No. 05-15630

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, et al.,
Plaintiffs-Appellants,

v.

JAN BREWER, et al.,
Defendants-Appellees,

and

STEVEN S. POE and CLEAN ELECTIONS INSTITUTE, INC.,
Defendants-Intervenors-Appellees.

Appeal From The United States District Court For The District Of Arizona
No. 04-CV-00200

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES JAN BREWER ET AL. AND URGING AFFIRMANCE

J. GERALD HEBERT
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER, INC.
1640 Rhode Island Ave., NW Suite 650
Washington, DC 20036
(202) 736-2200

Counsel for Amicus Curiae

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
(434) 924-3127

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE CCEA CONSTITUTIONALLY ENCOURAGES VOLUNTARY COMPLIANCE WITH SPENDING LIMITS IN EXCHANGE FOR PUBLIC CAMPAIGN FINANCING 3

A. The Supreme Court held in *Buckley* that public financing of candidate campaigns advances First Amendment values without restricting First Amendment rights 4

B. More than 25 state and local governments around the nation have relied on the Supreme Court's *Buckley* decision in implementing public financing programs linked to voluntary spending limits 6

C. The First, Sixth and Eighth Circuits have all rejected "coerciveness" challenges to public financing programs with spending limits 8

D. Like the public financing laws challenged and upheld in the First, Sixth and Eighth Circuits, Arizona's law does not coerce candidate compliance with spending limits 10

E. Decisions by Appellant Candidates and others not to participate in Arizona's public financing program is strong evidence that the program is not unconstitutionally coercive 14

II. MATCHING FUNDS PROVISION OF THE CCEA DOES NOT HINDER THE ASSOCIATION'S ABILITY TO ENGAGE IN PROTECTED SPEECH 15

A. *Buckley* makes clear that public funds may constitutionally be targeted to certain candidates in order to limit demand on the public fisc 17

B. Arizona's matching funds provision is a constitutional means of enhancing public debate by targeting public funds to candidates in greatest need and limiting demand on the public fisc 19

C. The weight of Circuit Court authority supports the constitutionality of matching funds provisions 21

1. The Eighth Circuit in *Day* wrongly concluded that responsive candidate speech constitutes an impairment to the initial speaker 22

2. The First Circuit in *Daggett* correctly ruled that matching funds provisions are constitutional 23

3. The Eighth Circuit decision in *Rosenstiel* calls into question the continuing vitality of the Court's reasoning in *Day* 24

D. The district court correctly adopted and applied the reasoning of *Daggett* and rejected the reasoning of *Day* 26

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF FILING AND PROOF OF SERVICE 30

TABLE OF AUTHORITIES

Cases:

Ass'n of Am. Physicians and Surgeons v. Brewer, 363 F. Supp. 2d 1197 (D. Ariz. 2005) 26, 27

Associated Press v. U.S., 326 U.S. 1 (1945) 16

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) ..... *passim*

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 21, 22, 23, 26

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) 8, 9

KEEP IT CLEAN – NO TO C-04-2004 v. Flake, No. CV-04-0253-SA (Arizona Supreme Court 2004) 1

McConnell v. FEC, 540 U.S. 93 (2003) 1

Mont. Right to Life Ass'n v. Eddleman, 343 F.3d 1085 (9th Cir. 2003) 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 16

Pac. Gas and Electric Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1 (1986) 16

Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980) 10

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) 10, 22, 24, 25, 26

Roth v. U.S., 354 U.S. 476 (1957) 16

Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) 1

Vote Choice v. DiStefano, 4 F.3d 26 (1st Cir. 1993) 8, 9, 10

Statutes, Legislation and Legislative History:

