Case No. 10-15165 & 10-15166

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCCOMISH, et al. and DEAN MARTIN, et al.
Plaintiffs and Plaintiff-Intervenors – Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, et al. and CLEAN ELECTIONS INSTITUTE, INC.,
Defendants and Defendant-Intervenor –Appellants.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS (CCP) IN SUPPORT OF APPELLEES URGING AFFIRMANCE OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

The Center for Competitive Politics is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Center for Competitive Politics 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 Center for Competitive Politics.

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STATEMENT OF *AMICUS CURIAE*

The Center for Competitive Politics ("CCP") is a non-profit organization founded in 2005 by former FEC Chairman Bradley A. Smith, professor of law at Capital University Law School, and Stephen M. Hoersting, campaign finance attorney and former general counsel to the National Republican Senatorial Committee. Both Chairman Smith and Mr. Hoersting maintain an active involvement in CCP's activities. Mr. Smith is Chairman of CCP and Mr. Hoersting is Vice President; both are members of the Board of Directors. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication, is to evaluate and explain the actual effects of money in politics, and the results of a more free and competitive electoral process.

CCP regularly files amicus briefs to assist the Supreme Court of the United States, United States Courts of Appeals, and various state courts in deciding cases involving regulation of political speech. CCP has submitted amicus briefs on behalf of litigants in cases such as *Citizens United v. FEC*, No. 08-205, slip op., 558 U.S. __, 2010 WL 183856 (Jan. 21, 2010), *Davis v. FEC*, 554 U.S. __,128 S. Ct. 2759 (2008), *Randall v. Sorrell*, 548 U.S. 230 (2006), and *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006). CCP also submitted an amicus brief in support of plaintiffs in *McComish v. Bennett* in the U.S. District Court for the District of Arizona. CCP is interested in continuing to participate in this case as amicus

curiae because at issue in this case is whether the Arizona Matching Funds penalize the exercise of the First Amendment rights to make unlimited, lawful, and constitutionally-protected campaign expenditures, a matter of critical importance to "traditional candidates" as well as those such as CCP who oppose penalizing the exercise of First Amendment political speech.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment for plaintiffs and held that the Arizona Citizens Clean Elections Act ("Act") is unconstitutional under the First Amendment. The District Court concluded that the Matching Funds provisions created by the Act constitutes a substantial burden on speech under *Davis v. FEC*, 128 S. Ct. 2759, and that the Act fails strict scrutiny review. CCP agrees with appellees and the Court below that the Act violates the First Amendment under the U.S. Supreme Court's holding in *Davis*; the Act's chilling effect on political speech and expenditures constitute a substantial burden on speech, thus warranting strict scrutiny review, which the Act cannot satisfy.

The Matching Funds provisions substantially burden the First Amendment rights of "traditional candidates" who decline to participate in public financing and instead wish to fully and freely exercise their First Amendment rights to raise and

spend unlimited amounts of campaign contributions.[1] *Cf. Davis*, 128 S. Ct. at 2772. Traditional candidates are penalized for exercising their First Amendment rights when the Act provides dollar-for-dollar matching funds to their opponents when they hit certain spending thresholds. The Matching Funds provisions act as *de facto* expenditure limitations, to which the U.S. Supreme Court has applied strict scrutiny since *Buckley v. Valeo*, 424 U.S. 1, 39–58 (1976). The Act also provides matching funds above the initial disbursement to participating candidates to counterbalance independent expenditures benefitting traditional candidates. This means that the Matching Funds scheme disadvantages traditional candidates for the actions of independent speakers and burdens the speech of independent expenditure groups engaging in constitutionally protected political speech. The Supreme Court has repeatedly recognized the constitutional infirmity of legal structures that advantage "certain preferred speakers." *Citizens United*, slip op. at 24; *see Davis*, 128 S. Ct. at 2772.

