

**Case Nos. 10-15165 & 10-15166**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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KEN BENNETT, et al. and CLEAN ELECTIONS INSTITUTE, INC.,

*Appellants,*

v.

JOHN MCCOMISH, et al. and DEAN MARTIN, et al.,

*Appellees.*

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

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**RESPONSE BRIEF OF APPELLEES DEAN MARTIN, RICK  
MURPHY, ROBERT BURNS, ARIZONA FREE ENTERPRISE  
CLUB'S FREEDOM CLUB PAC, AND  
ARIZONA TAXPAYERS ACTION COMMITTEE**

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**Corporate Disclosure Statement**

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

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

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## I. INTRODUCTION

This case concerns a governmental effort to coerce Arizona state independent expenditure committees, self-financing candidates, and privately financed candidates into limiting their speech during political campaigns. Its resolution will determine whether the government may create a public campaign financing system that benefits government-subsidized candidates and burdens privately financed candidates and the groups that support them. It will also determine whether the government may try to “level the playing field” by reducing the speech of groups and candidates it has decided spend too much money speaking about candidate qualifications.

Arizona has created a campaign finance mechanism in which the act of speaking becomes the catalyst by which one’s political and ideological opponents can counter, and often overwhelm, that speech. Ultimately, the question in this case is whether the State of Arizona may achieve indirectly what it is constitutionally forbidden from doing directly: capping the expenditures of independent expenditure committees and candidates. In the zero-sum game of competitive state elections, the government has created *de facto* limits on expenditures by imposing significant disincentives for speakers to spend above a certain limit. The district court correctly

concluded that this is unconstitutional. Recent Supreme Court decisions simply reinforce the conclusion that the government may not amplify the voices of some speakers by reducing the voices of others.

This Court should hold that the Matching Funds Provision<sup>1</sup> violates the rights of independent expenditure groups and privately financed candidates in Arizona. This Court should also issue an immediate injunction to ensure that the free speech rights of Arizonans are not burdened for yet another election.

## II. STATEMENT OF JURISDICTION

The Martin Appellees<sup>2</sup> concur in the State's "Statement of Jurisdiction."

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<sup>1</sup> The following abbreviations will be used to refer to the statutes at issue: Ariz. Rev. Stat. § 16-952 (A) – (C) will be referred to as the "Matching Funds Provision." The entire Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.*, will be referred to as the "Act."

<sup>2</sup> The following abbreviations will be used to refer to the parties: Plaintiff-Intervenors-Appellees Dean Martin, Rick Murphy, Robert Burns, the Arizona Free Enterprise Club's Freedom Club PAC, and the Arizona Taxpayers Action Committee will be referred to as the "Martin Appellees." Plaintiff-Appellees John McComish, Nancy McLain, and Tony Bouie will be referred to as the "McComish Appellees." Defendants Ken Bennett, the members of the Arizona Clean Elections Commission, and Defendant-Intervenor Clean Elections Institute, Inc., will be referred to collectively as the "State."

### **III. STATEMENT OF THE ISSUES**

A. Did the district court correctly grant summary judgment in the Martin Appellees' favor when it concluded that the Matching Funds Provision was an unconstitutional restriction on First Amendment rights?

B. Did the district court correctly deny the State's motions for summary judgment in light of the Supreme Court's decision in *Davis v. FEC*?

C. Did the district court correctly apply strict scrutiny to the Matching Funds Provision when that law burdens speech?

D. Did the district court correctly conclude that the Matching Funds Provision is not narrowly tailored to achieve a compelling governmental interest?

E. Should this Court immediately enjoin the operation of the Matching Funds Provision when that law burdens political speech during an ongoing state election?

### **IV. STATEMENT OF THE CASE**

The State's "Course of Proceedings" is accurate, but neglects two relevant procedural facts: first, that Appellee Dean Martin has been challenging this law in federal court for over six years; and second, that the

district court twice found the Matching Funds Provision unconstitutional during the preliminary stages of this case.

Martin's challenge to the Matching Funds Provision began on January 29, 2004. Martin, joined by other candidates and an independent expenditure group, filed a federal lawsuit against the Arizona Secretary of State and members of the Citizen Clean Elections Commission asserting that the Matching Funds Provision chilled speech and coerced candidates to accept public funding. ER 3092. The district court, the Hon. Earl Carroll, dismissed the case. *Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005). In 2007, this Court found that Martin had stated a cause of action and reversed and remanded. *Ass'n of Am. Physicians and Surgeons v. Brewer*, 494 F.3d 1145 (9th Cir. 2007), as amended by 497 F.3d 1056 (9th Cir. 2007).<sup>3</sup>

On remand, Martin amended his complaint to add two independent political organizations as plaintiffs—the Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club") and the Arizona Taxpayers Action Committee ("Arizona Taxpayers"). In August 2008, the McComish Appellees filed a similar legal challenge to the Matching Funds Provision

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<sup>3</sup> Martin's original co-plaintiffs' claims were moot by this point in time. *Ass'n of Am. Physicians and Surgeons*, 494 F.3d at 1146.

against the same defendants in federal district court.<sup>4</sup> The district court in that case, the Hon. Roslyn Silver, denied the McComish Appellees' application for a temporary restraining order but, having determined that the Matching Funds Provision "violates the First Amendment of the U.S. Constitution," the court *sua sponte* scheduled a preliminary injunction hearing. Martin Appellees' Supplemental Excerpts of Record ("Supp. ER") 28.

The State moved to consolidate the two cases before Judge Carroll. The Martin Appellees did not oppose the motion, which Judge Carroll nonetheless denied. The Martin Appellees then moved to intervene in the *McComish* case and filed a motion for a preliminary injunction. The court permitted intervention and the Martin Appellees voluntarily dismissed the *Martin* case. Supp. ER 21. The court also permitted the Clean Elections Institute to intervene as a defendant. Supp. ER 21.

The district court denied the challengers' requests for a preliminary injunction but emphasized that they had "shown a very high likelihood that their First Amendment rights of free speech are being restrained." Supp. ER 17. After discovery and cross motions for summary judgment, Judge Silver

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<sup>4</sup> The McComish Appellees are comprised solely of privately financed candidates and do not include any groups making independent expenditures.

granted the challengers' motions and denied the State's motions. The district court entered final judgment on January 21, 2010.

## **V. STATEMENT OF FACTS**

While the facts necessary for this Court to decide this case are undisputed, the State's "Statement of Facts" omits key facts necessary for this Court to resolve the case correctly. The Martin Appellees therefore supplement the State's Statement of Facts to include undisputed facts demonstrating the Act's true purpose and its effect on political speech.

### **A. The Act and Its Effect**

The purpose of the Act is to reduce, if not eliminate, the private funding of campaigns in Arizona. To that end, the Act provides grants to candidates who agree to two conditions: (i) they will not generally accept private contributions, and (ii) they will not spend more than the amounts allotted to them under the public financing system.

The constitutional problem arises in the mechanism the Act uses to address a purported problem occurring when groups making independent expenditures and privately financed candidates are able to outspend publicly financed candidates. The law creates a system of "matching funds," under which the government issues a nearly dollar-for-dollar check to publicly financed candidates when an independent expenditure group or a privately

financed opponent engages in political activity in dollar amounts larger than the grant provided to the publicly financed candidate. The government distributes matching funds to all publicly financed candidates in a race, so matching funds not only “equalize” speech, they often overwhelm it. Privately financed candidates receive no matching funds, however, even when independent groups spend money to oppose them or support their publicly funded opponents.

The result of the Act is a state-created disincentive for independent groups and privately financed candidates to speak above a certain level. Because the act of speaking—via campaign mailer, radio or TV ad, or yard sign—triggers a direct government subsidy to the political opposition, speech becomes conditioned on the willingness of the speaker to act as the catalyst for her opposition to counter and sometimes drown out that speech. This disincentive is not incidental to the scheme; as discussed below, it is the overarching intent of the Act.

### **1. The Matching Funds Provision**

The Act provides government money to candidates who collect enough “qualifying contributions” and who agree to abide by the Act’s spending limitations. Ariz. Rev. Stat. § 16-946. The government provides a set level of money, or initial disbursement, to candidates who qualify.

Publicly financed candidates generally cannot accept contributions. They also may not make expenditures above the amount of the initial disbursement unless they receive matching funds, which can amount to up to two times the amount of the initial disbursement.

The government provides matching funds because of the free speech activity of certain Arizona political actors. Privately financed candidates trigger matching funds when they spend (in the primary election) or raise (in the general election) money above the government's initial disbursement to publicly financed candidates. Independent groups trigger matching funds when they spend money in opposition to the publicly financed candidate or in favor of a privately financed opponent (although independent expenditures on behalf of publicly financed candidates or against privately financed candidates do not trigger matching funds to the privately financed candidate in the race). Ariz. Rev. Stat. §§ 16-951, -952.

The matching funds distributed by the government are equal to the amount the privately financed candidate spent or received—or the amount spent by the independent political group—over the initial disbursement, less 6%. Ariz. Rev. Stat. § 16-952(A)-(C). The Act offers a grant of the total matching funds amount to each publicly financed candidate running against a privately financed candidate. Ariz. Rev. Stat. § 16-952. Therefore, in a

campaign with one privately financed candidate and three publicly financed candidates, if an independent expenditure group makes an expenditure of \$10,000 in support of the privately financed candidate and the total amount of expenditures for that candidate is above the initial disbursement, then the government gives \$10,000 (less 6%) to each publicly financed candidate. Thus, under the portion of the Act entitled “Equal funding of candidates,” \$10,000 worth of expenditures in support of a privately financed candidate (who may not have wanted it) results in \$28,200 worth of speech against that candidate.

