No. 10-238

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,

Petitioners,

v.

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

CLEAN ELECTIONS INSTITUTE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Davis v. FEC*, 128 S. Ct. 2759 (2008), this Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates who are outspent by self-financed opponents. Arizona's Citizens Clean Elections Act achieves a similar result by providing extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The questions presented are:

1. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates?

2. Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by these candidates' privately financed opponents?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were parties in the court of appeals proceeding and separate plaintiffs before the district court: John McComish, Nancy McLain, and Tony Bouie.

CORPORATE DISCLOSURE STATEMENT

The Arizona Free Enterprise Club's Freedom Club PAC has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Free Enterprise Club's Freedom Club PAC.

The Arizona Taxpayers Action Committee has no parent company and there is no publicly held company that has a 10% or greater ownership interest in the Arizona Taxpayers Action Committee.

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PETITION FOR A WRIT OF CERTIORARI

Arizona Free Enterprise Club's Freedom Club PAC, Arizona Taxpayers Action Committee, Dean Martin, and Rick Murphy respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is unreported and appears in the Appendix ("App.") at App. 1-44. The decision of the U.S. District Court for the District of Arizona is unreported and appears in the Appendix at App. 45-78.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." Relevant portions of the Arizona Citizens

Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.*, are reproduced at App. 134-49.

STATEMENT OF THE CASE

This case asks whether the government may provide funding benefits to candidates in contested elections in order to "level the playing field" among those candidates. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), this Court held the government may not do so. The benefit provided in *Davis* was an increase in contribution limits for federal candidates who ran against so-called "millionaire" candidates who could finance their own campaigns. In this case, the benefit is a subsidy in the form of "matching funds" paid to candidates when their opponents or their supporters engage in political activity in excess of a government-created threshold. The result, however, is the same. The candidates who opt into the system are granted funding advantages designed to equalize their speech with the speech of candidates who elect to fund their own campaigns or raise money from private donors. But *Davis* is clear that the government may not create funding benefits for favored candidates in order to equalize their ability to spend money on campaign speech. Arizona does just that by providing matching funds to one candidate triggered by the spending by or for his opponent.

In upholding Arizona's system of matching funds subsidies, the Ninth Circuit rejected *Davis*' application to Arizona's law and concluded that the government may burden the speech of advocacy groups that speak independently of candidates ("independent expenditure groups") and privately financed candidates as an incentive for candidates to publicly finance their campaigns. The Ninth Circuit's decision simply cannot be squared with *Davis* and both the Second and Eleventh Circuits have therefore subsequently refused to follow the Ninth Circuit's reasoning, creating a significant conflict among the circuits. Because the law burdens the speech of independent groups, the Ninth Circuit's decision also conflicts with *Citizens United v. FEC*, 130 S. Ct. 876 (2010). In light of the inextricable conflict among the circuits, the increasing prevalence of similar laws in the states, and the Ninth Circuit's erroneous reading of *Davis* and *Citizens United*, this Court's authoritative guidance is urgently needed.

I. THE ACT

1. At issue are certain provisions of the Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. §§ 16-940 *et seq.* (the "Act"), and specifically, Ariz. Rev. Stat. § 16-952(A-C) (the "Matching Funds Provision"). App. 138-41. The Act is a system of public funding for campaigns for Arizona state offices. It was adopted in 1998 through a ballot initiative by a margin of 51% to 49%. It took effect in 2000. The Act applies to races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction,

Corporation Commissioner, Mine Inspector, State Senator, and State Representative. The Citizens Clean Elections Commission, the members of which are named as defendants in their official capacities, is tasked with enforcing the provisions of the Act.

The Act provides government funds to candidates who collect a sufficient number of $5 "qualifying contributions" from the public. These candidates must agree to abide by spending limits set out in the Act. Ariz. Rev. Stat. § 16-946. The government provides a set amount of money, or "initial disbursement," to qualifying candidates. Except for the $5 contributions and other minor exceptions, publicly financed candidates cannot accept any private contributions. Ariz. Rev. Stat. § 16-941(A)(1); App. 135. They also may not make expenditures above the initial disbursement unless they receive funds under the Matching Funds Provision. Ariz. Rev. Stat. § 16-941(A)(3-4); App. 135-36. These matching funds are provided by the government and can amount to up to two times the amount of the initial disbursement for each candidate that receives them. Ariz. Rev. Stat. § 16-952(E); App. 142-43.

2. Two overriding purposes of the Act were to "level the playing field" among candidates and reduce the influence and relative voice of certain business groups with whom the ballot measure's proponents disagreed. [Public Campaign, "Why America's Seniors Should Care about Money in Politics," ECF No. 294-2 at 123-24, Ninth Cir. Excerpts of R. ("ER") 4194-95;

Public Campaign, "Why Working People Should Care About Money in Politics," ECF No. 294-2 at 126-27, ER 4197-98; Public Campaign, "Why Environmentalists Should Care about Money in Politics," ECF No. 294-2 at 129-30, ER 4200-01; *see also* Chart of "Level the Playing Field" and/or "Limit Spending" References (with citations), ECF No. 288-6 at 37-70, ER 3584-3617.] As an internal memorandum to the ballot measure's steering committee from the initiative's campaign manager stated: "Clean Elections is NOT about public funding. Its [*sic*] about spending limits, getting rid of special interests, and leveling the playing field." [Confidential "State of the Campaign" Mem. From Campaign Manager Josh Silver, Apr. 6, 1998, ECF No. 333-2 at 3, ER 5070.] The constitutional problem arises in the Act's attempt to address those situations where the "playing field" is not level and independent groups or privately financed candidates can outspend publicly financed candidates. To achieve this leveling, the Act's drafters added the Matching Funds Provision, Ariz. Rev. Stat. § 16-952. This section is entitled "Equal Funding of Candidates." App. 138.

The matching funds subsidies distributed by the government to each publicly financed candidate equal the amount the privately financed candidate spent or received – or the amount spent by the independent political group – over the initial disbursement, less 6% for fundraising expenses. Ariz.