26 U.S.C. § 9004(a) 17

26 U.S.C. § 9008(b) 17

Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq* 3

Federal Election Campaign Act, Pub. L. No. 94-283, § 320, 90 Stat. 475 (1976) 6

Ariz. Rev. Stat. § 16-952(E) 19

Ariz. Rev. Stat. § 16-959(A) 20

Ariz. Rev. Stat. § 16-961(G)-(H) 20

Fla. Stat. ch. 106.30 *et seq.* 6

Haw. Rev. Stat. § 11-217 *et seq.* 6

Me. Rev. Stat. Ann. tit. 21-A, § 1121 *et seq.* 6

Md. Code Ann. Elec. Law § 15-101 *et seq.* 6

Mich. Comp. Laws § 169.261 *et seq.* 6

Minn. Stat. § 10A.30 *et seq.* 6

Neb. Rev. Stat. § 32-1603 *et seq.* 6

N.J. Stat. Ann. § 19:44A-1 *et seq* 6

N.M. Stat. Ann. § 1-19A-1 *et seq.* 6

N.C. Gen. Stat. § 163-278.61 *et seq.* 6

R.I. Gen. Laws § 17-25-18 *et seq.* 7

Vt. Stat. Ann. Tit. 17, § 2851 *et seq.* 7

Wis. Stat. § 11.50(1) *et seq.* 7

Austin, Tex., Code § 2-2-6 *et seq.* 7

Boulder, Colo., Rev. Code § 13-2-20 *et seq.* 7

Long Beach, Cal., Mun. Code § 2.01.110 *et seq.* 7

Los Angeles, Cal., Mun. Code § 49.7.1 *et seq.* 7

Code of Miami-Dade County, Fla. § 12-22 *et seq.* 7

New York City, N.Y. Admin. Code § 3-701 *et seq.* 7

Oakland, Cal., Mun. Code § 3.13.010 *et seq.* 7

Code of the City of Portland, Or. § 2.10.010 *et seq.* 7

Sacramento, Cal., Sacramento City Code § 2.14.010 *et seq.* 7

San Francisco, Cal., Campaign and Governmental Conduct Code § 1.100 *et seq.* 7

City of Tucson, Ariz., Charter, Chapter XVI, Subchapter B, § 1 *et seq.* 7

Cal. A.B. 583 (introduced Feb. 16, 2005) 7

Wash. H.B. 1526 (introduced Jan. 26, 2005) 7

Miscellaneous Sources:

State of Arizona Citizens Clean Elections Commission, Participating Candidate Guide 2005-2006 Election Cycle, http://www.azcleanelections.gov/ccecweb/ccecays/docs/2006 Participating CandidateGuide.pdf (visited August 10, 2005) 20

BRIEF OF APPELLANTS ..... *passim*

CLEAN ELECTIONS INSTITUTE, INC., 2004 ELECTIONS STATISTICS, http://azclean.org/documents/1-21-05Gen.Elect.Statistics2.doc (visited August 17, 2005) 15

STATEMENT OF INTEREST

The Campaign Legal Center, Inc. is a nonpartisan, nonprofit organization which works in the area of campaign finance law, generating legal and policy debates about public campaign financing, disclosure, political advertising, contribution limits, enforcement issues, and many other related matters.

The present case concerns allegations that provisions of Arizona campaign finance law violate the constitutional rights of candidates and a professional association. This case directly implicates the campaign finance interests and activities of the *amicus.* The Campaign Legal Center believes this brief may be helpful to the Court in understanding the historical context, constitutionality AND widespread existence of voluntary public campaign financing programs throughout the nation. Accordingly, this *amicus* brief is desirable because it specifically offers legal authorities and arguments not likely to be advanced in either Party's filings, and may help guide the Court in reaching its decision.

The Campaign Legal Center has provided legal counsel to parties and *amici* in numerous other campaign finance cases at both the federal and state court level across the United States. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005); and *KEEP IT CLEAN – NO TO C-04-2004 v. Flake*, No. CV-04-0253-SA (Arizona Supreme Court 2004).

SUMMARY OF THE ARGUMENT

Public campaign financing programs have existed in the United States for more than 30 years. The Supreme Court made clear in its seminal *Buckley v. Valeo* decision, 424 U.S. 1 (1976), that public campaign financing advances First Amendment values without restricting First Amendment rights, and noted that public financing could be used as an incentive to encourage voluntary candidate compliance with spending limits. More than 25 state and local jurisdictions around the nation—including the State of Arizona—have relied on the *Buckley* decision to enact voluntary systems of public campaign financing linked to spending limits.

Appellant Candidates and Association here cloak themselves in the First Amendment in an effort to silence open public debate in Arizona elections. Appellants misconstrue the First Amendment's purpose of enlarging public debate, wrongly claiming the state's facilitation of political speech amounts to a restriction of their own First Amendment rights.

Appellant Candidates and Association are free under Arizona law to make unlimited political expenditures. Arizona's public financing program merely gives Appellant Candidates the additional option of abiding by a voluntary spending limit in exchange for public campaign financing. As such, Appellants have failed to state a valid constitutional claim for relief. We urge this Court to affirm the decision of the district court.

ARGUMENT

I. THE CCEA CONSTITUTIONALLY ENCOURAGES VOLUNTARY COMPLIANCE WITH SPENDING LIMITS IN EXCHANGE FOR PUBLIC CAMPAIGN FINANCING.

In 1974, the United States Congress imposed limits on expenditures by candidates for federal office. These mandatory spending limits were challenged and invalidated on First Amendment grounds by U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Court held that the mandatory spending limits were an impermissible direct restraint on candidate speech. The Court noted, however, that a voluntary spending limit, linked to public financing as an incentive for compliance, would be constitutionally permissible. *Buckley*, 424 U.S. at 57 n.65. The *Buckley* Court then went on to consider and reject various constitutional challenges to the federal public financing program. In short, the Court found that the government's provision of public funds to candidates raises no constitutional concerns. *Buckley*, 424 U.S. at 90-109.

Over the past 30 years, state and local governments around the nation—including Arizona—have followed the Court's advice and implemented voluntary spending limits, using public financing as an incentive to encourage candidate compliance.

