No. 10-238, vide 10-239

In The
Supreme Court of the United States

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

v.

Ken Bennett, in His Official Capacity
as Arizona Secretary of State, et al.,
Respondents.

John McComish, et al.,
Petitioners,

v.

Ken Bennett, in His Official Capacity
as Arizona Secretary of State, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has its "fullest and most urgent application" to speech uttered during a political campaign. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). This core political speech embraces both issues and candidates. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("*Buckley*").

Independent groups are often passionate about particular issues and work to help elect candidates who share their positions. When the government squelches independent expenditures, even without imposing a direct ceiling on what may be spent, it is like leaving someone "free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Buckley* 424 U.S. at 19 n. 18. For independent advocacy groups as well as candidates, Arizona's matching funds trigger "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. In spite of viewpoint neutrality, the program stifles speech "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). The law also burdens the right to associate—and even issue advocacy may fall within its clutches.

As applied to independent associations, the matching funds provision serves no legitimate state interest—let alone the compelling purpose mandated by strict scrutiny. These groups pose no threat of quid pro quo corruption—they are *independent*. And this Court has found it improper for government to equalize campaign speech and thus "level the playing field."

ARGUMENT

I. PUBLIC FUNDING SCHEMES ARE PATENTLY UNCONSTITUTIONAL AS APPLIED TO INDEPENDENT GROUPS.

Small independent groups can inadvertently fall prey to complex campaign finance regulations. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth,* 556 F.3d 1021 (9th Cir. 2009) (small church in Montana had to engage in protracted litigation to escape regulation as political committee); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 284-285 (4th Cir. 2008) ("*NCRTL v. Leake*") (vague, overly broad "political committee" definition threatened to chill issue advocacy); *id*. at 291 (striking down limits on contributions to independent groups). The "matching funds" trigger is the latest link in a chain of challenges to the First Amendment rights of independent groups.

Public funding programs strangle independent speech. These schemes raise grave constitutional concerns even for *candidates*—who may choose whether to participate. Although some courts have upheld public funding, "such benefits could conceivably snowball into a coercive measure upon a non-participating candidate. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (There is a point at which [public financing] incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.)." *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (internal quotation marks omitted).

The *Buckley* dissent highlighted serious deficiencies in public campaign funding, including the long-

standing concern that "the use of funds from the public treasury to subsidize political activity of private individuals would produce substantial and profound questions about the nature of our democratic society." *Buckley*, 424 U.S. at 247 (Burger, C.J., dissenting). It may not be appropriate for the government "to finance a segment of the political debate itself." *Id.* at 248 (Burger, C.J., dissenting). It may even be "politically incestuous" for government to finance and eventually regulate the procedures by which its own representatives are selected. *Id.*, quoting Senator Howard Baker's remarks during debate on the legislation at stake in *Buckley*. 120 Cong. Rec. S8202 (1974). The "inappropriateness of subsidizing...the actual political dialogue of the people" may be "as basic to our national tradition as the separation of church and state" [*Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971)] or "the separation of civilian and military authority" [*Orloff v. Willoughby,* 345 U.S. 83, 93-94 (1953)]. *Buckley*, 424 U.S. at 248-249 (Burger, C.J., dissenting).

When the government funds political speech, it "tak[es] the right to speak from some and giv[es] it to others." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). If an independent group spends money during a campaign, its voice is muffled by state funding of opposing voices. That financing "deprives the [group] of the right to use speech to strive to establish worth, standing, and respect for [its] voice" and "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id*.

The matching funds provision "imposes an unprecedented penalty on any [association that]

robustly exercises [its] First Amendment right[s]." *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008). Speech requires money. Arizona's law deters independent spending—a form of protected speech. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994); *Scott v. Roberts*, 612 F.3d 1279, 1284 (11th Cir. 2010) ("Scott explains that he has a constitutional right to avoid providing his opponents 'with a competitive advantage and in turn permitting them to counteract and diminish [his] campaign speech.'")

When speakers spend money to persuade voters, they "presuppos[e] that the people have the ultimate influence over elected officials." *Citizens United*, 130 S. Ct. at 910. In *Citizens United*, this Court affirmed that "We The People...are sovereign" and thus it is "vitally important...that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id*. at 901, citing *United States v. Auto. Workers,* 352 U.S. 567, 593 (1957) (dissenting opinion of Douglas, J., joined by Warren, C. J., and Black, J.). *Citizens United* catalogued hypothetical examples of nonprofit advocacy groups whose speech would be restrained by the broadcast electioneering restraints at issue: Sierra Club (disapproving of Congressman who favors logging); National Rifle Association (urging vote against incumbent senator who supports handgun ban); American Civil Liberties Union (website urging vote for candidate who defends free speech). *Citizens United*, 130 S. Ct. at 897. Groups like these need breathing space to reach the voting public with their concerns.