Rev. Stat. § 16-952(A-C); App. 138-41. Independent expenditure groups trigger matching funds to each publicly financed candidate in a race when (i) they spend money in opposition to a publicly financed candidate or in favor of a privately financed opponent, and (ii) the total amount spent by an independent expenditure group plus the amount spent or received by the privately financed candidate exceeds the amount of the initial disbursement. *Id.* When an independent group's spending triggers matching funds, the government provides those funds directly to the publicly financed candidate or candidates in the race and not to independent groups supporting them. Independent expenditures on behalf of publicly financed candidates or against privately financed candidates do not trigger matching funds to privately financed candidates. *See* Ariz. Rev. Stat. § 16-952(C); App. 139-41. An independent expenditure in support of a publicly financed candidate results in matching funds to other publicly financed candidates in the same race, however. Ariz. Rev. Stat. § 16-952(C)(3); App. 140. Thus, a $10,000 expenditure on behalf of a privately financed candidate results in an almost $10,000 governmental subsidy to each publicly financed candidate in the race. In contrast, a $10,000 independent expenditure on behalf of a publicly financed candidate results in no government money going to any privately financed candidates in that race, but would trigger matching funds to any other publicly financed candidates in the race.

Privately financed candidates trigger matching funds to each publicly financed candidate in a race when they spend (in the primary election) or raise (in the general election) money above the government's initial disbursement amount. Ariz. Rev. Stat. § 16-952(A-B); App. 138-39.

Although commonly referred to as "matching funds," that term does not accurately describe how the Matching Funds Provision actually works. The money distributed by the government to publicly financed candidates often substantially exceeds the amount of contributions or spending that triggered the Matching Funds Provision. That is, the Act does not really "match" expenditures or contributions – it often significantly exceeds them. This is because the Act offers a grant of the total matching funds subsidy to each publicly financed candidate running against a privately financed candidate. Ariz. Rev. Stat. § 16-952(A-B); App. 138-39. For example, assume a race with (i) one privately financed candidate and three publicly financed candidates, and (ii) the privately financed candidate has spent or raised more than the amount of the initial disbursement. If an independent expenditure group makes an expenditure of $10,000 in support of the privately financed candidate in this race, then the government gives $10,000 (less 6%) directly to each publicly financed candidate. In other words, $10,000 worth of expenditures in support of a privately financed candidate (who may not have wanted it) results in $28,200 worth of speech against that candidate.

II. THE ACT'S EFFECT ON SPEECH

1. The Petitioners are two political action committees, the Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") and the Arizona Taxpayers Action Committee ("Arizona Taxpayers"), which make or fund independent expenditures in Arizona state campaigns. The Petitioners also include two elected officials, Arizona State Treasurer Dean Martin and State Representative Rick Murphy, who have in the past, and intend to in the future, run campaigns for Arizona state offices using money raised from private parties.

The Petitioners brought this case because the Act burdens their ability to engage in unfettered political speech in competitive elections for Arizona state offices. As an experienced political consultant testified below, since the advent of the Act, "every spending decision" is made with the Act's matching funds in view. [Querard Dep. 99, Feb. 12, 2009, ECF No. 345-3 at 3, ER 1927.] Independent expenditure groups and candidates testified that their entire campaign strategy takes the Act's matching funds into account. Candidates testified to intentionally lowering their expenditures and fundraising to avoid triggering matching funds. The Act's matching funds therefore affect speech at the very core of elections. As Representative Murphy stated, candidates "do not run two campaigns: one with matching funds and one without matching funds. The availability of matching funds for my opponents dictates my strategy and influences my thinking from the very beginning of the election

cycle right up to the very end." [Pl.-Intervenor Murphy's Resp. to Defs.' & Def.-Intervenor's Interrogs. & Doc. Reqs. at 5, ECF No. 338 at 97, ER 3186.]

In that regard, the record below demonstrates that the Act causes independent expenditure groups to take the Act's matching funds into account when deciding on which races to spend money. Specifically, Arizona Taxpayers has delayed making independent expenditures to avoid triggering matching funds until later in the election cycle. It engaged in self-censorship in 2006 when it chose not to speak in opposition to a publicly financed candidate in a Senate primary race to avoid triggering the Act's matching funds. [Kirkpatrick Dep. 72-75, Jan. 30, 2009, ECF No. 338 at 135-36, ER 3224-25.] The Freedom Club PAC has reluctantly triggered matching funds to candidates it opposes and the Act has affected every spending decision it makes with regard to races involving publicly financed candidates. This forces the Freedom Club to alter the timing of its independent expenditures. App. 163-64.

2. The Matching Funds Provision also burdens the speech of privately financed candidates. Representative Murphy is an Arizona State Representative and a privately financed candidate for the Senate in 2010 facing at least one publicly financed general election candidate. He ran as a privately financed candidate in 2006 and 2008 and a publicly financed candidate in 2004. In his 2006 general election campaign, Murphy stopped raising money to avoid

triggering matching funds to his publicly financed opponent. Murphy did not fundraise during the 2008 general election because doing so would have triggered almost $3 in additional subsidies for every $1 he raised. Nonetheless, in the 2008 general election, when a group made an independent expenditure of $3,627 to support Murphy's candidacy, all three of his publicly financed opponents received a check for nearly $3,627 – meaning that the group's small expenditure triggered $10,881 (minus 6%) in government subsidies to his opponents. [Pl.-Intervenors' Resps. to Defs.' & Def.-Intervenor's First Set of Interrogs. & Doc. Reqs. at 6-8, ECF No. 338 at 71-73, ER 3160-62.]

