Nos. 10-238, 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,
v.
KEN BENNETT, et al.,
Respondents.

JOHN MCCOMISH, et al.,
Petitioners,
v.
KEN BENNETT, et al.,
Respondents.

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

REPLY BRIEF OF PETITIONERS ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.
**Counsel of Record*

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

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INTRODUCTION

Just three years ago, in *Davis v. FEC*, this Court struck down a law under which "the vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." 554 U.S. 724, 739 (2008). In *Davis*, those who chose to exercise "the First Amendment right to engage in unfettered political speech" by spending more of their own money on campaign speech than the government preferred were subjected to the "special and potentially significant burden" of higher contribution limits for their opponents. *Id.* Here, independent groups and candidates who choose to exercise their First Amendment rights by raising and spending what the government considers to be too much money on political speech face the burden of direct grants of government subsidies to their opponents. Otherwise, the cases are identical. In this case, as in *Davis*, strict scrutiny applies and Respondents must demonstrate that this law is narrowly tailored to achieve a compelling state interest. They have not done so.

Respondents cannot escape the application of *Davis* here. Instead, they attack the premises on which *Davis* was based, hoping to convince this Court to abandon *Davis*'s reasoning without explicitly overturning that case. Thus, they claim that Petitioners have not proven that their speech was chilled, ignoring that this Court did not require such evidence in *Davis* and that, in any event, the record contains substantial evidence that the law has altered the

timing, nature, and amount of political speech in Arizona. Similarly, Respondents claim that Arizona's Citizens Clean Elections Act (the "Act") places no limits on Petitioners' ability to raise and spend campaign funds and that it is simply an effort to allow some candidates to compete with others, ignoring that *Davis* considered and rejected these arguments as well.

Respondents also contend that *Davis* is distinguishable because the candidates there were "similarly situated," and here they are not because some have chosen to forego private financing in favor of public financing with a spending cap. For independent expenditure groups, this choice does not exist – a fact which Respondents and their supporting *amici* steadfastly ignore. Moreover, for candidates, "similarly situated" is a distinction without a difference. Jack Davis, too, could have chosen to fund his campaign with private donations, like his opponents, and thus avoided triggering fundraising advantages to them. This, however, is precisely the "choice" this Court held that the government could not impose.

Misunderstanding *Buckley v. Valeo*, 424 U.S. 1 (1976), Respondents view public funding as a constitutionally favored option that entitles those who choose it to demand a level playing field upon which to run for office. But *Buckley* simply upheld initial-grant public financing as one funding option among many from which candidates could choose. It did not authorize the government to burden the speech of those who do not choose public funding in order to correct alleged financial imbalances that result from the free choices of those who do.

From top to bottom, the Act is an effort by the State of Arizona to manipulate the speech-related decisions of candidates and independent groups in campaigns. Its structure, its effects, and the intentions of its drafters, proponents, and administrators all make clear that its purpose was to impose a harsh disincentive to raise and spend private funds for campaign speech in order to reward those who chose to accept government subsidies. It is a quintessential example of a state "arrogat[ing] the voters' authority to evaluate the strengths of candidates competing for office." *Davis*, 554 U.S. at 742. This Court did not permit the government to engage in such "dangerous business" in *Davis*. It should not do so here.

I. THE MATCHING FUNDS PROVISION SEVERELY BURDENS POLITICAL SPEECH.

Respondents'[1] chief argument is that the Matching Funds Provision does not severely burden speech. Respondents' argument is a full attack on the reasoning of *Davis* that stops just short of calling for its reversal. If Respondents were to prevail, it would not just fatally undermine *Davis*, but it would also spell an effective end to this Court's well-established jurisprudence regarding self-censorship. Respondents'

[1] Petitioners shall refer to Respondents and their supporting *amici* collectively as "Respondents" because supporting *amici* largely repeat Respondents' arguments. We will specifically refer to *amicus* briefs only in those instances where *amici* present distinct arguments.

argument also demonstrates a highly selective and inaccurate reading of the record, as well as a misunderstanding of how campaigns are conducted and the Act's effect on political activity.