II. THE STATUTE BURDENS THE ASSOCIATION RIGHTS OF INDEPENDENT ADVOCACY GROUPS.

Independent groups emerge when people band together to pool their resources and amplify the effect of their individual voices. Association enhances effective advocacy. *Buckley*, 424 U.S. at 15; *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). It amplifies "the voices of those of modest means" that might otherwise be drowned out by wealthier speakers who can afford expensive media. *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985); *see also NCRTL v. Leake*, 525 F.3d at 295 ("[I]ndependent expenditure political committees offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them…they allow ordinary citizens to receive the benefits that result from economies of scale in trying to convince the electorate of a political message."); *Citizens Against Rent Control / Coalition for Fair Hous. v. City of Berkeley, Cal.,* 454 U.S. 290, 294 (1981) ("By collective effort individuals can make their views known, when, individually, their voices would be faint or lost.").

Political association encompasses the right to pool money. "The right to join together 'for the advancement of beliefs and ideas'…is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66. Arizona's statutory scheme muffles speech and infringes the rights of associations because their political expenditures will trigger public funding of candidates and views they oppose. The North Carolina Right to Life would not wish to trigger

funding for a pro-choice candidate—nor would an abortion rights group want to facilitate financing for a pro-life candidate's campaign. The matching funds provision silences independent voices. As in *Buckley*, "[t]he Act's constraints on the ability of independent associations...to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents,' *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion)." *Buckley*, 424 U.S. at 22; *see also Day v. Holahan*, 34 F.3d at 1360 n. 3.

Political association is a core First Amendment right (*Rutan v. Republican Party*, 497 U.S. 62, 69 (1990)), as this Court has recognized for decades:

> "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. *NAACP v. Button*, 371 U.S. 415, 430; *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

Elrod v. Burns, 427 U.S. 347, 356-357 (1976). Association is "closely allied to freedom of speech" and is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960).

Arizona's interference with association rights must be strictly scrutinized. "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *NAACP v. Alabama, supra,* at 460-461." *Buckley*, 424 U.S. at 25. This is even true for contributions limits, which are more easily sustained than restrictions on expenditures. These must be "closely drawn" to serve a "sufficiently important interest" if they significantly interfere with associational rights. *Davis*, 128 S. Ct. at 2772, citing *McConnell v. FEC,* 540 U.S. 93 (2003). In the sphere of contributions, individual association members at least remain free to make their own contributions even if the corporation cannot do so. *FEC v. Beaumont*, 539 U.S. 146, 163 n. 8 (2003). But when expenditures are at stake, effective advocacy mandates the ability to pool resources.

In the past, this Court restricted the ability of corporations to participate in the political process, "recogniz[ing] a state interest in combating a broader form of corruption"—"the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Esenberg, Richard M., *Article: The Lonely Death of Public Campaign Financing,* 33 Harv. J.L. & Pub. Pol'y 283, 302 (2010) ("*Lonely Death*"), quoting *McConnell v. FEC*, 540 U.S. 93 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)). The Court carved out a narrow exemption for certain nonprofit organizations in *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263-264 (1986) ("*FEC v. MCFL*"). MCFL successfully brought an as-applied challenge, because it was formed solely to

advocate political ideas and not to accumulate wealth. Its resources reflected the support of its own donors rather than economic success in the marketplace. *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 295; ***FEC v. MCFL***, 479 U.S. at 260-261. But in spite of the exemption crafted for MCFL-type corporations, this Court in *Austin* upheld a Michigan statute that prohibited the use of corporate funds for express advocacy—even as applied to a nonprofit membership corporation. The Chamber of Commerce, unlike MCFL, was not formed for strictly political purposes and it accepted contributions from for-profit corporations. *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 295-296.

But just months ago, this Court loosened the stranglehold on corporations, overruling *Austin* and portions of *McConnell*. "First Amendment protection extends to corporations." *Citizens United*, 130 S. Ct. at 899. In making this decree, the Court revived its judicious reasoning of prior years:

> Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster.

Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("*PG&E*"), quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 783 (1978) ("*Bellotti*"). *Bellotti's* restatement of the issue is worth repeating:

> We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party

> seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

Id. at 776. If the speakers had been *individuals* rather than *corporations*, "no one would [have] suggest[ed] that the State could silence their proposed speech." *Id*. No matter who the speaker is—individual or association—the government may not dictate the appropriate subjects or the speakers who may address the public. *Id*. at 784-785; *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 96 (1972). "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public." *Bellotti,* 435 U.S. at 784-785. The First Amendment forbids such censorship, which could squelch "an informal neighborhood group that solicits contributions and spends money on a Presidential election" as easily as it could regulate a wealthy, professionally managed corporation. *FEC v. Nat'l Conservative PAC*, 470 U.S. at 496.

Association, like most other constitutional rights, is "not absolute." *Daggett v. Comm'n on Governmental Ethics & Election Practices,* 205 F.3d 445, 454 (1st Cir. 2000) ("*Daggett*"). But it is short-sighted to claim that the association rights of independent groups are "not burdened" merely "because their names and messages

are not associated—in any way indicative of support—with the candidate they oppose." *Id.* at 465. Although not as direct as a ceiling on expenditures or a fine or criminal sanction, the matching funds trigger deters vigorous advocacy—it "abridges expression that the First Amendment was meant to protect." *Bellotti,* 435 U.S. at 776. Independent groups expend funds at their peril, knowing that every dollar spent to advocate for their side of a campaign will result in a dollar—or two or three—to fund the opposition.

III. THIS CONTENT-BASED STATUTE IS FATALLY OVERBROAD BECAUSE IT ENCOMPASSES INDEPENDENT EXPENDITURES THAT POSE NO THREAT OF CORRUPTION.

Independent advocacy is "expression 'at the core of our electoral process.'" *FEC v. MCFL*, 479 U.S. at 251, quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes,* 393 U.S. at 32); see also *FEC v. National Conservative PAC,* 470 U.S. at 493. Arizona has imposed a content-based restriction on this core speech that captures only one side of a pending campaign and is far too broad in scope—even if it did serve the asserted government interest in eliminating corruption.

A. The Statute Is Content-Based Because It Burdens Only One Side Of The Political Debate.

Ariz. Rev. Stat. § 16-952 singles out political expression that supports a privately financed candidate or opposes a publicly financed candidate—contrary to this Court's recent edict "that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010), quoting *Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564, 573 (2002). Content-based restrictions are "presumptively invalid." *United States v. Stevens*, 130 S. Ct. at 1584; *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 817 (2000); *R. A. V. v. St. Paul,* 505 U.S. 377, 382 (1992). The government must show that the law is "narrowly tailored to promote a compelling Government interest"—even if it can be "described as a burden rather than outright suppression." *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. at 826.

These principles are even more compelling where core political speech is involved. As the Eighth Circuit observed in striking down a similar law, the statute "singles out particular political speech...for negative treatment that the state applies to no other variety of speech." *Day v. Holahan*, 34 F.3d at 1360-61. The *Day* Court noted that "[i]ndependent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increasing and money-shifting provisions." *Id.* at 1361. The same is true of Ariz. Rev. Stat. § 16-952. "This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that [this Court] sustained in *Buckley* and in *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540 (1983)." *PG&E,* 475 U.S. at 14-15.

Content-based restrictions on political speech violate the established principle that "the State cannot advance some points of view by burdening the

expression of others." *PG&E*, 475 U.S. at 20. *See also Buckley*, 424 U.S. at 48-49; *Bellotti,* 435 U.S. at 785-786. Arizona advances the campaign speech of publicly financed candidates by burdening the expression of privately financed candidates and the independent groups that support them. As one of the Petitioners observes, an independently financed ad *against* a privately financed candidate will trigger matching funds—but an ad in *favor* of that same candidate will not. Opening Brief of Petitioner Arizona Free Enterprise Club's Freedom Club PAC, 43. The content—opposing or favoring a particular candidate—is the critical factor.

B. Independent Expenditures Pose No Threat Of Corruption.

Far from generating corruption, independent advocacy may actually help guard against it:

> [G]eneral evidence of corruption hardly justifies the specific regulation of independent expenditure committees. In fact, some may argue that free political speech is the best remedy for, rather than a cause of, corruption. Indeed, independent expenditure committees may be the very ones to take up the lance against corrupt public practices.

NCRTL v. Leake, 525 F.3d at 306.