In the present law suit, Appellant Candidates allege that Arizona's public financing law, the Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*

("CCEA" or the "Act"), is not voluntary but, instead, "coerces participation by punishing those who refuse to participate" and, thus, violates their First Amendment rights. BRIEF OF APPELLANTS, 22. Nevertheless, the Candidates fail to cite a single case in which a spending limit has been struck down as unconstitutionally coercive. The Candidates do, however, cite First, Sixth and Eighth Circuit decisions rejecting "coerciveness" challenges—and attempt to distinguish their claim on the ground that "those circuit courts examined less objectionable campaign finance laws." BRIEF OF APPELLANTS, 23. The truth is that the architects of post-*Buckley* spending limit systems—including Arizona's system—have taken great care to design programs that are truly voluntary, not coercive.

A. The Supreme Court held in *Buckley* that public financing of candidate campaigns advances First Amendment values without restricting First Amendment rights.

The U.S. Supreme Court's landmark decision in *Buckley* is the only decision in which the Court has examined the constitutionality of public financing. The *Buckley* Court stated unequivocally:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Buckley, 424 U.S. at 57 n.65. The federal public financing law upheld in *Buckley* provides qualified major party presidential candidates with partial public financing in the primary election, and with full public financing in the general election. Appellants in *Buckley* argued, *inter alia*, that "any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Buckley*, 424 U.S. at 90. The Court found "no merit" to this contention. *Id.*

In upholding the federal law against constitutional challenge, the *Buckley* Court noted with approval that Congress had enacted the law "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91. In rejecting the appellants' claim "that public financing of election campaigns, however meritorious, violates the First Amendment," the *Buckley* Court explained that the public financing law:

> is a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the public financing law] furthers, not abridges, pertinent First Amendment values.

Id. at 92-93 (footnotes omitted)(emphasis added). The Court explained further:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.

Id. at 93 n.127.

In short, the Supreme Court in *Buckley* held that public campaign financing programs advance First Amendment values without restricting First Amendment rights.

B. More than 25 state and local governments around the nation have relied on the Supreme Court's *Buckley* decision in implementing public financing programs linked to voluntary spending limits.

Less than four months after the Supreme Court in *Buckley* advised that government may constitutionally condition the provision of public campaign financing on candidate compliance with a voluntary spending limit, Congress amended the Federal Election Campaign Act ("FECA") to reflect the Court's decision. *See* Pub. L. No. 94-283, § 320, 90 Stat. 475 (1976). More than twenty-five state and local governments around the nation have followed Congress' lead, relying on the Supreme Court's *Buckley* decision to enact and implement voluntary public financing programs with spending limits.

In addition to Arizona, the states of Florida,[1] Hawaii,[2] Maine,[3] Maryland,[4] Michigan,[5] Minnesota,[6] Nebraska,[7] New Jersey,[8] New Mexico,[9] North Carolina,[10]

[1] *See* Fla. Stat. ch. 106.30 *et seq.* (2005).
[2] *See* Haw. Rev. Stat. § 11-217 *et seq.* (2004).
[3] *See* Me. Rev. Stat. Ann. tit. 21-A, § 1121 *et seq.* (2004).
[4] *See* Md. Code Ann., Elec. Law § 15-101 *et seq*. (2004).
[5] *See* Mich. Comp. Laws § 169.261 *et seq.* (2004).
[6] *See* Minn. Stat. § 10A.30 *et seq*. (2004).
[7] *See* Neb. Rev. Stat. § 32-1603 *et seq*. (2004).

Rhode Island,[11] Vermont,[12] and Wisconsin[13] offer public financing to candidates for some or all state offices, in exchange for voluntary compliance with spending limits. Our nation's two most populous cities, New York[14] and Los Angeles,[15] along with Austin,[16] Boulder,[17] Long Beach,[18] Miami-Dade County,[19] Oakland,[20] Portland,[21] Sacramento,[22] San Francisco[23] and Tucson,[24] likewise offer public financing to candidates for local office. Furthermore, several state and local governments are considering the adoption of voluntary public financing programs linked to spending limits—including the Ninth Circuit states of California[25] and Washington.[26]

The Ninth Circuit Court's decision in this case could impact longstanding public financing programs nationwide. We urge this Court to reaffirm the Supreme Court's *Buckley* decision, and decisions by the First, Sixth and Eighth

---

[8] *See* N.J. Stat. Ann. § 19:44A-1 *et seq*. (2005).
[9] *See* N.M. Stat. Ann. § 1-19A-1 *et seq*. (2004).
[10] *See* N.C. Gen. Stat. § 163-278.61 *et seq*. (2004).
[11] *See* R.I. Gen. Laws § 17-25-18 *et seq*. (2004).
[12] *See* Vt. Stat. Ann. tit. 17, § 2851 *et seq*. (2004).
[13] *See* Wis. Stat. § 11.50(1) *et seq*. (2005).
[14] *See* New York City, N.Y., Admin. Code § 3-701 *et seq*. (2004).
[15] *See* Los Angeles, Cal., Mun. Code § 49.7.1 *et seq*. (2004).
[16] *See* Austin, Tex., Code § 2-2-6 *et seq*. (2004).
[17] *See* Boulder, Colo., Rev. Code § 13-2-20 *et seq*. (2004).
[18] *See* Long Beach, Cal., Mun. Code § 2.01.110 *et seq.* (2004).
[19] *See* Code of Miami-Dade County, Fla. § 12-22 *et seq.* (2004).
[20] *See* Oakland, Cal., Mun. Code § 3.13.010 *et seq.* (2004).
[21] *See* Code of the City of Portland, Or. § 2.10.010 *et seq.* (2005).
[22] *See* Sacramento, Cal., Sacramento City Code § 2.14.010 *et seq.* (2004).
[23] *See* San Francisco, Cal., Campaign and Governmental Conduct Code § 1.100 *et seq*. (2005).
[24] *See* City of Tucson, Ariz., Charter, Chapter XVI, Subchapter B, § 1 *et seq*. (2005).
[25] *See* Cal. A.B. 583 (introduced Feb. 16, 2005).
[26] *See* Wash. H.B. 1526 (introduced Jan. 26, 2005).