A. Respondents' Efforts To Distinguish *Davis* Fail Because Their Argument Attacks the Premises on Which *Davis* Rests.

Respondents contend that *Davis* simply held that the government may not impose unequal contribution limits on candidates in the same race. *See, e.g.*, Br. for Clean Elections Institute at 2; Br. of State Resp'ts at 27. This misstates the reasoning and holding in *Davis*, as well as its broader recognition that allowing the government to manipulate the speech-related decisions of speakers and voters during elections – as Arizona is doing here – is "dangerous business" that is not only *not* compelling, it is not even a legitimate governmental interest. *Davis*, 554 U.S. at 742.

In *Davis*, this Court recognized that the nature of the harm at issue stemmed not simply from the unequal contribution limits, but from the fact that the government handing a substantial "fundraising advantage[ ]" to one side in a competitive election necessarily harms the other. 554 U.S. at 739. That fundraising advantage was uniquely burdensome to the candidate who did not receive it because it was triggered by his speech. *Id*. at 740. Whether that advantage comes in the form of a higher contribution

limit or an additional direct subsidy, the burden on the opposing candidate is the same: When he speaks more than the government prefers, he faces the "special and potentially significant burden" of additional grants to his opponent. *Id*. at 739.

In reality, Respondents' argument against the application of *Davis* to this case is simply an attack on *Davis* itself. But because nearly every major argument Respondents make here was raised and rejected in *Davis*, there is no way this Court can accept Respondents' arguments without fatally undermining that case.[2]

For example, in *Davis*, the FEC argued that the Millionaire's Amendment imposed no ceiling on Davis's expenditures and did not prevent him from spending his own money. *See* Br. for Appellee at 25-26, 28-29, *Davis v. FEC*, 554 U.S. 724 (2008) (No. 07-320), U.S. S. Ct. Briefs LEXIS 318, at **45, 49 ("FEC *Davis* Br."). Respondents, too, claim that Petitioners have suffered no actual injury and they are free to spend as much as they want. *See, e.g.*, Br. for Clean Elections Institute at 13; Br. of State Resp'ts at 35, 38. Yet the response from *Davis* is equally applicable here: While some candidates may choose to continue spending, they will nonetheless face the "special and potentially significant burden" of having the state grant

[2] Not coincidently, the district court in *Davis* upheld the Millionaire's Amendment by relying on cases approving clean elections systems like Arizona's. *See Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007).

their opponents a fundraising advantage. 554 U.S. at 739.

Likewise, in *Davis*, the FEC argued that the Millionaire's Amendment was an effort "to 'enhance the relative voice' of non-wealthy candidates *without* 'restrict[ing] the [self-financing candidate's] speech.'" FEC *Davis* Br. at 29; *see also Davis*, 554 U.S. at 753 (Stevens, J., dissenting) ("Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles."). Respondents claim that the Matching Funds Provision serves the same purpose. *See* Br. for Clean Elections Institute at 17-18. In both cases, however, the answer is the same: The government cannot constitutionally "arrogate the voters' authority to evaluate" candidates to itself, which this Court termed a "dangerous business." *Davis*, 554 U.S. at 742.

In *Davis*, the FEC claimed that *Buckley* authorized the government to grant fundraising advantages to one speaker based on the speech of the other. FEC *Davis* Br. at 4. Respondents make the same claim here. *See, e.g.*, Br. for Clean Elections Institute at 17. But this Court rejected that argument in *Davis* in terms that apply equally here. The choice in *Buckley* is fundamentally different than the choice Petitioners face, in that independent groups and candidates who do not choose to take public funding will trigger matching funds whenever they speak above a certain point. *See Davis*, 554 U.S. at 739-40.

Respondents do not only challenge *Davis*'s harm standard, however. They also challenge *Davis*'s broader conclusion that the government cannot manipulate spending in campaigns in an effort to correct alleged financial imbalances. In *Davis*, this Court recognized the threat to the First Amendment extended to the effect on the nature of our competitive electoral system as a whole. The First Amendment assigns decision-making authority in elections to candidates, their supporters, and voters. *Id.* at 742 (stating that "[d]ifferent candidates have different strengths" including different fundraising abilities and sources and the candidates and voters – not government – must decide how those strengths contribute to the outcome of elections). The Millionaire's Amendment, by attempting to correct a "financial imbalance" among candidates, contravened this purpose by giving government the authority to "mak[e] and implement[ ] judgments about which strengths [of candidates] should be permitted to contribute to the outcome of an election." *Id.* at 736, 742.

