Nos. 10-238, 10-239

# In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

*Petitioners,*

v.

KEN BENNETT, *et al.*,

*Respondents.*

JOHN McCOMISH, *et al.*,

*Petitioners,*

v.

KEN BENNETT, *et al.*,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* UNION FOR REFORM JUDAISM IN SUPPORT OF RESPONDENTS


GARVEY SCHUBERT BARER
ANDREW J. GOODMAN, ESQ.
*Counsel of Record*
100 Wall Street, 20th Floor
New York, New York 10005
(212) 965-4534
agoodman@gsblaw.com

DAVID SAPERSTEIN, ESQ.
MARK PELAVIN, ESQ.
RELIGIOUS ACTION CENTER OF REFORM JUDAISM
2027 Massachusetts Avenue, N.W.
Washington, DC 20036

*Attorneys for Amicus Union for Reform Judaism*



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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES

TABLE OF AUTHORITIES – Continued

## STATEMENT OF INTEREST[1]

The Union for Reform Judaism ("URJ") consists of approximately 900 member congregations dedicated to the practice of Reform Judaism in North America. For the past fifty years through its Religious Action Center ("RAC"), the URJ has been, and remains, actively engaged in many of the ethical and moral issues confronting our country. The URJ establishes positions on these crucial questions by resolutions presented to its representative bodies, including its biennial plenary congregational assemblies and its Board of Trustees. Both the URJ itself, and the organization of Rabbis serving the Reform Jewish Movement – the Central Conference of American Rabbis – have passed repeated resolutions supporting campaign finance reform as of central importance to the effective functioning of a democratic nation.

For *amicus* URJ, these resolutions reflect prescient ancient doctrine. The Talmud – a collection of Rabbinic writings that form the basis of Jewish law – warns that "as soon as a man receives a gift from another he becomes so well disposed towards him that he becomes like his own person, and no man sees himself in the wrong." Talmud, Tractate Ketubot, 105b. Even from the days of the Pentateuch, our sages have warned against undue influence which "blind

[1] This brief is filed with the written consent of all parties. The letters of consent are on file with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

the eyes of the discerning and upset the plea of the just." Deuteronomy, 16:19. As the ancients recognized, any time something of value changes hands, the potential exists for those in position of power to see the world in a tinted hue. Public financing, when voluntarily accepted, provides resources for candidates to make their case to the public in a manner that is free from any opportunity of unintentional distortion. Publicly financed candidates should not be penalized for voluntarily accepting funding that accomplishes this ancillary good, and matching funds ensure the means to remain competitive in a manner that facilitates additional speech rather than restricting the speech of others.

## SUMMARY OF ARGUMENT

As the Ninth Circuit succinctly summarized:

> This is a challenge to the constitutionality of the "matching funds" provision of Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-952. The Act establishes a legal framework within which the State of Arizona may provide public financing to candidates for state political offices. A candidate who chooses to participate in the Act's voluntary public financing scheme relinquishes her or his right to raise private campaign contributions. Instead, she or he receives an initial grant of funds from the state to spend on her or his campaign. The challenged provision ensures that if the participating candidate has an

> opponent who is not participating in the public financing system and whose campaign expenditures or contributions exceed a threshold set by the Act, she or he receives additional matching funds from the State.

*McComish v. Bennett*, 611 F.3d 510, 513.

But the additional matching funds are not unlimited:

> During both elections, matching funds, combined with the initial grant, may not exceed three times the amount of the initial grant. Ariz. Rev. Stat. § 16-952(E). This means that a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage in the campaign.

*Id.* at p. 517. Nevertheless, it is the non-participants who are seeking to invalidate the statute.

The Ninth Circuit rejected the challenge and upheld the statute. As Judge Kleinfeld noted in concurrence, "Because the challenged scheme imposes no contribution or spending limits, it does not restrict speech at all. . . ." *Id.* at p. 528. Judge Kleinfeld went on to explain:

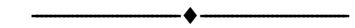
> But the First Amendment does not protect the candidate's interest in winning, just his interest in being heard. There is no First Amendment right to make one's opponent speak less, nor is there a First Amendment

> right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.

*Id.* at p. 529.

From *Buckley v. Valeo*, 424 U.S. 1 (1976) through *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010), the consistent core teaching of this Court's campaign finance jurisprudence is "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. at 14, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Thus, where, as here, the campaign finance regime enhances, rather than restricts, debate it not only passes constitutional muster, but indeed furthers the goals and objectives of the First Amendment.

Accordingly, and for the reasons set forth below, *amicus* respectfully requests that the decision of the Ninth Circuit Court of Appeals be affirmed.