Circuit Courts, by rejecting the Appellant Candidates' claim that the Arizona CCEA is unconstitutionally coercive.

C. The First, Sixth and Eighth Circuits have all rejected "coerciveness" challenges to public financing programs with spending limits.

Maine's public financing program—a program nearly identical to Arizona's—was upheld by the First Circuit against a claim that the program unconstitutionally coerced candidate participation. *See Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 470-72 (1st Cir. 2000). The *Daggett* court explained that a "voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice. *Id.* at 470 (quoting *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998)). In addition, the *Daggett C*ourt noted that "the significant encumbrances [that qualifying for public financing placed] on participating candidates . . . would give significant pause to a candidate considering his options." *Daggett*, 205 F.3d at 472. Thus, Maine's public financing scheme, it held, provides "a roughly proportionate mix of benefits and detriments to candidates seeking public funding, such that it does not burden the rights of candidates or contributors."[27] *Id*.

[27] Similarly, in its earlier opinion in *Vote Choice v. DiStefano*, the First Circuit upheld Rhode Island's system of public financing with spending limits against a First Amendment "coerciveness" challenge, concluding that the law "achieves a rough proportionality between the

In *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), the Sixth Circuit rejected a claim by a candidate for governor of Kentucky, who alleged that the state public financing program "trigger" provision unconstitutionally coerced him to limit his campaign spending. Under the challenged "trigger" provision, a nonparticipating candidate's fundraising in excess of the voluntary spending limit triggers the release of publicly-financed candidates from the duty to comply with the spending limit. The Sixth Circuit began by acknowledging: "[T]he central question we are faced with is whether the substantial advantage the Trigger provides to participating candidates rises to the level of unconstitutional coercion." *Id.* at 948. The court continued:

> [I]t is clear that candidates are under financial pressure to participate, since participation will be the rational choice in the large majority of cases. However, a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice. Were we to conclude that the incentives provided by Kentucky are unconstitutional, we would be making a distinction based on degree. . . . Absent a clearer form of coercion, we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives. Faced with a difference only in degree, we will not second guess the Kentucky legislature by applying a "scalpel" and declaring that Kentucky's scheme goes one step over the line of unconstitutional coercion, especially where, as here, the line is not a clear one. Therefore, we affirm the district court and hold that Kentucky's Trigger provision is constitutional.

---

advantages available to complying candidates . . . and the restrictions that such candidates must accept to receive these advantages." *Vote Choice*, 4 F.3d 26, 39 (1st Cir. 1993).

Id. at 949.

Similarly, the Eighth Circuit in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), rejected claims by two candidates who had enrolled in the state's public financing program that the provisions of the public financing programs were so attractive that the candidates were coerced into abiding by spending limits. The Eighth Circuit explained that public financing programs are "choice-increasing framework[s]" that "promote[], rather than detract[] from, cherished First Amendment values." *Rosenstiel*, 101 F.3d at 1552; *see also Vote Choice*, 4 F.3d at 39; *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980), *aff'd mem.*, 445 U.S. 955 (1980).

D. Like the public financing laws challenged and upheld in the First, Sixth and Eighth Circuits, Arizona's law does not coerce candidate compliance with spending limits.

The Appellant Candidates point to three allegedly coercive aspects of Arizona's law: (1) providing matching funds to participating candidates based on nonparticipating candidate fundraising and spending; (2) requiring additional campaign finance reports; and (3) subjecting nonparticipating candidates to contribution limits 20 percent lower than those in effect prior to voter passage of the CCEA. *See* BRIEF OF APPELLANTS, 25. The district court correctly rejected these claims as meritless.

The State's policy of providing participating candidates with public funding to match nonparticipating candidate spending does not render the State's program coercive. Arizona's public financing program provides a "roughly proportionate mix of benefits and detriments to candidates seeking public funding, such that it does not burden the rights of candidates or contributors." *Daggett*, 205 F.3d at 472. The primary benefit provided to participating candidates is public funding. In exchange for this public funding, candidates must limit their total campaign spending, collect a large number of $5 qualifying contributions to demonstrate broad public support, participate in mandatory debates and forego private campaign funding—running the risk of being dramatically outspent by an opponent.

