Nos. 10-238 and 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 FOR *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL AND ELECTION LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors and scholars with expertise in constitutional and election law. Although they hold divergent views on many issues, *amici* have a common interest in the application of constitutional principles to campaign finance regulation. *Amici* have a shared belief that state regulation of campaign finance can promote important public interests in government integrity, competitive elections, and robust debate from different perspectives, and that, absent clear evidence of infringement on constitutional rights, states should be given space to experiment with and develop such regulations.

SUMMARY OF ARGUMENT

Public funding of campaigns serves states' compelling interests in combating corruption and the appearance of corruption, as well as other speech-enhancing goals that have been recognized by the Court as important interests. Arizona's supplemental funding trigger is a helpful and appropriate tool for ensuring the viability and cost-effectiveness of its public funding system. Available data indicate that supplemental funding triggers in Arizona and other states provide more funding for campaign speech, increase electoral competition, reduce dependence on private contributions, and ameliorate the rigors of

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

fundraising, without burdening political participation by other campaign actors. Supplemental funding triggers play important roles in providing appropriate levels of funding to the most competitive elections, without wasting scarce state resources in elections where additional public funds are not needed. In the absence of evidence of any actual burden on constitutional rights, the Court should continue to allow states and local governments to regulate campaign finance and experiment with innovative means to further their legitimate governmental interests, much as it has allowed states to experiment with a variety of other election laws.

Amici believe that there is no one clearly correct method of financing elections, nor that there is one clearly correct form of public funding. Supplemental funding triggers, however, are a significant feature in the development of public funding systems at the state and local level. Their ability to advance core goals of campaign finance regulation – to ameliorate the potentially corrupting effects of campaign contributions and promote vigorous election competition, without curbing campaign speech – make them worthy of close examination and possible emulation by other states and, potentially, the federal government. Such state and local innovation is a valuable source of learning in our federal system. *Amici* therefore respectfully submit that the Court should allow Arizona and other states to continue using supplemental funding triggers in their ongoing efforts to improve their campaign finance laws.

ARGUMENT

THE COURT SHOULD PERMIT STATES TO CONTINUE DEVELOPING PUBLIC CAMPAIGN FINANCE SYSTEMS USING SUPPLEMENTAL FUNDING TRIGGERS

In November 1998, in response to a widespread series of campaign corruption scandals, the voters of Arizona approved an initiative adopting a public campaign funding system to regulate their state's elections. In doing so, they added Arizona to the growing group of state and local jurisdictions, now numbering thirty-nine, *see* Br. of *Amicus Curiae* Center for Governmental Studies at 1-3 & n.4, which have adopted some form of public campaign financing.

The supplemental funding trigger in Arizona's Citizens Clean Elections Act is part of the ongoing effort by states to design and implement cost-effective campaign regulations that serve their important and compelling interests. Many states and local governments that have implemented public funding programs have included some form of trigger mechanism in their systems. Some of those measures – including Arizona's Citizens Clean Elections Act – were adopted by voter initiative, reflecting strong grassroots support for this reform. *See, e.g.*, "An Act to Reform Campaign Finance," L.D. 1823, Initiated Bill 5, 1996 117th Leg., Sec. Reg. Sess. (Me. 1996); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 450, 458 (1st Cir. 2000). Although the design of trigger mechanisms varies considerably from

jurisdiction to jurisdiction, each seeks to provide a cost-effective means of ensuring that more funding is available in the most competitive elections, without wasting public funds in elections where additional funds are not needed.

In its prior election law cases, this Court has frequently indicated its respect for the value of state experimentation and the importance of states having discretion to determine which laws, in varying ways, advance their interest in self-government. The Court should not curtail such experimentation in an area of core local concern absent clear evidence of constitutional harm. Given the lack of any showing that supplemental funding triggers have curtailed speech, discriminated against particular political views, or interfered with electoral competition, the Court should allow Arizona and other states to continue employing public campaign financing with supplemental funding triggers in their election laws.