**2. The Act’s Drafters Intended It to Limit Spending and Level the Political Playing Field**

The Act was adopted in 1998 by ballot initiative by a narrow margin of 51% to 49%. Excerpt of Record (ER) 4. The Act’s primary author, Louis Hoffman, testified that he and the Act’s other proponents sought to reduce the influence and relative voice of certain business groups. ER 3460-62. In a campaign memorandum to the ballot measure’s steering committee, the initiative’s campaign manager stated the Act’s purpose: “Clean Elections is NOT about public funding. Its [*sic*] about spending limits, getting rid of special interests, and leveling the playing field.” ER 5070. In that regard, the documents authored by the employees and agents of Arizonans for Clean Elections and the Defendant-Intervenor Clean Elections Institute

overwhelmingly demonstrate that they intended the Act—and the Matching Funds Provision in particular—to limit spending and level the financial playing field. Combating corruption or its appearance was, at best, a secondary concern. ER 3584-617 (chart summarizing hundreds of statements discussing leveling the playing field and limiting spending).

For example, one internal document, entitled “Justifications for Clean Elections Matching Funds,” identified the two main reasons for the Act’s Matching Funds Provision: “fairness” and “limiting overall campaign spending.” ER 5081. It would achieve these goals by chilling a privately financed candidate’s expenditures: “[a] traditional candidate may think twice about raising additional funds in a race against a Clean Elections candidate.” ER 5081. The reason for thinking twice is that “[t]here is no incentive for the traditional candidate to raise and spend more, unless that candidate intends to outspend the [publicly financed] candidate by going beyond three times the initial grant.” ER 5081. The document concludes by stating that “[w]ith the Clean Elections matching funds system, it can be argued that millions of dollars in spending never takes place.” ER 5081. In other words, the Act was specifically designed to lower spending in Arizona elections, dampen the voices of certain groups, and enhance the relative voices of others.

The Act's proponents thought the resulting "level" playing field would finally allow them to achieve certain progressive policy goals. Jim Driscoll, one of the earliest proponents of an Arizona clean elections scheme, ER 3431, and a ballot measure steering committee member and employee of the campaign, ER 3427, authored a series of reports, ER 3443-55, 3467-79, 3481-511, 3513-34, 3536-47, arguing that until a system of public financing was in place, "no significant progress can be made to protect the environment, fund education, [or] provide adequate health care." ER 3537. To that end, Driscoll recruited a number of progressive groups<sup>5</sup> to support the Act. ER 3365-67.

**3. The Act Has Successfully Reduced Speech in Arizona While Not Reducing Corruption**

The Matching Funds Provision has accomplished its twin goals of dampening overall campaign spending, on the one hand, and creating disincentives for candidates and independent groups to speak, on the other. It has not, however, had any effect on corruption or its appearance.

Defendant-Intervenor's own expert, Prof. Donald Green, testified that while overall electoral spending has increased in Arizona, it has not increased as much as would have occurred if the Act had not been in effect.

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<sup>5</sup> In Arizona, the local chapters of the Sierra Club, the League of Women Voters, and the Arizona Chapter of the ACLU all worked to support the Act's passage. ER 3421-24, 3428, 3431-32, 3549-50, 3564.

ER 3742. Prof. Green even conceded that the Act violates the First Amendment by limiting speech, but that, in his opinion, the constitutional violation is “immaterial.” ER 3744. Similarly, the Martin Appellees’ expert, Dr. David Primo of the Political Science Department of the University of Rochester, testified that many states have seen a surge in campaign spending since 1998; Arizona is not one of them. ER 1941. Dr. Primo testified that the actual increase in spending in absolute terms has been modest. ER 1942.

There is also no evidence that the Act prevents corruption or lessens the appearance of corruption. Half of Arizona voters have never heard of the Act. ER 3393-94, 3873-74. Prof. Green was not able to present any statistical evidence that the Act lessens concerns about corruption. ER 5104. Likewise, Dr. David Primo found no such evidence regarding the Act’s impact on corruption. ER 3657. The Executive Director of the Clean Elections Commission testified that the Commission does not study the Act’s effects on corruption or its appearance. ER 3808. The State’s expert, Dr. Kenneth Mayer, was likewise unable to point to any study or statistical evidence that the Act or its Matching Funds Provision has reduced corruption or the appearance of corruption. ER 3390-92, 3885.

The failure of the Act to achieve its stated goals is not limited to corruption. The Act has not changed incumbent re-election rates. ER 3657. The re-election rate for incumbents in 2006 was roughly equal to the re-election rate in 1994. ER 3749.

**4. The Act's History Demonstrates That It Limits Speech, Favors Publicly Financed Candidates, and Burdens Privately Financed Candidates and Independent Expenditure Committees**

After passage, the asymmetrical nature of the Matching Funds Provision became clear when Matt Salmon, a plaintiff in *American Physicians and Surgeons v. Brewer*, ran as a privately financed gubernatorial candidate in 2002. ER 3239-40. The Democratic Party spent \$1 million on independent expenditures against Salmon. ER 3240. Those expenditures did not count toward the publicly financed Democratic candidate's spending limit. ER 3240. When the Republican Party spent \$333,000 in responsive independent expenditures, the government gave both of Salmon's publicly funded opponents \$333,000 in matching funds. ER 3240-41. Salmon also held a fundraiser with President Bush that raised \$750,000. After expenses, including meals and costs for Air Force One, his campaign netted only \$500,000. ER 3242. Nonetheless, the Matching Funds Provision triggered

\$750,000 to each of his two opponents. ER 3242.<sup>6</sup> A spokesperson for the Democratic campaign stated, “I’m not sure the president realizes he’s raising money for both candidates,” and referred to the event as a “dual fundraiser.” ER 3769; 3776. Club for Growth director Steve Moore told Salmon during the campaign that because of matching funds, the Club would not spend any money supporting his candidacy. ER 3242.

The Matching Funds Provision also chilled the speech of a nonprofit group named Mainstream Arizona, which inadvertently triggered matching funds when it spoke about candidates on issues it was founded to advance. ER 3788. Mainstream then stopped speaking. ER 3788. In 2008, a political committee named Victory 2008 made independent expenditures believing that a publicly financed candidate’s violation of the Act had disqualified him from receiving matching funds. ER 3795-96. When the Commission decided to award matching funds regardless, Victory 2008 filed an ultimately unsuccessful lawsuit to block the award. ER 3793. Victory 2008 also asserted that the Matching Funds Provision, as a general matter, delayed the ideal timing of its expenditures. ER 3799.

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<sup>6</sup> At this point, the Legislature had not yet added the 6% reduction for fund-raising expenses.

**B. The Act Has Harmed and Continues to Harm the Expressive Activity of the Martin Appellees**

The Matching Funds Provision alters a privately financed candidate's strategy from the outset of an election. As political consultant Constantin Querard explained, "every spending decision" is made with matching funds in view. ER 1927. Privately financed candidates are thus "always aware of the cost of spending that first incremental dollar" that triggers matching funds. ER 1927. As each of the Martin Appellees testified, their entire campaign strategy takes matching funds into account. They purposefully keep their expenses and fundraising low enough to avoid triggering matching funds to their publicly financed opponents. ER 531, 1782, 1788, 3109-3111, 3113, 3136, 3141. This means that they mailed information to fewer voters and did so less frequently. ER 1783-84. The Act also requires them to work harder in order to comply with its disclosure requirements and they tended to over-report expenditures and contributions for fear of missing a reporting deadline. ER 3093-99. The Martin Appellees also testified that high propensity donors prefer to give to privately financed candidates who will not trigger matching funds to publicly funded candidates they oppose. ER 3175, 3178, 3183, 3186.

**1. The Matching Funds Provision Has Burdened the Speech of the Candidate Appellees**

Robert Burns is an Arizona State Senator and the current President of the Arizona Senate. ER 3375, 3731. Burns ran each of his campaigns as a privately financed candidate. In 2008, the Matching Funds Provision ensured that his general election opponent had significantly more money for her campaign, despite Burns' attempt to avoid the triggering of matching funds by altering the timing of his expenditures and by holding only one fundraiser. ER 3146-47, 3376. His publicly financed opponent received \$28,250 in matching funds in addition to the \$12,921 primary election disbursement—all of which she could use against Burns because she had no primary opponent—and a \$19,382 disbursement for the general election. ER 3141, 3376-77. Thus, in the 2008 election cycle, Burns' publicly financed opponent had \$7,263 more than Burns to run her campaign. ER 3377. Burns also testified that the Act coerced him to change the timing of his speech. ER 3377, 3732.

Rick Murphy is an Arizona State Representative and a privately financed candidate for the Senate in 2010 facing at least one publicly financed general election candidate. ER 3737. In his first campaign, Murphy was coerced into accepting public financing because the Act penalizes privately financed candidates. However, his subsequent

campaigns were privately financed. ER 3737. In the 2006 general election, Murphy stopped raising money to avoid triggering matching funds to his publicly financed opponent. ER 3160, 3378.