Appellant Candidates misconstrue the State's distribution of public funds as a burden on their First Amendment rights. As explained above, the Supreme Court in *Buckley* made clear that the provision of public funds to a participating candidate does not impair the ability of nonparticipating candidates to speak. Instead, public financing "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. The *Buckley* Court wisely recognized that public financing "furthers, not abridges, pertinent First Amendment values." *Id.* at 93. Furthermore, public financing programs serve the laudable goals of freeing

candidates from perpetual fundraising and reducing the potential corrupting influence of special interest contributions.

Appellant Candidates also misconstrue Arizona's campaign finance reporting requirements as an unconstitutional burden on their First Amendment rights. The Supreme Court held in *Buckley* that reporting requirements advance three compelling government interests: (1) informing voters as to the source and extent of a candidate's financial support in order to aid voters in evaluating candidates; (2) deterring actual and apparent corruption by exposing contributions to the "light of publicity"; and (3) facilitating enforcement of contribution limits. *Buckley*, 424 U.S. at 66-68. Arizona's reporting requirements are closely drawn to advance these same compelling government interests and in no way burden or hinder nonparticipating candidate First Amendment activity. These governmental interests far outweigh any inconvenience to candidates subject to the reporting requirements. Not surprisingly, Appellant Candidates cite no legal authority in support of their argument that the frequency with which Arizona requires nonparticipating candidates to report campaign finance activities renders the reporting requirements unconstitutional.

Finally, the Candidates' erroneously claim that Arizona's contribution limits are unconstitutional because they "penalize them for running a traditional political campaign and ensure that the participating candidate is funded on an equal basis."

BRIEF OF APPELLANTS, 29. The Candidates correctly note that "contribution limits have routinely been upheld by the U.S. Supreme Court and this Court because of the state's compelling interest in preventing corruption or even the appearance of corruption." BRIEF OF APPELLANTS, 29 (citing *Buckley*, 424 U.S. at 26-27; *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003).

In upholding a $1,000 contribution limit, the Supreme Court in *Buckley* reasoned that "a court has no scalpel to probe, whether, say, a $ 2,000 ceiling might not serve as well as $ 1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30 (citations omitted).

The fact that Arizona voters, when enacting a public campaign financing program that limits participating candidates' receipt of private funds to a specified number of $5 qualifying contributions, also reduced by 20 percent longstanding contribution limits applicable to nonparticipating candidates, in order to more effectively prevent real and apparent corruption, does not render Arizona's contribution limits unconstitutional. A 20 percent reduction clearly can not be said to amount to a "difference in kind." This modest reduction in contribution limits makes clear why the Supreme Court has held that federal courts have "no scalpel to probe" whether the reduced limit might serve as well or better than the pre-1998

contribution limits. Arizona's contribution limits are constitutional under *Buckley* and its progeny.

E. Decisions by Appellant Candidates and others not to participate in Arizona's public financing program is strong evidence that the program is not unconstitutionally coercive.

Perhaps the strongest evidence that Arizona's public financing program and related spending limits are truly voluntary and not coercive, is the fact that Appellant Candidates Martin and Salmon have both chosen in previous elections to forego public financing—and have run highly competitive campaigns doing so. The First Circuit in *Daggett* observed, as evidence that Maine's public financing program did not unconstitutionally coerce participation, that one appellant candidate in the suit had attested that she was not going to participate in the program in an upcoming election, and that another had not yet decided). *Daggett*, 205 F.3d at 472. One might reasonably presume that if a public financing program were in fact coercive, that the appellant candidates in *Daggett* and the Appellant Candidates here would be program participants.

Appellant Martin "is a three-term elected member of the Arizona Senate who has consistently eschewed public campaign funds." BRIEF OF APPELLANTS, 5. Appellant Salmon was a privately-financed candidate for governor in 2002 who raised $2,116,203. Salmon's publicly-funded major party general election opponent received $2,254,740—a mere 6 percent difference.

Salmons publicly-financed independent opponent received only $1,694,875—20 percent less than Salmon raised in private funds. BRIEF OF APPELLANTS, 27. These figures belie the Appellants' assertion that "[n]o matter how you look at the election, Salmon was vastly outspent by his participating opponents." BRIEF OF APPELLANTS, 27.

Appellant Candidates are not alone in their decisions to forego participation in Arizona's public financing program. In 2004, 46 percent (73 out of 157) of the candidates running in the general election chose not to abide by the state's voluntary spending limits in exchange for public financing. And nearly two-thirds (66%) of these nonparticipating candidates won. *See* CLEAN ELECTIONS INSTITUTE, INC., 2004 ELECTION STATISTICS, http://azclean.org/documents/1-21-05Gen.Elect.Statistics2.doc (visited August 17, 2005). These statistics alone should dispel any illusion that Arizona's public financing program is unconstitutionally coercive to nonparticipating candidates.