This Court "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC*

v. Nat'l Conservative PAC, 470 U.S. at 496-497. In *Buckley*, that solitary state interest could not salvage a ceiling on independent expenditures—which "heavily burden[ed] First Amendment expression." *Buckley*, 424 U.S. at 45, 48.

Buckley's ruling applies with equal force to independent associations. This Court confirmed "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"—rejecting dicta in a *Bellotti* footnote suggesting that "a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010), citing *Bellotti,* 435 U.S. at 788 n. 26.

Restricting independent expenditures does not serve the government's interest in halting corruption because "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *FEC v. Nat'l Conservative PAC*, 470 U.S. at 498. The connection is too tenuous. Since there is neither prearrangement nor coordination with a candidate or campaign agent, there is "substantially diminished potential for abuse" and little danger that the expenditures will be paid "as a *quid pro quo* for improper commitments from the candidate." *Citizens United*, 130 S. Ct. at 908, quoting *Buckley*, 424 U.S. at 47.

This Court's analysis of expenditures differs from its treatment of political *contributions*. *Citizens United*, 130 S. Ct. at 909. ("[C]ontribution limits...unlike limits on independent expenditures,

have been an accepted means to prevent *quid pro quo* corruption."); *Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."); *FEC v. MCFL*, 479 U.S. at 259-260 ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195 (1981) ("[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC [a multicandidate political committee receiving contributions from multiple sources] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.")

The constitutionality of expenditure limitations varies depending on the source and circumstances. In *Davis*, this Court rejected limits on a candidate's own funds, "reason[ing] that reliance on personal funds *reduces* the threat of corruption, and therefore [the statute], by discouraging use of personal funds, disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773; *see also Scott v. Roberts*, 612 F.3d at 1292 (accord); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010) (accord). However, expenditures of a political party, coordinated with a candidate, are not truly independent and may be limited even though "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001).

But truly independent expenditures—even for express advocacy—cannot jump the constitutional hurdle. In the case of a PAC supporting Reagan's

presidential campaign, this Court struck down limits on independent group expenditures—even those of a nonprofit corporation formed primarily to influence elections. *FEC v. Nat'l Conservative PAC*, 470 U.S. at 493. "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *Id*. at 498. The Court explained that the criminal sanctions in question applied *only* where political views were propagated using money—"much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id*. at 493.

A particular burden falls on independent groups. In *FEC v. MCFL*, 479 U.S. 238, this Court sustained as-applied challenge to the "Special Newsletter" of a non-profit group that did not accept contributions from business corporations, even though it fell within the statutory definition of "express advocacy." The Court noted the integral relationship between candidates and the issues independent groups typically advocate:

> [The] distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

FEC v. MCFL, 479 U.S. at 249, quoting *Buckley*, 424 U.S. at 42.

The Fourth Circuit explained that "independent expenditure political committees do not serve as mouthpieces for political candidates" but rather "offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them." *NCRTL v. Leake*, 525 F.3d at 295. The Circuit Court cited the example of a hypothetical group, "Farmers for Fairness," sponsoring an ad for the hog industry financed by hog producers and suppliers. If that ad "was successful in convincing voters to oust their targeted candidates it can hardly be termed corruptive." *Id*. at 294. In fact, "[i]f robust advocacy alone [were] sufficient to demonstrate corruption, the term corruption would cease to have meaning." *Id*.

C. Extending The Matching Funds Trigger To *Independent* Expenditures Renders The Statute Fatally Overbroad.

Arizona's matching funds statute (Ariz. Rev. Stat. § 16-952) is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. at 1587, quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449, n. 6 (2008) (internal quotation marks omitted). Even if the statute were constitutional as applied to candidates—a questionable assumption—its inclusion of independent expenditures fails to serve the state's interest in preventing corruption—the *only* interest this Court has recognized as legitimate. Even if some large associations held multimillion dollar war chests and perhaps posed a

potential for corruption, the statute is "a fatally overbroad response to that evil" because "its terms [Ariz. Rev. Stat. § 16-901(14)] apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." *FEC v. Nat'l Conservative PAC*, 470 U.S. at 498. Moreover, there is a "realistic danger" the statute "will significantly compromise recognized First Amendment protections of parties not before the Court" (*Members of City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984))—the many nonprofit advocacy groups that participate in political campaign debates in order to advance particular issues.

