Nos. 10-238, 10-239

IN THE
Supreme Court of the United States

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

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

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

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Arizona may give a publicly funded candidate extra money because a privately funded opponent or his supporters have, in the State's judgment, spoken too much.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case concerns Cato because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

INTRODUCTION

The Ninth Circuit's decision upholding Arizona's matching-fund statute disregarded long-established, fundamental First Amendment principles by upholding severe burdens on core political speech. The statute gives additional funding to a publicly financed candidate for political office when his opponent—or his opponent's supporters, even if they act independently—spend above a certain threshold amount. In effect, the law compels a privately

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both parties have consented to the filing of this brief in letters on file with the Clerk's office.

financed candidate and his supporters to facilitate the speech of publicly financed opponents as a condition of exercising their First Amendment rights.

The Cato Institute endorses petitioners' arguments and will not belabor them here. This brief instead demonstrates just how badly the Ninth Circuit's decision offends the Court's well-established campaign finance jurisprudence, as well as broader First Amendment principles. The Arizona statute is indistinguishable from the law invalidated in *Davis v. FEC*, because both "impose[] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right" by correlating "the vigorous exercise of the right" to spend in support of one's campaign with "fundraising advantages for opponents in the competitive context of electoral politics." 128 S. Ct. 2759, 2771-72 (2008). The decision, moreover, flies in the face of this Court's established precedents that have consistently found expenditures for political campaigns to be highly protected speech.

Perhaps most importantly, the decision below contradicts cardinal First Amendment principles regarding laws that unduly burden the exercise of free speech. Time and again, the Court has made clear that the government cannot, by conditioning the right to speak on the acceptance of burdensome consequences, indirectly deter speech that the government cannot ban directly. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The Ninth Circuit disregarded volumes of U.S. Reports to reach the untenable, opposite conclusion. In short, the Ninth Circuit's decision is ill-reasoned, conflicts with decades of this Court's precedents, and must be reversed.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS.

This Court has not minced words in describing the importance of campaign speech: "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted). Nonetheless, the Arizona statute punishes candidates and their supporters for speaking too much. The Ninth Circuit's decision upholding the law clashes with this Court's campaign finance decisions, including, most pertinently, *Davis v. FEC*. This Court should reverse the decision below and vindicate the First Amendment's core protections.

A. The Arizona Statute Cannot Be Distinguished From The Law Struck Down In *Davis v. FEC*.

Davis v. FEC leaves no doubt that the Arizona statute transgresses the First Amendment. In *Davis*, the challenged Bipartisan Campaign Reform Act (BCRA) provisions allowed an opponent of a candidate who self-financed his own campaign with over $350,000 to "receive individual contributions at treble the normal limit," even "from individuals who ha[d] reached the normal aggregate contributions cap." *Davis*, 128 S. Ct. at 2766. The law also allowed such opponents to "accept coordinated party expenditures without limit." *Id.* The Court struck down the law, explaining that it "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right." *Id.*

at 2771. That penalty took the form of "fund-raising advantages for opponents" granted solely because a candidate engaged in the "vigorous exercise of the right" to spend and to speak in support of his campaign. *Id.* at 2772.

The Arizona statute suffers from the same fatal flaw. It similarly creates a more favorable funding regime for candidates when opponents (or their supporters) spend above a certain amount. In that scenario, the statute provides for the disbursal of additional funds to those publicly financed candidates. *See McComish v. Bennett*, 611 F.3d 510, 516 (9th Cir. 2010). By rewarding the publicly financed opponents of nonparticipating candidates who "vigorously exercise the right" to spend money on their campaigns, the Arizona statute substantially burdens free speech in violation of the First Amendment. And, because the disbursal of matching funds is also triggered by independent expenditures, the Arizona law burdens the free speech of ordinary citizens who support nonparticipating candidates.

The main difference between the Arizona statute and the BCRA provisions at issue in *Davis* makes the Arizona statute *more* burdensome. *Cf. Green Party v. Garfield*, 616 F.3d 213, 245 (2d Cir. 2010) (noting that Connecticut's matching-funds scheme imposed a "penalty" that was "*harsher* than the penalty in *Davis*"). Whereas the law in *Davis* merely gave opponents of candidates who spent above the threshold the opportunity to collect higher contributions (with time and effort), *see Davis*, 128 S. Ct. at 2766, the Arizona statute actually dispenses funds to opponents of such candidates, *see McComish*, 611 F.3d at 516, making the harsh consequences of speech more certain and therefore more chilling.