Murphy testified that in the 2008 primary, he did not send out any mail pieces in order to conserve his resources for the general election—where he accurately anticipated being massively outspent. ER 3186. In total, his publicly funded opponents received approximately \$150,000 to spend against Murphy. ER 3161-62, 3378-80. Murphy did not fundraise during the 2008 general election because doing so would have triggered almost \$3 in matching funds for every \$1 he raised. ER 3738. Nonetheless, in the 2008 general election, he experienced the full discriminatory and asymmetrical nature of the law when he faced three publicly financed candidates. ER 3737-38. When a group made an independent expenditure of \$3,627 to support Murphy's candidacy, all three of his publicly funded opponents received a check for \$3,627—meaning that the group's small expenditure triggered \$10,881 to Murphy's opponents. ER 3162. It also meant that the group triggered three times the amount of money it spent directly to the publicly financed candidates it did not support.

Dean Martin is the current Arizona State Treasurer and an announced candidate for governor. ER 3752-53. In Martin's experience, the Act

punishes privately financed candidates for fundraising and spending money against a publicly financed candidate. For instance, in his 2004 Senate re-election campaign, Martin intentionally delayed fundraising to minimize the amount of matching funds. ER 3116, 3126, 3374, 3753. In his 2006 campaign, Martin avoided fundraising to prevent triggering matching funds. ER 3109, 3753. Martin also actively discouraged groups from making independent expenditures on his behalf that might trigger matching funds. ER 3112, 3375.

Most recently, the Matching Funds Provision forced Martin to alter his campaign strategy by not raising private contributions and instead running a publicly financed campaign. This was not Martin's optimal strategy, but it was the only strategy that would preclude his opponents from receiving copious amounts of matching funds. ER 3105-06. In other words, participating in a system to which he is ideologically and politically opposed was the only way he could avoid becoming "Matt Salmon version 2.0."

## **2. The Matching Funds Provision Has Burdened the Speech of Independent Expenditure Committees**

Independent political groups—both parties and non-parties—testified that they take matching funds into account when deciding on which races to spend money. ER 3232, 3381-86. Arizona Taxpayers has delayed making independent expenditures in order to avoid triggering matching funds until

later in the election cycle, and it engaged in self-censorship in 2006 when it chose not to speak in opposition to a publicly financed candidate in a Senate primary race to avoid triggering matching funds. ER 512, 3163, 3215-16, 3225-26. The Freedom Club PAC has been harmed by triggering matching funds to candidates it opposes, ER 3202-05, and its director testified that matching funds impact every spending decision it makes with regard to races involving publicly financed candidates, forcing the Freedom Club to alter the timing of its independent expenditures strategy. ER 3210-11, 3556. Thus, the Matching Funds Provision has affected the timing and nature of how the Freedom Club spends money. ER 3557.

**3. The State’s “Lack of Harm” Argument Ignores the Record, Political Reality, and Relevant Expert Testimony**

The State uses selective quotes to argue that none of the Martin Appellees has experienced a burden on their free speech rights. However, the State’s emphasis paints a distorted picture.

First, as a matter of political reality, it is often impossible for candidates to predict the most important times to raise or spend money. As the Supreme Court recently recognized:

It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speed can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in

the heat of political campaigns, when speakers react to messages conveyed by others.

*Citizens United v. FEC*, 2010 U.S. LEXIS 766, at \*41 (Jan. 21, 2010).

Second, because of the need for flexibility in the later stages of the campaign, candidates and independent expenditure groups factor the possibility of matching funds into the overall campaign strategy from the very beginning, so they are not faced with the choice to remain silent or speak and benefit their opponents as the campaign becomes more competitive. As Murphy explained, candidates “do not run two campaigns: one with matching funds and one without matching funds. The availability of matching funds for my opponents dictates my strategy and influences my thinking from the very beginning of the election cycle right up to the very end.” ER 3186. Matching funds influence the entire trajectory of candidate campaigns, from start to finish. ER 531, 1782, 3109-11, 3113, 3136, 3141.

Third, the expert testimony demonstrates that the Matching Funds Provision distorts political speech and alters the nature, timing, and amount of such speech, so that speech occurs during the very end of the campaign (and, in the general election, after the campaign) so that matching funds cannot affect the outcome. ER 3644. According to the Martin Appellees’ expert witness, Dr. Primo, “the matching provisions lead to changes in fundraising and campaign spending in ways that are harmful to free

expression.” ER 3644. Based on a regression analysis, Dr. Primo testified that in races where matching funds are triggered, candidates change the timing of their fundraising activities, the timing of their expenditures, and their campaign strategies. ER 3644. Matching funds therefore have a very powerful negative effect in competitive races, where they matter most. ER 3645. Dr. Primo concluded that the Act imposes significant burdens on free speech that exceed any of the Act’s beneficial effects. ER 3658.

**C. Alternatives to the Matching Funds Provision Exist**

The State argues that the Act cannot operate without the Matching Funds Provision. Appellants’ Opening Br. (“Br.”) 24. However, the evidence demonstrates that matching funds are not necessary to a successful publicly funded campaign system. Constantin Querard testified that a system that provided a larger initial disbursement, with no matching funds, would be superior to the current system. ER 1928. The State’s own expert, Dr. Mayer, also acknowledged that matching funds are not an essential component of a public-financing scheme. ER 1945-47. The immediate-past director of Defendant-Intervenor Clean Elections Institute also agreed that, even in the absence of matching funds, if the initial disbursement amounts were increased, participation under the Act might increase. ER 1795.

Moreover, the State of Minnesota has a public financing system with almost 100% participation and no matching funds. ER 3395, 3915.

## **VI. SUMMARY OF ARGUMENT**

The district court correctly resolved this case by granting summary judgment to the Martin Appellees and denying summary judgment to the State.

The Martin Appellees' speech is political expression fully protected by the First Amendment. Laws such as the Matching Funds Provision burden protected expression by creating a system in which the act of speaking enables the speaker's opponent to counter—and, in Arizona, often overwhelm—that speech. In fact, the Act was intended to create such a burden. Because the Matching Funds Provision burdens the Martin Appellees' unfettered political expression and their right to autonomy over their message, the Matching Funds Provision is subject to the strictest scrutiny.

The Matching Funds Provision fails this scrutiny. Because the Matching Funds Provision reaches independent expenditures and self-financed campaign speech—two forms of political expression that cannot be restricted under an anti-corruption rationale—the Matching Funds Provision is not narrowly tailored. The Matching Funds Provision also regulates non-

corrupting speech under the guise of regulating potentially corrupting speech, an approach the Supreme Court has never permitted. Because it exists only to provide ancillary support to other portions of the law, the Matching Funds Provision is not narrowly tailored. The Matching Funds Provision is also not necessary for the achievement of any compelling government interest because less burdensome alternatives are available to the State.

The Matching Funds Provision also is not supported by a compelling government interest. The overwhelming purpose of the Act was to reduce expenditures by, and the political participation of, certain groups and candidates with whom the sponsors of the Act disagreed. The fact that the Matching Funds Provision regulates independent expenditures and self-financed candidates demonstrates that the central purpose of the Act was to level the playing field, not to combat corruption.

This Court should immediately enjoin the operation of the Matching Funds Provision. Neither candidates nor the public has any fundamental right to publicly financed elections, while independent expenditure groups, self-financing candidates, and privately financed candidates do have a fundamental right to make expenditures without government restrictions.

## VII. STANDARD OF REVIEW

While the State correctly states the standard of review, two additional considerations apply.

First, this Court may affirm a grant of summary judgment on any basis supported by the record and this Court need not limit its reasons for affirmance to only those set forth by the district court. *Hoeck v. City of Portland*, 57 F.3d 781, 784 (9th Cir. 1995). Second, “[g]iven the special solicitude” this Court has for claims alleging the abridgment of First Amendment rights, this Court reviews a district court’s findings of fact when striking down a restriction on speech for clear error. *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003) (citations and quotation marks omitted). Within this framework, this Court reviews the “application of facts to law on free speech questions de novo.” *Id.*

## VIII. ARGUMENT

### A. The First Amendment Protects Political Speech and Association from Indirect Restrictions

#### 1. The First Amendment Fully Protects Political Speech and Association

The Act impacts political speech occurring during political campaigns, when the protections of the First Amendment are at their zenith. *See Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (“[I]t can hardly be doubted that

the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”) (internal quotation marks and citation omitted). Indeed, “[p]rotection of political speech is the very stuff of the First Amendment.” *Republican Party v. White*, 416 F.3d 738, 748 (8th Cir. 2005). Because effective advocacy is enhanced by group association, the First Amendment also protects the right to “associate with others for the common advancement of political beliefs and ideas . . .” *Buckley*, 424 U.S. at 15 (citation and quotation marks omitted).

## **2. The First Amendment Forbids the Government from Chilling or Burdening Political Speech**

The State nonetheless argues that the Matching Funds Provision does not prevent anyone from speaking because it contains no affirmative restriction. Br. 30-32. The courts have long rejected such a restrictive view of First Amendment freedoms. In the First Amendment context, “courts must ‘look through forms to the substance’ of government conduct.” *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). “[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First

Amendment rights as imprisonment, fines, injunctions or taxes.” *American Commc’ns Ass’n v. Doubs*, 339 U.S. 382, 402 (1950). “[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.” *Citizens United*, 2010 U.S. LEXIS 766 at \*51.

This Court has concluded that the government may be liable for stifling speech through indirect means when the government’s motive is to chill speech. “In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that by his actions the defendant deterred or chilled the plaintiff’s political speech and such deterrence was a substantial or motivating factor in the defendant’s conduct.” *Mendocino Env’tl Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (quotation marks, citations, and alterations omitted). Intent is a significant factor in this Court’s approach to First Amendment violations:

[O]ur description . . . requires only a demonstration that defendants *intended* to interfere with [the plaintiff’s] First Amendment rights. Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks whether an official’s acts would chill or silence a person of ordinary firmness from future First Amendment activities.

