09-3760-cv(L)

09-3941-cv(CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREEN PARTY OF CONNECTICUT, S. MICHAEL DEROSA, LIBERTARIAN PARTY OF CONNECTICUT, ELIZABETH GALLO, JOANNE P. PHILLIPS, ROGER C. VANN, BARRY WILLIAMS, ANN C. ROBINSON,

Plaintiffs-Appellees,

AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT,
ASSOCIATION OF CONNECTICUT LOBBYISTS,

Plaintiffs,

v.

JEFFREY GARFIELD, in his official capacity as Executive Director and General Counsel of the State Elections Enforcement Commission,
RICHARD BLUMENTHAL, in his official capacity as Attorney General,

Defendant-Appellants,

(caption continued on inside front cover)

On Appeal from the United States District Court
for the District of Connecticut

***AMICI CURIAE* BRIEF OF DEAN MARTIN, ROBERT BURNS, RICK MURPHY, ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE IN SUPPORT OF AFFIRMANCE AND PLAINTIFFS-APPELLEES**

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Defendants,

and

AUDREY BLONDIN, COMMON CAUSE OF CONNECTICUT, CONNECTICUT CITIZEN ACTION GROUP, KIM HYNES, TOM SEVIGNY,

Intervenors-Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

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 Arizona Free Enterprise Club's Freedom Club PAC.

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

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IDENTITY OF *AMICI CURIAE*

The *amici* fall into two categories of political speakers in the State of Arizona: (i) elected officials, and (ii) groups making or funding independent expenditures. Specifically, Dean Martin is the current Arizona State Treasurer and was elected to the State Senate in 2000, 2002, and 2004. Robert Burns is an Arizona State Senator and the President of the Senate. Burns ran for his current position in 2002, and was re-elected in 2004, 2006, and 2008. Rick Murphy is an Arizona State Representative. He first ran for the Arizona House in 2004, and was re-elected in 2006 and 2008. The Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is a Candidate Support or Opposition Committee. Arizona Taxpayers Action Committee ("Arizona Taxpayers") is an Independent Expenditures Committee that makes expenditures in state elections. Each of *amici* is a Plaintiff-Intervenor in *McComish v. Bennett*, CV 08-1550-PHX-ROS (D. Ariz.) ("*McComish*"), an on-going First Amendment challenge to Arizona's Citizens Clean Elections Act (the "Arizona Act"), Ariz. Rev. Stat. § 16-940 *et. seq.*[1] The Arizona Act is a system of public funding of elections for state offices that shares many features of the Connecticut Citizens' Election Program ("CEP") at issue before this Court.

[1] As of the date of this brief, there exists four currently pending motions for summary judgment before the District Court in that case.

AMICI'S INTEREST IN THIS CASE

In their brief, Appellants Jeffrey Garfield and Richard Blumenthal (together, the "State") argue that this Court should overturn the decision of the District Court here because the CEP is too new to determine whether it violates the U.S. Constitution. *See* Br. Defs.-Appellants 110 ("One election cycle … does not provide sufficient evidence or experience to prove anything, let alone a constitutional violation."). *See also id.* at 113-15, 121, 126. While the CEP may be new, the Arizona Act has been in effect since 2000, it influenced the CEP, and the CEP replicates many of its provisions. This is particularly true with regard to the CEP's "Trigger Provisions,"[2] which mimic, and in some ways exceed, similar provisions in the Arizona Act. *See* Ariz. Rev. Stat. §§ 16-951, 16-952. *Amici* are thus knowledgeable with how such a system operates and have experienced firsthand how "clean elections" systems violate First Amendment protections.

Based on their experience, *amici* are well-aware that systems like the Arizona Act and the CEP are designed, at their core, to create disincentives for political speech. Despite the State's argument, speakers in Connecticut need not endure any additional "experience" for this Court to recognize the

[2] The District Court referred to Connecticut's equal funding provisions as "Trigger Provisions." *See* Conn. Gen. Stat. §§ 9-713, -714. *Amici* will also use this term to describe these provisions of the CEP.

harm such systems impose on free speech rights. Indeed, Connecticut's law not only replicates many of the constitutional flaws of the Arizona Act, the CEP adds additional burdens to free speech and associational rights.

Each *amici* is a proponent of wide-open, robust, and unrestricted political speech and each wishes to ensure that the residents of Connecticut do not labor under the same restrictions on their First Amendment rights *amici* have shouldered for years. In addition, a decision from this Court upholding the CEP could reinforce the vitality of Arizona's punitive campaign funding system and encourage the development of similar systems in other states. For these reasons, *amici* have significant interests in the outcome of this case.