The Matching Funds Provision operates in the same manner. It attempts to correct a purported imbalance between candidates who choose to accept public financing and those who do not. And it operates within a public funding scheme whose avowed purpose is to limit overall campaign spending, "level the playing field,"[3] and crowd out private financing –

[3] Of course, whether a political field is "level" and whether such an imbalance justifies limits on speech are inherently

(Continued on following page)

even private funds raised in the face of one of the lowest contribution limits in the nation. *See* Br. of Pet'rs at 56 n.13. Whether Respondents agree that this is the purpose of the law is irrelevant. It is inherent in the statute and is its obvious effect. It thus represents a comparable effort by Arizona to influence judgments about candidates that, as the Court recognized in *Davis*, must remain with the people.

This Court should not accept Respondents' invitation to discard *Davis* three years after it was decided. *Davis* was correctly decided then and its reasoning is equally vital now.

B. The Purpose and Function of the Matching Funds Provision Is To Create a Drag on Speech and, as such, the Law Constitutes a Severe Burden on Protected Expression.

The Matching Funds Provision was designed to serve the Act's purposes of restricting overall

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subjective questions "especially susceptible to the infiltration of illicit factors. It is the rare person who can determine whether there is 'too much' of some speech (or speakers), 'too little' of other speech (or speakers), without any regard to whether she agrees or disagrees with – or whether her own position is helped or hurt by – the speech (or speakers) in question." Elena Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. 413, 469-70 (1996). Therefore, "[l]aws directed at equalizing speech . . . demand strict scrutiny because of heightened concerns relating to improper purpose." *Id.* at 472.

campaign spending and equalizing electoral speech. Joint Appendix (JA) at 109-10, 213, 719-24, 809-55; ECF No. 288-4 at 132. Toward that end, the Matching Funds Provision creates "various disincentives" to independent expenditure groups and privately financed candidates to outpace their publicly financed opponents by spending more money on speech. JA 96.

Respondents ignore the obvious purpose and operation of the Matching Funds Provision and instead argue that Petitioners must present specific evidence of a chilling effect to prevail. *See, e.g.*, Br. for Clean Elections Institute at 14-16. But this Court has never required speakers to make such a showing, because it places the burden of proof on the wrong party. Instead of looking to the severity of a burden, this Court looks to the nature of the governmental action to determine the burden on speech. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (stating that, in the First Amendment context, courts must "look through forms to the substance" of government conduct to see if the law or policy at issue represents an intrusion into constitutionally protected freedoms); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). Not surprisingly, this Court did not require the plaintiff in *Davis* to present specific instances where he did not contribute to his campaign or where he did not spend money. *See* 554 U.S. at 738-39 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.").

Respondents' approach would, if adopted, require courts to create the fine distinction among favored and disfavored speech that this Court specifically rejected in *Citizens United v. FEC*. 130 S. Ct. 876, 891 (2010) (rejecting a test that would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable"); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.) (stressing that First Amendment standards must "entail minimal if any discovery" and "eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal'" (first alteration in original)). Under Respondents' heightened evidentiary standard, proof of a chilling effect would require speakers to show they did not spend as much as they otherwise would have.

In other words, Respondents seek a standard for First Amendment harm that requires proof that individuals have chosen not to speak. *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (recognizing that self-censorship may be difficult to detect because it derives from an individual's own actions). In the context of campaign finance laws, political speakers, under Respondents' test, would have to track and disclose what they have *not* spent and what others have *not* contributed if they are to prevail. This Court's First Amendment jurisprudence would devolve into an array of multi-factor tests to determine just how much non-fundraising

and non-spending is enough to constitute a sufficiently "severe" chilling effect for the courts to intervene. *Cf. Citizens United*, 130 S. Ct. at 895 (noting the inherent harm to political speech caused by complex, multi-part tests used to determine the validity of a particular expression).