The Ninth Circuit's attempt to distinguish *Davis* is specious. The Ninth Circuit reasoned that the law in *Davis* "was unconstitutional because it specifically sought to disadvantage the rich" and thereby "singled out the speakers to whom it applied based on their identity." *Id.* at 522. Tested against that misreading, the Arizona statute was permissible, the Ninth Circuit held, because it did not distribute matching funds "specifically to the opponents of wealthy candidates" and thus did not make "identity-based distinctions." *Id.* But *Davis* did not create a novel equal protection rule or issue a narrow holding shielding only a wealthy candidate's expenditures from disfavored treatment. Instead, *Davis* enforced the well-established principle that "the First Amendment simply cannot tolerate" restrictions "upon the freedom of a candidate"—rich or poor—"to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam); *see Davis*, 128 S. Ct. at 2771 (noting "*Buckley*'s emphasis on the fundamental nature of the right to spend personal funds for campaign speech").[2]

The Ninth Circuit majority deemed it a virtue that the Arizona statute "does not distinguish between

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[2] The Ninth Circuit's misjudgment is evident in what its reasoning would justify. By the Ninth Circuit's logic, a State seemingly could grant a publicly funded candidate *double* the funds (or more) spent by the opponent. After all, such a scheme would make no "identity-based distinctions" disfavoring wealthy candidates, *McComish*, 611 F.3d at 522, would simply "enable[]" more speech, *id.* at 524, and would advance the State's interest in "encourag[ing] participation in its public funding scheme." *Id.* at 526. Even though such massive state assistance to a publicly funded opponent would obviously punish a nonparticipating candidate's speech, absent evidence of "actual[] chill[ing]," *id.* at 522-23, the Ninth Circuit would sustain it.

different sources of nonparticipating candidates' financing"; it awards matching funds regardless of whether the trigger is pulled by independent expenditures, a candidate's expenditure of personal funds, or third-party contributions. *McComish*, 611 F.3d at 522. But, the Arizona statute is not saved by its breadth. The statute's wide scope means that it would chill even a modest spending of personal funds by a candidate if his overall campaign expenditures and independent expenditures approached the trigger point. And, given that matching funds are awarded when independent expenditures and third-party contributions reflect wide popular support, *see id.* at 516, 522, the statute impairs the ability of thousands of grassroots supporters to make their voices heard. Limits on independent expenditures and campaign expenditures, no less than limits on a candidate's personal expenditures, "impose . . . severe restrictions on protected freedoms of political expression and association," and therefore are subject to strict scrutiny. *Buckley*, 424 U.S. at 19-23; *see also id.* at 55-58 (striking down limits on campaign expenditures). The Court should reverse the decision below.

B. The Decision Below Conflicts With This Court's Broader Campaign Finance Jurisprudence.

The decision below also clashes with this Court's broader, well-established protections of core political speech. As this Court has made clear, "[s]peech is an essential mechanism of democracy," for "it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means

to protect it." *Id.* Accordingly, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

This Court has specifically protected campaign expenditures and independent expenditures as political speech. "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Id.* at 917 (Roberts, C.J., concurring). It also protects the political candidate and the expenditures needed to mount a campaign. *Id.* at 908-09. Indeed, the Court has indicated that "expenditure limitations 'impose significantly more severe restrictions on protected freedoms of political expression and association than' do contribution limitations." *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 23). This reflects the reality that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*, 424 U.S. at 19. Thus, the speech burdened by the Arizona statute is core political speech.

Appropriately, "[l]aws that burden" a right so vital to our system of government as "political speech are 'subject to strict scrutiny.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). This most searching standard of review requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Wisconsin Right to Life*, 551 U.S. at 464) (internal quotation marks omitted). This Court has never suggested that limits on expenditures are anything but severe burdens, and certainly has never suggested that they are comparable to mere disclosure requirements subject only to intermediate

scrutiny, as the Ninth Circuit held. *See McComish*, 611 F.3d at 525. Given that the Arizona statute severely burdens expenditures, it must be subjected to strict scrutiny. *See Davis*, 128 S. Ct. at 2772.

Under that exacting standard, the Arizona law must be struck down. Not only does it impose severe consequences on a non-participating candidate's own speech, it also burdens supporters' independent expenditures. No compelling state interest justifies those burdens. As this Court made clear in *Citizens United*, independent expenditures, like a candidate's personal expenditures, "do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909. Precisely because independent expenditures are not coordinated with the candidate, they do not create a risk of *quid pro quo* arrangements to influence the candidate's decisions in office. *Id.* at 908. To the contrary, the fact that a speaker "is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 910. Accordingly, the Arizona law cannot be justified as an anti-corruption measure.