SOURCE OF *AMICI*'S AUTHORITY TO FILE

The *amici* have received consent to file this *amicus curiae* brief in support of Plaintiff-Appellees Green Party of Connecticut, *et al.*, from counsel for each party pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

The State here has repeated many of the arguments put forth by the State of Arizona and the defendant-intervenors supporting the Arizona Act regarding the constitutionality of the CEP's Trigger Provisions. Like their

Arizona counterparts, the State is wrong on the law and wrong regarding the damage such systems present to free speech.[3] First, the State argues that the proper standard of review is the "flexible" *Anderson/Burdick* standard. The State errs on this point: the CEP burdens political speech and is subject to the strictest scrutiny. Second, the State argues the Trigger Provisions support a compelling government interest. The State errs on this point as well: the Trigger Provisions themselves are not justified by a compelling governmental interest, but exist only to provide ancillary benefits to other portions of the law. The Supreme Court has long held, and recently reaffirmed, that each application of a restriction on speech must itself be supported by a compelling government interest. Finally, even if this Court were to find a compelling government interest, the Trigger Provisions are not necessary to achieve any such interest. For these reasons, this Court

[3] *Amici* also note that Intervenors-Defendants-Appellants here claim that the Trigger Provisions of the CEP are severable, arguing that "[t]here is no reason to believe . . . that the availability of such matching funds is such an indispensible aspect of the public financing system that the CEP cannot exist without them." Br. Intervenors-Defs.-Appellants 58. The defendant-intervenors in *McComish*, in contrast, argued the opposite, despite also being represented, in part, by the Brennan Center for Justice. *See* Mem. Def.-Intervenor Clean Elections, Inc. Supp. Summ. J. 13 [Doc. 286], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009). In other words, according to some public financing proponents, matching funds are essential for such systems to operate in the Grand Canyon State, but not essential in the Nutmeg State.

should affirm the District Court and conclude the CEP is unconstitutional.[4]

ARGUMENT

1. Strict Scrutiny Is Appropriate

The State argues that the District Court erred in subjecting the CEP to strict scrutiny and that a "flexible" standard is appropriate. Br. Defs.-Appellants 30-46. In particular, the State argues that this Court should apply the standard of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), two ballot access cases, instead of the strict scrutiny standard. The State thus requests that this Court start its analysis in the middle of the Supreme Court's methodology for analyzing campaign finance cases.

A. Laws That Burden Political Speech Are Subject To Strict Scrutiny, Regardless Of The Severity Of The Burden

As an initial matter, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007), sets out the standard for laws that burden political speech: "Because [the legislation in question] burdens political speech, it is subject to strict scrutiny." This statement could scarcely be any more unequivocal.

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[4] *Amici* here largely address the Trigger Provisions because the Arizona Act contains a similar matching funds mechanism. The Arizona Act does not contain a discriminatory and burdensome restriction on minor parties like that contained in the CEP. While not specifically addressed in this brief, *amici* agree with plaintiffs' arguments regarding the effect of the CEP on minor parties and believe that this Court would be correct in striking down the CEP on that ground as well.

Nonetheless, the State argues that because the plaintiffs have not suffered "a severe burden" on their rights, a "flexible standard" is appropriate. However, the "basic premise . . . for reviewing political financial restrictions [is that] 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) (internal quotation marks and citation omitted). Thus, while the CEP does, in fact, heavily burden speech (as amply demonstrated by the plaintiffs and the District Court), it is the right impacted that determines the proper level of scrutiny.

In that regard, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). *See also 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). For that reason, when faced with a regulation that is not "an ordinary election restriction," but one that burdens core political speech, the Court uses strict or exacting scrutiny, regardless of the extent of the burden.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345-46 (1995). *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 207-08 (1999) (Thomas, J., concurring) ("When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech" and noting that the extent of the burden is only considered "if a challenged law regulates the mechanics of the electoral process" rather than speech) (internal quotation marks and citation omitted). The extent of any burden only comes into play after the level of scrutiny has been determined. *See Beaumont*, 539 U.S. at 162 (difference between a ban and a limit is considered "when applying scrutiny at the level selected, not in selecting the standard of review itself").

The reason for the difference in standards between political speech cases and cases dealing with the mechanics of elections is simple: the Supreme Court justifies a lower standard of review in cases challenging laws regulating the conduct of elections because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (internal quotation marks and citation omitted). In recognition of the public interest in orderly elections, regulations that impose only slight burdens on speech and associational

rights will trigger less rigorous judicial review. In contrast, the Trigger Provisions affect pure political speech, activity at the heart of the First Amendment.