Treasurer Martin is a former state senator and the current Arizona State Treasurer. He was a candidate for governor in the 2010 election but has since withdrawn.[1] His campaigns for the Senate and Treasurer were all privately financed. In his 2004 Senate campaign, Martin intentionally delayed fundraising to minimize the amount of government

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[1] Although he has ended his race for governor in the 2010 election, Martin has long been active in Arizona state politics and expects to run for state office again in the future. App. 151-53. He has also been pressing his claim that the Matching Funds Provision is unconstitutional for six years. Because his claims could not be resolved before this or any of his previous campaigns for office had concluded, and because he plans to run for state office again, his claim is "capable of repetition, yet evading review." *Davis*, 128 S. Ct. at 2770.

subsidies his opponents received. In his 2006 campaign, Martin avoided fundraising to prevent triggering the Act's matching funds. Martin has also actively discouraged groups from making independent expenditures on his behalf to avoid triggering matching funds to his opponents. [Martin Dep. 21-22, 69-71, Jan. 23, 2009, ECF No. 338 at 20-21, 23-24, Tr. 3109-10, 3112-13; Pl.-Intervenor Dean Martin's Supplemental Resp. to Defs.' Req. for Clarification at 1-2, ECF No. 338 at 37-38, ER 3126-27; Martin Decl. 2, Nov. 26, 2007, ECF No. 288-7 at 113, ER 3753; Martin Fundraising Email, Aug. 31, 2004, ECF No. 338 at 27, ER 3116.] In 2010, the Matching Funds Provision forced Martin to run a publicly financed campaign for governor. Despite being philosophically and politically opposed to the Act, Martin believed this was the only strategy that would preclude his opponents from receiving significant government subsidies based on his exercise of his free speech rights. *See* App. 153. [Martin Decl. 2, Nov. 26, 2007, ECF No. 288-7 at 113, ER 3753.][2]

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[2] Robert Burns, a plaintiff-intervenor below, is an Arizona State Senator and the current President of the Arizona Senate. Senator Burns testified that the Act coerced him to change the timing of his speech in order to avoid triggering the Act's matching funds. App. 155. [Pl.-Intervenor Burns' Resps. to Defs.' & Def.-Intervenor's Interrogs. & Doc. Reqs. at 1-2, ECF No. 338 at 57-58, ER 3146-47; Burns Dep. 104, Sept. 17, 2008, ECF No. 338 at 47, ER 3136.] Senator Burns has announced that he intends to retire from politics when his current Senate term ends. While he no longer has a direct interest in the outcome of

(Continued on following page)

3. Finally, a systematic analysis of four cycles of Arizona election data shows that it is now commonplace for candidates to delay campaign activities to minimize the Act's matching funds triggered by their own speech. [Primo Decl. in Support of Pl.-Intervenors' Mot. for Summ. J., May 26, 2009, ECF No. 288-7 at 2-39, ER 3642-79.] Indeed, one researcher reports that, of the Arizona candidates who responded to his survey, all reported putting off spending to avoid having their opponents receive these additional subsidies through the Matching Funds Provision. Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS: Political Science & Politics 527 (Jul. 2008) [ECF No. 288-7 at 54-59, ER 3694-99.]

III. THE PROCEEDINGS BELOW

1. Treasurer Martin, along with other privately financed candidates and an independent expenditure group, first challenged the constitutionality of the Matching Funds Provision in 2004, when he was a State Senator. The United States District Court for the District of Arizona, the Honorable Earl Carroll, dismissed the case for failure to state a claim. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005).

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this proceeding, his experience is relevant to illustrate how the Matching Funds Provision burdens free expression.

Martin and his co-plaintiffs appealed to the Ninth Circuit. The Ninth Circuit initially dismissed the entire appeal as moot, but then reversed itself solely as to Martin. The court held that Martin's claim was not moot, concluded that he had stated a cause of action, and remanded to the district court. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 486 F.3d 586, *reh'g granted*, *rev'd in part*, 494 F.3d 1145, *amended by*, 497 F.3d 1056 (9th Cir. 2007). Martin then amended his complaint to include two independent expenditure groups, Petitioners Arizona Taxpayers and the Freedom Club PAC, as plaintiffs. The amended complaint was entitled *Martin, et al. v. Brewer, et al.*, No. 04-cv-0200 (D. Ariz. May 1, 2008).

Separate from Treasurer Martin's case, on August 21, 2008, privately financed candidates John McComish, Nancy McLain, Tony Bouie and others filed suit in the United States District Court for the District of Arizona, the Honorable Roslyn Silver. This complaint was styled *McComish v. Brewer*, No. 08-cv-1550 (D. Ariz. Aug. 21, 2008). These candidates asserted that the Matching Funds Provision violated the First Amendment and ran afoul of this Court's then-very recent decision in *Davis*. Because the *McComish* and *Martin* actions were against the same defendants and raised similar issues, the state defendants moved to consolidate the cases before Judge Carroll. The *Martin* plaintiffs did not object. Nonetheless, Judge Carroll denied the motion. To avoid duplicative proceedings, the *Martin* plaintiffs intervened in the *McComish* case and voluntarily dismissed the

Martin case.[3] Murphy then joined Martin and the independent expenditure groups as plaintiff-intervenors in the *McComish* proceeding. The Clean Elections Institute, Inc. (CEI), a non-profit group promoting the Act, also intervened as a defendant.

In the end, there were four groups of parties to the case before Judge Silver, each represented by separate counsel: (i) the state defendants (the Arizona Secretary of State and the members of the Citizens Clean Elections Commission), (ii) defendant-intervenor CEI, (iii) the *McComish* plaintiffs (privately financed candidates McComish, McLain, and Bouie), and (iv) the *Martin* plaintiff-intervenors (independent expenditure groups Arizona Taxpayers and the Freedom Club PAC and privately financed candidates Martin and Murphy), which are the Petitioners here.[4]

Before the *Martin* plaintiffs intervened in the case, the *McComish* plaintiffs moved for a temporary restraining order prohibiting the members of the

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[3] As discussed more thoroughly *infra*, the *McComish* plaintiffs are also filing a separate petition for certiorari with this Court regarding the Ninth Circuit's decision. Petitioners here fully support the *McComish* plaintiffs' petition and urge this Court to grant it. Petitioners also respectfully request that this Court consolidate its review of both petitions into one proceeding so that this Court can consider the full range of the Act's harm to the free speech of both independent expenditure groups and privately financed candidates.

[4] As noted above in footnote 2, the *Martin* plaintiff-intervenors also included Senator Burns at this time.