IV. THE STATUTE ATTEMPTS TO LEVEL THE ELECTORAL PLAYING FIELD.

Arizona law impermissibly restricts the speech of independent groups in order to equalize the voices of the candidates—a purpose this Court has soundly rejected. "Most such [asymmetrical public financing] systems cannot be reconciled with *Davis's* suggestion that measures designed to 'counter' the constitutionally protected speech of one side of a campaign are unconstitutional burdens upon that speech." *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 289. Even the title of Ariz. Rev. Stat. § 16-952—"Equal Funding of Candidates"—exposes its illicit purpose.[2]

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[2] The purpose of the Act is transparent. See Opening Brief of Petitioner Arizona Free Enterprise Club's Freedom Club PAC, 38, citing JA 95, 106, 228-29, 236, 240, 248, 263-4, 308, 457, 809-54, 840, 854-55; Opening Brief of Petitioner McComish, 66, citing JA 95, 106, 107, 109, 110, 213, 228-29, 236, 240, 248, 257, 263-64,

Buckley long ago rejected the equalization of political voices as a rationale for restricting expenditures: "[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. In *Davis*, this Court "reasserted *Buckley's* long-neglected declaration that equalizing interests are 'wholly foreign' to the First Amendment." Gedge, Samuel, *Recent Development*: "*Wholly Foreign to the First Amendment*": *The Demise of Campaign Finance's Equalizing Rationale in Davis v. FEC, 128 S. Ct. 2759 (2008)*, 32 Harv. J.L. & Pub. Pol'y 1197, 1209 (2009) ("*Wholly Foreign*"); *see Davis*, 128 S. Ct. at 2773 ("[I]n *Buckley,* we held that '[t]he interest in equalizing the financial resources of candidates' did not provide a 'justification for restricting' candidates' overall campaign expenditures, particularly where equalization 'might serve...to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.' *Buckley,* 424 U.S., at 56-57.")

Between *Buckley* and *Davis*, scholars and litigants have proposed a variety of equalizing theories suggesting that the anti-corruption rationale is not the only state interest that justifies campaign finance regulations. *Wholly Foreign*, 32 Harv. J.L. & Pub. Pol'y at 1197 n. 4. Beginning in the mid-1980s, the Court "appeared amenable to stretching the anticorruption rationale almost beyond recognition, at times

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308, 457, 809-54, 885. Respondent CCEC, Clean Elections proponents, and an administrative law judge all openly acknowledge that the Act was designed to "level the playing field."

implicitly acknowledging an equalizing interest in campaign finance jurisprudence." *Id.* at 1198.

Shortly after *Buckley*, the *Bellotti* Court expressed alarm that a statute's suppression of speech "suggest[ed] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Bellotti,* 435 U.S. at 785. This concern "play[ed] a central role in the outcome of *Davis* three decades later." *Wholly Foreign,* 32 Harv. J.L. & Pub. Pol'y at 1204. Meanwhile, the Court strayed from *Buckley's* decree in *FEC v. MCFL*, 479 U.S. 238—sustaining the as-applied challenge of a nonprofit corporation yet finding that "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." *FEC v. MCFL*, 479 U.S. at 257. Four years later, the concentrated wealth rationale reached its apex in the now-overruled *Austin*, a case that seems to endorse an equalizing rationale. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1369 n.1 (1994) (asserting that the Court in *Austin* "defined 'corruption' in a way that made it essentially equivalent to inequality"); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 628 (1991) ("[T]he rationale for the Court's holding...boils down to a determination that eliminating corporate speech will tend to level the playing field...").

But the equalization rationale came to a screeching halt in *Davis*—and if that case left any doubt, *Citizens United* cut through the fog, overruling *Austin* and rejecting its "anti-distortion rationale as a means to

prevent corporations from obtaining 'an unfair advantage in the political marketplace.'" *Citizens United*, 130 S. Ct. at 904, citing *Austin*, 494 U.S. at 659. This Court restored *Buckley's* proclamation that the government has no interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Citizens United*, 130 S. Ct. at 904, citing *Buckley*, 424 U.S. at 48.

The Second and Eleventh Circuits followed this Court's precedents, acknowledging that the state cannot lawfully level the campaign playing field. *Green Party of Conn. v. Garfield*, 616 F.3d at 245. ("[I]nsofar as the excess expenditure provision is the result of a desire 'to level electoral opportunities,' they are, under *Davis*, clearly unconstitutional."); *Scott v. Roberts*, 612 F.3d at 1293 ("[T]he Florida public campaign financing...levels the electoral playing field, and that purpose is constitutionally problematic."). Several years before *Davis*, the First Circuit upheld the Maine Clean Election Act, which provided a roughly proportionate combination of benefits and detriments to candidates seeking public funding. The Court upheld the inclusion of independent expenditures in the scheme, reasoning that "if the state structured public funding with a blind eye to independent expenditures, such expenditures would be capable of defeating the state's goal of distributing roughly proportionate funding...to publicly funded candidates." *Daggett,* 205 F.3d at 469-470. But in light of *Davis* and *Citizens United*, the state's goal cannot be sustained:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications

> because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office.