*Id.* Finally, governmental liability may be “demonstrated either through direct or circumstantial evidence.” *Id.* That a speaker engages in some level of protected speech does not mitigate the government’s liability. *See Rhodes*

*v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2004) (“Speech can be chilled even when not completely silenced.”).

**3. Overall Increases in Political Activity Cannot Justify Burdens on Individual Rights**

The State argues that overall political activity in Arizona has increased. Br. 18.<sup>7</sup> But the State does not explain how an increase in the speech of the collective can compensate for harm to individual speakers.

Precedent does not support the notion that the rights of the individual speaker must be subordinate to the rights of other speakers or the voting public. “While both the speaker and the listener have the right to assert First Amendment rights, no precedent exists for the proposition that the listener’s rights are greater than those of the speaker.” *NAACP v. Jones*, 131 F.3d 1317, 1322 (9th Cir. 1997). “While it is well-established that the First Amendment protects not only the right to engage in protected speech, but also the right to receive such speech, it remains true that the rights of the recipients of speech . . . derive in the first instance from the primary rights of the speaker.” *Spargo v. New York State Comm’n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003).

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<sup>7</sup> The State overshoots the mark in its championing of the overall increase in spending. Many states have seen a surge in campaign spending since 1998; Arizona is not one of them. ER 1941. The actual increase in spending in absolute terms has been modest. ER 1942.

In the free speech context, the First Amendment places primacy on the individual speaker and not the collective. *See Jones*, 131 F.3d at 1323 (“The First Amendment simply does not guarantee access to all of the information a voter would like to receive.”). Thus, the question before this Court is not, “Has spending increased?” Rather, the proper question is, “Does the Matching Funds Provision burden the speech of independent expenditure committees, self-financing candidates, and privately financed candidates?” The State’s attempt to absolve itself of its harm to the Martin Appellees’ First Amendment rights by noting benefits purportedly received by others must fail.

More fundamentally, however, the State’s argument fails because the First Amendment is a prohibition against government restrictions on speech, not a mandate for the government to promote the speech of those it believes are not speaking enough. The Constitution does not permit the government to distribute burdens to speakers in order to “improve” the marketplace of ideas. “[T]he 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 . . . .” *Buckley*, 424 U.S. at 48-49.

**B. The Matching Funds Provision Burdens Political Speech**

**1. The Record Demonstrates That the Matching Funds Provision Burdens Political Speech**

While the Act does little to combat corruption, it is effective at suppressing speech. Despite the portions of the record picked by the State to demonstrate little or no effect on speech, an independent examination of the whole record demonstrates that the Matching Funds Provision has burdened speech:

- Each of Martin, Burns, and Murphy has intentionally delayed and limited his fundraising in order to minimize matching funds.<sup>8</sup>
- Martin has actively discouraged independent political groups from making expenditures that would trigger matching funds.<sup>9</sup>
- Murphy did not fundraise in the 2008 general election because he faced three publicly funded opponents and would have triggered almost \$3 in matching funds for every \$1 he raised beyond the general election trigger amount.<sup>10</sup>
- The independent expenditure committees have been harmed by triggering matching funds to the candidates they oppose based solely

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<sup>8</sup> ER 3105-06, 3109, 3122, 3126, 3135-36, 3141-42, 3146-47, 3159-62, 3169, 3176-77, 3182, 3374-81.

<sup>9</sup> ER 3112, 3375.

<sup>10</sup> ER 3170, 3379.

on the exercise of their free speech rights.<sup>11</sup>

- The independent expenditure committees have altered the timing of their speech, often delaying it until later in the election cycle to minimize the harmful effects of the Matching Funds Provision.<sup>12</sup>
- In the 2006 primary, Arizona Taxpayers declined to speak in opposition to a publicly financed Senate candidate because such speech would have triggered matching funds.<sup>13</sup>

Moreover, Dr. Primo conducted a statistical analysis of spending by, and contributions to, privately financed candidates during the 2000, 2002, 2004, and 2006 elections.<sup>14</sup> Dr. Primo's regression analysis of Arizona's campaign finance data shows that privately financed candidates in races where matching funds were awarded changed the timing of their fundraising activities, the timing of their expenditures, and, thus, their overall campaign strategies.

Accordingly, the State is simply wrong when it argues that the Matching Funds Provision does not burden speech.

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<sup>11</sup> ER 3202-05, 3226, 3383-85.

<sup>12</sup> ER 3163, 3210-11, 3215, 3220-21, 3382-83.

<sup>13</sup> ER 3224-25, 3385.

<sup>14</sup> *See* ER 3644, 3671. Dr. Primo did not examine 2008 because the data was incomplete at the time of his report.

**2. *Davis v. FEC* Rejected the State’s Arguments**

**a. The FEC Made the Same Arguments in *Davis* That the State Makes Here**

The State maintains that this evidence is insufficient to establish a burden on free speech. The State’s argument fails for two reasons. First, as described above, the record demonstrates that the Martin Appellees meet and exceed the inappropriate evidentiary standard urged by the State. Second, the State’s argument fails as a matter of law. In *Davis v. FEC*, 128 S. Ct. 2759 (2008), the Supreme Court reiterated that laws that create such disincentives harm political speech and, in so doing, rejected arguments identical to those made by the State here.

In *Davis*, the Court struck down the “Millionaire’s Amendment,” which allowed opponents of self-financed candidates to accept funds in the amount of three times the maximum contribution limit from individuals if their self-financed opponents spent more than a certain amount of their own funds. The Court concluded that this system “impermissibly burden[ed] [the self-financing candidate’s] First Amendment right to spend his own money for campaign speech.” *Id.* at 2771. The law created an “unprecedented penalty” on any self-financing candidate who robustly exercised their First Amendment rights: if she “engage[s] in unfettered political speech” she will be subject “to discriminatory fundraising limitations.” *Id.* Self-financing

candidates could still spend their own money, “but they must shoulder a special and potentially significant burden if they make that choice.” *Id.* at 2772. The Court agreed with Davis that this system “unconstitutionally burden[ed] his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis’ own speech.” *Id.* at 2770.

In coming to this conclusion, the Supreme Court rejected arguments identical to those the State makes here. Like the State, Br. 15-17, the Federal Elections Commission (FEC) argued that Davis suffered no actual injury. *Initial Brief of Appellee-Respondent*, 2007 U.S. S. Ct. Briefs LEXIS 318 at \*\*44-45, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320). *See also id.* at \*\*45 (arguing that “[d]uring the 2006 election campaign, [Davis’s] opponent received no contributions, and the opponent’s political party made no coordinated expenditures, in excess” of the FECA limits and that Davis had not been deterred “from loaning his campaign approximately \$2.25 million in 2006”). Like the State, Br. 23, the FEC argued that the Millionaire’s Amendment “places no restrictions on a candidate’s ability to spend unlimited amounts of his personal wealth to communicate his message

to voters, nor does it reduce the amount of money he is able to raise from contributors.” *Id.* at \*\*49 (citation and quotation marks omitted). Like the State, Br. 25, the FEC argued that the Millionaire’s Amendment was an effort “to ‘enhance the relative voice’ of non-wealthy candidates *without* ‘restricting the self-financing candidate’s speech.” *Id.* at \*\*50 (quoting Appellant’s brief). *See also Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting) (“But Davis cannot show that the Millionaire’s Amendment causes him—or any other self-funding candidate—any First Amendment injury whatsoever. . . . Enhancing the speech of the millionaire’s opponent, far from contravening the First Amendment, actually advances its core principles.”).<sup>15</sup>

The U.S. Supreme Court rejected these arguments, as should this Court. The Court recognized that laws that force a speaker to be the unwilling vehicle by which his message is countered create “a special and potentially significant burden . . .” *Davis*, 128 S. Ct. at 2772 (citing *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994)). The *Davis* Court correctly concluded that the “fundamental nature of the right to spend personal funds for campaign speech” was burdened by the Millionaire’s

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<sup>15</sup> Relying on the same cases relied upon by the State here, the district court in *Davis* concluded that the Millionaire’s Amendment did not burden the exercise of political speech. *See Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007).

Amendment because it “impose[d] some consequences” on a candidate’s choice to self-finance beyond certain amounts. *Davis*, 128 S. Ct. at 2772 (quoting FEC brief).

As discussed above, however, the Matching Funds Provision does more than simply “impose some consequences” on speech. It creates distinct and measurable harm to the nature, timing, and amount of expenditures. Indeed, as the district court found here, the Matching Funds Provision is more constitutionally objectionable than increasing an opponent’s individual contribution limits because, under the Millionaire’s Amendment, the non-self-financing candidate must still raise funds, whereas under the Act, the government simply gives money to the publicly funded candidate. ER 0015.

In sum, the State’s arguments have been made before by those seeking to “level” the playing field. But the government lost *Davis* and the Constitution requires that it lose here as well. The harm shown by the Martin Appellees is more than enough to demonstrate “a special and potentially significant burden.”<sup>16</sup>

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<sup>16</sup> The Martin Appellees created a much more substantial factual record establishing the burden on their speech than that made by the plaintiff in *Davis*. Compare ER 412-542, 1759-1987, 3090-4361, with ER 1990-92, 2322-82.

**b. Davis Rejected the State’s “Voluntary Choice” Theory**

Citing footnote 65 of *Buckley*, the State argues that whatever burdens privately financed candidates endure, they endure them because of a voluntary choice and this choice allots benefits to them that are not available to publicly financed candidates. Br. 33. This argument fails for two reasons. First, independent expenditure committees have no such choice. So long as they make expenditures in support of the wrong candidates or against the right ones, they will have their speech “leveled.”