A. States Have Recognized that Supplemental Funding Triggers in Public Financing Systems Serve Important and Compelling Interests

Arizona, like other jurisdictions, adopted its system of public campaign funding for the express purpose of combating real and apparent corruption. *See* Ariz. Rev. Stat. Ann. § 16-940(A); *see also, e.g.*, Neb. Rev. Stat. § 32-1602(2); 1997-64 Vt. Adv. Legis. Serv. 1 (LexisNexis). States have found that public funding systems also serve several important speech-enhancing purposes, such as increasing political discussion and debate, encouraging potential

candidacies, improving voter participation, and improving access to information. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-940(A); Fla. Stat. § 106.31; Neb. Rev. Stat. § 32-1602(1)-(2); R.I. Gen. Laws § 17-25-18; 1997-64 Vt. Adv. Legis. Serv. 1 (LexisNexis). As the Court observed in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in addition to reducing "the deleterious influence of large contributions on our political process," public funding "facilitate[s] communication by candidates with the electorate" and helps "to free candidates from the rigors of fundraising." *Id*. at 91. Public funding is a laudable "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93 (concluding that public funding therefore "furthers, not abridges, pertinent First Amendment values"). Public funding programs provide funds so that all candidates may speak, "entrusting the people to judge what is true and what is false." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 907 (2010).

As explained in Respondents' briefs, Arizona's supplemental funding trigger serves a critical role in ensuring that the Citizens Clean Elections Act meets the vital goals that Arizona voters intend it to achieve. *See* Br. of Resp. Clean Elections Inst., at 40-58; Br. of State Resps., at 46-47. By providing additional funds to a participating candidate only after his or her opposition has exceeded certain levels of contributions or expenditures, the supplemental funding trigger allows Arizona to allocate appropriate levels of public funds to the most competitive races. In this way, it balances the state's

need to conserve limited public resources with its goal of enabling robust public debate and competition in state election campaigns. *See Buckley*, 424 U.S. at 96-98 (upholding certain provisions in the federal presidential public financing system on the ground that they conserve federal resources and prevent "raid[s on] the United States Treasury") (internal quotation marks omitted).

B. States and Local Governments Have Adopted a Variety of Supplemental Funding Triggers as Part of Their Efforts to Create Viable and Cost-Effective Public Financing Systems

Over the past twenty years, most states and local governments that have adopted public campaign financing have included trigger mechanisms in their systems. Although the specific mechanisms vary from jurisdiction to jurisdiction, each seeks to ensure that candidates in the most competitive elections will be adequately funded, without wasting scarce public resources in elections where additional funds are not needed. This makes public funding more attractive to more candidates and promotes a core public funding goal of reducing candidates' dependence on private donations that may give rise to corruption or the appearance of corruption.

Supplemental funding triggers make additional funds available only in those elections where high levels of spending by other campaign participants indicate that those elections are particularly competitive. It would be impossible in advance to determine which specific elections in a particular

election year will be more competitive than others, and it would be wasteful to pump more public funds into all elections just to ensure that more money is available in those elections where it is most needed. Triggers address this difficulty with appropriate flexibility by allowing the level of public funding, or the mix of public and private funds, to respond to specific electoral conditions.

The variety of trigger mechanisms testifies to the vibrancy of our federal system, demonstrating the differences in political preferences, resources, or circumstances across states and localities as they grapple with this common problem. A significant number of jurisdictions, like Arizona, employ supplemental funding triggers to provide additional funds to candidates who participate in the public funding system if statutory criteria are met. The events that trigger supplemental funding vary by jurisdiction, with some looking to spending of both non-participating candidates and opposing independent entities, and some just to spending of non-participating candidates. *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-952(A)-(B); L.A., Cal., Mun. Code § 49.7.22(C)-(D); New Haven, Conn., Code of Gen. Ordinances § 2-825; Fla. Stat. § 106.355; Me. Rev. Stat. tit. 21-A, § 1125(9); N.M. Stat. Ann. § 1-19A-14; Albuquerque, N.M., Charter of the City of Albuquerque, art. XVI, § 16; N.C. Gen. Stat. § 163-278.67; Chapel Hill, N.C., Gen. Code of Ordinances § 2-95(a)-(b); Wis. Stat. § 11.512.

Other jurisdictions have implemented triggers that increase or remove voluntary contribution or expenditure limits, which initially apply to

candidates who receive public funding, if a non-participating opponent receives or spends funds above a designated limit. These measures also vary in their specifics from one jurisdiction to another. *See, e.g.*, L.A., Cal., Mun. Code § 49.7.14; Oakland, Cal., Mun. Code § 3.12.220; Sacramento, Cal., City Code § 2.14.060; S.F., Cal., Campaign & Governmental Conduct Code § 1.143; Fla. Stat. § 106.355; Mich. Comp. Laws § 169.269(8); Minn. Stat. § 10A.25(10); N.Y.C., N.Y., Admin. Code § 3-706(3); R.I. Gen. Laws § 17-25-24; Austin, Tex., Code of the City of Austin § 2-2-17.