Davis, 128 S. Ct. at 2773-2774. This declaration—about *candidates*—is even more germane to independent expenditures, which are only loosely linked to any legitimate government interest and certainly cannot be sustained as a means to equalize political speech.

V. THE STATUTE THREATENS TO CHILL GENUINE ISSUE ADVOCACY—ONE OF THE MAJOR PURPOSES OF MANY INDEPENDENT GROUPS.

The First Amendment does not merely protect against outright censorship, but "'any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations, 8th ed., p. 886." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 248-249 (1936). The Constitution protects the right to discuss public issues, and that discussion "cannot be suppressed simply because the issues may also be pertinent in an election. Where the *First Amendment* is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) ("*FEC v. WRTL*") (WRTL's ads addressed the filibuster of Bush administration judicial nominees).

Arizona defines "independent expenditures" in terms of *express* advocacy (Ariz. Rev. Stat. § 16-901(14)) rather than *issue* advocacy, which "conveys

information and educates." *FEC v. WRTL*, 551 U.S. at 470. Issue ads typically "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.* at 470. Voters may later factor the information into their voting decisions. *Id*.

But "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at 499 (Scalia, J., concurring), quoting *McConnell v. FEC*, 540 U.S. at 126 n. 16. Political candidates "are intimately tied to public issues involving legislative proposals" and "campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42. "[I]t would be an extraordinarily cramped view of an issue ad that limited it to calling for advocacy without setting forth the position of the officeholder to whom that advocacy is to be directed." *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 312. Lines drawn in sand are easily washed away, and the result can be devastating for independent groups formed primarily for issue advocacy.

Independent associations face a variety of dangers that their speech will be suppressed—even if it concentrates on issues rather than naming candidates. Arizona's broad definition of "political committee" brings within its clutches "any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election"—even if the group is "part of a larger association...not primarily organized...for the purpose of influencing the result of any election...." Ariz. Rev. Stat. § 16-901(19). The Fourth Circuit sustained a challenge to a similar statute, finding that it

"threaten[ed] to regulate the ordinary political speech that is democracy's lifeblood." *NCRTL v. Leake*, 525 F.3d at 284. The defective North Carolina statute was too broad because it burdened organizations that had only "a" major purpose of influencing elections, not "the" major purpose. *Id*. at 288-189 ("Permitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple 'major purposes' threatens the regulation of too much ordinary political speech to be constitutional.") Moreover, this Court has rejected the use of a subjective, intent-based test to ascertain a speaker's purpose. "An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *FEC v. WRTL*, 551 U.S. at 468, citing *Buckley*, 424 U.S. at 43. "It compels the speaker to hedge and trim." *Thomas v. Collins,* 323 U.S. 516, 535 (1945).

Another grave danger is that these broad definitions will engender extensive as-applied challenges, leaving "political speakers...at sea" in the meantime. *NCRTL v. Leake*, 525 F.3d at 284 ("Nothing in *McConnell*, *WRTL*, or any First Amendment tradition that we know of forces political speakers to incur these sorts of protracted costs to ascertain nothing more than the scope of the most basic right in a democratic society—the right to engage in discussion of issues of unquestioned public importance.") The danger here is not that express advocacy will masquerade as issue advocacy, but that core political speech will be chilled because some regulator fears it might possibly relate to a campaign. *Id.* at 306. *See FEC v. WRTL*, 551 U.S. at 479 (rejecting the idea that "an expansive definition of 'functional equivalent' is needed to ensure that issue

advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions").

In *McConnell*, the majority reasoned that there was "little difference between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell v. FEC*, 540 U.S. at 193. But *WRTL* significantly narrowed the scope of regulable express advocacy, finding that the restrictions at issue could only be applied to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. WRTL*, 551 U.S. at 469-470. The Court affirmed a First Amendment right to communicate with the public about issues, even during election time and even if a political candidate is named. *Id*. at 481-482. This landmark decision seems to create a "rather large safe harbor for independent expenditures mentioning candidates but purporting to focus on issues." *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 310. Now that *Citizens United* has overruled *Austin*, that "safe harbor [should] include not only issue advocacy but uncoordinated express advocacy" as well. *Id*. at 315.