The Act cannot survive strict scrutiny. No compelling state interest can support the Matching Funds provisions since, as the District Court recognized, "the *only* legitimate and compelling interest [of the state] is the elimination of

[1] This Brief will refer to candidates who choose not to accept public funding under Arizona's Clean Elections Act as "traditional candidates," and those who do as "participating candidates."

corruption or the perception of corruption." *McComish v. Bennett*, No. CV-08-1550-PHX-ROS at 16 (D. Ariz. Jan. 20, 2010) (citing *Davis v. FEC*). The stated purposes of fairness and increasing candidate participation cannot survive strict scrutiny review and any claim by the State that the Act combats corruption is illusory. Even if a compelling state interest could be found, the program fails narrow tailoring since the Matching Funds program is not the least restrictive alternative. Indeed, other public financing options, such as lump sum financing, are available that do not burden candidates' and supporters' First Amendment rights.

ARGUMENT

I. The Court Below Should Be Affirmed Because The Matching Funds Provisions Are Subject To Constitutional Strict Scrutiny.

Appellants attempt to lower the level of constitutional scrutiny applicable to the Matching Funds provisions by arguing that the Matching Funds "promote[ ], rather than abridge[ ] free speech," and thus "do[ ] not have to survive a heightened level of scrutiny." Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. #286) at 12:14-15, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS; *see also* Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293),at 1:20 ("the Act is designed to increase the amount of political speech"), 5:24-26, 7:6-7 ("matching funds serve to advance First Amendment values").

But in so arguing, Appellants totally miss the actual issue raised in this

litigation by attempting to distract the Court from the specific constitutional claims and injuries alleged by Appellees. After all, by asserting an alleged increase in the totality of speech by all candidates, Appellants ignore and obscure the fact that the Matching Funds provisions burden, suppress, and chill campaign speech of *traditional* candidates (and their supporters) by triggering "[e]qual funding" for *opposing participating* candidates. Ariz. Rev. Stat. §§ 16-952. Thus, when properly focused on the constitutional claims alleged and injuries suffered by Appellees, it is clear the Matching Funds provisions are subject to strict scrutiny because they (1) "impose[ ] a substantial burden on" traditional candidates' (and their supporters') "exercise of the[ir] First Amendment right[s]," *Davis*, 128 S. Ct. at 2772, and (2) act as impermissible *de facto* expenditure limitations on traditional candidates (and their supporters).

A. The Matching Funds Provisions Substantially Burden the First Amendment Rights of Traditional Candidates and Their Supporters By Penalizing Speech of Traditional Candidates.

The District Court found that Arizona's Matching Funds provisions substantially burden the First Amendment rights of traditional candidates (and their supporters) in much the same way as did the federal Millionaire's Amendment in *Davis* — namely, by "impos[ing] an unprecedented penalty on any [traditional] candidate who" chooses to "robustly exercise[his or her] First Amendment

right[s]."[2] 128 S. Ct. at 2771. Indeed, the penalty imposed by Arizona's Matching Funds provisions on traditional candidates is even more severe and direct than was imposed by the Millionaire's Amendment struck down in *Davis* because, if a traditional candidate (or an independent expenditure of his supporters) triggers Matching Funds to a participating opponent in Arizona, that opponent is *certain* to receive dollar-for-dollar opposition public funds, *see* Ariz. Rev. Stat. §§ 16-952(A)-(C), while under the Millionaire's Amendment the opposing candidate was provided with only the *opportunity* to raise additional funds under asymmetrical contribution limits, *see Davis*, 128 S. Ct. at 2766.

This is precisely the conclusion which the United States District Court for the District of Connecticut drew from *Davis* in *Green Party of Connecticut v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009). In *Green Party of Connecticut*, at

[2] While it is true that the First Amendment right being exercised in *Davis* was that of candidate self-financing, the District Court correctly concluded that the fact does not make the constitutional rule and rationale derived from *Davis* inapplicable here. Not only has the Supreme Court been clear that the First Amendment protects the right of candidates to engage in unlimited expenditures of lawfully contributed campaign funds, whether they come from the candidates themselves, contributors, or PACs, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 39–58 (1976), but also the unconstitutional choice imposed on traditional candidates by Arizona's Matching Funds provisions is the same as that struck down in *Davis* — either "abide by a limit on [campaign] expenditures or endure the burden that is placed on that [First Amendment] right by the activation of a scheme of discriminatory" counter-funding, 128 S. Ct. at 2772.

