No. 10-238

OCT 29 2010

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 HOFFMAN 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

REPLY BRIEF FOR PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300
wmaurer@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

Page

ARGUMENT 3

THE SPLIT AMONG THE CIRCUITS IS ATTRIBUTABLE TO THE NINTH CIRCUIT'S FAILURE TO FOLLOW *DAVIS*, NOT TO IRRELEVANT DISTINCTIONS AMONG THE DIFFERENT STATUTES 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Davis v. FEC, 128 S. Ct. 2759 (2008) ..... *passim*

Green Party of Connecticut v. Garfield, 616 F.3d 213 (2d Cir. 2010) 1, 3, 4, 5, 6

McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) 1

Respect Maine PAC v. McKee, No. 10-2119, 2010 U.S. App. LEXIS 20545 (1st Cir. Oct. 5, 2010) 2

Respect Maine PAC v. McKee, No. 10-A362, 2010 U.S. LEXIS 8326 (Oct. 22, 2010) 2

Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010) 1, 3, 4, 5, 6

OTHER PUBLICATIONS

Thomas D. Edmondson, *'Matching Funds' Under State Election Laws Split Appeals Courts, Beckon Supreme Court*, 79 U.S. Law Week 1371 (Sept. 28, 2010) 1

In *Davis v. FEC*,[1] *Scott v. Roberts*,[2] *Green Party of Connecticut v. Garfield*,[3] and the Ninth Circuit's decision below,[4] each court considered a system of campaign regulation in which a speaker's political activity resulted in funding advantages to the speaker's political or ideological opposition during an election. Except for the Ninth Circuit below, each court concluded that the program before it was a substantial burden on First Amendment rights. Except for the Ninth Circuit below, each court applied strict scrutiny to the program before it. And except for the Ninth Circuit below, each court found the challenged program did not withstand judicial scrutiny. As argued in the Petition, the Ninth Circuit's decision below deepens a clear and significant split among the circuits and contravenes this Court's decision in *Davis*.[5]

---

[1] 128 S. Ct. 2759 (2008).

[2] 612 F.3d 1279 (11th Cir. 2010).

[3] 616 F.3d 213 (2d Cir. 2010).

[4] *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); App. 1-44.

[5] As discussed in the Petition, the split among the circuits predates *Davis* and currently involves six different circuits. *See* Pet'rs Br. 20-21 (discussing the current three-to-three split among circuit courts regarding the constitutionality of triggered matching fund systems). The persistence of this split, especially after *Davis*, militates strongly in favor of this Court's grant of certiorari here. *See* Thomas D. Edmondson, *'Matching Funds' Under State Election Laws Split Appeals Courts, Beckon Supreme Court*, 79 U.S. Law Week 1371 (Sept. 28, 2010) (describing the courts of appeals' approach to triggered matching funds as "all over the map").

In arguing against certiorari, Respondents Ken Bennett, *et al.*, and Clean Elections Institute, Inc. (CEI) attempt to explain the Ninth Circuit's divergence from the holdings of this Court and the Eleventh and Second Circuits by stressing distinctions among the various laws at issue. However, what is constitutionally significant is not what differences exist among these laws. Instead, what is important is that each law attempted 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.

The Ninth Circuit's decision applying intermediate scrutiny and upholding a system of triggered matching funds is an anomaly among post-*Davis* cases and substantively departs from well-established First Amendment jurisprudence. It has created further confusion and unpredictability in the law. This lack of certainty is unacceptable, especially when these systems are becoming increasingly common throughout the nation and litigation over their constitutionality shows no sign of abating. *See, e.g.*, *Respect Maine PAC v. McKee*, No. 10-2119, 2010 U.S. App. LEXIS 20545 (1st Cir. Oct. 5, 2010), *application for injunction denied*, No. 10-A362, 2010 U.S. LEXIS 8326 (Oct. 22, 2010). Despite Respondents' arguments to the contrary, this Court's immediate intervention is thus not only appropriate – it is imperative.

ARGUMENT

THE SPLIT AMONG THE CIRCUITS IS ATTRIBUTABLE TO THE NINTH CIRCUIT'S FAILURE TO FOLLOW *DAVIS*, NOT TO IRRELEVANT DISTINCTIONS AMONG THE DIFFERENT STATUTES.

As discussed in the Petition, there is a pronounced split among the circuits regarding the constitutionality of "clean elections" laws employing triggered matching fund provisions. *See* Pet'rs Br. 19-28. Nonetheless, Respondents argue that the decisions of the Eleventh Circuit in *Scott* and the Second Circuit in *Green Party* do not conflict with the Ninth Circuit's decision below. Respondents instead allege that the differences in outcomes are the result of distinctions among the laws at issue. *See* Resp't Clean Elections Inst. Br. Opp'n ("CEI Br.") 2 ("[T]he public funding programs at issue in those cases were very different from Arizona's. . . ."); Resp'ts Bennett, *et al.* Br. Opp'n ("State Br.") 14 ("The alleged circuit split does not warrant reviewing the court of appeals' decision in this case because the difference in applying *Davis* can be attributed to differences in the various campaign-finance systems.").