Clean Elections Commission from applying the Matching Funds Provision during the 2008 elections. On August 29, 2008, Judge Silver found that the Matching Funds Provision "violates the First Amendment of the U.S. Constitution," but refused to grant the motion because of ongoing elections. App. 128. Both the *McComish* plaintiffs and the *Martin* intervenors then moved to preliminarily enjoin the members of the Clean Elections Commission from applying the Matching Funds Provision during the 2008 elections. On October 17, 2008, Judge Silver found that the challengers had "shown a high likelihood of success on the merits," but refused to temporarily enjoin the system because, again, the court did not wish to interfere with ongoing elections. App. 112.

After significant discovery, all parties filed cross motions for summary judgment. On January 20, 2010, Judge Silver found that the Matching Funds Provision was unconstitutional, granted the challengers' motions, and entered an injunction. App. 45-78. Judge Silver stayed the effect of the injunction for ten days to permit defendants and defendant-intervenor time to appeal, which they did. App. 77.

2. The *McComish* plaintiffs then moved the Ninth Circuit to vacate the stay. On January 29, 2010, the Ninth Circuit refused to vacate the stay of the injunction and consolidated both state defendants' and defendant-intervenor's appeals. App. 87-88. Judge Carlos Bea dissented from the court's refusal to vacate the stay. App. 89. On February 1, 2010, the Ninth Circuit extended the stay of the injunction and

expedited the appeals. App. 80-81. Judge Bea again dissented, concluding that this case was "determined by *Davis* . . . because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his money." App. 81.

3. On May 21, 2010, the Ninth Circuit issued its opinion on the merits, reversing the district court as to its First Amendment determination and remanding for further proceedings on the challengers' Equal Protection claims. App. 1-38. Judge Kleinfeld concurred separately, noting that, while he agreed with the majority, *Davis* was the closest decision on point and that the circuits were divided. App. 38-44.

On June 8, 2010, at the request of both the *Martin* and *McComish* plaintiffs, this Court vacated the Ninth Circuit's stay of the district court's injunction and stayed the mandate of the Ninth Circuit "pending the timely filing and disposition of a petition for a writ of certiorari." App. 79. On June 23, 2010, the Ninth Circuit issued an amended opinion, but did not withdraw its judgment or issue a new judgment. App. 3-4. This timely Petition by the *Martin* plaintiffs followed.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for three reasons.

First, the Ninth Circuit's decision directly conflicts with the Second Circuit's decision in *Green Party of Conn. v. Garfield*, ___ F.3d ___, 2010 U.S. App. LEXIS 14286 (2d Cir. July 13, 2010), and the Eleventh Circuit's decision in *Scott v. Roberts*, ___ F.3d ___, 2010 U.S. App. LEXIS 15897 (11th Cir. July 30, 2010). The reason for this split is simple: the Second and Eleventh Circuits both correctly applied *Davis* to the matching funds systems they considered, while the Ninth Circuit did not. The Second and Eleventh Circuits' rejection of the Ninth Circuit's conclusion thus creates a clear circuit split. Resolution of this split is imperative because there is currently significant uncertainty regarding the constitutionality of public financing laws employing matching funds subsidies across the nation. For independent groups, countless candidates running in states and municipalities across the country with such systems, and lawmakers who may attempt to implement similar laws in the future, timely clarification of this area of the law is imperative.

Second, this split flows from the conflict between the Ninth Circuit's decision and *Davis* itself. The Ninth Circuit upheld a law that attempts to coerce speakers into limiting their political activities by turning the exercise of their First Amendment rights into the catalyst by which their political and ideological opponents gain funding advantages. As the

Second and Eleventh Circuits correctly concluded, *Davis* controls in such a situation and requires that the reviewing court strike such a law down. The Ninth Circuit's conclusion otherwise means its decision clearly conflicts with *Davis*, in which this Court struck down a federal law that employed a similar mechanism that provided funding advantages to a candidate's opponent triggered by the candidate's exercise of his First Amendment rights.

Third, with regard to independent expenditure groups, the Ninth Circuit's decision conflicts with *Citizens United* and decades of decisions from this Court striking down laws seeking to limit the amount of expenditures such groups may make in elections. A mere four months after *Citizens United* was decided, the Ninth Circuit has given the government a powerful tool to indirectly achieve what this Court has made clear it cannot do directly: burden political expenditures by independent groups. Under Arizona's law, if an independent expenditure group spends above a certain level, the government then directly subsidizes candidates the independent expenditure group opposes. And the more an independent expenditure group speaks, the more the candidates it wishes to defeat benefit. Because Petitioners include independent expenditure groups directly affected by the Matching Funds Provision, granting this Petition will provide this Court with the opportunity to directly address whether the government may make such an end-run around *Citizens United.*

I. EVEN AFTER THIS COURT'S DECISION IN *DAVIS*, CIRCUITS ARE DIVIDED ON WHETHER SYSTEMS OF PUBLIC FINANCING OF CAMPAIGNS EMPLOYING MATCHING FUNDS MECHANISMS ARE CONSTITUTIONAL.

In *Davis*, this Court struck down the "Millionaire's Amendment," which allowed opponents of self-financed candidates in federal elections to accept funds at three times the maximum contribution limit from individuals if their self-financed opponents spent more than a certain amount. 128 S. Ct. at 2771. This Court concluded that such a system "impermissibly burden[ed] [the self-financing candidate's] First Amendment right to spend his own money for campaign speech" by creating an "unprecedented penalty" on any self-financing candidate who robustly exercised her First Amendment rights: if she "engage[s] in unfettered political speech," she will be subject "to discriminatory fundraising limitations." *Id.* Self-financing candidates could still spend their own money, "but they must shoulder a special and potentially significant burden if they make that choice." *Id.* at 2772. This Court applied strict scrutiny to the law and struck it down. *Id.*

The Second and Eleventh Circuits both specifically followed *Davis* when they considered matching funds systems and, consistent with the reasoning of *Davis*, each court struck down the system before it. *Scott*, 2010 U.S. App. LEXIS 15897, at *30; *Green Party*, 2010 U.S. App. LEXIS 14286, at *77. The

Ninth Circuit, in contrast, did not apply *Davis* and upheld Arizona's matching funds system. App. 24, 37. The Ninth Circuit's failure to follow this Court's decision in *Davis* has thus created a clear split among the circuits regarding the constitutionality of public financing systems employing matching funds mechanisms and whether, or to what extent, such systems burden core political speech.

A. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND ELEVENTH CIRCUITS.

The Ninth Circuit's decision below directly conflicts with the decision of the Second Circuit in *Green Party* and the decision of the Eleventh Circuit in *Scott*. It also directly conflicts with the pre-*Davis* decision of the Eighth Circuit in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). Moreover, the Second, Eighth, and Eleventh Circuit decisions not only conflict with the Ninth Circuit's decision, but they also conflict with pre-*Davis* decisions from the First and Fourth Circuits, *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied, Duke v. Leake*, 129 S. Ct. 490 (2008), and *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).[5] The depth and scope of the split among the

[5] The Sixth Circuit, in *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), upheld a Kentucky campaign finance law that

(Continued on following page)

circuits strongly militate in favor of review under Sup. Ct. R. 10(a).

In *Green Party*, the Second Circuit considered Connecticut's version of the Matching Funds Provision – there called the "Excess Expenditure Provision" – in its system of public financing for state elections. The Second Circuit correctly concluded that while the burden imposed by the Excess Expenditure Provision was slightly different than the burden at issue in *Davis*, matching funds provisions are actually "more constitutionally objectionable" than the law in *Davis*. *Green Party*, 2010 U.S. App. LEXIS 14286, at *81 (internal quotation marks and citation omitted). The Second Circuit applied strict scrutiny to the Excess Expenditure Provision and concluded that the "state's asserted interest in promot[ing] participation in" Connecticut's system was not enough to justify the burden placed on speech. *Id.* at *85-86 (internal quotation marks omitted). Significantly, the Second Circuit expressly stated that it was "not persuaded by the Ninth Circuit's opinion" below. *Id.* at *83 n.19.

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triggered a benefit to a candidate participating in a public financing system when his non-participating opponent collected more than $1.8 million in campaign funds in a primary or general election. That benefit was not the direct provision of additional funds, but rather gave the participating candidate the right to raise additional funds, which the state would match on a 2-to-1 basis. *Id.* at 947. Although Kentucky's system was not a pure matching funds system, the fact that the court upheld a system that triggered funding advantages to a candidate's opponent based on that candidate's exercise of his First Amendment rights means that *Gable* also conflicts with *Davis*, *Green Party*, and *Scott*.

This split became even more pronounced with the Eleventh Circuit's decision in *Scott*. There, a self-financing candidate sought to preliminarily enjoin Florida's system of matching subsidies for gubernatorial candidates.[6] The district court refused to enter the injunction (albeit while noting that the "Ninth Circuit is just wrong" on whether such matching subsidies imposed a burden on speech). Prelim. Inj. Tr. at 91, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010). The Eleventh Circuit reversed, finding it "obvious that the subsidy imposes a burden on nonparticipating candidates ... who spend large sums of money in support of their candidacies." *Scott*, 2010 U.S. App. LEXIS 15897, at *30. Moreover, it concluded that this burden was "substantial," and that it "is harsher than the penalty in *Davis*, as it leaves no doubt that the nonparticipants' opponents will receive additional money." *Id.* at *33 (internal quotation marks and citations omitted). The court held that the system did not satisfy strict scrutiny because the supporters of the system had not "sufficiently explained how the Florida public financing system furthers the anticorruption interest." *Id.* at *35. Finally, the court concluded that "the system levels the electoral playing field, and that purpose is constitutionally problematic." *Id.* at *37.

The Second and Eleventh Circuits did not tread new ground. In *Day*, the Eighth Circuit considered a

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[6] Like Florida's system, Arizona's law uses a candidate's contributions of their own funds to their campaign in calculating matching funds.

challenge to a Minnesota statute that provided additional funds to a publicly financed candidate in response to independent expenditures either against the publicly financed candidate or for his privately financed opponent. If groups made such independent expenditures, publicly financed candidates had their own expenditure limits increased by the amount of the independent expenditure and received an additional public subsidy equal to one-half of the independent expenditure's value. *Day*, 34 F.3d at 1358. The Eighth Circuit concluded that this law burdened speech "because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure." *Id.* at 1360. It found that the law was not narrowly tailored to support a compelling government interest and struck it down. *Id.* at 1361-62.

This Court specifically referenced *Day* in *Davis* when it concluded that "[m]any candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the Millionaire's Amendment], but they must shoulder a special and potentially significant burden if they make that choice." *Davis*, 128 S. Ct. at 2772 (citing *Day*, 34 F.3d at 1359-60). Nonetheless, the Ninth Circuit explicitly refused to rely on *Day*. The court stated, "[o]ur decision is not controlled by *Day*, nor are we persuaded by it." App. 28 n.9. It also minimized this Court's reference to *Day* in *Davis* by claiming that this Court cited *Day* "only once for a single, limited proposition," and that this Court did not "affirm or adopt the Eighth Circuit's approach."

App. 28 n.9. Instead, the Ninth Circuit followed two pre-*Davis* decisions that approved similar systems and specifically rejected *Day*. App. 27 n.9 (citing *Leake*, 524 F.3d at 437-49, and *Daggett*, 205 F.3d at 464-65). As Judge Kleinfeld noted in concurrence below, "[o]ther circuits have divided on whether schemes like Arizona's violate the First Amendment. The Supreme Court cited with apparent approval the Eighth Circuit decision [in *Day*], which may be contrary to the view we take today." App. 39 (Kleinfeld, J., concurring) (internal citations omitted). *See also Leake*, 524 F.3d at 437 ("There is some conflict in the circuits as to whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment.").

In sum, at best, there exists a fundamental disagreement between the Second, Eighth, and Eleventh Circuits, on one hand, and the First, Fourth and Ninth Circuits, on the other, regarding the constitutionality of public financing systems employing a matching funds subsidy. At worst, the Ninth Circuit's decision is an outlier reflecting a now-extinct trend in pre-*Davis* First Amendment jurisprudence. This is particularly troubling given that, as explained below, a number of other jurisdictions employing such systems (Hawaii, Portland, Oregon, and Tucson, Arizona) are located in the Ninth Circuit. This level of uncertainty and patchwork of constitutional protections for independent expenditure groups and privately financed candidates across the circuits confirm the urgent need for this Court's intervention.