Second, the Court in *Davis* already rejected this precise argument. Specifically, the Court rejected the argument that footnote 65 permitted the government to create a drag on speech “as a consequence of a statutorily imposed choice.” *Davis*, 128 S. Ct. 2772. The Court noted that “[i]n *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.” *Id.* After noting that the Millionaire’s Amendment offered the self-financing candidate two choices, both bad, the Court concluded that this choice was “not remotely parallel to that in *Buckley*.” *Id.*

The same principle applies in this case. If the privately financed candidate foregoes public money, she cannot fully engage in the “unfettered right to make unlimited . . . expenditures” above a certain level without triggering the Matching Funds Provision.<sup>17</sup>

**3. *Davis* Is Consistent with Precedent Striking Down Laws That Interfere With A Speaker’s Autonomy Over Her Message**

*Davis* did not tread new ground. Rather, *Davis* is consistent with precedent that recognizes the government chills speech when it creates a system under which the act of freely speaking enables the speaker’s opponent to counter that speech—even when the government’s goal is to promote more speech. *Davis* specifically relied on *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 14 (1986) (plurality

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<sup>17</sup> The State seeks to have this Court join other courts in upholding matching funds provisions. See *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445, 465 (1st Cir. 2000); *NCRTL v. Leake*, 524 F.3d 427 (4th Cir. 2008); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551-2 (8th Cir. 1996). But because *Davis* cited *Day*—the one lower federal court that went the other way—the *Daggett* line of cases are no longer good law. Moreover, these cases are distinguishable. *Daggett* involved a facial challenge and the *Daggett* court noted that the “door remains open” for as-applied challenges. *Daggett*, 205 F.3d at 472. This case is both an as-applied and facial challenge. *Leake* was dismissed for failing to state a claim, while this Court previously concluded that Martin adequately stated a cause of action. Finally, the *Rosenstiel* plaintiffs were enrolled in the State’s public funding program and sought to lift the scheme’s expenditure limits, while the Martin Appellees argue the system burdens free speech by forcing candidates to choose between speaking and conferring a benefit on an opponent or remaining silent.

opinion). There, California ordered a utility to make its billing envelope available to a hostile group. In rejecting this order, the plurality reasoned: “Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.” *Id.* at 9. The plurality stated that the order “force[d] appellant to respond to views that others may hold.” *Id.* at 11. Although the government sought to “offer the public a greater variety of views,” this was impermissible viewpoint discrimination because access was limited to only those who disagreed with the utility. *Id.* at 12. Thus, “whenever [the utility] speaks out on a given issue, it may be forced . . . to help disseminate hostile views. Appellant might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote.” *Id.* at 14 (internal quotation marks and citation omitted).

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a Florida law that granted candidates equal space to reply to criticism by a newspaper. The government claimed this regulation was necessary to ensure a variety of viewpoints reached the public and maintained the law did not prevent the newspaper from

publishing what it wished. *Id.* at 247-48. *See also id.* at 256 (“Appellee’s argument that the Florida statute does not amount to a restriction of appellant’s right to speak because ‘the statute in question here has not prevented the *Miami Herald* from saying anything it wished’ begs the core question.”). The Court nonetheless concluded that the statute chilled expression about candidates and thus diminished free and robust debate: “[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced.” *Id.* at 257.<sup>18</sup> *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995) (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).<sup>19</sup>

This Court recently affirmed the importance of the speaker’s autonomy over their speech when it refused an injunction that would have forced a newspaper to rehire employees who sought to interfere with the owner’s editorial control over the newspaper. *McDermott v. Ampersand*

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<sup>18</sup> At the district court, the State argued that *Pacific Gas* and *Miami Herald* did not apply because the Matching Funds Provision does not require the speaker to devote any property to the dissemination of her opponent’s message. This was an independent ground for invalidating these restrictions. *See Pacific Gas*, 475 U.S. at 12 n. 7.

<sup>19</sup> Notably, in *Pacific Gas* and *Miami Herald*, the Supreme Court did not condition its decisions on the severity of the burden on the speaker.

*Publ’g, LLC*, 2010 U.S. App. LEXIS 1716 (9th Cir. Jan. 26, 2010). Relying on *Hurley*, *Pacific Gas*, and *Miami Herald*, this Court noted that such an injunction would chill protected speech and stated that an infringement on the paper’s “right to publish what it pleases is inescapable.” *Id.* at \*28. This Court concluded that, “[t]o the extent the publisher’s choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.” *Id.* at \*30.<sup>20</sup>

“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet.” *Harper & Row Publ’g v. Nation Ent.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y. 2d 341, 348, 244 N.E. 2d 250, 255 (1968)). *See also Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“Here . . . we are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”) The Matching Funds Provision destroys the speaker’s autonomy over her message because it influences and distorts when, under what circumstances, and how much she may speak.

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<sup>20</sup> The State may argue that this case concerns editorial control and does not address political speech. However, the institutional press does not have any constitutional privilege beyond that of other speakers. *Citizens United*, 2010 U.S. LEXIS at \*71.

“At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broad. Sys. v. Fed. Comm. Comm’n*, 512 U.S. 622, 641 (1994). For these reasons, the Matching Funds Provision burden speech.

**4. *Davis’s Outcome Did Not Turn on the Status of the Non-Self-Financing Candidate***

Nonetheless, the State attempts to distinguish *Davis* by arguing that it turned on the fact that the Congressional candidates there were similarly situated, while Arizona’s system applies to privately financed candidates, who have no direct spending limits, and publicly financed candidates, who do. Br. 35. While the Court in *Davis* did discuss the fact that the Millionaire’s Amendment treated two candidates for the same seat differently, this point was an independent, complementary reason for striking down the Millionaire’s Amendment. It did not constitute the sole basis for the Court’s conclusion.

Notably, nothing in *Davis*, or any of the cases cited by the State, mandates that a candidate be similarly situated with her opponents in order to claim a burden on her free speech rights. Under *Davis*, it was the burden on the candidate—and not the attributes of the opposition candidate—that ultimately decided the First Amendment question. In that regard, *Davis*

relied on *Pacific Gas*. In *Pacific Gas*, the two speakers were not similarly situated: one was a utility while the other was a consumer group. See *Pacific Gas*, 475 U.S. at 5-6. Nonetheless, the Court concluded that the government action violated the First Amendment. Moreover, the speakers in *Miami Herald* (newspaper and political candidate), *Hurley* (parade organizers and would-be-participants), and *McDermott* (newspaper publisher and newspaper employees) were not “similarly situated.”

Moreover, even if the Martin Appellees were required to prove asymmetry and discrimination, the Matching Funds Provision embodies those terms. It beggars belief to suggest that a law that requires \$10,000 worth of speech to be countered with almost \$30,000 worth of response is symmetrical. Nor is it reasonable to suggest that a law that gives candidates free money while deducting 6% for fund raising costs is symmetrical when actual fundraising costs can be substantially higher. A law is also discriminatory when an unwanted independent expenditure triggers funds directly to a publicly funded candidate. A law is also discriminatory when only independent expenditures made in favor of a privately financed candidate are subject to matching funds. Most significantly, of the purported “burdens” on publicly financed candidates, the most significant—the cap on

expenditures—is lifted (to a certain amount) by the Matching Funds Provision.

This discriminatory and asymmetrical system thus matches and exceeds that of the Millionaire’s Amendment struck down in *Davis*.

**C. Strict Scrutiny Is Appropriate**

The State next argues that the district court erred in subjecting the Matching Funds Provision to strict scrutiny and that a “flexible” standard is appropriate. Br. 3. The State errs: the level of scrutiny is determined by the political activity being regulated, not by the level of the state’s interference with that activity. Because the Matching Funds Provision burdens core political speech, it is subject to strict scrutiny. The Matching Funds Provision also warrants strict scrutiny because it is a content-based restriction.

**1. Laws That Burden Expenditures Are Subject To Strict Scrutiny**

“Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United*, 2010 U.S. LEXIS 766 at \*51 (citations and quotation marks omitted). This statement could scarcely be less equivocal. Nonetheless, the State argues that because the plaintiffs have not suffered “a severe burden” on their

rights, a “flexible standard” is appropriate. Specifically, the State argues that bans or caps on spending should receive strict scrutiny, while indirect restrictions should only receive intermediate scrutiny. Br. 26-27.

This argument “overlooks the basic premise [the Supreme Court has] followed in setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the ‘political activity at issue’ to effective speech or political association.” *FEC v. Beaumont*, 539 U.S. 146, 161 (2003). Direct expenditures are core political expression that is at the “heart of the First Amendment’s protection.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Accordingly, the Supreme Court has held that restrictions on expenditures are limitations “on core First Amendment rights of political expression” and subject to “strict” or “exacting” scrutiny. *Buckley*, 424 U.S. at 44-45.

Contributions, on the other hand, while still protected, “lie closer to the edges than to the core of political expression” because they involve speech by someone other than the contributor. *Beaumont*, 539 U.S. at 161-62. Contribution limits need only satisfy “the lesser demand of being closely drawn to match a sufficiently important interest.” *Id.* at 162 (citations and quotation marks omitted).