II. MATCHING FUNDS PROVISION OF THE CCEA DOES NOT HINDER THE ASSOCIATION'S ABILITY TO ENGAGE IN PROTECTED SPEECH.

The Association argues that Arizona's matching funds provision violates the Association's First Amendment right to make independent expenditures. The Association erroneously equates the state's facilitation of candidate speech,

through its public financing system, with some perceived restriction of its own speech. Put differently, the Association mistakes the state giving candidates small carrots with the state beating the Association with a large stick. In doing so, the Association misconstrues the purpose of the First Amendment. The Association "does not, of course, have the right to be free from vigorous debate." *Pac. Gas and Electric Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 14 (1986). On the contrary, the purpose of the First Amendment is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964), *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945), and *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

Arizona's matching funds provision in no way restricts or abridges the Association's First Amendment rights. The Association is free to make unlimited independent expenditures supporting or opposing candidates for public office. The Association does not argue that it is unable to make independent expenditures as a result of the matching funds provision. Instead, the Association argues that it is unwilling to make expenditures, because if it does, the state's public financing program would enable participating candidates to respond to the Association's ads. *See* BRIEF OF APPELLANTS, 6. The Association's own unwillingness to speak

in a political arena where publicly funded candidates will have the resources to respond does not give rise to a cognizable harm under the First Amendment. Rather, the Association is subject only to a self-imposed restriction that raises no First Amendment issues.

A. *Buckley* makes clear that public financing may constitutionally be targeted to certain candidates in order to advance First Amendment values while limiting demand on the public fisc.

As explained in Section I, above, the Supreme Court in *Buckley* held that government may constitutionally provide candidates with public funds to run their campaigns in order to "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 at 92-93. When determining precisely how to facilitate public discussion and participation in the electoral process, Congress designed a public financing program that targets funds to certain candidates in order to prevent the waste of precious taxpayer dollars. Specifically, Congress designed a public financing system that provides major parties and their candidates with more public funds than minor parties and their candidates. *See* 26 U.S.C. §§ 9004(a) and 9008(b).

Congress' decision to target public funding to major parties and their candidates was challenged in *Buckley* as a form of invidious discrimination in violation of the Fifth Amendment. The Court rejected these challenges, reasoning

that "Congress' interest in not funding hopeless candidacies with large sums of public money" justifies the system Congress designed. *Id*. at 96 (citation omitted).

Showing a great deal of deference towards legislative judgments regarding which candidates should receive public funding and in what amounts they should receive it, the *Buckley* Court determined that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Id*. at 97. "Without any doubt a range of formulations would sufficiently protect the public fisc . . . and would also recognize the public interest in the fluidity of our political affairs." *Id*. at 103-104 (emphasis added).

Furthermore, Appellants in the present case argue that the Arizona law is unconstitutional because, by using taxpayer dollars to fund the public financing system, the Arizona law forces Appellants to "finance their opponents' speech." BRIEF OF APPELLANTS, 11. A similar argument was made and rejected by the Supreme Court in *Buckley*. In *Buckley*, the Court explicitly rejected the argument that the federal public financing law is unconstitutional because a taxpayer has no control over which candidates receive the taxpayer's money. The Court explained that "every appropriation made by Congress uses public money in a manner to which some taxpayers object." *Buckley*, 424 U.S. at 92. The Court concluded that "Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent." *Id.* at 92 n.125.

B. Arizona's matching funds provision is a constitutional means of enhancing public debate by targeting public funds to candidates in greatest need and limiting demand on the public fisc.

Like the federal public financing system challenged and upheld in *Buckley*, Arizona's public financing law targets limited public resources to candidates who need them most—in order to "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 at 92-93. The architects of Arizona's public financing program, along with the voters who approved it, estimated that the amount of funds necessary for a candidate to wage a competitive campaign would vary according to several factors beyond the candidate's control—including the amount of funds spent in opposition to the candidate's campaign by other candidates and independent entities.

Under Arizona law, the maximum amount of public funding a participating candidate may receive equals three times the amount of the initial public funding disbursement. *See* Ariz. Rev. Stat. § 16-952(E)(2005). For example, a participating party candidate in the 2006 gubernatorial general election would receive an initial public funding disbursement of $680,774, but may then become eligible to receive an additional $1,361,548 in matching funds depending on

spending by the opposition candidate or independent groups—for a total public funding disbursement of $2,042,322.[28]

Presumably, under *Buckley*, the state would be permitted to initially disburse $2,042,322 to each participating gubernatorial candidate in the 2006 general election—which would better enable participating candidates' voices to be heard in the event of large expenditures by opposing nonparticipating candidates or independent entities such as the Appellant Association. However, much like Congress chose to target public funds to the most deserving presidential candidates in order to limit demand on the federal treasury, the State of Arizona has chosen to target public funds to the most deserving state office candidates in order to limit demand on the state treasury. Rather than disbursing more than $2 million to every participating gubernatorial general election candidate, the state instead disburses $680,774 to candidates initially, and then disburses additional funds only to those candidates who need additional funds to prevent their voices from getting lost in the din of a highly competitive election.