issue was the Connecticut Citizens' Election Program ("CEP") which, among other things, provided additional funding to publicly funded candidates when those opting out of the system hit certain "expenditure triggers." *Id.* at 302. The Court, relying on *Davis*, concluded: "The expenditure triggers in the CEP require non-participating . . . candidates . . . considering making independent expenditures to choose between limiting their political speech and providing bonus public funding grants to candidates they oppose," thus requiring strict scrutiny review. *Id.* Further, the *Green Party of Connecticut* Court argued that "the benefit conferred by the CEP trigger provisions is more constitutionally objectionable than [the arrangement in *Davis*, because in *Davis*,] the opponent must still go out and raise the additional contributions . . . . The CEP, by contrast, ensures that there will be additional money to counteract the excess expenditures by the non participating candidate . . . ." *Id.* at 373. Though the CEP had wider-reaching flaws than the expenditure triggers alone, the result in Connecticut is instructive in examining Arizona's Matching Funds provisions in light of *Davis*.

Thus, even more so than in *Davis*, traditional candidates (and their supporters) in Arizona find that "the vigorous exercise of the[ir First Amendment] right[s] to use [lawfully contributed and constitutionally protected] funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Davis* at 2772. As the Supreme Court

held in *Davis*, such a regulatory scheme "imposes a substantial burden on the exercise of the First Amendment right to use [candidate] funds for campaign speech," which "cannot stand unless it is 'justified by a compelling state interest'" and is narrowly tailored to that interest (*i.e.*, strict scrutiny). *Id*. (quoting *Federal Election Comm'n v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 256 (1986)) (citations omitted); *see also Citizens United*, slip op. at 23.

B. The Matching Funds Provisions Act as Expenditure Limitations Against Traditional Candidates and Their Supporters

Strict scrutiny was correctly applied to Arizona's Matching Funds provisions because they act as *de facto* expenditure limitations against traditional candidates (and their supporters), despite the fact that traditional candidates (and their supporters) never agree to limit their First Amendment rights by participating in the public financing regime.

It is hornbook law that, while candidate contribution limits can be upheld as constitutionally permissible if they are "closely drawn to match a sufficiently important government interest," *McConnell v. FEC*, 540 U.S. 93, 136 n.39 (2003) (internal quotation marks omitted); *see also Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25), candidate expenditure limits are subject to strict scrutiny and must be struck down unless they are narrowly tailored to a compelling governmental interest**.** *See, e.g.*, *McConnell*, 540 U.S. at 291 (Kennedy, J., concurring in part and dissenting in part) ("*Buckley* subjected

expenditure limits to strict scrutiny."); *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002) ("[I]t is clear that expenditure limitations are subject to strict scrutiny."); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990), overruled in *Citizens United v. FEC*, 558 U.S. __, 130 S. Ct. __ (2010)) ("Expenditure limitations are subject to strict scrutiny and will be upheld only if they are 'narrowly tailored to serve a compelling state interest.'"); *see also generally Buckley*, 424 U.S. at 39–58 (striking down expenditure limits). Indeed, the Supreme Court has *never* upheld — or subjected to less than strict scrutiny — any expenditure limit imposed on candidates who reject public funding for their campaigns. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. at 242 ("Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints, including those on expenditure limits.") (citing cases).

Rather, the sole context in which the Supreme Court has upheld an expenditure limit is when a candidate voluntarily consents to an expenditure limitation in exchange for gaining access to public funds for his or her campaign. *See Buckley*, 424 U.S. at 57 n.65; *see also generally Buckley*, 424 U.S. at 85–108. Of course, this is not the case here with respect to Appellants and all traditional candidates who decline to participate in Arizona's public financing scheme. These

candidates instead choose to be able to fully and freely exercise their First Amendment rights to raise and spend unlimited amounts of lawful campaign contributions by foregoing any public financing of their campaigns. But by providing additional dollar-for-dollar counter-financing to participating candidates when a competing traditional candidate exceeds limitations to which only the publicly funded candidates consent (or when independent expenditures benefitting the traditional candidate are made), the Matching Funds provisions end up imposing those same limitations on traditional candidates (and their supporters). This is why Appellants, who have expressly rejected public financing and the campaign finance limits that come with it, complain that Arizona's Matching Funds provisions are unconstitutional.