Thus, “the degree of scrutiny turns on the nature of the activity regulated,” and not the severity of the regulation. *Id.* “It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.” *Id.* While the State is correct that this Court should consider the magnitude of the burden (which is considerable), that analysis occurs only after it determines whether the law regulates expenditures, contributions, or both. *See Jacobus v. Alaska*, 338 F.3d 1095, 1109 n. 21 (9th Cir. 2003) (applying the *Beaumont* standard).

The Matching Funds Provision burdens core political speech because it chills the expenditures of independent advocacy groups, as well as the expenditures (in the primary) and contributions (in the general) of self-financing and privately financed candidates. Laws that place a burden on both expenditures and contributions are subject to strict scrutiny. *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2001).<sup>21</sup>

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<sup>21</sup> The State does not cite *Beaumont*. It instead argues that *Lincoln Club* dictates a lesser level of scrutiny because that case states that the level of scrutiny “is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue.” *Lincoln Club*, 292 F.3d at 938. However, *Lincoln Club* predates *Beaumont* by two years. Whatever uncertainty that existed prior to *Beaumont* regarding how to set the appropriate level of scrutiny was resolved by that case.

## **2. The Matching Funds Provision Is a Content-Based Restriction on Speech**

Regardless of the level of burden, strict scrutiny is still appropriate because the Matching Funds Provision is a content-based restriction. “A law is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009). “[Content-based laws] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.” *Turner Broad.*, 512 U.S at 641.

The Matching Funds Provision is content-based because it kicks in only when an independent expenditure group, self-financing candidate, or privately financed candidate engages in speech (i) about a political race, (ii) against a publicly funded opponent, and (iii) above a certain point. All other speech is unaffected. The law then distributes benefits and burdens on the basis of the content of speech: it burdens the speakers who deliver speech that is detrimental to publicly financed candidates and it benefits the speakers who deliver speech that is supportive of publicly financed candidates. But the government is prohibited both from distinguishing

among speech and from “distinguishing among certain speakers.” *Citizens United*, 2010 U.S. LEXIS 766 at \*52.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

...

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.

*Id.* at \*52-53.

The Matching Funds Provision thus manages to be both a content-based restriction on speech and a law that unconstitutionally allocates benefits and burdens among speakers based on such content. This is precisely what *Citizens United* forbids. Because the Matching Funds Provision both “suppresses” and “exalts” speech and speaker based on content, it is “presumptively invalid and subject to strict scrutiny.” *Video Software Dealers*, 556 F.3d at 957.

**3. The Matching Funds Provision Is Designed To Restrict Speech and Cases Regarding Disclosure Are Inapposite**

The State analogizes the Matching Funds Provision to disclosure requirements and urges this Court to employ the lesser level of scrutiny used in *Buckley* for such requirements. Br. 26-29. But the disclosure law at issue in *Buckley* is different from the Matching Funds Provision in a constitutionally significant way. In *Buckley*, the Court used a lesser form of scrutiny because the “deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct in requiring disclosure.” *Buckley*, 424 U.S. at 64. *See also id.* at 83 (the disclosure thresholds could discourage participation, but this was “a result that Congress hardly could have intended”).

Here, in contrast, the overwhelming purpose of the Act was to impose “spending limits, get[] rid of special interests, and level[] the playing field.” ER 5070. The Matching Funds Provision is therefore more analogous to the disclosure provision struck down in *NAACP v. Alabama*, 357 U.S. 449 (1958). Like the Matching Funds Provision, the effort in that case was intended to chill constitutionally protected free expression while the

disclosure provision at issue in *Buckley* was not, even if that was a result.

The *Buckley* disclosure standard is therefore inapplicable.<sup>22</sup>

#### **D. The Matching Funds Provision Fails Strict Scrutiny**

“Under strict scrutiny, the *Government* must prove that [the statute] furthers a compelling interest and is narrowly tailored to achieve that interest.” *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007). The State does not meet this burden. The Matching Funds Provision is neither narrowly tailored nor supported by the sole governmental interest sufficient to warrant restrictions on political activity—battling corruption or its appearance.

##### **1. The Matching Funds Provision Is Not Narrowly Tailored**

Under strict scrutiny, “the State . . . has the burden of demonstrating that the [law] is narrowly tailored to further that interest, and that there are no less restrictive alternatives that would further the [law].” *Video Software Dealers*, 556 F.3d at 964-65. This means that the government is not free to simply adopt the “most effective” way to further its goal—it must instead choose the least restrictive means unless such means would be ineffective.

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<sup>22</sup> The State also imports a “rational basis” standard. Br. 59 (quoting the “wholly without rationality” standard of *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009)). However, that standard applies to a court’s consideration of the monetary level at which disclosure is required, not to the level of scrutiny applied to the speech regulation in the first place. *See Buckley*, 424 U.S. at 83.

*Id.* at 965. “A narrowly tailored regulation is one that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).” *White*, 416 F.3d at 751.

The State has not met its burden of demonstrating that the Matching Funds Provision is narrowly tailored to battle corruption for three reasons.<sup>23</sup> First, the Matching Funds Provision is fatally overinclusive because it regulates the speech of independent expenditure committees and self-financing candidates. Second, the Matching Funds Provision regulates such activity simply to provide ancillary benefits to other parts of the statute. Finally, there are less restrictive alternatives available.

**a. The Matching Funds Provision is Fatally Overinclusive**

“Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted

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<sup>23</sup> Here, the Martin Appellees assume, for the sake of argument, that the State’s actual interest is to combat corruption or its appearance.

regulation.” *Fed. Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986).

The Matching Funds Provision awards government money to counter the non-corrupting spending of independent expenditure committees and self-financing candidates. Crucially, the State, in its discussion of AzScam, the “Invisible Legislature,” and bundling, never identifies the link between any of this evidence and independent expenditure committees or self-financed candidates. This is because there is no link.

Because of the absence of pre-arrangement and coordination between an independent expenditure committee and a candidate, the value of the expenditure is undermined and the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate is alleviated. *Citizens United*, 2010 U.S. LEXIS 766 at \*79-80. *See also Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 618 (1996) (noting that the government in that case was unable to “point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures”); *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (“But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and

thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”); *Buckley*, 424 U.S. at 46-47 (stating that independent expenditures do not implicate corruption concerns because they are made independently); *EMILY’S List v. Fed. Election Comm’n*, 581 F.3d 1, 4 (D.D.C. 2009) (“The First Amendment, as interpreted by the Supreme Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office.”); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (“At the extreme, the entities furthest removed from the candidate are political committees that make solely independent expenditures. As such, it is ‘implausible’ that contributions to independent expenditure political committees are corrupting.”). Moreover, candidates who finance their own campaigns actually reduce the threat of corruption. *Davis*, 128 S. Ct. at 2773.

Nonetheless, in the face of this overwhelming precedent, the Matching Funds Provision treats the non-corrupting speech of independent expenditure committees and self-financing candidates as if it were the potentially “corrupt” speech of candidates beholden to large donors. While the Matching Funds Provision might entice participation in public financing, the law may only reach the speech of those it regulates if it possesses an

anti-corruption rationale in the first instance. But independent expenditures are “immune from regulation as a matter of law,” *Kruse v. City of Cincinnati*, 142 F.3d 907, 914 (6th Cir. 1998), and self-financed candidates obviate the risk of corruption. Because the Matching Funds Provision sweeps far too broadly, it is not narrowly tailored.

**b. The Matching Funds Provision Exists Only To Provide Ancillary Benefits to Other Portions of the Law**

The Matching Funds Provision is not narrowly tailored for another reason: it impermissibly regulates non-corrupting speech solely to effectuate regulation of potentially corrupting speech. The State argues that this is permissible because it produces an ancillary benefit: increased participation in the program, which, the State maintains, is supported by the goal of combating corruption or its appearance. *See* Br. 48. However, burdening constitutionally protected speech to supply ancillary benefits to a law with an otherwise legitimate scope is impermissible.

In *Wisconsin Right to Life*, the FEC argued that it could regulate constitutionally-protected issue advocacy ads because doing so facilitated its ability to regulate express advocacy ads. 551 U.S. at 473-74. The Supreme Court rejected the FEC’s argument, holding that “Government may not suppress lawful speech as the means to suppress unlawful speech.” *Id.* at

475 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)). The Court rejected a similar argument in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). There, the government justified its regulation of anonymous leafleting by asserting that the regulation “serve[d] as an aid to enforcement of” other, permissible provisions of the election code and as “a deterrent to the making of false statements by unscrupulous prevaricators.” *Id.* at 350-51. The Court rejected the argument, holding that “[a]lthough these ancillary benefits are assuredly legitimate,” they could not justify the leafleting regulation. *Id.* at 351.

Other cases have rejected the argument that protected speech may be burdened to facilitate the objectives of permissible regulations. *See, e.g.*, *Free Speech Coal.*, 535 U.S. at 254-55 (striking down law banning virtual child pornography despite government’s argument that it facilitated enforcement of ban on actual child pornography); *Stanley v. Georgia*, 394 U.S. 557, 567-68 (1969) (striking down law banning the possession of obscene materials despite government’s argument that it was a “necessary incident” to laws prohibiting the distribution of such materials); *ACLU of Nev. v. Heller*, 378 F.3d 979, 1000 (9th Cir. 2004) (striking down law requiring identification of financial sponsors of campaign literature because

the law “reach[ed] a substantial quantity of speech not subject to the reporting and disclosure requirements it purportedly help[ed] to enforce”).

These cases make clear that the State may not rely on an ancillary benefit to justify burdening protected independent expenditures. Were it not clear already, however, *Citizens United* dispels any doubt.