B. THE SPLIT AMONG THE CIRCUITS CREATES CONSIDERABLE CONFUSION REGARDING THE CONSTITUTIONALITY OF SIMILAR SYSTEMS ACROSS THE COUNTRY.

At the time of the Ninth Circuit's decision, three states – Maine,[7] Arizona[8] and Connecticut[9] – had statutes that create public financing systems with matching funds in all of their statewide and legislative political campaigns. At least six other states have public financing systems with matching fund mechanisms for certain offices: Florida (governor),[10] Hawaii (pilot program for county of Hawaii Council

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[7] An Act to Reform Campaign Finance, 1996 Me. Legis. Serv. Initiated Bill Ch. 5 (West) (codified at scattered sections of Me. Rev. Stat. Ann. tit. 21-A, §§ 1121-28 (Supp. 2006)). This law has now been challenged in federal court as well. Compl., *Cushing v. McKee*, No. 10-cv-0330 (D. Me. Aug. 8, 2010).

[8] Arizona Citizens Clean Elections Act, 1998 Ariz. Legis. Serv. Prop. 200 (West) (codified at Ariz. Rev. Stat. Ann., §§ 16-901.01, -940 to -961 (2006)).

[9] An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, 2005 Conn. Pub. Acts 5 (Spec. Sess.) (codified as amended at Conn. Gen. Stat. §§ 9-600 to -674, 9-700 to -751 (Supp. 2007)). As noted above, the Second Circuit has struck down Connecticut's Excess Expenditure Provision. The Connecticut Legislature has now revised the law to conform to the court's decision.

[10] Florida Election Campaign Financing Act, Fla. Laws 86-276, (codified at Fla. Stat. §§ 106.30-.36). As noted above, the Eleventh Circuit has preliminarily enjoined enforcement of this law.

elections),[11] New Mexico (Public Regulation Commission and statewide judicial elections),[12] North Carolina (judicial elections),[13] West Virginia (judicial elections)[14] and Wisconsin (judicial elections).[15] Nebraska provides government subsidies to candidates for statewide and legislative offices who agree to abide by a spending limit to match the expenditures by those candidates' opponents that the government deems excessive.[16] Still more states have considered enacting such systems, including New York, Illinois, Maryland, Washington and Wyoming.[17] In addition,

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[11] Pilot Comprehensive Public Funding for Elections to the Hawaii County Council, 2008 Haw. Act 244.

[12] Voter Action Act, 2007 N.M. Laws 1st Spec. Sess. Ch. 2 (H.B. 6) (West) (Public Regulation Commission provisions are codified at N.M. Stat. § 1-19A-10 (2003)). The judicial elections provisions took effect in 2008.

[13] North Carolina Judicial Campaign Reform Act, 2002 N.C. Sess. Laws 158 (codified as amended in scattered sections of N.C. Gen. Stat. ch. 163 (2005)).

[14] West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, 2010 W. Va. Acts 72 (codified at W. Va. Code §§ 3-12-1 to 3-12-17) (pilot program for 2012).

[15] Wisconsin Impartial Justice Act, 2009 Wis. Sess. Laws 89 (codified in scattered sections of Wis. Stat. Ch. 8, 11, 20, 25, 71 (2010)).

[16] Nebraska Campaign Finance Limitation Act, 1992 Neb. Laws 556 §§ 1-10 (codified as amended at Neb. Rev. Stat. §§ 32-1601 to -1613).

[17] Press Release, Public Campaign: While Congress Fiddles and Washington Burns, States Take Action to Clean Up Politics (May 22, 2006), http://www.publicampaign.org/pressroom/2006/05/22/while-congress-fiddles-and-washington-burns-states-take-action-to-clean-up-politics.

the cities of Tucson, Ariz.,[18] Portland, Or.[19] and Albuquerque, N.M.,[20] have some form of matching funds systems. For a number of years, U.S. Senators Richard Durbin and Arlen Specter introduced a taxpayer-funding system for federal elections called the "Fair Elections Now Act," although the senators removed the matching funds provision from later versions of this bill after this Court's decision in *Davis*.[21] Moreover, the push to enact similar public financing systems with matching funds subsidies in states across the country is a top priority for well-funded, politically influential special interests groups, who view such systems as "a bold solution to the problem of money in politics." Brennan Center for Justice et al., *Breaking Free with Fair Elections: A New Declaration of Independence for Congress* 1 (March 2007), *available at* http://www.cleanupwashington.org/documents/breaking_free.pdf. Put simply, such systems are becoming more common across the country and their proponents seek to make them the norm for all U.S. campaigns.

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[18] Tucson, Ariz., Charter ch. XVI, Subchapter (B) § 5 (2003).

[19] Portland, Or., Municipal Code ch. 2.10 (2005).

[20] Albuquerque, N.M., Charter art. XVI (2004).

[21] *Compare* S. 1285, 110th Cong. (2007) (2007 version of Fair Elections Now Act containing a matching funds provision similar to Arizona's), *with* S. 752, 111th Cong. (2009) (2009 version of Fair Elections Now Act omitting the previous matching funds provision). *See also* H.R. 1826, 111th Cong. (2009) (House version of 2009 Senate version of Fair Elections Now Act).

There is now no clear answer as to whether these laws are constitutional, however. The existence of a three-to-three deadlock in the federal appellate courts is clear evidence that there is so much confusion here that this Court should intervene. Independent expenditure groups and privately financed candidates should know whether they have judicial recourse for the harm caused to their free speech rights by such schemes. Publicly financed candidates and the enforcement agencies administering such systems should have some degree of certainty as to whether the systems in which they participate or administer are constitutional. As a federal judge recently noted while struggling with whether to preliminarily enjoin Florida's system for the 2010 primary election, "[t]he law on the merits is unsettled. . . . I cannot end the uncertainty." Prelim. Inj. Tr. at 108, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010). While this district court judge could not end the uncertainty in each of the jurisdictions in which such schemes operate, this Court can. This Court's immediate intervention – before yet another election season occurs with such systems in place – is therefore necessary.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *DAVIS* THAT, IN THE CONTEXT OF A COMPETITIVE ELECTION, LAWS THAT PROVIDE FUNDING ADVANTAGES TO A SPEAKER'S POLITICAL OPPONENTS BASED ON THE EXERCISE OF THE SPEAKER'S FIRST AMENDMENT RIGHTS ARE UNCONSTITUTIONAL.