Nonetheless, Arizona and the Ninth Circuit defend the law on anti-corruption grounds and thus run headlong into *Citizens United*. *McComish*, 611 F.3d at 525-26. It is no answer to say, as the lower courts did, that Arizona has an interest in promoting participation in its public funding system. *Id.* at 526. Promoting the system is not, standing alone, a compelling interest. Instead, as the Ninth Circuit later conceded, Arizona seeks to encourage candidates to take public funds on the theory that publicly funded candidates have "reduced opportunities and reduced incentives to trade legislative favors for financial favors"—*i.e.*, for supposed anti-corruption goals. *Id.* Regardless of

whether that theory is correct, it does not justify penalizing a candidate's or independent citizen's speech. *Citizens United*, 130 S. Ct. at 908-09.

The Court should clarify that matching-fund provisions like the Arizona statute, which substantially burden core speech and are not narrowly tailored to serve a compelling state interest, violate the First Amendment.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT STRIKING DOWN LAWS THAT UNDULY BURDENED PROTECTED SPEECH BY CONDITIONING IT ON ACCEPTANCE OF ASSORTED PENALTIES.

Not only does the decision below run counter to established campaign finance case law, it also tramples principles that undergird this Court's wider First Amendment jurisprudence.

A basic tenet of our constitutional system is that the state may not, by cunning manipulation of the laws, circumvent rights guaranteed to the people. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) (forbidding state action in which "[t]he belief and association which government may not ordain directly are achieved by indirection"); *Speiser*, 357 U.S. at 526 (invalidating law because it "produce[d] a result which the State could not command directly").

This principle is particularly strong in the First Amendment context. The government cannot, using statutes that stop just short of prohibition, "deter[] . . . speech which the Constitution makes free." *Id.* Such a state of affairs would expose one of our most precious liberties to the power of any government clever enough to veil its commands in the

form of suggestions, encouragement, and threats. Thus, this Court has often struck down laws that impinge on the exercise of free speech by conditioning exercise of that right on acceptance of assorted penalties. While the laws the Court has invalidated vary greatly in the type and magnitude of the penalty imposed on speech, a single theme emerges from this Court's unconstitutional conditions cases: The state may not prevent through the threat of negative consequences the speech it cannot ban directly. And yet, this is precisely the operation of the Arizona statute approved by the decision below.

A. The State Cannot Condition Free Speech On The Promotion Of A Viewpoint Contrary To The Speaker's.

The Court has long made clear that conditioning the exercise of First Amendment rights on promotion of a viewpoint contrary to the speaker's position substantially burdens speech and cannot be tolerated. In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a "right to reply" law that provided that if a political candidate "is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." 418 U.S. 241, 244 (1974). Noting that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court struck down the law because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 256-57 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

The Court reached the same conclusion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion). In that case, a state agency required "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]." *Id.* at 4. The Court found a First Amendment violation because the utility was forced to "contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views," and that the utility "'might well conclude' that . . . 'the safe course is to avoid controversy'" and remain silent. *Id.* at 14 (quoting *Tornillo*, 418 U.S. at 257).

The Arizona statute presents the very dangers that this Court warned of in *Tornillo* and *Pacific Gas*: A candidate and his supporters cannot spend over a certain amount without facilitating the opponent's promotion of a contrary viewpoint. The Arizona law, by affixing penalties to expenditures and contributions above the threshold amount, "operates as a command in the same sense as a statute or regulation forbidding [a candidate] to publish specified matter." *Tornillo*, 418 U.S. at 256. It forces a candidate and his supporters "to help disseminate hostile views," *Pacific Gas*, 475 U.S. at 14, as a condition of exercising their First Amendment rights. As a result of the penalties it imposes on speech, it "inescapably 'dampens the vigor . . . of public debate,'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times*, 376 U.S. at 279).

In *Davis v. FEC*, the Court recognized the application of *Pacific Gas* to the campaign finance law at issue. *See* 128 S. Ct. at 2772. The Court should do the same here and affirm that provisions, like the Arizona statute, which condition free speech on the

promotion of a contrary viewpoint, violate the Constitution.

B. The Decision Contradicts The Court's Wider Unconstitutional Conditions Jurisprudence.

In numerous additional contexts, the Court has struck down laws that, while not limiting the freedom of speech directly, attached conditions that unduly burdened its exercise. The burdens at issue in these cases varied in kind and degree, but the cases make clear that even relatively insignificant conditions on speech can offend the Constitution. Judged against these cases, the substantial consequences imposed by the Arizona statute to punish expenditures for a non-participating candidate must be invalidated.