In other words, under Arizona's Matching Funds Provisions, traditional candidates are provided with no real choice at all. Sure they can reject public funding, but the consequence, as the District Court observed, "is substantially the same" since Arizona's Matching Funds provisions "force[ ] a [traditional] candidate to choose to 'abide by a limit on [campaign] expenditures' or else endure a burden placed on that right" via the dollar-for-dollar grant of additional public funding to each participating opponent when the traditional candidate exceeds the limits he or she rejected in the first place. Order (Dkt. #30),at 7:2-5, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS (quoting *Davis*, 128 S. Ct. at 2772); *see also* Findings of Fact & Conclusion of Law (Dkt. #185) at 10:18-27, *McComish v.*

Bennett, No. CV-08-1550-PHX-ROS (same).

As the Supreme Court explained in *Davis*, the *de facto* imposition of such limits on candidates who choose to exercise their First Amendment rights to receive and spend unlimited amounts of lawful and constitutionally protected campaign contributions subjects the scheme to strict scrutiny:

> The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. But the choice involved in *Buckley* was quite different from the choice imposed by [the Millionaire's Amendment]. In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, [the Millionaire's Amendment] does not provide any way in which a candidate can exercise that right without abridgment. . . . The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*.

128 S. Ct. at 2772 (citation omitted). The District Court properly cited this language to explain why Arizona's Matching Funds provisions are subject to strict scrutiny, *see* Findings of Fact & Conclusions of Law (Dkt. #185) at 10:18-27, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS. Accordingly, the District Court was correct in holding that "the Act has the ability, if not always the effect, of regulating expenditures in both the primary and general campaigns. The Act's burden must be evaluated in terms of potentially affecting 'fully protected speech.'" *McComish v. Bennett*, No. CV-08-PHX-

ROS at 12 (quoting *Lincoln Club of Orange County*, 292 F.3d at 938).

II. No Compelling State Interest Supports the Matching Funds Provisions

Being subject to strict scrutiny, Arizona's Matching Funds provisions must be supported by a compelling interest, but they are not. Rather, not only is it readily apparent that the purpose of the Matching Funds provisions is to unconstitutionally level the electoral opportunities between traditional and participating candidates, *see*, *e.g.*, *Davis*, 128 S. Ct. at 2773–74, but the Matching Funds provisions also undermine and provide new and additional opportunities to frustrate the only compelling governmental interest in sustaining campaign finance restrictions — preventing corruption or the appearance of corruption, *see*, *e.g.*, *id.* at 2773 (quoting *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 496–97 (1985)) (citation omitted).

A. The Obvious and Admitted Purpose of the Matching Funds Provisions Is to Level the Electoral Opportunities Between Competing Candidates

Even if it was not obvious from the Section's title — "Equal funding of candidates," Ariz. Rev. Stat. § 16-952 — that the purpose of Arizona's Matching Funds provisions is the constitutionally illegitimate one of leveling electoral opportunities between traditional and participating candidates, such a purpose is clear from both the operation of the Matching Funds provisions and the Appellants' defense of them as part of Arizona's public funding scheme. After

all, not only are there the self-evident financial equalization aims of the Matching Funds provisions — which provide additional dollar-for-dollar public financing to opposing participating candidates when traditional candidates (and their supporters) outspend participating candidates in the primary election period, *see* Ariz. Rev. Stat. §§ 16-952(A) & (C), and outraise or outspend participating candidates in the general election period, *see* Ariz. Rev. Stat. §§ 16-952(B) & (C) — but also Appellants were forced to admit at the District Court that the true intention of the Matching Funds provisions is to level electoral opportunities so that participating candidates will not face a financial disadvantage that would make them reluctant to accept public funding, *see*, *e.g.*, Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293) at 5:24–26, 7:6–8, 12:12–17 & 21–22, 13:1–2, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS; Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. #286) at 6:27–7:1, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS.

Of course, being subject to strict scrutiny, Appellants cannot successfully seek to have this Court uphold the Matching Funds provisions as "an important component" part of Arizona's public funding scheme as a whole. Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), *McComish v. Bennett*, No. CV-08-1550-PHX-ROS, at 12:9; c*f. Timmons v. Twin Cities Area New Party*, 520 U.S. 349, 358 (1997) (only if the burden on speech is "lesser," requiring "less exacting

review," would "a State's 'important regulatory interests' . . . be enough to justify 'reasonable, nondiscriminatory restrictions'") (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Instead, Appellants must prove the Matching Funds provisions, by themselves, are supported by a compelling interest because, as the Supreme Court has held, a "court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *Federal Election Comm'n v. Wis. Right to Life, Inc.* (*WRTL*), 127 S. Ct. 2652, 2672 (2007) (emphasis in original). Indeed, as Appellees correctly noted at District Court, "[r]estrictions that exist simply to enable other portions of a statute to operate do not satisfy strict scrutiny." Mem. in Supp. of Pl.-Intervenors' Mot. for Summ. J. (Dkt. #288-2) at 6:24–7:2, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS (citing *WRTL*, 127 S. Ct. at 2672).