States have been experimenting with such trigger mechanisms in public funding systems for more than twenty years. *See, e.g.*, Minn. Stat. § 10A.25(10) (1988) (lifting expenditure limits of participating candidates); R.I. Gen. Laws § 17-25-24 (1988) (lifting contribution and expenditure limits for participating candidates); *see also* 1991 Fla. Sess. Laws Serv. 2281 (West) (amending law to allow lifting of expenditure limits for participating candidates). The public funding program enacted by Arizona voters in 1998 was among the first to adopt its particular form of supplemental funding trigger, and other states have adopted similar measures in the years since then. *See, e.g.*, 2003 N.M. Legis. Serv. 1763 (West); 2002 N.C. Legis. Serv. 1768 (West). States have also revised their approaches as they have gained experience with their trigger mechanisms. Arizona's law, for example, has been refined both by the state commission responsible for administering it, *see* Br. of Resp. Clean Elections Inst., at 62 n.19 (noting amendment of commission rules to prevent distribution of supplemental funds when candidates engage

in coordinated conduct), and by state courts interpreting the law, *see Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712-15 (Ariz. 2000) (excising portions of the law that impermissibly expanded the authority of the judicial branch by involving it in nominating candidates for, and appointing members to, the commission); *see also May v. McNally*, 55 P.3d 768, 774 (Ariz. 2002) (upholding surcharge funding provision of Arizona's law against First Amendment challenge because the act expands rather than burdens speech and the allocation of funds is viewpoint neutral).

In these ways, states are engaged in an ongoing effort to develop the most cost-effective means of using public campaign funding to combat corruption, promote competition, and enhance speech in their elections. It is worth noting that, although the presidential public funding system pioneered public funding in the United States, in recent elections fewer major candidates have chosen to participate in that system. Presidential public funding does not use a trigger; if one major candidate opts out and raises more money in private funds, the other candidates who take public funding still receive the same limited funds and remain subject to the same spending limit as before. This has increasingly led the candidates who believe they are most able to finance their campaigns with private funds to opt out, so that the program has begun to turn into one that funds only the more marginal candidates. The spread of trigger mechanisms at the state and local levels reflects an awareness of the shortcomings of public campaign financing systems that lack a means

of enabling publicly funded candidates in the most competitive races to raise and spend more money.

Amici do not believe there is one ideal trigger mechanism or, indeed, one best campaign finance system. We do, however, believe that it is very valuable to take advantage of the genius of the federal system by letting states and local governments, in some instances acting by grassroots voter initiatives, implement and thereby learn from these laws.

C. Absent Clear Evidence of Constitutional Harm, the Court Should Allow States Space to Continue Using Supplemental Funding Triggers as They Develop Their Public Financing Systems

As the Court has repeatedly recognized, states have broad power to regulate their own elections. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest." *Storer v. Brown*, 415 U.S. 724, 730 (1974). This Court's precedents have recognized that regulation of elections is an area of core local interest and expertise, entitling states to exercise their own judgment where there is no clear evidence of constitutional harm.

The Court recently recognized the importance of allowing states latitude in administering their own elections. In *Doe v. Reed*, 130 S. Ct. 2811 (2010), the Court rejected a First Amendment challenge to Washington State's law permitting private parties to

obtain the names of referendum signatories. *Id.* at 2821. The Court explained that, although "[p]etition signing remains expressive even when it has legal effect in the electoral process[,] . . . that is not to say that the electoral context is irrelevant to the nature of our First Amendment review. We allow States significant flexibility in implementing their own voting systems." *Id.* at 2818.

Numerous other cases have upheld state election regulations and state experimentation with new means of achieving legitimate state purposes, even when those regulations have had potential implications for constitutional rights, where no clear evidence existed that the regulations actually burdened protected rights. Thus, in *Crawford v. Marion County Election Board*, 553 U. S. 181 (2008), the Court recognized that a state voter identification requirement could potentially affect the ability of eligible voters to cast ballots, but upheld the measure because it had been adopted to advance the important state interest in preventing voter fraud, and the evidence of a burden on voting was inadequate to displace the state's choice. *Id.* at 191, 197-203.