## ARGUMENT

In sustaining limits on campaign contributions but not on expenditures, the *Buckley* Court established the applicable analytical framework:

The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates. . . ." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." 424 U.S. at 14-15.

The very purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 49-50.

Just last year in *Citizens United*, *supra*, the Court again re-emphasized the importance of the "open marketplace of ideas protected by the First Amendment." 130 S.Ct. at 906. Speaking for the majority, Justice Kennedy there wrote that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes," *id.* at 899, and again that "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 911.

*Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), adopting the rationale of Justice Kennedy's *Austin* dissent which noted "we confront here society's interest in free and informed discussion on political issues, a discourse vital to the capacity for self government." 494 U.S. 698-699.

The touchstone, then, of this Court's analysis in each campaign finance decision is whether on balance the restriction promotes or inhibits speech. Those schemes that on the whole restrict speech, have been rejected as in *Citizen's United*, while those that do not are upheld. So, for example, this Court has uniformly sustained "disclaimer and disclosure requirements," even though they "may burden the ability to speak but they 'impose no ceiling on campaign-related

activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S.Ct. at 914, quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Elections Commission*, 540 U.S. 93, 201 (2003).

Likewise, by memorandum in *Republican National Committee v. Federal Election Commission*, 445 U.S. 955 (1980), this Court affirmed Judge Mansfield's decision on behalf of a three judge District Court, 487 F.Supp. 280 (S.D.N.Y. 1980), sustaining the Presidential Election Campaign Act of 1971 ("PECFA") against constitutional challenge. There, the plaintiffs attacked conditioning eligibility for public campaign funds upon compliance with expenditure limitations. In rejecting that contention, Judge Mansfield, affirmed by this Court without comment, wrote that "The Fund Act merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding." 487 F.Supp. at 285. Judge Mansfield concluded that "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters." *Id.* at 284.

The First Circuit Court of Appeals in *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) applied the rationale of *Republican National Committee*, *supra*,

in upholding Maine's campaign finance statute. 205 F.3d at 467. Using a mechanism quite similar to Arizona's statute, Maine provides an initial grant, and then a dollar for dollar match of funds raised by non-participating opponents above the initial grant, up to double of that first grant. Plaintiffs challenged the matching funds scheme, positing, as the Circuit Court characterized it, "a claim of a First Amendment right to outraise and outspend an opponent, a right that they complain is burdened by the matching funds clause." 205 F.3d at 464. Recognizing that the matching funds provision enables response and thereby broadens the marketplace of ideas, the First Circuit soundly rejected that argument in reliance on *Buckley*'s holding that enhancing debate is precisely the object of the First Amendment:

> Moreover, the provision of matching funds does not indirectly burden donors' speech and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They 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."'" *Buckley*, 424 U.S. at 49, 96 S.Ct. 612 (citations omitted); *see Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (there exists no right to speak "free from vigorous debate"). 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.

In language equally applicable to the Arizona statute, the First Circuit further explained why matching funds do not burden the non-participant:

> We cannot say, however, that the matching funds create an exceptional benefit for the participating candidate. Maine's Act does not provide an unlimited release of the expenditure ceiling – it allocates matching funds for the participating candidate of only two times the initial disbursement. Thus, a non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after that limit is reached. Further, the non-participating candidate holds the key as to how much and at what time the participant receives matching funds.
>
> * * *
>
> Moreover, the participating candidate, not having any way of foreseeing the timing or amounts of any matching funds, is unable to budget, to commit time for radio or television, or to plan, produce, or distribute printed material.

205 F.3d 468-469.

In *North Carolina Right to Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), the Fourth Circuit upheld an identical North Carolina matching funds statute, finding that matching funds further First Amendment values as held in *Buckley*, and do not chill or penalize the non-participant.

> Our analysis must begin with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Court made clear in *Buckley* that public financing of political campaigns does not, in itself, violate the First Amendment. 424 U.S. at 57 n. 65, 96 S.Ct. 612. In fact, the Court observed that the Federal Election Campaign Act's (FECA's) public financing scheme "furthers, not abridges, pertinent First Amendment values" because it "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93, 96 S.Ct. 612.