The split among the circuits reflects the fact that the Ninth Circuit's decision directly conflicts with *Davis*. Like the law at issue in *Davis*, the Matching Funds Provision attempts to "level electoral opportunities" in the context of competitive elections by providing funding advantages to a candidate based on the exercise of free speech rights by that candidate's political and ideological opponents. *See Davis*, 128 S. Ct. at 2773. As Judge Bea correctly concluded in his dissent from the panel decision extending the stay of the district court's injunction, "this case is determined by *Davis* . . . because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech by the candidate who spends his own money." App. 81.

Despite the existence of a similar trigger mechanism in the Matching Funds Provision, the Ninth Circuit rejected *Davis*'s application here. The court

held that *Davis* did not apply because this Court had described the Millionaire's Amendment as asymmetrical and discriminatory. The Ninth Circuit averred that, "the law constituted a burden on Davis's speech *only* because it treated candidates running against each other under the same regulatory framework differently based on a candidate's decision to self-finance his or her campaign. . . ." App. 25 (emphasis added). Because candidates under the Arizona system were burdened based on their status as publicly or privately financed, the court held that the Matching Funds Provision was not asymmetrical and discriminatory and was therefore unlike the Millionaire's Amendment. App. 25-26. The court concluded that what distinguished the Matching Funds Provision in a constitutional sense was that the Arizona law "makes no such identity-based distinctions." App. 26-27. The Court thus suggested that publicly and privately financed candidates are not similarly situated and that the government may distribute different benefits and burdens to each. In that regard, the court placed considerable emphasis on the fact that publicly financed candidates "voluntarily choose to participate in a public financing system" and accept expenditure limits, while privately financed candidates choose to run without a spending cap. App. 25. These benefits and burdens, the court suggested, balance each other out.

The Ninth Circuit badly misinterpreted *Davis*. As the Eleventh Circuit subsequently noted, "what

triggered strict scrutiny was the grant of a competitive advantage – an increase in the ability of Davis's opponent to speak," *Scott*, 2010 U.S. App. LEXIS 15897, at *33, not the fact that the law was asymmetrical. Neither *Davis* nor any of the cases cited by the Ninth Circuit require that a speaker be similarly situated with another speaker in order to claim a burden on free speech. In *Davis,* this Court was clear that the burden on the self-financed candidate – not the attributes of his opponent – ultimately decided the First Amendment question. 128 S. Ct. at 2771-72.

The Ninth Circuit's "voluntary choice" theory also fails because it is irrelevant to independent expenditure groups. Under the Act, independent expenditure groups cannot qualify for public funding and cannot "voluntarily choose" to accept or reject public funds. The government's imposition of burdens on such groups cannot be balanced by the benefit of public funds because these groups cannot receive public funds. Independent groups supporting privately financed candidates or opposing publicly financed candidates have only two choices available to them: they can either remain silent or they can speak and have the government "level" their speech by directly funding candidates they oppose. As in *Davis*, the Act does not "provide any way" an independent expenditure group "can exercise" the unfettered right to make unlimited expenditures without abridgment. *See Davis*, 128 S. Ct. at 2772.

Because of this misreading of the law, the Ninth Circuit applied only intermediate scrutiny to the Act.

The court did so despite the fact that it found that the Matching Funds Provision burdens "fully protected speech." App. 22. It classified the Act's effect on speech as "indirect or minimal" and the harm to Petitioners as "mere metaphysical threats to political speech." App. 27. Again, the Ninth Circuit badly misread *Davis*. *Davis* held that the "fundamental nature of the right to spend personal funds for campaign speech" was burdened by the Millionaire's Amendment because it "impose[d] some consequences" on a candidate's choice to self-finance beyond certain amounts. *Davis,* 128 S. Ct. at 2772 (internal quotation marks and citation omitted). Because these consequences affected core political speech, this Court applied strict scrutiny. As discussed above, however, the Act does more than simply "impose some consequences" on speech. It creates distinct and measurable harm to the nature, timing, and amount of expenditures.

Aside from the Ninth Circuit, every court considering "clean elections" systems after *Davis* has concluded that matching funds subsidies burden speech more heavily than the Millionaire's Amendment. *See Scott*, 2010 U.S. App. LEXIS 15897, at *33 ("Like both the district court and the Second Circuit, we conclude that the burden that an excess spending subsidy imposes on nonparticipating candidates is harsher than the penalty in Davis, as it leaves no doubt that the nonparticipants' opponents will receive additional money." (internal quotation marks omitted)); *Green Party*, 2010 U.S. App. LEXIS 14286, at

*82 ("The penalty imposed by the excess expenditure provision, therefore, is harsher than the penalty in *Davis*, as it leaves no doubt that Candidate B, the opponent of the self-financed candidate, will receive additional money."); Prelim. Inj. Tr. at 91, *Scott v. Roberts*, No. 10-cv-0283 (N.D. Fla. July 14, 2010) ("Indeed, in the *Davis* case, it was only a potential dollar. . . . Here, it's not just a potential dollar. It's a certain dollar."); App. 65-66 ("In *Davis*, the negative consequence was having one's opponent subject to higher contribution limits. Here, the negative consequence is having one's opponent receive additional funds."); *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 373 (D. Conn. 2009) ("Arguably the benefit conferred by the CEP trigger provisions is more constitutionally objectionable than increasing an opponent's individual contribution limits."). Under the Millionaire's Amendment, the non-self-financing candidate still had to raise funds from private parties – that is, the candidate had to develop a message contributors wished to support, identify potential contributors, and persuade them to contribute. In contrast, a group or candidate triggering the Matching Funds Provision results in the government directly giving extra financing to all publicly financed candidates in a race. It beggars logic to hold, as the Ninth Circuit did, that a law that imposes harsher penalties on speech than the Millionaire's Amendment should receive less searching scrutiny because the law burdens speech in a purportedly nondiscriminatory fashion.