Similarly, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the Court upheld the provision of Washington's "top-two" primary law allowing a candidate to list a party preference below his or her name on the ballot, against the assertion that this provision burdened the parties' freedom of association. *Id.* at 457. Under the "top-two" law, the two candidates receiving the most votes in the

primary would advance to the general election, regardless of their party affiliations. *Id.* at 447-48. The law was a novel measure intended to broaden participation in the process of nominating candidates, while focusing the general election decision on the "top two" candidates. The party-preference designation was an innovative compromise provision intended to enable a candidate to inform voters about the candidate's party preference without imposing that candidate as the nominee of that party absent the party's consent. The Court held that Washington could try this new system, finding that enabling a candidate to list a party preference advanced the state's "interest in providing voters with relevant information about the candidates on the ballot." *Id.* at 458. By the same token, there was no evidence that voters would be confused into thinking that the party-preference designation constituted a party's endorsement. *Id.* at 454-55. The Court emphasized that granting such a facial challenge, in the absence of a showing of actual harm, "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

In other areas of election law, the Court has likewise upheld regulations potentially implicating constitutional rights, so long as they are reasonable measures advancing legitimate state interests. The Court has recognized the interest of voters in being able to put forward and have a range of choices among candidates by striking down laws that require new parties to obtain so many signatures to get on the ballot that it is virtually impossible for any party

other than the Democrats and Republicans to do so. *See Williams v. Rhodes*, 393 U.S. 23, 32-34 (1968). At the same time, the Court has permitted states to adopt more modest restrictions that advance legitimate state interests in ballot integrity, political stability, and focusing electoral choice on more serious candidates. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353-54, 369-70 (1997) (upholding Minnesota law that prohibited a candidate from appearing on the ballot for two different parties, because the burdens on party associational rights were "justified by 'correspondingly weighty' valid state interests in ballot integrity and political stability"); *Jenness v. Fortson*, 403 U.S. 431, 432, 438-39, 442 (1971) (upholding Georgia statutory scheme that imposed significant ballot access requirements on candidates who did not win a party primary, because even though requirements were in some respects more onerous than provisions in other states, they were less burdensome in other ways, such that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Similarly, the Court has invalidated lengthy durational residency requirements that seriously burden the right to vote, while upholding more limited measures to advance what it has considered to be legitimate state goals. *See Rosario v. Rockefeller*, 410 U.S. 752, 753, 761 (1973) (upholding New York party enrollment rule that allowed voters to participate in primaries only if they enrolled in a party at least 30 days before previous general election, because requirement was "an integral part"

of a scheme that preserved the integrity of the electoral process by preventing party raiding); *Marston v. Lewis*, 410 U.S. 679, 679-81 (1973) (per curiam) (upholding Arizona's 50-day voter residency and registration requirements for state elections because it represented "an amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists," and "[t]he Constitution is not so rigid that that determination and others like it may not stand").

Embedded in the Court's approach to examining states' regulation of elections is an appreciation for the value of experimentation within and across jurisdictions. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Court considered First and Fourteenth Amendment challenges to Tennessee's law prohibiting solicitation of votes and display of campaign materials within 100 feet of the entrance to a polling place. *Id.* at 193. Acknowledging the long history behind such restrictions, the Court explained that states (and other countries) had experimented with several different ways to eliminate election fraud and voter intimidation at the polls, before settling on geographic limitations on vote solicitation and campaigning. *Id.* at 199-206. The Court noted that a handful of jurisdictions' early measures to restrict electioneering within a certain distance of polling places served as a springboard for other jurisdictions to adopt similar laws. *Id.* at 203-06. Upholding Tennessee's restriction, the Court noted that while some rules could be so restrictive as to create an impermissible burden, it would not employ a "litmus-paper test" in "reviewing challenges

to specific provisions of a State's election laws." *Id.* at 210-11.

The Court's approach in these cases accords with its longstanding recognition of the vital function states serve as laboratories for developing solutions to difficult legal and policy issues. *See, e.g.*, *Oregon v. Ice*, 129 S. Ct. 711, 718-19 (2009) (invoking states' role "as laboratories for devising solutions to difficult legal problems" as one reason for upholding state policy granting judges authority to determine whether criminal sentences run concurrently or consecutively); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (noting that "the theory and utility of our federalism are revealed [when] the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory" seeking new solutions on issues of public concern).

