green Party*, 648 F. Supp. 2d at 373 (rejecting, on this basis, "state's claim that the matching funds are necessary to prevent against wasting the public fisc with high initial grant amounts").

These fundamental differences among the laws at issue in *Scott*, *Green Party*, and this case militate against this Court's granting certiorari. There is no clearly irreconcilable conflict among the results reached by the Second, Ninth, and Eleventh Circuits with respect to the various laws addressed by them. Particularly given that many other states are experimenting with these and still other types of public funding programs, *see infra*, and that only a

few courts have yet had the opportunity to consider the operation and effects of such laws, this Court should refrain from addressing the important but difficult issues raised by them at this time.

B. States Are Continuing To Experiment With Creative Ways In Which To Implement Public Financing Of Elections While Being Fiscally Responsible.

Many states have adopted or are considering adopting various forms of public financing of elections, some of which (in addition to Arizona, Connecticut, and Florida) include matching funds triggered by contributions or expenditures. *See* Neb. Rev. Stat. § 32-1606(1) (2010) (triggered matching funds for Nebraska elections for public office); N.M. Stat. Ann. § 1-19A-14 (West 2010) (triggered matching funds for New Mexico elections for public regulation commissioner and offices of the judicial department subject to statewide elections); N.C. Gen. Stat. Ann. § 163-278.67(a) (West 2010) (triggered matching funds for elections for North Carolina Supreme Court justice and North Carolina Court of Appeal judges); W. Va. Code Ann. §§ 3-12-1–3-12-17 (2010) (pilot program providing for triggered matching funds for elections for the office of Justice of the West Virginia Supreme Court of Appeals); Wis. Stat. Ann. § 11.512(2), 11.513(2) (West 2009) (triggered matching funds for Wisconsin Supreme Court justice elections); Albuquerque, N.M., Charter of the City of Albuquerque art. XVI, § 16 (2009) (triggered matching funds for Albuquerque, New Mexico elections for mayor and city council); Chapel Hill, N.C., Code of Ordinances §§ 2-95(a)–(b) (2010) (triggered matching funds for Chapel Hill, North Carolina elections for mayor and city council); L.A.,

Cal., Municipal Code § 49.7.20(A) (2007) (triggered matching funds for Los Angeles, California elections for mayor, city controller, city attorney, and city council); New Haven, Conn., Code of Ordinances § 2-825(c) (2010) (triggered matching funds for New Haven, Connecticut elections for mayor); N.Y., N.Y., New York City Administrative Code § 3-706(3) (2007) (triggered matching funds for New York City elections for mayor, public advocate, comptroller, borough president, and city council); Portland, OR, City Code § 2.10.145 (2009) (triggered matching funds for Portland, Oregon elections for public office). *See also* R.I. Gen. Laws § 17-25-24 (allowing participants to raise additional private contributions and make additional expenditures if their traditionally-funded opponent's expenditures exceed the maximum allowable expenditure limit for candidates receiving public funds); Vt. Stat. Ann., tit. 17, § 2855 (providing public funding grants for qualifying candidates for governor and lieutenant governor in Vermont without triggered matching funds but with a limited continued ability to fundraise); 2010 Haw. Sess. Laws, Act 211 (providing for public funding for Hawaii statewide and local political races without triggered matching funds).

These efforts by states reflect their varied attempts to craft successful public financing programs to promote participation and combat real and apparent corruption at a time when state budgets are already strained to the breaking point. Triggered matching funds are one important approach to achieving the compelling purposes of public financing while protecting the public fisc, because they allow a state to provide publicly financed candidates with sufficient funds to run competitive campaigns without wasting money. States (as well as Congress)

are also experimenting with other public financing models that involve different trade-offs among the states' interests in promoting participation, preventing corruption, and protecting the public fisc. It is too early to know which of these various models will emerge as the most effective or popular, and the Court should not stifle this democratic experimentation by entirely precluding, at this early stage, one entire approach.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, ___ U.S. ___, 129 S.Ct. 711, 718-719 (2009); *see Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("We will not cavalierly impede the States' ability to serve as laboratories for testing solutions to novel legal problems.") (internal quotations omitted). This Court will be better able to accurately assess the balance between the states' compelling interests in protecting and enhancing the democratic process and the dictates of the First Amendment in light of more, rather than less, experimentation and after the lower courts have had more opportunities to assess the actual effects of those experiments.

The differences among triggered matching funds in Arizona, Connecticut, and Florida are exemplary of the experimentation that is going on in states across the country in an effort to combat corruption, enhance political speech, and restore faith in our democracy while being fiscally responsible. This Court may eventually need to step into this process to address the constitutional issues that will indisputably be raised by these experiments. This, however, is neither the appropriate vehicle nor the right time for the Court to do so.

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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