Instead of requiring plaintiffs to prove a negative, this Court should adhere to its longstanding practice of looking to the structure of the governmental action at issue to determine whether, by its nature, it involves "risk[s] of a 'reaction of self-censorship' on matters of public import." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-16 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985)); *see also Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) ("Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusations or the evidence under it, which prescribes the limits of permissible conduct . . . ."). The Court took this approach in *Davis*. 554 U.S. at 739. It should do the same here.

C. The Record Contains Extensive Evidence That the Matching Funds Provision Severely Burdens Speech.

Nonetheless, if this Court were to require that Petitioners meet Respondents' novel evidentiary standard, Petitioners have done so. This is despite the fact that Respondents, like the Ninth Circuit, contend that there is no evidence of harm in this case. The

Ninth Circuit failed in its "obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotations and citations omitted). The record belies both Respondents' arguments and the Ninth Circuit's conclusion. For example:

- Dr. David Primo: Petitioners' expert found that privately financed candidates facing the prospect of triggering matching funds changed the timing of their fundraising activities, the timing of their expenditures, and, thus, their overall campaign strategy. JA 791-92, 922. The U.S. Government Accountability Office made a similar finding and found evidence that independent expenditure groups do likewise. U.S. Gov't Accountability Office, GAO-10-390, *Campaign Finance Reform: Experiences of Two States That Offered Full Public Funding for Political Candidates* 80 (2010), *available at* http://www.gao.gov/new.items/d10390.pdf. Researcher Michael Miller came to the same conclusion. JA 363-72 (Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS: Political Science & Politics 527 (2008)). The decision to delay spending does not simply shift political activity to some other time. It reduces the time the speaker has to speak and the

listener has to hear and consider his message. *See* App. to McComish Pet'rs' Pet. for a Writ of Cert. ("McComish App.") at 311.[4]

- Rick Murphy: In 2006 and 2008, Murphy curtailed his fundraising to avoid triggering matching funds. JA 567. In 2008, he declined to send out a mailer in order to conserve resources for the general election where he would face three publicly financed opponents. JA 567. He also delayed raising money until "the very end of my general campaign so that even if I did trigger matching funds to my opponents, I would do so late enough in the process that their advantage would be lessened." App. to Pet'rs' Pet. for a Writ of Cert. ("App.") at 168. Murphy's own father and stepmother declined to contribute to his campaign because of the effect of matching funds. JA 569.

- Dean Martin: In his 2010 election, Martin delayed private fundraising to avoid triggering matching funds and ultimately chose to run as a publicly financed candidate to avoid the burdens of matching funds. App. 153; ECF No. 432-1 at 2-4. In the 2006 general election, he raised about $72,000 and then stopped soliciting funds in order to keep his campaign near the trigger level. JA 578-79. Martin has

[4] Respondents almost completely ignore Dr. Primo's findings and do not mention the GAO report at all.

also actively discouraged independent expenditures on his behalf and none were made on his behalf. JA 578.

- Tony Bouie: Bouie ceased promoting his campaign and held his expenditures until they could be timed to minimize matching funds. McComish App. 310-11. As a result, he refrained from sending out mailers, making auto-calls, and distributing information, which meant the public had less time to consider his message. McComish App. 311. In 2010, he chose to run for a different office because the contest for that office would be less likely to implicate matching funds. McComish App. 296-97.

- John McComish: In the 2008 election, McComish did not spend money on an auto-dialer to avoid triggering matching funds. McComish App. 328-29.

- Matt Salmon: The Club for Growth chose not to contribute to or make an independent expenditure in support of his campaign specifically to avoid triggering matching funds. JA 290.

- Political consultants: Political campaign consultants in Arizona routinely advise their clients to minimize the competitive disadvantage of matching funds by minimizing fundraising or spending in ways that minimize matching funds. JA 927-28. An experienced campaign consultant testified that "particularly with the

traditional candidate in a multicandidate race where one or more is a Clean Elections candidate, it is a part of basically every spending decision that would put you over that minimum, and sometimes part of the decision is that you don't because you know you only have so much to spend before you start to trigger. So you're always aware of the cost of spending that first incremental dollar." JA 596.