524 F.3d at 436.

* * *

> The thrust of the plaintiffs' First Amendment argument against the matching funds provision is that it "chill[s] and penalize[s] contributions and independent expenditures made on behalf of [nonparticipating] candidates." Appellants' Br. at 32. The plaintiffs argue that their political speech is chilled because spending in excess of the specified

> trigger results in public funds being disbursed to a participating candidate whom the plaintiffs do not support. Therefore, according to the plaintiffs, they choose to spend less money (and thus engage in less political speech) in order to prevent candidates they oppose from receiving public funds.
>
> * * *
>
> The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system. But this does not impinge on the plaintiffs' First Amendment rights. To the contrary, the distribution of these funds "furthers, not abridges, pertinent First Amendment values" by ensuring that the participating candidate will have an opportunity to engage in responsive speech. *See Buckley*, 424 U.S. at 92-93, 96 S.Ct. 612.

524 F.3d at 437.[2] *See also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding Kentucky's post-trigger matching statute, even though post-trigger

[2] Thus, contrary to the *amicus* brief for the Center for Competitive Politics (at p. 13), matching funds do not intervene in the debate; they in truth enable and enhance the debate.

public match was double the amount raised by non-participant).

Before *Davis v. Federal Election Committee*, 554 U.S. 724 (2008), the one outlier taking a contrary position on matching funds was *Day v. Holahan*, 34 F.3d 1356 (8th Cir.1994), which found a chilling effect on the speech of the non-participant. But the First Circuit in *Daggett* rejected *Day*, succinctly identifying the flaw in its rationale: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." 205 F.3d at 465. Moreover, the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), ruling constitutional a statute that removes participants' expenditure limits when a non-participant raises private funds in excess of a stated trigger, calls *Day*'s vitality into question. The *Daggett* Court explains:

> The State, as well as amici, assert that *Day* was called into question by the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir.1996), which held that a provision waiving the expenditure ceiling for a participating candidate once a non-participating opponent reached a certain threshold did not burden the non-participant's First Amendment rights. *See id.* at 1553. 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.

205 F.3d at 464, n.25.

Accordingly, "until *Davis*, [*supra*], these [matching] schemes were generally considered constitutionally permissible." Note, 122 Harv. L. Rev. 375, 381 (2008). They have also enjoyed wide-spread public support.

Faith communities have long recognized the importance of campaign finance reform. "The issue of campaign financing is far more than a political matter. It goes to the heart of the ethical and moral life of a nation." General Board of Church & Society of the United Methodist Church, Resolution #5071, 2008 BOR. In August, 1999, more than 20 Christian denominations or churches, the Unitarian Universalist Association and the *amicus* Union for Reform Judaism ("URJ") formed Religious Leaders for Campaign Finance Reform, declaring, through Rabbi David Saperstein of the URJ's Religious Action Center that, "campaign finance reform is not an esoteric technical issue of election regulations, but one that goes to the essence of the ethical and moral life of our nation." New York Times, Aug. 21, 1999, p. A9, col. 1. And so

in 1984, the *amicus* URJ[3] explicitly endorsed public campaign finance through matching funds. Resolution, Congressional Campaign Finance Reform, Board of Trustees, May, 1984.

Other faith communities reach the same conclusion. In 2008 the Assembly of the United States Presbyterian Church endorsed campaign finance legislation containing matching funds provisions. *Lift Every Voice: Democracy, Voting Rights and Electoral Reform*, Presbyterian Church (U.S.A.), 2008, p. 22. The Church Assembly's Stated Clerk recalled in support the words of Reinhold Niebuhr that "man's (human) capacity for justice makes democracy possible but man's (human) capacity for injustice makes democracy necessary." *Id.* at p. 1.

However, "The more that access to elected officials is linked to wealth, the greater the likelihood that the civil rights of the poor and minorities will be eroded. Without major campaign finance reforms (i.e., clean money reforms that provide public financing of elections), the prospects for future public policies that support social and economic justice are extremely limited." *Campaign Finance Reform*, 2000 Action of Immediate Witness, Universalist Association of Congregations. Consequently, both the Universalist Association and the NAACP have explicitly endorsed campaign finance reforms in all relevant

[3] Then known as the Union of American Hebrew Congregations.

particulars similar to the Arizona matching funds regime and the very similar Maine statute upheld in *Daggett*, *supra*. *See Campaign Finance Reform*, 2000 Action of Immediate Witness, Universalist Association of Congregations; and Action Alert, Feb. 1, 2010, NAACP-Supported Public Financing of Congressional Campaigns Bill Introduced in the House and Senate.

Even so avid a guardian of First Amendment rights as the American Civil Liberties Union supports voluntary public financing plans provided "they ensure candidates have a true choice as to whether to participate and provide sufficient and equitable funding for all legally qualified candidates to run an effective campaign." Release, April 19, 2010, ACLU Board Addresses Campaign Finance Policy.