Respondents are wrong. The reason the Eleventh and Second Circuits did not follow the Ninth Circuit's decision is not because the Eleventh and Second Circuits found the laws before them distinguishable from Arizona's, but because the Eleventh and Second

Circuits correctly followed *Davis* while the Ninth Circuit did not. *Compare Scott*, 612 F.3d at 1290 ("We agree with Scott that *Davis* requires us to subject the excess spending subsidy to strict scrutiny."), *and Green Party*, 616 F.3d at 244 ("The Supreme Court's analysis in *Davis* directly governs plaintiffs' challenge to the CEP's trigger provisions. . . ."), *with* App. 24 ("[W]e conclude that *Davis* is easily and properly distinguished from the case at bench."). That is, the Eleventh and Second Circuits concluded that *Davis* applied and was controlling. These courts also held that the laws they considered were more constitutionally objectionable than the law at issue in *Davis*. *See* Pet'rs Br. 32-33. In contrast, the Ninth Circuit concluded that *Davis* did not apply and the Arizona law was less burdensome than the Millionaire's Amendment. *See* App. 26-27. [6] Thus, the difference in outcomes reflects a fundamental disagreement

---

[6] CEI also argues that because Petitioners engaged in political activity despite triggered matching funds, Arizona's law constitutes a "minimal burden" on speech subject to intermediate scrutiny. *See* CEI Br. 13-17. CEI errs on the facts. In their Petition, Petitioners detailed the significant harm to the nature, timing, and amount of their speech caused by Arizona's law. Pet'rs Br. 8-12. Moreover, CEI's standard for First Amendment harms, adopted by the Ninth Circuit below, is simply another way of disagreeing with *Davis'* conclusion that laws giving funding benefits to a candidate based on the political activity of those opposing that candidate significantly burden speech. In that regard, in *Davis*, the candidate triggered the Millionaire's Amendment during both of his campaigns and this Court nonetheless applied strict scrutiny to that law. *Davis*, 128 S. Ct. at 2767.

between this Court, the Eleventh Circuit, and the Second Circuit, on one hand, and the Ninth Circuit, on the other, over the meaning and application of the First Amendment. As the Second Circuit explicitly stated, "We are not persuaded by the Ninth Circuit's opinion. . . ." *Green Party*, 616 F.3d at 245 n. 19.

Like Arizona's law, the statutes at issue in *Davis*, *Scott*, and *Green Party* were governmental programs in which the government gave additional funding benefits to a speaker's political and ideological opposition based on the amount of political activity in which the speaker engaged. Despite outward differences among these laws, they shared a common and primary purpose with Arizona's law – namely, to level electoral opportunities. Indeed, both the Eleventh and Second Circuits specifically noted the similarity of the laws before them to the Arizona Citizens Clean Elections Act. *Scott*, 612 F.3d at 1287 (noting that the Ninth Circuit case "involved a materially similar subsidy provision"); *Green Party*, 616 F.3d at 245 n. 19 (noting that "Arizona's public financing system bears some similarity to the [Connecticut law's] excess expenditure provision"). Thus, at their core, these laws are essentially the same in all relevant respects, which makes the Ninth Circuit's decision upholding Arizona's law an anomaly in post-*Davis* jurisprudence.

Respondents are therefore simply incorrect that there are any meaningful differences among the laws at issue in *Scott*, *Green Party*, and the Ninth Circuit's decision below. There is no way to reconcile the

decisions of the Eleventh and Second Circuits with the decision of the Ninth Circuit. The split among the circuits is real and significant and derives from a fundamental disagreement over the meaning and application of this Court's decision in *Davis*.

Finally, there is no reason for this Court to delay so that states can continue to "experiment" with similar laws burdening First Amendment rights. *See* CEI Br. 32-34. As CEI correctly notes, "[m]any states have adopted or are considering adopting various forms of public financing of elections, some of which . . . include matching funds triggered by contributions or expenditures." CEI Br. 32. For these states and jurisdictions, there is no discernable answer as to why Arizona's law survived judicial scrutiny and Florida's and Connecticut's systems did not. In light of the large number of jurisdictions affected by this uncertainty, the need for a nationally binding rule of law is clear.

CONCLUSION

The Ninth Circuit's decision below conflicts with *Davis*, *Scott*, and *Green Party*. Respondents' arguments to the contrary do not demonstrate how the Ninth Circuit's decision can be reconciled with these three cases, leaving considerable uncertainty in the significant number of jurisdictions in which triggered

matching funds operate. This Court's immediate intervention is therefore warranted.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 341-9300

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
(480) 557-8300

Counsel for Petitioners

**Counsel of Record*

Blank Page