The fact that the State of Arizona saves precious taxpayer money by limiting initial disbursements of public funds—rather than going farther, by disbursing to

---

[28] *See* State of Arizona Citizens Clean Elections Commission, Participating Candidate Guide 2005-2006 Election Cycle, http://www.azcleanelections.gov/ccecweb/ccecays/docs/2006ParticipatingCandidateGuide.pdf (visited August 10, 2005). *See also* Ariz. Rev. Stat. §§ 16-961(G)-(H)(establishing unadjusted general election spending limits) and 16-959(A)(requiring inflationary adjustment of, *inter alia*, spending limits).

every candidate an amount of funds sufficient to be heard in a hotly contested race—in no way invalidates an otherwise constitutional public campaign financing system. Any interpretation of the U.S. Constitution that would permit the State of Arizona to disburse $2 million to each candidate, but prohibit the state from disbursing a lesser amount, subject to increase in the event of need, ignores the Supreme Court's constitutional analysis of public campaign financing in *Buckley*, where the Court advised:

> [I]n deciding the constitutional propriety of . . . such a reform measure we are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id. at 105 (internal quotation marks and citations omitted)(emphasis added).

C. The weight of Circuit Court authority supports the constitutionality of matching funds provisions.

Appellants cite only one case, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), supporting the proposition that an independent expenditure "trigger" provision like the one before this Court violates the First Amendment rights of would-be independent spenders. The reasoning employed by the Eighth Circuit in *Day* has not only been flatly rejected by the First Circuit in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), but has also been called into question by the Eighth Circuit's more recent decision in

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996). Circuit Court decisions in *Rosenstiel* and *Daggett* are more soundly reasoned and more faithful to Supreme Court precedent, especially the holding in *Buckley*, than the Eighth Circuit's holding in *Day*.

1. The Eighth Circuit in *Day* wrongly concluded that responsive candidate speech constitutes an impairment to the initial speaker.

In *Day v. Holahan*, the treasurer of an independent political committee challenged on First Amendment grounds a Minnesota public financing law that provided additional public funds to a participating candidate who was opposed by, or whose opponent benefited from, independent expenditures. *Day*, 34 F.3d at 1359. The Eighth Circuit invalidated this matching funds provision, asserting: "To the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure 'against' her (or in favor of her opponent) is impaired." *Id*. at 1360. The Court described the harm to would-be independent spenders as follows:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.

Id.

The Court's characterization of the enhancement of a candidate's ability to speak as an impairment to the ability of others to speak misconstrues the purpose of the First Amendment—promoting the dissemination of information and the interchange of ideas—and thus constitutes a fatal flaw in the *Day* Court's reasoning.

2. The First Circuit in *Daggett* correctly ruled that matching funds provisions are constitutional.

The Eighth Circuit's reasoning in *Day* was flatly rejected by the First Circuit in *Daggett*. In *Daggett*, several independent political committees challenged on First Amendment grounds a Maine matching funds provision nearly identical to the Arizona matching funds provision challenged in the present case. The First Circuit began by reviewing the challenged provision of the statute to determine whether it burdens First Amendment rights. The Court noted that "[d]irect limitations on independent expenditures have been found impermissibly to burden constitutional rights of free expression," but found that Maine's matching funds provision neither directly restricts, nor indirectly burdens First Amendment rights. *Daggett*, 205 F.3d. at 464.

According to Court, the political committees "misconstrue[d] the meaning of the First Amendment's protection of their speech." *Id*. The committees, the Court reasoned, "have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from

diverse and antagonistic sources." *Id*. (quoting *Buckley*, 424 U.S. at 49 (citations omitted)). Importantly, the *Daggett* Court continued:

> The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Id.

The *Daggett* Court noted that the appellants had relied heavily on the Eighth Circuit decision in *Day*, but stated bluntly: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Id*. at 465. The *Daggett* Court further noted that the Eighth Circuit decision in *Rosenstiel v. Rodriguez* left the "continuing vitality" of the *Day* opinion "open to question." *Id*. at n.25.

3. The Eighth Circuit decision in *Rosenstiel* calls into question the continuing vitality of the Court's reasoning in *Day*.

In *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), two candidates who had enrolled in Minnesota's public financing program challenged the program on First Amendment grounds. The candidates argued to the Eighth Circuit, *inter alia*, that the trigger provision eliminating the spending limit for any participating candidate whose nonparticipating opponent receives contributions or makes

expenditures exceeding specified thresholds[29] violates the candidates' First Amendment rights. *Id.* at 1547. The court rejected the candidates' claim and upheld the trigger provision as constitutional, concluding that the trigger "is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." *Id.* at 1551.

Although the *Rosenstiel* Court made no mention of *Day* while discussing the constitutionality of the trigger provision,[30] the logic employed by the Court in *Rosenstiel* is clearly inconsistent with, and thus calls into question, the Court's reasoning in *Day*. As the First Circuit correctly observed in *Daggett*:

> Although *Day* involved independent expenditures while *Rosenstiel* regarded candidate expenditures, the logic of the two cases is somewhat inconsistent. In *Rosenstiel*, the fact that a candidate's expenditure triggered the release of his opponent's spending limitation did not burden his First Amendment rights; yet in *Day*, the fact that a non-candidate's spending triggered matching funds burdened the speaker's First Amendment rights. We recognize that there may be a difference between expenditures by a candidate and those by a non-candidate, but nonetheless agree that the continuing vitality of *Day* is open to question.

Daggett, 205 F.3d at 465 n.25.