Since *Davis*, *supra*, two Circuits have felt compelled by that decision to hold matching funds statutes unconstitutional. *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010). With all due respect, these decisions misread *Davis*.

First, *Davis* was not a matching funds case. Rather, there, if a candidate exceeded a limit of personal expenditures on his/her campaign, the ceiling on contributions which his/her opponent could accept tripled, while the non-participant remained subject to the original cap. Because this put the self-funding candidate at a serious disadvantage, the Court held it unconstitutionally burdened his ability to spend his own money. The reading of *Davis* by the *Green Party* and *Scott* Courts:

> oversimplifies and overbroadens the Court's reasoning, and *it ignores the critical constitutional distinction between government restrictions on speech and government subsidies of speech*. While the Court may well set its sights on asymmetrical public funding, *Davis* is hardly the warning shot these commentators think it is. (Emphasis added)

Note, 122 Harv. L. Rev. 375, 381 (2008).

*Davis* is factually inapposite beyond this distinction. *Davis* treated similarly situated candidates asymmetrically. This important distinction is emphasized by the observation in *Davis* that if the "elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits." 554 U.S. at 737.

Conversely here – as upheld by this Court in *Buckley*, *supra*, and *Republican National Committee*, *supra* – public "opt-in" financing schemes create two different groups of candidates based on the candidates' own choices. Opt-in programs bear limitations which a candidate weighs in making a determination whether to participate. Thus, unlike in *Davis*, the non-participating candidate in Arizona is never similarly situated and has a choice of various options available to all candidates. Indeed, by not opting in, the Arizona privately financed candidate at all times retains the potential to outspend the publicly funded candidate since matching funds are capped.

Neither *Davis*, nor any other decision of this Court undermines this core tenet of public campaign

funding jurisprudence: so long as the statute at issue enhances rather than limits the marketplace of political ideas it furthers, and does not run afoul of, the First Amendment. This Court has never struck down a matching public funds program, and nor should it start now. The First Circuit in *Daggett v. Commission on Governmental Ethics and Election Practices*, *supra*, the Fourth Circuit in *North Carolina Right to Life Committee Fund For Independent Political Expenditures v. Leake*, *supra* and the Ninth Circuit in this case have it right: public matching funds in the manner and method of the Arizona statute only enhance and improve the public political debate, for the benefit of us all.

The thrust of Petitioner's contrary argument is that assured publicly funded responsive speech burdens contributions to non-participant candidates. But even if this were true, this Court has never subjected any restraints on contributions to strict scrutiny. *Fed. Election Comm'n v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (observing that ever since *Buckley* the Court has understood that limits on expenditures deserve closer scrutiny than restrictions on contributions); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (construing *Buckley* as providing that contribution limitations warrant less compelling justification than expenditure limitations); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending").

Rather, from *Buckley* through *Citizen's United*, this Court has repeatedly and consistently held any slight burden on adverse party contributions because of public funding does not, and should not, outweigh the important public value of the fullest possible open and free political discourse, an objective only furthered by the Arizona statute, and matching funds statutes like it. As the late Judge Skelly Wright recognized 35 years ago,

> Nothing in the First Amendment prevents us, as a political community, from making certain modest but important changes in the kind of process we want for selecting our political leaders. Nothing bars us from choosing to move closer to the kind of community process that lies at the heart of the First Amendment conception – a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor, and not because one side puts on the more elaborate show of support.

85 Yale L.J. 1001, 1005 (1976).[4]



[4] Lest there be any doubt, the Ninth Circuit majority details a long and sordid history of *quid pro quo* corruption in Arizona politics. 611 F.3d at 514-515. This, of itself, is a sufficiently compelling state interest to survive even strict scrutiny. *Buckley*, *supra*; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993). *A fortiori* it suffices here.

## CONCLUSION

WHEREFORE *amicus* Union for Reform Judaism respectfully requests that the Decision and Order of the Ninth Circuit Court of Appeals be affirmed in all respects.

Dated: February 18, 2011

Respectfully submitted,

GARVEY SCHUBERT BARER
ANDREW J. GOODMAN, ESQ.
*Counsel of Record*
100 Wall Street, 20th Floor
New York, New York 10005
(212) 965-4534
agoodman@gsblaw.com

DAVID SAPERSTEIN, ESQ.
MARK PELAVIN, ESQ.
RELIGIOUS ACTION CENTER
OF REFORM JUDAISM
2027 Massachusetts Avenue, N.W.
Washington, DC 20036

*Attorneys for Amicus*
*Union for Reform Judaism*