Nevertheless, Appellants still pin their constitutional defense of the Matching Funds provisions on their being an integral part of Arizona's larger public funding scheme. Such a defense does not satisfy strict scrutiny, and only draws attention to the constitutionally illegitimate purpose of the Matching Funds provisions. Therefore, Appellants' statements that

> (1) "Matching funds play an important role in a candidate's decision to participate in the public funding system [because, without such Funds, a] participating candidate would receive only a modest public disbursement, after which she could be grossly outspent by a[traditional] opponent [and his supporters] unconstrained by limits on

> expenditures or contributions," Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 12:14–17; and
>
> (2) "Without matching funds, 'the State could reasonably believe that far fewer candidates would enroll in its campaign finance program,'" Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 13:1–2 (citation omitted);

must be seen for what they are — admissions that the Matching Funds provisions were designed and are intended to impermissibly level electoral opportunities between participating and traditional candidates.[3] Moreover, it becomes quite obvious that even Defendants cannot escape the fact that the Matching Funds provisions advance the illegitimate purpose of "'equalizing the financial resources of candidates'" rejected most recently in *Davis*, 128 S. Ct. at 2773 (quoting *Buckley*, 424 U.S. at 56), since throughout their submissions Defendants continue to insist that "the distribution of matching funds[ ] furthers, not abridges, pertinent First Amendment values by ensuring that the participating candidate will have an opportunity to engage in responsive speech" — triggered, of course, by the

[3] The same is true of Defendant-Intervenor's statements that (1) "To encourage sufficient participation by counteracting the fear that a participating candidate will be outspent by a traditionally-funded opponent or an independent expenditure committee, the Act provides additional matching funds," Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. # 286), at 6:27–7:1; and (2) that the Matching Funds provisions are "an integral part of the package of benefits . . . that candidates accept when choosing whether to participate . . . and [are] necessary to incentivize the levels of candidate participation required to make the program successful," *id.* at 7:10–13.

exercise of traditional candidates' (and their supporters') First Amendment rights. *E.g.*, Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 5:25–26, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS (citation omitted).

The Supreme Court has been consistently and unequivocally clear that such a purpose violates the First Amendment. Indeed, in soundly rejecting the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" in *Buckley*, the Court emphatically held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 4849; *see also Davis*, 128 S. Ct. 2773 (same). The *Davis* decision only amplifies the constitutional illegitimacy of the government using campaign finance restrictions for the purpose of leveling candidate electoral opportunities, noting that

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit [the government] to arrogate the voters' authority to evaluate the strengths of candidates competing for office. Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not [the government], the power to choose the[ir elected r]epresentatives, . . . and it is a dangerous business for [the government] to use the election laws to influence the voters' choices.

128 S. Ct. 2773–74 (citations omitted). Lest there remain any doubt about the status of the equalization rationale, in *Citizens United*, the United States Supreme Court explicitly overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had been the "first and only case [before *McConnell*] in which a majority of the Court accepted . . . the equality rationale as a permissible state interest." *Citizens United*, slip op. at 10 n.2 (Roberts, C.J., concurring) (quoting Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore 114 (2003)). The Court's rejection of *Austin* in *Citizens United* means that the equality rationale is not a legitimate state interest at all for burdensome campaign restrictions, let alone a compelling one. Because Arizona's Matching Funds provisions advance precisely that illegitimate purpose, they are unconstitutional both on their face and as-applied for that reason alone.