Thus, if the CEP burdens political speech, it is subject to strict scrutiny. The question then becomes, "Does the CEP burden political speech?" The answer to that question is an unequivocal "yes," because, at their core, "clean elections" systems are designed to create disincentives for speakers to engage in "too much" political activity.

B. "Clean Elections" Systems Like Arizona's And Connecticut's Burden Political Speech

i. Connecticut's System Was Influenced By The Arizona Act

Like Arizona's Act, the CEP is a "clean elections" system that incorporates a trigger matching fund system by which publicly financed candidates realize a greater benefit the more a privately financed candidate or independent group speaks. In that regard, Connecticut's law was influenced by Arizona's. *See Green Party of Conn. v. Garfield*, 2009 U.S. Dist. LEXIS 78188, at *35, *192 (D. Conn. Aug. 27, 2009). Indeed, Connecticut's Trigger Provisions are even more burdensome, discriminatory, and punitive than Arizona's. *Compare* Conn. Gen. Stat. §§ 9-713 (a single dollar raised or spent by a privately-financed candidate

above the publicly financed candidate's expenditure limit results in direct subsidy to all publicly financed candidates in the amount of 25% of the initial government grant with no discount for fundraising costs) *with* Ariz. Rev. Stat. § 16-952 (dollar for dollar match above the expenditure limit, minus 6% for fundraising costs). Given their substantive similarities, their genesis from the same set of campaign finance advocacy groups, and the influence of the Arizona Act on the CEP, the effect of the CEP on free speech rights should be similar to the effect of the Arizona Act, and should, in fact, be even worse.

ii. "Clean Elections" Systems Are Designed To Limit Speech

The State has expressly disclaimed any notion that the Trigger Provision's purpose is to "level the playing field." *Green Party*, 2009 U.S. Dist. LEXIS at *237. However, as the District Court found, there is no practical difference between utilizing the Trigger Provision as a mechanism to achieve the goal of "increasing participation" and the goal of "leveling the playing field." *Id.* The whole point of matching funds is to give publicly financed candidates the assurance that any time a privately financed candidate or group advocates their defeat the CEP will equalize the relative financial resources of candidates and discourage such privately financed candidates and groups from speaking. *Id.* In other words, "clean elections"

systems are designed, from the outset, to level the playing field, set *de facto* across-the-board expenditure limits, and limit speech.

iii. The Arizona Act Has Resulted In Significant Burdens On Free Speech

While "clean elections" systems achieve few, if any, of their stated goals, they are effective at suppressing speech. In *McComish*, *amici* produced evidence demonstrating the effect of clean elections systems on both their speech and the general exercise of free speech rights in Arizona:

- Each of the candidate *amici* have intentionally delayed and limited their fundraising activities in order to minimize the amount of equalization funds paid to their publicly funded opponents.[5]
- *Amici* Martin has actively discouraged independent political groups from making independent expenditures that would trigger equalization funds to his participating opponents.[6]
- *Amici* Murphy did not fundraise in the 2008 general election because he faced three publicly-funded opponents and would have triggered

[5] *See* Decl. Martin Supp. Mot. Summ. J. 16-17 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009); Decl. Murphy Supp. Mot. Summ. J. 98 [Doc. 288-7], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009); Decl. Burns Supp. Mot. Summ. J. 92 [Doc. 288-7], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).

[6] Dep. Martin Supp. Mot. Summ. J. 23 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).

almost $3 in equalization funds for every $1 he raised beyond the general election trigger amount.[7]

- The *amici* political committees have been harmed by triggering equalization funds to the candidates they oppose based solely on the exercise of their free speech rights.[8]
- The trigger funds have altered the timing of the *amici* political committees' speech—typically delaying it until later in the election to minimize the harmful effects of trigger funds.[9]
- In the 2006 primary, Arizona Taxpayers declined to speak in opposition to a publicly financed Senate candidate because such speech would have triggered equalization funds.[10]

Moreover, *amici*'s expert witness in *McComish*, Dr. David M. Primo, Ph.D., conducted a statistical analysis of spending by and contributions to privately

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[7] Disc. Resp. Murphy Supp. Mot. Summ. J., Jan. 20, 2009, 72 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).
[8] Disc. Resp. AZ Taxpayers Supp. Mot. Summ. J., Jan. 20, 2009, 74 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009); Dep. Kirkpatrick Supp. Mot. Summ. J. 138-39 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).
[9] Decl. Voeller Supp. Mot. Summ. J. 121-22 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009); Decl. Wikfors Supp. Mot. Summ. J. 132 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).
[10] Disc. Resp. Supp. Mot. Summ. J., Jan. 20, 2009, 74 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009); Dep. Kirkpatrick Supp. Mot. Summ. J. 135-36 [Doc. 338], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009).