The Ninth Circuit's failure to apply strict scrutiny was also erroneous because the Act is clearly content-based. In races between privately financed candidates and publicly financed candidates, independent expenditures in favor of privately financed candidates are "matched" by the government, while independent expenditures against privately financed candidates are not. *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (laws that distinguish between message, ideas, subject matter, or content are content-based); *Day*, 34 F.3d at 1360-61 (Minnesota's excess subsidy provision was content-based because it "singles out particular political speech – that which advocates the defeat of a candidate and/or supports the election of her opponents – for negative treatment that the state applies to no other variety of speech"). As such, not only is the Matching Funds Provision subject to strict scrutiny, it is "presumptively invalid" as well. *Stevens*, 130 S. Ct. at 1584.

The Ninth Circuit's attempt to distinguish *Davis* is little more than a rejection of that case. Lower federal courts, however, cannot overturn, alter, or narrow Supreme Court precedent. Moreover, the Ninth Circuit's application of intermediate scrutiny means that Arizona's Matching Funds Provision has so far escaped appellate application of the appropriate level of scrutiny. The Ninth Circuit's decision thus creates uncertainty regarding the scope of *Davis* and its application to similar public financing systems.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *CITIZENS UNITED* BY ALLOWING GOVERNMENTS TO INDIRECTLY RESTRAIN THE SPENDING OF INDEPENDENT EXPENDITURE GROUPS.

Section C of the Matching Funds Provision explicitly treats the expenditures of groups acting independently of candidates as "expenditures of . . . nonparticipating candidates." Ariz. Rev. Stat. § 16-952(C)(2); App. 140. It empowers the government to match the expenditures of independent groups supporting a privately financed candidate or opposing a publicly financed candidate. The purported rationale behind this burden is enticement – that is, the government must burden the speech of independent expenditure groups in order to encourage candidates who might otherwise be subject to purportedly corrupting influences to accept public funds. App. 35-37.

It is beyond dispute that the government may not burden independent expenditures under an anti-corruption rationale. In *Citizens United*, this Court stated explicitly what many understood the law to be since *Buckley v. Valeo*, 424 U.S. 1 (1976) – that independent expenditures cannot be regulated under an anti-corruption rationale. *Citizens United*, 130 S. Ct. at 909 ("[I]ndependent expenditures . . . do not give rise to corruption or the appearance of corruption."). Because of the absence of pre-arrangement and coordination between an independent expenditure committee and a candidate, the value of the expenditure to the candidate is undermined and the danger

that expenditures will be given as a *quid pro quo* for improper commitments from the candidate is alleviated. *Id.* at 908; *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

Nonetheless, the Ninth Circuit determined that the Matching Funds Provision could be applied against independent expenditure groups because the relevant inquiry is not whether independent expenditure groups cause corruption, but "whether matching funds bear a substantial relation to reducing corruption among participating candidates." App. 35. According to the court, unless the state matches "independent expenditures or expenditures from a nonparticipating candidate's own funds, the Act's public funding plan would not attract participants." App. 36. Thus, while independent expenditure groups cannot be directly regulated to reduce the possibility of corruption, the government may indirectly burden their speech to encourage candidates into the public financing system to reduce the possibility of corruption by these candidates. In other words, publicly financed candidates need matching funds available so they know they can match spending by independent groups that oppose them if they enter the system.

This rationale is simply a dressed-up version of the "level the playing field" justification for campaign finance restrictions that this Court has repeatedly and correctly rejected. *See Davis*, 128 S. Ct. at 2771, 2773 (rejecting the "leveling the electoral opportunities" justification for the Millionaire's Amendment).

In sum, the Ninth Circuit's decision stands for the proposition that while the government cannot burden speech to "level the playing field" and it cannot directly burden independent expenditures, it can indirectly burden independent expenditures in order to level the playing field. It is difficult to conceive of a conclusion more at odds with the holdings of both *Davis* and *Citizens United*.

The Ninth Circuit's holding stands *Citizens United* on its head. Because independent expenditures are core political speech and pose no threat of corruption, the government simply may not burden them in order to fight corruption, even if doing so might have an ancillary benefit of increasing participation by others in a public financing program. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986).

While matching funds do not directly restrict independent expenditures, they work as an indirect

and substantial restriction on the ability of independent expenditure groups to exercise "the unfettered right to make unlimited . . . expenditures." *Davis*, 128 S. Ct. at 2772. By allowing the government to create real, if indirect, restrictions on the right of independent groups to make unlimited expenditures, the Ninth Circuit has provided the state with the ability to achieve indirectly what it is constitutionally forbidden from doing directly and has set an example for other courts and legislators to follow to undermine *Citizens United*. This disruptive jurisprudential development in a circuit covering much of the western United States threatens to restrict the speech of independent expenditure groups mere months after this Court held, in the strongest possible terms, that such restrictions are constitutionally impermissible.

As *Citizens United* made clear, the Constitution protects the political speech of groups as well as individual candidates. 130 S. Ct. at 899-903. The *Martin* plaintiffs (the Petitioners here) include independent groups and raise issues regarding the application of *Citizens United* that are in addition to the harm the Act causes to candidate speech. Petitioners note that contemporaneously with this Petition, the *McComish* plaintiffs – each a privately financed candidate – are seeking this Court's review of the Ninth Circuit's decision. Petitioners here fully support the *McComish* plaintiffs' petition and urge this Court to accept it. This Court should grant both petitions, though, in order to directly consider the affect the Act has on both candidates and independent groups in one proceeding. In particular, this Court

should grant review of this Petition in order to provide much-needed guidance (if not outright correction) to the Ninth Circuit and other courts on the scope of *Citizens United*.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant both their petition for a writ of certiorari and that of the *McComish* plaintiffs and that this Court consolidate both petitions for consideration.

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