B. Any Asserted Interest in Eliminating Corruption or Its Appearance Is Frustrated by the Matching Funds Provisions

As the District Court properly recognized, the only compelling state interest that can support the Matching Funds provisions such that they are able to survive strict scrutiny is the interest in preventing candidate corruption or the appearance of such corruption. *See* Findings of Fact & Conclusions of Law (Dkt. #185) at 11:17–22 (quoting *Davis*, 128 S. Ct. at 2773 (quoting *NCPAC*, 470 U.S. at 496–97)); *see also* Order (Dkt. #30) at 6:9-10, *McComish v. Bennett*, No. CV-08-1550-

PHX-ROS. But, as Appellees detailed extensively at the District Court, the Matching Funds provisions actually provide new and additional opportunities that frustrate any alleged interest in eliminating candidate corruption or its appearance by allowing for (1) "teaming strategies" between traditional and participating candidates, and (2) "reverse targeting strategies" against traditional candidates, both to trigger Matching Funds, and hence additional campaign financing for the very candidates employing such strategies. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. (Dkt. #297) at 6:18–8:27, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS; *see also* Findings of Fact & Conclusions of Law (Dkt. #185) at 12:18–14:3, , *McComish v. Bennett*, No. CV-08-1550-PHX-ROS (concluding "this potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere"); Order (Dkt. # 30) at 7:9–17, , *McComish v. Bennett*, No. CV-08-1550-PHX-ROS. Additionally, Appellees pointed out that "the phenomena of 'bundling'" further undermines any interest in preventing corruption or its appearance because "participating candidates have an even stronger incentive to rely on bundlers than do traditional candidates" as a result of their "minimal resources," along with the fact that the need to qualify for public funds entitles participating candidates "not just [to] the amount bundled, but also the public financing," including matching funds that can triple the original lump sum grant of public financing." Mem. in Supp. of Pls.' Mot. for Summ. J.

(Dkt. # 197), at 8:28–9:18, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS.

Indeed, *Amicus*' own research concerning so-called "Clean Elections" programs in various states, including Arizona, has found no anti-corruption or anti-appearance benefit deriving from such regimes. Most notably, following a 2007 pilot "Clean Elections" program in New Jersey (that mimicked the features of Arizona's Clean Elections Act), *Amicus* studied the donors to participating candidates and their perceptions of their legislators through a survey mailed "to every individual who contributed $10 to at least one 'Clean Elections' candidate in either the 14th or 24th legislative districts." Sean Parnell, Laura Renz & Sarah Falkenstein, *Special Interests, Partisan Pouts, and the Usual Suspects: A Study of Donors to New Jersey's "Clean Elections" Candidates in 2007*, Feb. 2009, at 23 (in Appendix B – Methodology) (available at http://www.campaignfreedom.org/docLib/20090223_SR1NJ.pdf). Tellingly, the findings from that study directly contradict any assertion that "Clean Elections" programs, including Matching Funds, result in advancing any interest in reducing corruption or the perception of corruption on the part of donors. Indeed, perhaps the most notable finding of the survey showed that "[t]he donor group most supportive of 'clean elections' was most likely to believe their own 'clean' legislators favored party and special interests over constituents interests." *Id.* at 7; *see also id.* at 7–9. Also important were the findings that (1) "Organized interest groups supplied nearly half of all qualifying contributions to 'clean election' candidates," and (2) "A majority of

these interest group contributors were affiliated with just six groups." *Id.* at 19 (Summary of Findings and Conclusions); *see also id.* at 3–6. These dual findings provide empirical credence to Appellees' argument that bundling (or soliciting) by interest groups plays a more prominent role for participating candidates than for traditional candidates, thus undermining any assertion that so-called "Clean Elections" programs serve any interest in reducing the perception of corruption (and the influence of special interests).

Another study by *Amicus* demonstrates that such a resulting lack of faith in the ability of "Clean Elections" programs to reduce corruption or its appearance, especially in Arizona, is well founded on the part of the public. In a paper published in September 2008, *Amicus* studied whether publicly financed campaigns in Arizona and Maine had led to reduced spending growth by those state governments. *See* Sean Parnell, *Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?*, Sept. 2008 (available at http://www.campaignfreedom.org/docLib/20080930_Issue_Analysis_4.pdf). The issue is particularly significant here, where one of the "Findings and declarations" supporting Arizona's Clean Election Act was that the "current [private] election-financing system . . . [c]osts average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors." Ariz. Rev. Stat. § 16-940(B)(6). However, *Amicus*' study found that, while "[b]oth Arizona and Maine had below-average spending growth [compared to the national average] before

taxpayer-funded campaigns were enacted[, o]nce legislators began relying upon taxpayer dollars to fund their political campaigns, both states' spending grew at a faster rate than the national average." *Id.* at 3. Thus, the study concluded that, "[b]ased on the actual experience of [Arizona], there is no evidence to support the claim that replacing private, voluntary contributions to candidates with public funds will lead to savings for taxpayers . . . in the form of reduced spending." *Id.*