For example, the Court has expressed the unconstitutional conditions principle in public benefits cases. In *Perry v. Sindermann*, the Court declared that a State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972). Likewise, in *Elrod v. Burns*, the Court explained that its "decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights." 427 U.S. at 358 n.11 (plurality opinion) (emphasis added). Thus even conditions that "slight[ly]" chill the exercise of First Amendment rights can constitute impermissible burdens.

In *Perry*, a teacher who had been employed by a public college on a year-to-year basis alleged that the college's "decision not to rehire him was based on his

public criticism of the policies of the college administration and thus infringed his right to freedom of speech." 408 U.S. at 595. The Court declared that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597. Despite the fact that the teacher was not entitled to renewal of his contract, the Court held that "the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598.

The Arizona statute likewise inhibits speech by tying it to a significant burden—increased funding to a candidate's political opponent. It thus conditions constitutionally protected speech on the speaker's acceptance of a hardship.

This limit on unconstitutional conditions applies with even greater force when the speech at issue "is 'indispensable to the discovery and spread of political truth.'" *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). In such cases, the Court has been "especially careful in weighing the interests that are asserted in support of th[e] restriction and in assessing the precision with which the ban is crafted." *Id.* Thus, in *League of Women Voters*, the Court invalidated a law that conditioned funding from the Corporation for Public Broadcasting on a television or radio stations' refusal to "engage in editorializing," *id.* at 366 (internal quotation marks omitted). The Court found that the law impermissibly "operate[d] to restrict the expression of editorial opinion on matters of public importance" by attaching negative consequences to

the stations' speech. *Id.* at 375. In that way, the Court found, the stations were not truly free to speak as they wished. *See id.* at 402. Accordingly, the law violated the First Amendment by infringing on core political speech.

Arizona's law commits the same offense. It attaches negative consequences to the expression of core political speech and thereby interferes with "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 381-82 (internal quotation marks omitted). Just as the law in *League of Women Voters* made it difficult for the stations to survive financially without curtailing their speech, the Arizona statute discourages candidates and their supporters from discussing pressing political issues to the extent they believe necessary. As in *League of Women Voters*, the Court should be highly skeptical of a law that imposes such burdens.

The Court's decision in *Speiser v. Randall* likewise demonstrates how even minimally burdensome conditions on speech can run afoul of the First Amendment. In that case, the Court invalidated a California law that denied a tax exemption to persons who could not carry the state-imposed burden to show they refrained from advocating the overthrow of the government. 357 U.S. at 515-17. The Court noted that the law burdened speech, since "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. Even assuming for the sake of argument that the law applied only to illegal (and therefore unprotected) speech, the Court nonetheless found a constitutional violation because California shifted the burden of proof to the taxpayer. *See id.* at 528-29.

Describing "[t]he vice of the [California] procedure," the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526. Even though the California law required only proof that one's speech was lawful, and pertained only to the availability of a tax exemption, the Court held the statute unconstitutional.

In contrast, the Arizona statute poses a significantly greater burden on free speech. Whereas a speaker under the California law could avoid losing the tax exemption simply by proving that his speech was legal, the Arizona law provides no safe harbor: A candidate whose expenditures pass the threshold amount *will* trigger additional funding for the candidate's opponent. The Arizona statute fails to "provide any way in which a candidate can exercise [his free speech] right without abridgement." *See Davis*, 128 S. Ct. at 2772. Moreover, the nature of the Arizona statute's penalty strikes at the heart of the First Amendment. It affects not the speaker's tax bill, but his prospects in an election—a central institution in our republican form of government. Because the *Speiser* Court found the California statute imposed an unconstitutional condition, there can be no doubt that the Arizona statute does likewise and must be invalidated.

While the particular consequences attached to speech in these cases differed, a consistent rule runs throughout them: Tying burdensome consequences to protected speech is no more permissible than directly banning speech itself. This rule is strong; even consequences which result in mere "slight . . . inducement[s]" to curtail speech, *Elrod*, 427 U.S. at

358 n.11, can be impermissible under this Court's precedents. And the rule gains additional strength when the speech in question is political. *League of Women Voters*, 468 U.S. at 383.

The Arizona statute significantly impairs core political speech by attaching an inescapable condition to it. It therefore falls into the most forbidden category of unconstitutional conditions. Because the Ninth Circuit failed to recognize this vital part of First Amendment jurisprudence, the Court should reverse the decision below.

CONCLUSION

For these reasons, and those stated by petitioners, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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