- Independent expenditure groups: Victory 2008 and Arizonans for a Healthy Economy both stated that if they knew their 2008 independent expenditures were going to trigger matching funds to the campaign of David Stevens, they would not have made them and that matching funds chilled their ability to effectively implement campaign plans. JA 548-49, 550-52, 553-55, 557-58. In 2006, the Arizona Taxpayers Action Committee (ATAC) declined to spend money on auto-dialers in one election to avoid triggering matching funds. JA 581-83. Matching funds are "certainly [a] top-of-mind issue" for ATAC and "an important factor" in their decision to make expenditures. JA 584. When they have made expenditures that would trigger matching funds, they have done so at the end of October to minimize the fundraising benefits to the candidates they oppose. JA 583-84. Similarly, a representative from Arizona Free Enterprise Club's

> Freedom Club PAC ("Freedom Club") testified that matching funds determined when they would spend money. JA 670. In short, matching funds impact "every spending decision" both ATAC and Freedom Club make. JA 777, 782.

Respondents and the Ninth Circuit ignored this evidence and focused on select portions of the record that Respondents view as inconsistent with their opinion of how campaigns should operate. For instance, Respondents make much of Martin's inability to specifically recall triggering matching funds, Br. for Clean Elections Institute at 6-7, but ignore that his campaign strategy was to keep his political activity sufficiently low to avoid triggering them. JA 574. Regarding the 2006 campaign, Martin testified that as soon as he realized that his 2006 general election opponent would receive matching funds based on his primary and general election fundraising, "[w]e stopped fundraising, stopped actively soliciting. And that, for the most part, brought everything to a crawl on the fundraising side." JA 578-79, 729. Because he curtailed his political activities, Martin was able to minimize the amount of matching funds – only $1,800 – he ultimately triggered to his opponent. JA 755. This was despite the fact that Martin had the ability to raise tens of thousands of dollars more for his campaign. JA 578.

Similarly, Respondents fault Murphy for failing to track and report people who did not give him money. Br. for Clean Elections Institute at 7. Like the

Ninth Circuit, they ignore his testimony regarding how the Matching Funds Provision caused him to stop fundraising, delay his speech, and forego communications with potential voters (and thereby reduce all contributions). *See supra* p. 13.

This testimony demonstrates the real-world burden the Matching Funds Provision imposes on speech.[5] But to Respondents, the fact that a candidate brought his political activity "to a crawl" is less important than whether he specifically remembered triggering less than $2,000 in matching funds.

D. Self-Censorship Caused by Government Policy Is Not a "Strategic Choice," But a Severe Burden on Political Speech.

Where Respondents do recognize matching funds' impact on speech, they, like the Ninth Circuit before

[5] Respondents argue as well that a lack of "clustering" around the trigger amount demonstrates a lack of First Amendment harms. But, as the district court concluded, "this evidence does not dispose of Plaintiffs' claims that their speech was chilled and will be chilled. For example, some of the Plaintiffs triggered matching funds. Those individuals now claim they would have spent more or spent at a different time if matching funds were not a possibility." App. 52. Moreover, the lack of "clustering" is consistent with the evidence of the Matching Funds Provision delaying speech set out by the GAO, Dr. Primo, and Mr. Miller. If independent expenditure groups and privately financed candidates delay spending money until the final weeks of the campaign, it is logical that their spending would not cluster at the trigger limit.

them, dismiss it as merely a "strategic choice." Br. for Clean Elections Institute at 16. But this is meaningless, as one could describe the decision to alter one's speech in response to any burdensome law short of a complete ban as a "strategic choice."

For example, in *United States v. Playboy Entertainment Group*, this Court struck down a law that gave cable television operators the choice between fully blocking adult entertainment or limiting it to specified hours. 529 U.S. 803, 806, 827 (2000). This Court has come to similar conclusions in other cases. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (holding "Son of Sam" law unconstitutional despite fact that authors could choose to forego payment for writing books); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (holding tax on paper and ink expenditures above $100,000 unconstitutional despite publishers having a "choice" to avoid tax by using less); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (striking down law that required addressees of "communist political propaganda" to choose to receive it before it could be delivered). In each case, the law presented speakers with "strategic choices" between speaking on their own terms or altering their speech to conform to government disincentives. In each case, this Court concluded that the government's imposition of such a choice violated the First Amendment.