All of these findings by *Amicus*' research only add to the already abundant submissions by Appellees demonstrating that Arizona's Clean Elections Act — and more specifically its Matching Funds provisions — has neither reduced candidate and officeholder corruption nor the appearance of such corruption perceived by the public-at-large. That Appellants are able to turn up and point at a few decades-old examples of corruption — dealt with under existing and separate laws — does not, and cannot, change the fact that the Matching Funds provisions do nothing to prevent such public ills. In short, while the Matching Funds provisions advance the illegitimate interest in leveling electoral opportunities between traditional and participating candidates, those same provisions — and, indeed, the whole Clean Elections Act — have never been shown to advance the only constitutionally legitimate interest in preventing corruption or its appearance, and instead have only provided candidates (and their supporters) new and additional opportunities to frustrate that goal.

III. The Matching Funds Provisions Fail Narrow Tailoring Because Public Funding Could Occur Without Abridging the First Amendment Rights of Traditional Candidates

Once it is clear that Arizona's Matching Funds provisions advance not the legitimate compelling interest in preventing corruption and its appearance, but rather the illegitimate interest in "[e]qual funding of candidates," Ariz. Rev. Stat. § 16-952, it also becomes clear that the Matching Funds fail narrow tailoring because Arizona's public campaign financing could be implemented without abridging the First Amendment rights of traditional candidates. In fact, on the federal level, public financing proponents have dropped triggered Matching Funds from the "Fair Elections Now Act" — proposed not only in the current Congress after the *Davis* decision, but also in the previous one before that ruling — because of their understanding that the provision of participating candidate Matching Funds triggered by traditional candidate fundraising or spending violates both the constitutional rule and rationale of *Davis*, *see* 128 S. Ct. at 2770–74. *Compare*, *e.g.*, S. 752 (111th Cong. introduced Mar. 31, 2009) (excluding triggered matching funds); *with* S. 1285 (110th Cong. introduced May 3, 2007) (including them). Instead, under the current proposed "Fair Elections Now Act," public financing is provided to participating candidates through a combination of a lump sum allotment provided upon qualification for each election, additional financing provided though public quadrupling of qualifying small dollar contributions, and advertising vouchers. *See*, *e.g.*, S. 752 (111th Cong.), §§ 521–524. In other words,

under the currently proposed "Fair Elections Now Act," the fundraising or spending of traditional candidates has nothing to do with the public financing available to participating candidates, which also means that the public funding is not an unconstitutional punitive consequence of a traditional candidate's (or his supporters') exercise of First Amendment rights.

Of course, public financing need not be so elaborate. As Appellees noted in District Court, "there is one obviously plausible alternative to Matching Funds: Lump sum public financing." Mem. in Supp. of Pls.' Mot. for Summ. J. (Dkt. #297) at 24:5–6, *McComish v. Bennett*, No. CV-08-1550-PHX-ROS. But regardless of the public funding mechanism chosen, what is constitutionally obvious is that narrow tailoring means nothing and must be absent when opponents reap public financing rewards in the form of Matching Funds specifically tailored to and triggered by the exercise of First Amendment rights by traditional candidates, as is the case with Arizona's provisions.

VI. Conclusion

For the reasons stated herein, this Court should affirm the District Court's grant of Summary Judgment, declare Arizona's Matching Funds provisions and disclosure requirements unconstitutional on their face and as-applied, and permanently enjoin them.

Respectfully submitted on this 9th day of March, 2010,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Rules 32(a)(5) & (7) that the attached *amicus* brief was prepared using a proportionally spaced, 14–point typeface and contains 5,249 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: March 9th, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2010, I electronically filed the foregoing Brief of *Amicus Curiae* Center for Competitive Politics in Support of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/EMF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to those participants not registered with CM/EMF.

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