This Court recently affirmed *Buckley's* pronouncement that "'the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.' *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)." *Citizens United*, 130 S. Ct. at 909. This inherent imprecision jeopardizes the ability of independent associations to educate and persuade the people about public issues—and "it is not the

government but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57 (emphasis added). *Citizens United* reversed the ban on independent corporate expenditures—even for what was admittedly *express* advocacy (documentary film regarding the qualifications of candidate Hillary Clinton). Arizona's matching funds scheme threatens to wind back the clock—and because of the often murky line between candidates and issues, it may unwittingly deter issue advocacy in spite of statutory language that identifies "independent expenditures" only with "express" advocacy.

VI. THE STATUTE COMPELS INDEPENDENT GROUPS TO FACILITATE THE SPEECH OF OPPONENTS AS A CONDITION OF MAKING INDEPENDENT POLITICAL EXPENDITURES.

"Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 130 S. Ct. at 896. Arizona's statutory scheme has a negative impact on independent groups at multiple points. It deters the spending of independent associations that have not voluntarily agreed to participate in the program—and the indirect nature of the burden fails to cure the defect. It imposes harsh penalties on associations that do make expenditures by subsidizing one or more political opponents.

A. The Matching Funds Trigger Is Not Merely A *Subsidy* To Amplify The Voices Of Political Opponents Or Express The Government's Perspective—But A *Penalty* On The Exercise Of Core First Amendment Rights.

Under certain circumstances, the government may use its own resources to subsidize speech. *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540. The government can disseminate its own message, express indirect support through selective funding, or fund a viewpoint neutral forum for speech. *Rust v. Sullivan,* 500 U.S. 173, 194 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995).

The language of *penalty* and *subsidy* is one way to "characteriz[e] the impact of a selective subsidy or a different set of rules on the disfavored party." A speaker has no absolute right to a subsidy but does have the right to be free from government-imposed penalties on the exercise of free speech. *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 324. Subsidization "cannot justify interference with the speech of others." *PG&E,* 475 U.S. at 24 (Marshall, J., concurring); *see Buckley,* 424 U.S. at 48-49, *Bellotti,* 435 U.S. at 790-792. Arizona selectively subsidizes the speech of candidates who elect to participate in its program and applies a different set of rules to candidates who opt out. Those rules penalize non-participants—candidates *and* independent associations.

Arizona's program, like the "Millionaire's Amendment" struck down in *Davis,* imposes an "unprecedented penalty" on any association that

"robustly exercises [its] First Amendment right" to make political expenditures. *Davis*, 128 S. Ct. at 2771. Associations must "shoulder a special and potentially significant burden" if they choose to exercise their rights. *Id.* at 2772. *See Day v. Holahan,* 34 F.3d at 1359-1360 (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).

Arizona's penalty parallels the unconstitutional burdens struck down in *Mills v. Alabama,* 384 U.S. 214 (1966) and *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974). These two cases "held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*, 424 U.S. at 50. In *Mills*, a newspaper editor was arrested for publishing an editorial—on election day—urging the people to vote a certain way. "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Mills v. Alabama,* 384 U.S. at 216. In *Miami Herald*, newspaper editorials triggered a right-of-reply statute. "The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression." *PG&E*, 475 U.S. at 10. This Court also found an unconstitutional penalty where a tax assessor denied a veterans' property tax exemption to claimants who refused to execute an oath on the exemption form. *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to

penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.")

The Second and Eighth Circuits followed this Court's rationale in striking down matching fund triggers for independent expenditures. *Green Party of Conn. v. Garfield*, 616 F.3d at 246 ("[T]he independent expenditure provision clearly acts as a 'penalty'...[a]s the resident spends more and more money advocating against the candidate he opposes...the state will give more and more money to that candidate."); *Day v. Holahan,* 34 F.3d at 1359-62 (striking down a similar law penalizing independent expenditures).

The distinction between government subsidies and penalties cannot salvage Arizona's asymmetrical funding scheme. Arizona has neither created a viewpoint neutral forum nor engaged in government speech that it may subsidize. The subsidy to participating candidates and the corresponding penalty imposed on political opponents are both "triggered...by the decision to speak." *Lonely Death,* 33 Harv. J.L. & Pub. Pol'y at 325. The state subsidizes private speech only in response to the speech of opposing candidates and associations. "Particularly in the context of an election, the effect and intent of such a scheme is to dissuade constitutionally protected speech and to do so in a way that the *Davis* majority regarded with extreme skepticism." *Id*.