---

[29] Under Minnesota law, spending limits for participating candidates are eliminated either when a nonparticipating candidate receives contributions or makes expenditures equaling 20% of the spending limit more than 10 days before the primary election, or equaling 50% of the applicable limit thereafter. *Rosenstiel*, 101 F.3d at 1547.

[30] Nevertheless, the Eighth Circuit in *Rosenstiel* was certainly mindful of its earlier decision in *Day* because it cited that decision. *See Rosenstiel*, 101 F.3d at 1555.

In short, three U.S. Courts of Appeals have examined the constitutionality of public financing program provisions that trigger benefits for participating candidates in response to political expenditures by others. The First Circuit in *Daggett* and the Eighth Circuit in *Rosenstiel* have correctly ruled that such trigger provisions do not unconstitutionally infringe on First Amendment rights. Only the Eighth Circuit in *Day* has ruled otherwise, and did so based on logic that has been called into question by a more recent decision in the Eighth Circuit, and rejected outright by the First Circuit in *Daggett* and by the district court in the present case.

D. The district court correctly adopted and applied the reasoning of *Daggett* and rejected the reasoning of *Day*.

In the present case, the U.S. District Court for the District of Arizona discussed all three Circuit Court decisions summarized above—*Day, Daggett*, and *Rosenstiel*. The court began its discussion by noting that "[t]he First Circuit recently addressed a similar complaint involving Maine's Clean Elections Act," which the court considered to be "closely analogous" to the Arizona law challenged in this case. *See Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1200 (D. Ariz. 2005). After discussing the three Circuit Court decisions, and noting that the reasoning employed by the Eighth Circuit in *Day* had been called into question by *Rosenstiel*, the district court succinctly held: "The Court adopts the reasoning of the First Circuit in *Daggett* and finds that the

provisions of the CCEA challenged in this action are constitutional." *Id*. at 1202-03.

The district court was correct to adopt the more soundly reasoned approach taken by the First Circuit in *Daggett* in upholding Arizona's matching funds provision. The First Circuit's conclusion in *Daggett* that responsive candidate speech does not constitute an impairment to the initial speaker properly interprets the Supreme Court's *Buckley* decision and the long line of Supreme Court decisions encouraging robust political discourse. We respectfully urge this Court to affirm the district court's decision that the matching funds provision does not violate the appellants' First Amendment rights.

CONCLUSION

For the reasons set forth above and in the briefs of the Appellees and Intervenors-Appellees, the judgment below should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of September, 2005.

THE CAMPAIGN LEGAL CENTER

J. GERALD HEBERT
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER, INC.
1640 Rhode Island Avenue, NW
Suite 650
Washington, DC 20036
Tel.: (202) 736-2200
Fax: (202) 736-2222

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
Tel.: (434) 924-3127
Fax: (434) 982-2643

CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus* brief complies with the type-volume limitation, typeface requirements and type style requirements set forth in Rules 29(d) and 32(a)(5)-(7) of the Federal Rules of Appellate Procedure. This brief uses a proportionally spaced Times New Roman 14 point typeface and contains 6,190 words, as determined by the "word count" feature of Microsoft Word software.

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
Tel.: (434) 924-3127
Fax: (434) 982-2643

CERTIFICATE OF FILING AND PROOF OF SERVICE

This is to certify that on September 13th, 2005, I sent for filing the original and four copies of the foregoing brief and attached motion by overnight delivery via a third party commercial carrier to:

Office of the Clerk
U.S. Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526
(415)556-9800

This is to further certify that on September 13th, 2005, I served one copy of the foregoing brief and attached motion on each of the following counsel by overnight delivery via a third party commercial carrier:

Attorneys Representing Defendants-Appellees Jan Brewer et al.:

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Peter A. Silverman
Assistant Attorney General
1275 West Washington Street
Phoenix, AZ 85007-2997
Tel: (602) 542-8305

Attorneys Representing Defendants-Intervenors-Appellees Steven S. Poe and Clean Elections Institute, Inc.:

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
Timothy M. Hogan
Joy Herr-Cardillo
202 E. McDowell Road
Suite 153
Phoenix, AZ 85004

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
Deborah Goldberg
Suzanne Novak
James Sample
161 Avenue of the Americas
12th Floor

Tel: (202) 258-8850

New York, NY 10013
Tel: (212) 998-6730

Attorneys Representing Plaintiffs-Appellants Association of American Physicians and Surgeons, et al.:

INSTITUTE FOR JUSTICE
Timothy D. Keller
111 West Monroe Street
Suite 1107
Phoenix, AZ 85003
Tel: (602) 324-5440
Fax: (602) 324-5441

INSTITUTE FOR JUSTICE
Scott G. Bullock
1717 Pennsylvania Ave.
Suite 200
Washington, D.C. 20006
Tel: (202) 955-1300
Fax: (202) 955-1329

J. GERALD HEBERT
THE CAMPAIGN LEGAL CENTER, INC.
1640 Rhode Island Avenue, NW
Suite 650
Washington, DC 20036
Tel.: (202) 736-2200
Fax: (202) 736-2222