*Citizens United* stated explicitly what many understood as the law since *Buckley*—that independent expenditures cannot be regulated under the anti-corruption rationale. Nonetheless, the State invokes *Citizens United* as support for its argument that tying matching funds to independent expenditures is permissible because it will increase participation. Br. 49 n.8. Not only does *Citizens United* not support the State’s position, it directly undercuts it. If, as the Court held, “independent expenditures . . . do not give rise to corruption or the appearance of corruption,” *Citizens United*, 2010 U.S. LEXIS 766, at \*\*11-12, then the State simply may not regulate them, even if doing so might have the ancillary benefit of increasing participation in the public financing program.

The State argues, nonetheless, that the Matching Fund Provision does not regulate independent expenditures *per se*. The Supreme Court has already rejected this argument. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court addressed the constitutionality of a

law limiting contributions to ballot measure committees. In defending the contribution limit, the government made much of the fact that the law did not regulate expenditures. Unconvinced, the Court struck down the law, finding it irrelevant that expenditures themselves were not directly limited: “Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.” *Id.* at 299. Thus, it is no defense that the Act does not technically regulate independent expenditures—it “in turn limit[s] expenditures,” which “plainly impairs freedom of expression.” *Id.*

**c. Less Restrictive Alternatives Are Available**

“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). It is undisputed that Minnesota has a system of public financing that achieves almost 100% participation but does not have a matching funds provision. ER 3395, 3915 While Minnesota’s system does feature some private financing, it reduces participating candidates’ reliance on private contributions. ER 3915. Moreover, the State could increase the level of the initial disbursement here, ER 1795, 1928, 1945-47, making public financing a more attractive option to candidates even without matching funds.

The State, however, does not prefer the least restrictive alternative, but rather prefers what it views is the most effective. *See Video Software Dealers*, 556 F.3d at 965 (concluding that a state law was not narrowly tailored because the state sought to implement the “most effective” way to further its goal instead of the “least restrictive means” of doing so). This approach is not narrowly tailored. There are less restrictive avenues to address the State’s purported problem with corruption. That they may not be the means the State would prefer is not a justification to burden the Martin Appellees’ free speech rights.

**2. The Matching Funds Provision Is Not Supported By a Compelling Government Interest**

Preventing corruption or the appearance of corruption are the only acceptable compelling government interests for restricting campaign finances. *Davis*, 128 S. Ct. at 2773. Not surprisingly, the State attempts to fit the Act within the anti-corruption box. But anti-corruption concerns cannot support a restriction on expenditures. Moreover, the State’s effort to promote a legitimate but secondary rationale to primacy over the Act’s actual, but constitutionally illegitimate goal, is inconsistent with both Supreme Court and Ninth Circuit precedent.

**a. The State’s Evidence Is Insufficient to Justify a Restriction on Campaign Expenditures**

“Between [the] two poles of clearly valid and clearly invalid anti-corruption interests, legislators are free to craft new arguments about corruption provided they acknowledge that ‘[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny...will vary up or down with the novelty and plausibility of the justification raised.’” *Citizens for Clean Gov’t v. City of San Diego*, 474 F.3d 647, 652 (9th Cir. 2007) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000)). In demonstrating the need for regulation, the government’s evidence must be weighed against the plaintiff’s evidence of the lack of a legitimate purpose. “Because the government has the burden of demonstrating its state interest ..., any empirical evidence it offers must overcome any evidence to the contrary presented by the plaintiff.” *Citizens for Clean Gov’t*, 474 F.3d at 653 (citation omitted). In particular, this Court has “emphasize[d] the importance of factual development.” *Id.*

The State’s evidence of the anti-corruption purpose of the Act consists primarily of newspaper articles concerning a scandal that occurred nineteen years ago. Br. 9-11.<sup>24</sup> Historic evidence of long-ago corruption may be

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<sup>24</sup> The State also points to the perfectly legal activity of “bundling” and the access and influence of lobbyists as evidence of corruption. See Br. 11, 45.

sufficient to justify restrictions on contributions. *See Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093 (9th Cir. 2003) (finding a 1981 letter and a 1982 poll sufficient to demonstrate the state's interest in setting contribution limits for PACs). However, the Matching Funds Provision burdens expenditures. Tellingly, the Court in *Buckley* struck down caps on expenditures a mere two years after the Watergate scandal. *See Buckley*, 424 U.S. at 54.

“[T]he [evidentiary] fit between the evidence of corruption and the campaign finance legislation must be tight, relevant, and real.” David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 86, 113 (1999). The State has failed to demonstrate a danger sufficiently imminent to warrant a restriction on expenditures.<sup>25</sup> “Once corrupt, always corrupt” cannot justify restricting core political speech.

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However, “[i]ngratiation and access...are not corruption.” *Citizens United*, 2010 U.S. LEXIS 766 at \*85.

<sup>25</sup> Moreover, the Supreme Court has noted that Arizona has one of the lowest contribution limits in the country. *Randall v. Sorrell*, 548 U.S. 230, 250 (2006). The State produced no evidence that Arizona officials are currently so venal that they will trade their vote for a \$400 contribution.

**b. The Overwhelming Purpose of the Act Was to Level the Playing Field**

Under *Citizens for Clean Government*, the State's evidence must be weighed against the Martin Appellees' evidence of the lack of a compelling interest.<sup>26</sup> The record demonstrates that the overwhelming purpose of the Act was to "level the playing field" in order to promote the progressive voices with which the proponents of the Act agreed and reduce the business and corporate voices with which they disagreed. ER 3584-3617, 4194-95, 4197-98, 4200-01, 5081. The proponents of the Act fully believed in the need to "level the playing field," as evidenced by their internal documents. ER 3584-3617, 5070, 5081. They urged the public to pass the Act in order to "level the playing field." ER 3563, 3569, 3577, 3584-3617, 4093, 4103, 4108, 4134, 4135, 4136, 4149, 4157, 4155, 4159, 4162-64, 4167, 4192, 4209. It was the publicly proclaimed policy of the Citizens Clean Elections Commission. ER 3617, 4267, 4353, 4355. Indeed, the proponents of the Act seemed to only disclaim any desire to "level the playing field" after *Davis* made clear that such an intent was not "a legitimate government objective." *Davis*, 128 S. Ct. at 2773.

The State seeks to minimize this mass of evidence by arguing a logical fallacy. The State argues that because the Matching Funds Provision

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<sup>26</sup> The State does not cite *Citizens for Clean Government* in its brief.

does not restrict speech, it does not “level the playing field” in an impermissible way. Br. 46. But this begs the question—the State’s premise (that leveling the playing field is not illegitimate because the law does not restrict speech) depends on the truth of the matter in question (whether the law restricts speech). Because the Matching Funds Provision was designed to restrict speech and has succeeded in restricting speech, the State’s presumption and its ultimate conclusion are wrong.

**c. The Act Regulates Speech That Cannot Be Regulated Under an Anti-Corruption Rationale**

The anti-corruption rationale was ancillary to the Matching Funds Provision because, as noted above, the provision applies to independent expenditure committees and self-financing candidates, two speakers that do not create corruption concerns. “[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” *Citizens United*, 2010 U.S. LEXIS 766 at \*80, and self-financing reduces the threat of corruption. *Davis*, 128 S. Ct. at 2773.

If the true purpose of the Matching Funds Provision were to reduce corruption or its appearance, regulating the speech of independent groups and self-financing candidates cannot achieve that goal. The fact that these entities are brought within the law indicates that the Act’s purpose is to equalize speech, not control corruption.

**E. This Court Should Immediately Enjoin the Matching Funds Provision**

As discussed above, the Matching Funds Provision violates fundamental First Amendment rights. Candidates, in contrast, do not have a fundamental right to run for public office, *Jones*, 131 F.3d at 1324, and “voters do not have a right to have candidates’ campaigns publicly funded.” *Id.* at 1323. In addition, voters “do not have a fundamental right to receive publicly funded campaign speech.” *Id.* Finally, “[n]either candidates nor voters have a right to . . . elections that are financially viable for all candidates seeking election.” *Id.* at 1324. For these reasons, the State has no interest in the continued operation of an unconstitutional system. This Court should immediately enjoin the Matching Funds Provision before the First Amendment rights of Arizonans are harmed for yet another election.

**IX. CONCLUSION**

The district court properly concluded that the Matching Funds Provision is unconstitutional. This Court should affirm the district court.

Respectfully submitted this 2<sup>nd</sup> day of March, 2010

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**Certificate of Compliance**

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached opening brief is proportionally spaced, has typeface of 14 points and contains 12,935 words.

Dated: March 2, 2010

s/William R. Maurer

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William R. Maurer

**Certificate of Service**

I hereby certify that on March 2, 2010, I electronically filed the foregoing 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:

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Additionally, five copies of the supplemental excerpts of record were mailed to the Clerk of the U.S. Court of Appeals, 95 Seventh Street, San Francisco, CA 94103 via UPS overnight services. Furthermore, one copy of the supplemental excerpts of record will be mailed to each party listed above via UPS overnight services.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, to the following non-CM/ECF participants:

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**STATEMENT OF RELATED CASES**

The Martin Appellees are not aware of any related cases currently pending in this Court.