By causing candidates and independent groups to change their spending decisions, the Matching Funds

Provision severely burdens speech by injecting the government directly into the speaker's decisions about whether, when, and what the speaker will speak. *See Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (recognizing "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"). In *Davis*, this Court did not hesitate to strike down a law that had a similar impact on speech. It should take the same approach here.

E. Cases Involving the Mechanics of Elections Do Not Apply Because This Case Involves Core Political Speech.

The U.S. Solicitor General argues that in campaign finance cases this Court applies a sliding scale of review based on the severity of the harm to the plaintiff. Br. for the United States at 14-15. In support, he relies on cases involving challenges to government regulations of the time, place, and manner of elections. *Id*.[6]

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[6] The Solicitor General views the Matching Funds Provision as "integral" to Arizona's public financing system. Br. for the United States at 32. The Solicitor General, of course, represents a governmental entity that has a public financing system that does not contain a triggered matching funds component. The purported "integral" nature of triggered matching funds is therefore undercut by the considered view of Congress, which

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This argument is misplaced, however, as this Court has recognized a distinction between election regulations, which are justified by the need to make elections fair and honest and to impose order on the democratic process, and regulations of core political speech. *Compare Burdick v. Takushi*, 504 U.S. 428, 433 (1992), *and Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."), *with McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995) (noting that courts will resort to the severe/lesser burden framework only if a challenged election law regulates "the mechanics of the electoral process," not speech), *and Buckley v. Valeo*, 424 U.S. at 17-18; *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206-07 (1999) (Thomas, J., concurring in the judgment) (distinguishing between election regulations and those that affect political speech and stating that in the latter case courts must apply strict scrutiny).

This case, like *Davis*, involves a law that burdens political speech – it has nothing to do with the mechanics of elections.

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has consistently rejected public financing systems with triggered matching funds for years. *See id.*

II. STRICT SCRUTINY APPLIES TO THE MATCHING FUNDS PROVISION.

Despite the similarities between the Matching Funds Provision and the Millionaire's Amendment at issue in *Davis*, Respondents argue that intermediate scrutiny applies here because the Millionaire's Amendment applied to candidates who were "similarly situated," whereas the Matching Funds Provision applies to those who operate under different funding systems. Br. for Clean Elections Institute at 22-23; Br. of State Resp'ts at 27.

Davis did not turn on whether the candidates were or were not similarly situated. Indeed, that distinction is entirely in the eye of the beholder. The candidates in *Davis* could just as easily be described as not similarly situated in that one was a millionaire and the other was not. And the choice in Arizona to accept public financing or not cuts just as much against Respondents, because those who accept public funding could easily choose not to do so. The fact that some candidates have made that choice does not entitle the government to manipulate campaign spending so that their political activity is always at the same level as (or often times, significantly above) those who choose not to take the government's money.

As this Court made clear in *Davis*, governmental attempts to "equalize" speech based on the speech of others impose a severe burden on political speakers. 554 U.S. at 739-40. Respondents do not point to any case that entitles the government to impose such a

burden on a person who *refuses* to participate in a government spending program. In *Buckley*, the government-created burdens fell on candidates who accepted government grants; it did not create a new avenue for government regulation of speech by giving the government the power to burden the speech of nonparticipants. *Cf.* 424 U.S. at 57 n.65.[7]

Moreover, independent expenditure groups cannot choose public funding at all. Respondents and their supporting *amici* only acknowledge this fact once in a footnote and then only to suggest the issue be remanded. Br. of Former ACLU Officials at 19 n.10. Thus, even under Respondents' cramped reading of *Davis*, the Matching Funds Provision is as asymmetrical and discriminatory as Respondents read the Millionaire's Amendment to have been.