financed candidates in Arizona during the 2000, 2002, 2004, and 2006 elections.[11] Dr. Primo's regression analysis of Arizona's campaign finance data shows that privately-financed candidates in races where equalization funds were awarded changed the timing of their fundraising activities, the timing of their expenditures, and thus their overall campaign strategies.[12]

iv. The Supreme Court Has Consistently Recognized That Laws Designed To Incentivize Silence Are Unconstitutional

Based on the experience of *amici*, a plain reading of the CEP, and the purpose of the statute, it is clear that the CEP is designed to create disincentives for privately financed candidates and independent groups to speak above the expenditure limits on publicly financed candidates. Unfortunately for the State, the Supreme Court has consistently struck down laws that incentivize silence.

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[11] *See* Decl. of Dr. David M. Primo 4 [Doc. 288-7], *McComish v. Bennett*, CV08-1550-PHX-ROS (D. Ariz. June 12, 2009). Dr. Primo did not examine 2008 because the data was incomplete at the time of his report.

[12] Because Arizona's Act has been suppressing speech for years, the Supreme Court's direction that courts should use caution when considering the constitutionality of laws prior to their effectiveness should have little applicability to this Court's review of the CEP. *See* Br. Defs.-Appellants 113 (citing *Wash. State Grange v. Wash. Republican Party*, 128 S. Ct. 1184, 1191 (2008)). The model the Connecticut Legislature used to build the CEP has been used in other states and, in fact, the Connecticut Legislature made the scheme even worse. There is, therefore, little question as to whether "clean elections" systems will burden speech in Connecticut in the future. By structuring the CEP the way it did, the Legislature has pledged that the government will soon make such burdens a reality.

In *Davis v. FEC*, 128 S. Ct. 2759 (2008), 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 "asymmetrical" treatment of opposing candidates "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.

This conclusion is consistent with precedent recognizing that the government chills speech when it creates a system under which the act of free speech enables the speaker's opponent to counter that speech, even when the government's goal is to promote more speech. The *Davis* Court specifically cited *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 14 (1986) (plurality opinion). There, California ordered a utility to make its newsletter available to a hostile group. 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 that the law did not prevent the newspaper from publishing what it wished. *Id.* at 247-48. The Court nonetheless concluded that the statute violated the First Amendment because it 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. *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576 (1995) ("when 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"); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 969 (N. D. Cal. 1987) (striking down ordinance that gave city unlimited discretion in renewing a franchise to dictate use of cable access time and concluding that "[l]ike the newspapers in *Miami Herald* and *Pacific Gas*, a cable operator in Santa Cruz may be deterred from airing its views for fear that this will trigger – indeed, force it to produce and fund – the response of an opposing group").

The Trigger Provisions suffer from the same infirmities as the regulations in these cases. First, they present the speaker with the choice of robustly engaging in expressive activity and enabling the dissemination of a message opposed to his own or not speaking at all. Second, the Trigger Provisions are content-based. The Trigger Provisions only come into play when a privately financed candidate engages in (i) political activity (ii) against a publicly financed opponent (iii) above a certain point. All other speech is unaffected. Third, the Triggers Provisions are discriminatory and asymmetrical. They provide funds only to publicly financed candidates and only on the basis of the speech of the opponents of such candidates. The Trigger Provisions provide funds to multiple publicly financed candidates in order to counter the speech by, or in support of, a single privately financed candidate. They provide 25% of the initial grant to a publicly financed candidate based on the private candidate's raising or spending as little as $1 more than the expenditure limit. The Trigger Provisions ignore the privately financed candidate's fundraising expenses. They provide funds directly to a publicly financed candidate based on the independent expenditures of third parties, regardless of whether such expenditures were wanted, helpful, or actually harmed the privately financed candidate.

It is difficult to conceive of a system more inherently asymmetrical, discriminatory, and punitive than the CEP.

v. Conclusion

"Clean elections" systems like the CEP burden political speech and they match, and often exceed, the burdens presented in *Davis, Pacific Gas,* and *Miami Herald.* In order to survive judicial scrutiny, the State must prove that the CEP survives strict scrutiny; that is, that the CEP is narrowly tailored to achieve a compelling governmental interest. *See Wis. Right to Life*, 551 U.S. at 464 (under strict scrutiny, "the *Government* must prove that [the law] furthers a compelling interest and is narrowly tailored to achieve that interest"). The State has not met this burden.