The Court has recognized that allowing state experimentation is particularly appropriate when there is no evidence of constitutional harm. For example, in *Chandler v. Florida*, 449 U.S. 560 (1981), the Court upheld a Florida policy allowing cameras in criminal trials, noting that because "no one has been able to present empirical data sufficient to establish" constitutional harm, "the admonition of Justice Brandeis . . . is relevant" and the "concept of

federalism, echoed by the states favoring Florida's experiment, must guide our decision." *Id.* at 578-80.

The value of state experimentation in regulating elections – and the need for clear evidence of unconstitutionality before foreclosing such experimentation – also found expression in *Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, the Court first upheld a California law requiring a candidate wishing to run as an independent to disaffiliate from his or her party at least twelve months prior to its primary election. *Id.* at 733. The Court explained that this rule protected the direct primary process that California had come to employ after years of unfortunate experience with a prior nominating system that allowed candidates to run in multiple parties' primaries. *Id.* at 735-36.

At the same time, the Court in *Storer* remanded a challenge to a second California law, which required that independent candidates seeking ballot access file a petition with signatures constituting at least five percent of total votes cast in the last general election. *Id.* at 738. Although the Court speculated that this rule could require an impermissibly high percentage of signatures from the available pool of eligible signatories, it concluded that it did not have enough evidence to determine if the rule actually placed an unconstitutional burden on ballot access. *Id.*; *cf. Clingman v. Beaver*, 544 U.S. 581, 586-88 (2005) (upholding Oklahoma's "semiclosed primary" law, which existed in similar form in 23 other states, because any burdens imposed on associational rights were minimal when voters could elect to change party affiliation in order to vote in a primary).

D. There Is No Clear Evidence that Supplemental Funding Triggers Burden Speech

In this case, there is no evidence of constitutional injury to warrant shutting down Arizona's and others states' development of public funding systems using supplemental funding triggers. Instead, the existing data support the conclusion that Arizona's measure enhances overall speech without burdening the speech of any campaign participants. The Court should, therefore, permit Arizona and other states to continue experimenting with campaign finance regulations, including public funding systems that utilize the kind of trigger mechanism that Arizona employs.

As Respondents' briefs show, Arizona's law has been accompanied by an increase in overall speech in state elections. *See* Br. of Resp. Clean Elections Inst., at 58; Br. of State Resps., at 40. Rather than chilling speech, the evidence presented to the District Court demonstrated an increase in both candidate and independent expenditures since the enactment of the Citizens Clean Elections Act. Candidate expenditures increased between twenty-nine and sixty-seven percent, and independent expenditures increased by over 250 percent. The most robust published analysis of Arizona's system, conducted by the U.S. Government Accountability Office in 2010, found that candidate expenditures in state legislative elections have generally increased since passage of the Citizens Clean Elections Act. *See* U.S. Gov't Accountability Office, GAO-10-390, Campaign Finance Reform: Experiences of Two States that

Offered Full Public Funding for Political Candidates (2010), at 52-53, 59-60. Independent expenditures in Arizona have also increased since 2000. *Id.* at 63-64.

Moreover, expert evidence before the District Court showed that contested state Senate elections increased by twenty percent, and that the number of competitive state Senate elections involving incumbents increased by 300 percent. Br. of Resp. Clean Elections Inst., at 6. The District Court also received evidence that the public funding offered under Arizona law allowed candidates to seek election who otherwise would not have been able to do so. J.A. 541-42, 591.

The additional campaign funds that Arizona's supplemental funding trigger provides further First Amendment values by enabling participating candidates to speak, and voters to hear, more campaign communications. There is no evidence that non-participating candidates or independent committees have reduced their campaign speech in response. Quite the contrary – since Arizona adopted public funding with its supplemental funding trigger, electoral debate in the state has been more robust than ever.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals. Supplemental funding triggers are an important means by which states ensure the effectiveness and viability of the public funding systems that they have adopted to prevent corruption, promote competition, and enhance speech in their elections. There being no clear evidence that such measures infringe on constitutional rights, the Court should allow states to continue to develop their regulations in this traditional area of local control.

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February 2011

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