The Matching Funds Provision is also subject to strict scrutiny because the trigger for matching funds is content-based. In an election with a publicly financed candidate and a privately financed candidate, speech in favor of the publicly financed candidate triggers no government action. An identical expenditure in favor of the privately financed candidate

[7] For this reason, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), and *Rust v. Sullivan*, 500 U.S. 173 (1991), have no application here. Both cases dealt with challenges by recipients of government funding to restrictions attendant to such funding. Neither dealt with challenges with burdens placed on people who refused funding or were not eligible for it.

triggers matching funds to the publicly financed candidate. Despite Respondents' attempts to argue that the Act is not content-based because it is not viewpoint-based, Br. for Clean Elections Institute at 33, such a law "does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* . . . ." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Here, there is no way for an independent expenditure group supporting a privately financed candidate to avoid triggering matching funds except to change who they support or to stop speaking altogether.

Finally, Respondents' attempts to decouple *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) from *Davis* and this case are unpersuasive. This Court answered Respondents' argument that those cases only apply to the physical appropriation of property when it applied the rationale from *Pacific Gas* to the campaign finance system in *Davis*. Moreover, despite Respondents' arguments to the contrary, in *Pacific Gas*, the plurality explained that appropriation of a speaker's physical property was not the key to those decisions. Instead, the plurality explained, the decision in *Miami Herald*

> emphasizes that the right-of-reply statute impermissibly deterred protected speech. In the last paragraph of the opinion, the Court concluded that an *independent* ground for invalidating the statute was its effect on editors' allocation of scarce newspaper space.

> That discussion in no way suggested that the State was free otherwise to burden the newspaper's speech as long as the actual paper on which the newspaper was printed was not invaded.

Pac. Gas, 475 U.S. at 12 n.7 (citations omitted).

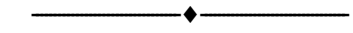
In short, strict scrutiny applies. For the Matching Funds Provision to survive, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ark. Writers' Project*, 481 U.S. at 231. That is, the government must meet the same standard as that set out in *Davis*. As explained in Petitioners' opening brief, this cannot be done. Because there is no way for the Matching Funds Provision to avoid strict scrutiny, there is no way for it to survive – as Respondents have conceded by failing to argue otherwise.

III. PURPORTED INCREASES IN OVERALL SPENDING CANNOT JUSTIFY BURDENS ON INDIVIDUAL SPEECH.

Respondents argue that the Act has increased spending in Arizona and therefore any resulting burden on the speech of independent groups or privately financed candidates is justified. Whether this increase in spending relates to the Act, however, is questionable; as the district court found, "it is unclear whether that increase can be traced to the Act." App. 51. Moreover, if one takes into account the increase in Arizona's population, Respondents are incorrect that

overall spending has gone up in Arizona at all. JA 767-68, 915-23. And as Dr. Primo testified, many states have seen a surge in campaign spending since 1998; Arizona is not one of them. JA 922. Indeed, Respondent Clean Elections Institute's expert testified that the Act has reduced the amount of spending that would have occurred had the Act not been in place. JA 768.

More importantly, the First Amendment protects the rights of individual speakers, and those rights are not subordinated to the rights of other speakers. This Court has specifically rejected the idea that a restriction on a speaker can be justified by the fact that someone else may speak: "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Ark. Writers' Project*, 481 U.S. at 231 (citation omitted). Any contrary ruling would also run afoul of the line of cases holding that the government may not open opportunities for some individuals to speak by abridging the First Amendment rights of other individuals. *E.g.*, *Pac. Gas*, 475 U.S. at 14 ("Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." (quoting *Buckley*, 424 U.S. at 49 n.55)). Respondents' attempt to absolve the state from liability by noting benefits purportedly received by other speakers must fail.



CONCLUSION

For the reasons discussed above and in Petitioners' brief, and the briefs of the petitioners in Case No. 10-239, the Ninth Circuit should be reversed.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM R. MAURER*
JEANETTE M. PETERSEN
101 Yesler Way, Suite 603
Seattle, WA 98104
Tel: (206) 341-9300
Fax: (206) 341-9311
wmaurer@ij.org
jpetersen@ij.org

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
STEVEN M. SIMPSON
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
wmellor@ij.org
ssimpson@ij.org

INSTITUTE FOR JUSTICE
TIMOTHY D. KELLER
PAUL V. AVELAR
398 South Mill Avenue,
Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Fax: (480) 557-8305
tkeller@ij.org
pavelar@ij.org

Counsel for Petitioners
Arizona Free Enterprise Club's Freedom Club PAC, et al.

**Counsel of Record*