2. The Trigger Provisions Are Not Supported By A Compelling Government Interest

The State argues that the Trigger Provisions are supported by the compelling government interest "in incentivizing sufficient participation in a public financing system." Br. Defs.-Appellants 127; *see also* Br. Intervenors-Defs.-Appellants 58. In other words, the Trigger Provisions exist to help the rest of the CEP operate. Even assuming the other portions of the CEP are supported by compelling government interests, the Trigger Provisions themselves must be supported by an independent compelling government interest and they are not.

"A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *Wis. Right to Life*, 551 U.S. at 478. Restrictions that exist simply to enable other portions of a statute to operate do not satisfy strict scrutiny. *See id.* at 479 ("But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."). "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). Because the Trigger Provisions are not independently designed to prevent corruption or the appearance thereof, they fail strict scrutiny.

Nonetheless, the State may argue that the Trigger Provisions produce an ancillary benefit to the system as a whole in the form of increased participation, which it argues is supported by the goal of combating corruption or its appearance. Even putting aside for a moment the Court's clear pronouncement in *Wisconsin Right to Life*, , the State simply cannot maintain an argument that sweeping laws that supply ancillary benefits to laws with a legitimate scope are constitutional. On the contrary, courts routinely strike down laws that restrict speech when such laws are designed to aid the execution of other laws that are supported by a compelling

government interest. For instance, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court examined Ohio's ban on anonymous leafleting. Ohio justified its ban by asserting it was "an aid to enforcement of the specific prohibitions [of the Election Code] and as a deterrent to the making of false statements by unscrupulous prevaricators." *McIntyre*, 514 U.S. at 350-51. The Court rejected this argument, holding that while "these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [the ban's] extremely broad prohibition." *Id.* at 351.

In that regard, courts have long rejected burdens on speech that exist simply to assist the enforcement of laws that are otherwise constitutional. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (striking down law banning virtual child pornography despite the government's argument that it supported laws banning actual child pornography because "the Government may not suppress lawful speech as the means to suppress unlawful speech"); *City of Houston v. Hill*, 482 U.S. 451, 464-66 (1987) (striking down law criminalizing verbal abuse of a police officer as not narrowly tailored despite government's argument that the law was necessary to preserve public order); *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); *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down ban on distributing anonymous handbills despite government's argument that the law "provid[ed] a way to identify those responsible for fraud, false advertising and libel"); *ACLU of Nev. v. Heller*, 378 F.3d 979, 1000 (9th Cir. 2004) (striking down law requiring identification of the 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").

The fact that the Trigger Provisions arguably support the remainder of the CEP does not demonstrate that they are designed to achieve a compelling government interest. The Trigger Provisions thus fail strict scrutiny.

3. The Trigger Provisions Are Not Narrowly Tailored

Under strict scrutiny, the Constitution requires that a law burdening speech "be employed only where it is '*necessary* to serve the asserted [compelling] interest.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)). The courts therefore require that statutes be directed precisely at the harm they seek to prevent, do not regulate more speech than is necessary, and actually achieve the goals for which they were designed. *See Turner Broad.*

Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (narrow tailoring requires the government to prove "that the regulation will in fact alleviate [the government's claimed] harms in a direct and material way"); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002 (9th Cir. 2003) (under narrow tailoring, "[r]estrictions that severely burden First Amendment rights 'must be the least drastic means of protecting the governmental interest involved; its restrictions may be 'no greater than necessary or essential to the protection of the governmental interest'") (quoting *Rosen v. City of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1976)).

Even assuming the existence of a compelling government interest, the Trigger Provisions are not necessary to achieve it. This is clear because the intervenors in this case freely admit that the Trigger Provisions are not necessary to the government's goals; indeed, they claim that this Court could excise the Trigger Provisions from the statute entirely and the law would be unaffected. *See* Br. Intervenors-Defs.-Appellants 58 ("There is no reason to believe … that the availability of such matching funds is such an indispensible aspect of the public financing system that the CEP cannot exist without them."). "Dispensable" does not mean the same thing as "necessary."

CONCLUSION

For these reasons and the reasons set out in plaintiffs' brief, the CEP manifestly fails constitutional scrutiny. This Court should affirm the District Court and strike the CEP down in its entirety.

Respectfully submitted this 18th day of December, 2009.

INSTITUTE FOR JUSTICE

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Certification of Service

I hereby certify that a true and correct copy of the foregoing *amicus* brief was served by first class mail, postage prepaid, in accordance with Rule 25(c)(1)(B) of the Federal Rules of Appellate Procedure on this 18th day of December, 2009, to the following counsel of record:

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I hereby certify that this *amicus* brief complies with the type-volume limitations of rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 4794 words and complies with the typeface requirements of rule 32(a)(5) and the type style requirements of rule 23(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman) with a 14-point font.

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