B. The Indirect Nature Of The Burden Does Not Ease The Statute's Constitutional Deficiencies.

Decades of precedent confirm that:

> When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.

United States v. Playboy Entm't Grp., Inc., 529 U.S. at 826.

The Fourth Circuit found the Eight Circuit's *Day* decision flawed because "it equate[d] the potential for self-censorship created by a matching funds scheme with 'direct government censorship.'" *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008), citing *Day v. Holahan*, 34 F.3d at 1360. But the Fourth Circuit's dismissive treatment of the burden departs from this Court's precedents. The First Amendment forecloses government attempts to accomplish indirectly what it is constitutionally prohibited from commanding directly. *Rutan v. Republican Party*, 497 U.S. at 77-78; *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E.g., Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967);

Lamont v. *Postmaster General*, 381 U.S. 301 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).").

Although Arizona's matching funds provision does not eliminate all opportunities for independent spending, its "practical effect [is] to discourage protected speech" and that is "sufficient to characterize [the law] as an infringement on First Amendment activities." *FEC v. MCFL*, 479 U.S. at 255.

C. Independent Groups Have The Right To Be Free From Government Restrictions That Abridge Their Own Rights In Order To "Enhance The Relative Voice" Of Opponents.

The First Circuit strayed off course with its assertion that a matching funds subsidy imposes no burden because speakers "have no right to speak free from response." *Daggett,* 205 F.3d at 464. The same logic emerged in a case upholding Arizona's matching funds provision. *Ass'n of Am. Physicians & Surgs. v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005) (nonprofit physicians association challenged the scheme because it had a chilling impact on its independent expenditures). The Court relied on *Daggett*, 205 F.3d at 465: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Id.* at 1202. The Court thus concluded that the law was not coercive and did not burden the association.

No speaker has "the right to be free from vigorous debate"—to be free of responsive speech. *PG&E,* 475 U.S. at 14. *But every speaker 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." Id., citing *Buckley,* 424 U.S. at 49 and n. 55 (emphasis added). There may be no right to escape the *privately financed private* speech of opponents—but there is a right to be free from *government* funding of that speech. The government has no business becoming entangled in funding one side of a political debate.

D. Unlike Participating Candidates, Independent Groups Have Not Voluntarily Agreed To Restrictions On Their Rights In Order To Receive A Government Benefit.

Arizona violates the well established principle that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *PG&E,* 475 U.S. at 16 n. 13, quoting *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). Although neither a candidate nor an association is forced to directly sponsor opposing speech, the deterrent impact of the matching funds provision has exactly that effect—advancing concepts the speakers decline to foster. The asymmetrical funding program collides with this Court's precedents concerning compelled speech.

Buckley approved the concept that Congress "may engage in public financing of election campaigns" because of the voluntary nature of the program. Public funds can be conditioned on a candidate's agreement to certain monetary limitations. *Buckley*, 424 U.S. at 57 n. 65. Although a mandatory limit on a candidate's own expenditures violates the First Amendment, a voluntary system does not. *Rosenstiel v. Rodriguez,*

101 F.3d 1544, 1549 (8th Cir. 1996) cert denied, 520 U.S. 1229 (1997), citing *Buckley*, 424 U.S. at 85-109.

Independent associations are in an entirely different position. The Fourth Circuit rejected challenges to matching funds provisions brought by independent entities, reasoning that "[t]hey will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system." *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d at 437. This truncated rationale highlights the lack of outright censorship but eschews the involuntary nature of the scheme for independent entities that cannot opt out of the program. These associations can only avoid facilitating opposing speech by muting their own voices. The statute "forces speakers to alter their speech to conform with an agenda they do not set." *PG&E,* 475 U.S. at 9.

CONCLUSION

Arizona has created a statutory scheme that is constitutionally suspect as applied to candidates—and patently unconstitutional in the way it impacts independent advocacy groups. As a consequence of exercising the most basic rights to political speech in a democratic society, these associations are forced to assist candidates and concepts they oppose. The state's curtailment of their rights serves no legitimate government interest. There is virtually no connection to the anticorruption interest that justifies valid campaign finance laws, and the interest in "leveling the playing field" is illegitimate under this Court's

precedents. This Court should reverse the Ninth Circuit's decision and reaffirm the right of the people—unencumbered by chilling government regulations—to evaluate the candidates and issues.

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