## ADDENDUM



**C**

Arizona Revised Statutes Annotated Currentness

Title 16. Elections and Electors (Refs & Annos)

▣ Chapter 6. Campaign Contributions and Expenses (Refs & Annos)

▣ Article 2. Citizens Clean Elections Act (Refs & Annos)

→ **§ 16-941. Limits on spending and contributions for political campaigns**

**A.** Notwithstanding any law to the contrary, a participating candidate:

1. Shall not accept any contributions, other than a limited number of five-dollar qualifying contributions as specified in § 16-946 and early contributions as specified in § 16-945, except in the emergency situation specified in § 16-954, subsection F.
2. Shall not make expenditures of more than a total of five hundred dollars of the candidate's personal monies for a candidate for the legislature or more than one thousand dollars for a candidate for statewide office.
3. Shall not make expenditures in the primary election period in excess of the adjusted primary election spending limit.
4. Shall not make expenditures in the general election period in excess of the adjusted general election spending limit.
5. Shall comply with § 16-948 regarding campaign accounts and § 16-953 regarding returning unused monies to the citizens clean elections fund described in this article.

**B.** Notwithstanding any law to the contrary, a nonparticipating candidate:

1. Shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in § 16-905, subsections A through E, as adjusted by the secretary of state pursuant to § 16-905, subsection H. Any violation of this paragraph shall be subject to the civil penalties and procedures set forth in § 16-905, subsections J through M and § 16-924.
2. Shall comply with § 16-958 regarding reporting, including filing reports with the secretary of state indicating whenever (a) expenditures other than independent expenditures on behalf of the candidate, from the beginning of the election cycle to any date up to primary election day, exceed seventy per cent of the original primary election spending limit applicable to a participating candidate seeking the same office, or (b) contributions to a candidate, from the beginning of the election cycle to any date during the general election period, less expenditures

made from the beginning of the election cycle through primary election day, exceed seventy per cent of the original general election spending limit applicable to a participating candidate seeking the same office. A nonparticipating candidate is exempt from this paragraph if there is no participating candidate running against that nonparticipating candidate.

**C.** Notwithstanding any law to the contrary, a candidate, whether participating or nonparticipating:

1. If specified in a written agreement signed by the candidate and one or more opposing candidates and filed with the citizens clean elections commission, shall not make any expenditure in the primary or general election period exceeding an agreed-upon amount lower than spending limits otherwise applicable by statute.

2. Shall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article.

**D.** Notwithstanding any law to the contrary, any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle, with the exception of any expenditure listed in § 16-920 and any independent expenditure by an organization arising from a communication directly to the organization's members, shareholders, employees, affiliated persons and subscribers, shall file reports with the secretary of state in accordance with § 16-958 so indicating, identifying the office and the candidate or group of candidates whose election or defeat is being advocated and stating whether the person is advocating election or advocating defeat.

#### CREDIT(S)

Added by Proposition 200, § 1, approved election Nov. 3, 1998, eff. Nov. 23, 1998. Amended by Laws 2007, Ch. 277, § 2; Laws 2009, Ch. 114, § 8.

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**C**

Arizona Revised Statutes Annotated Currentness

Title 16. Elections and Electors (Refs & Annos)

▣ Chapter 6. Campaign Contributions and Expenses (Refs & Annos)

▣ Article 2. Citizens Clean Elections Act (Refs & Annos)

→ § 16-951. Clean campaign funding

**A.** At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding:

1. For a candidate who qualifies for clean campaign funding for a party primary election, an amount equal to the original primary election spending limit;
2. For an independent candidate who qualifies for clean campaign funding, an amount equal to seventy percent of the sum of the original primary election, spending limit, and the original general election spending limit; or
3. For a qualified participating candidate who is unopposed for an office in that candidate's primary, in the primary of any other party, and by any opposing independent candidate, an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

**B.** At any time after the first day of January of an election year, any candidate who has met the requirements of § 16-950 may sign and cause to be filed a nomination paper in the form specified by § 16-311, subsection A, with a nominating petition and signatures, instead of filing such papers after the earliest time set for filing specified by that subsection. Upon such filing and verification of the signatures, the commission shall pay the amount specified in subsection A of this section immediately, rather than waiting for the beginning of the primary election period.

**C.** At the beginning of the general election period, the commission shall pay from the fund to the campaign account of each candidate who qualifies for clean campaign funding for the general election, except those candidates identified in subsection A, paragraphs 2 or 3 or subsection D of this section, an amount equal to the original general election spending limit.

**D.** At the beginning of the general election period, the commission shall pay from the fund to the campaign account of a qualified participating candidate who has not received funds pursuant to subsection A, paragraph 3 of this section and who is unopposed by any other party nominee or any opposing independent candidate an amount equal to five dollars times the number of qualifying contributions for that candidate certified by the commission.

**E.** The special original general election spending limit, for a candidate who has received funds pursuant to subsection A, paragraphs 2 or 3 or subsection D of this section, shall be equal to the amount that the commission is obligated to pay to that candidate.

CREDIT(S)

Added by Proposition 200, § 1, approved election Nov. 3, 1998, eff. Nov. 23, 1998.

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Title 16. Elections and Electors (Refs & Annos)

▣ Chapter 6. Campaign Contributions and Expenses (Refs & Annos)

▣ Article 2. Citizens Clean Elections Act (Refs & Annos)

→ **§ 16-952. Equal funding of candidates**

A. Whenever during a primary election period a report is filed, or other information comes to the attention of the commission, indicating that a nonparticipating candidate who is not unopposed in that primary has made expenditures during the election cycle to date exceeding the original primary election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate in the same party primary as the nonparticipating candidate an amount equal to any excess of the reported amount over the primary election spending limit as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses and less the amount of early contributions raised for that participating candidate for that office as prescribed by § 16-945. The primary election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

B. Whenever during a general election period a report has been filed, or other information comes to the attention of the commission, indicating that the amount a nonparticipating candidate who is not unopposed has received in contributions during the election cycle to date less the amount of expenditures the nonparticipating candidate made through the end of the primary election period exceeds the original general election spending limit, including any previous adjustments, the commission shall immediately pay from the fund to the campaign account of any participating candidate qualified for the ballot and seeking the same office as the nonparticipating candidate an amount equal to any excess of the reported difference over the general election spending limit, as previously adjusted, less six per cent for a nonparticipating candidate's fund-raising expenses. The general election spending limit for all such participating candidates shall be adjusted by increasing it by the amount that the commission is obligated to pay to a participating candidate.

C. For the purposes of subsections A and B of this section, the following expenditures reported pursuant to this article shall be treated as follows:

1. Independent expenditures against a participating candidate shall be treated as expenditures of each opposing candidate, for the purpose of subsection A of this section, or contributions to each opposing candidate, for the purpose of subsection B of this section.
2. Independent expenditures in favor of one or more nonparticipating opponents of a participating candidate shall be treated as expenditures of those nonparticipating candidates, for the purpose of subsection A of this section, or contributions to those nonparticipating candidates, for the purpose of subsection B of this section.

3. Independent expenditures in favor of a participating candidate shall be treated, for every opposing participating candidate, as though the independent expenditures were an expenditure of a nonparticipating opponent, for the purpose of subsection A of this section, or a contribution to a nonparticipating opponent, for the purpose of subsection B of this section.

4. Expenditures made during the primary election period by or on behalf of an independent candidate or a nonparticipating candidate who is unopposed in a party primary shall be deducted from the total amount of monies raised for purposes of determining the amount of equalizing funds, up to the amount of primary funds received by the participating candidate. Equalizing funds pursuant to subsection B of this section shall then be calculated and paid at the start of the general election period.

5. Expenditures made before the general election period that consist of a contract, promise or agreement to make an expenditure during the general election period resulting in an extension of credit shall be treated as though made during the general election period, and equalizing funds pursuant to subsection B of this section shall be paid at the start of the general election period.

6. Expenditures for or against a participating candidate promoting or opposing more than one candidate who is not running for the same office shall be allocated by the commission among candidates for different offices based on the relative size or length and relative prominence of the reference to candidates for different offices.

**D.** Upon applying for citizen funding pursuant to § 16-950, a participating candidate for the legislature in a one-party-dominant legislative district who is qualified for clean campaign funding for the party primary election of the dominant party may choose to reallocate a portion of funds from the general election period to the primary election period. At the beginning of the primary election period, the commission shall pay from the fund to the campaign account of a participating candidate who makes this choice an extra amount equal to fifty per cent of the original primary election spending limit, and the original primary election spending limit for the candidate who makes this choice shall be increased by the extra amount. For a primary election in which one or more participating candidates have made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original primary election spending limit as so increased. If a participating candidate who makes this choice becomes qualified for clean campaign funding for the general election, the amount the candidate receives at the beginning of the general election period shall be reduced by the extra amount received at the beginning of the primary election period, and the original general election spending limit for that candidate shall be reduced by the extra amount. For a general election in which a participating candidate has made this choice, funds shall be paid under subsections A and B of this section only to the extent of any excess over the original general election spending limit, without such reduction, unless the candidate who has made this choice is the only participating candidate in the general election, in which case such funds shall be paid to the extent of excess over the original general election spending limit with such reduction. For the purpose of this subsection, a one-party-dominant legislative district is a district in which the number of registered voters registered in the party with the highest number of registered voters exceeds the number of registered voters registered to each of the other parties by an amount at least as high as ten per cent of the total number of voters registered in the district. The status of a district as a one-party-dominant legislative district shall be determined as of the beginning of the qualifying period.

E. If an adjusted spending limit reaches three times the original spending limit for a particular election, the commission shall not pay any further amounts from the fund to the campaign account of any participating candidate, and the spending limit shall not be adjusted further.

CREDIT(S)

Added by Proposition 200, § 1, approved election Nov. 3, 1998, eff. Nov. 23, 1998. Amended by Laws 2007, Ch. 277, § 5.

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