Nos. 10-238 and 10-239

In the Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN, and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MITCH MCCONNELL, UNITED STATES SENATOR, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE

Amicus Senator Mitch McConnell is the Senate Republican Leader and the senior United States Senator from the Commonwealth of Kentucky. He is the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.[1]

Senator McConnell is a respected senior statesman and is recognized as the Senate's most passionate defender of the First Amendment guarantee of unrestricted political speech. In addition, he has acquired considerable practical experience over the last three decades complying with various federal and state campaign finance restrictions. He has been asked, and expects to be asked in the future, to assist other Republican candidates at all levels including by soliciting contributions so those candidates may make expenditures in connection with state and federal elections. For these reasons, Senator McConnell's associational and free speech rights may be impacted by the outcome of this case.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

I. Arizona's Clean Elections Act imposes a severe penalty on nonparticipating candidates and anyone making independent expenditures. Any nonparticipating candidate who spends more than the statutory limit, as well as many independent spenders, incur the direct statutory consequence of triggering incremental public funds to the very candidates they oppose. The Act unquestionably burdens the core political speech of nonparticipants and independent speakers, and therefore must withstand strict scrutiny to survive.

II. To survive strict scrutiny, the penalty imposed on candidates and independent expenditure organizations by the Arizona Clean Elections Act must fulfill a "compelling governmental interest" and be "narrowly tailored to achieve that interest." The only governmental interest that may be deemed "compelling" is the government's interest in preventing actual or apparent *quid pro quo* corruption, that is, the exchange of money for political favors.

III. When held to strict scrutiny, the Act's matching funds provision must fail. The Ninth Circuit incorrectly subjected the matching funds provision to intermediate scrutiny. The Ninth Circuit also improperly ignored the penalties the Act imposes on speech of nonparticipating candidates and independent speakers. Rather, it upheld the statute based exclusively on the benefits provided to participants in the public financing system. Just as in *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), the Arizona Clean Elections Act undeniably burdens

the core political speech of nonparticipants and independent speakers, and is not narrowly tailored to advance the government's interest in stemming *quid pro quo* corruption.

ARGUMENT

The First Amendment instructs: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Political speech is at the core of the First Amendment, which "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

The State of Arizona regulates the financing of state and local campaigns by imposing both strict limitations on contributions, which are not at issue here, and limitations on expenditures, which are central to this case. The expenditure limitations take two forms. Candidates who elect to participate in the state public campaign financing system must commit to expenditure limitations. These commitments by candidates to spending limits in exchange for taxpayer funding are also not at issue here, and in this limited respect are analogous to the public funding approved in *Buckley*. *Id.* at 85-90.

But, unlike the federal funding system upheld in *Buckley*, these expenditure limitations also affect candidates who elect not to participate in the public financing system, as well as any individual or organization who considers spending money independently to support or oppose a candidate. Non-

participating candidates who are running against participating candidates will trigger additional "matching funds" for their opponents if they spend above the statutory spending limit. Likewise, independent speakers are restricted by the public financing system because their spending in support of a nonparticipating candidate, or in opposition to a participating candidate, will trigger additional matching funds for the participating candidates.

The incremental matching funds payable to the participating candidates as a direct statutory consequence of these decisions to spend *more* (in the case of nonparticipating candidates) or *any* (in the case of independent speakers) money are called "*equalizing payments*." These "equalizing payments" are the amount of the above cap spending by the nonparticipating opposing candidate, or an amount equal to the independent spending, less six percent. Participating candidates receive these "equalizing payments" up to a maximum of three times their original public funding grant.

It cannot be seriously disputed that the "equalizing payments" affect, and burden, the decisions of nonparticipating candidates to engage in more speech, and the decisions of independent speakers to speak at all. This burden on campaign spending fits firmly within the line of precedents holding that expenditure limits are subject to strict scrutiny, and cannot survive unless the limit is narrowly tailored to serve the compelling interest of fighting *quid pro quo* corruption. The equalizing payments are analogous to, but even more oppressive than, the

expenditure limitations struck down by *Davis*, 554 U.S. 724.

Senator McConnell respectfully urges the Court to use this case as a vehicle to clarify that both direct and indirect expenditure limitations are subject to strict scrutiny, and that only a restriction narrowly tailored to combat *quid pro quo* corruption or the appearance of *quid pro quo* corruption can survive.

I. THE ARIZONA CLEAN ELECTIONS ACT IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IMPOSES BURDENS ON THE EXPENDITURE OF MONEY FOR POLITICAL SPEECH.

A. Any Governmental Burden on the Decision To Spend Money on Political Speech Must Withstand Strict Scrutiny.

Buckley established four basic propositions relevant here: Political speech costs money, restrictions on political spending infringe fundamental First Amendment freedoms, such restrictions will be upheld only if narrowly tailored to serve a compelling government interest, and the only government interests sufficiently compelling to support such restrictions are the prevention of actual or apparent *quid pro quo* corruption. 424 U.S. at 14-15, 26. Indeed, *Buckley* struck down the expenditure limitations in the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1994)) ("FECA"), on the grounds that they "impose direct and sub-

stantial restraints on the quantity of political speech," 424 U.S. at 39, and that the asserted governmental interests were insufficient "to justify the restriction," *id.* at 55. The Court reasoned that a candidate who *raised* a great deal of money in compliance with contribution limits could not be corrupted simply by *spending* the large amount of money legally raised. *Id.* at 28, 52-59.

Since at least *Buckley* it has been clear that

> [a] restriction on the amount of money a person or group can spend on political communications during a campaign 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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19. For this reason, the Court held that "expenditure ceilings impose direct and substantial restraints on the quantity of political speech." *Id.* at 39.

In the intervening 35 years, this Court has repeatedly confirmed *Buckley*'s four basic propositions. Whatever imaginative form government restrictions on political expenditures may take, this Court has continued to subject such restrictions to

strict scrutiny.[2] *See, e.g., Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010) (stating that limitations on political expenditures must be evaluated using "strict scrutiny standard" which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest"); *Davis v. FEC*, 554 U.S. 724, 128 S.Ct. at 2772 (subjecting "Millionaire's Amendment" to strict scrutiny); *Fed. Election Comm'n v. Wisconsin Right to Life* ("WRTL"), 551 U.S. 449, 449 (2007) ("Because [the statute] burdens political speech, it is subject to strict scrutiny."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.* ("Colorado Republican II"), 533 U.S. 431, 440 (2001) (observing "limits on political expenditures deserve closer scrutiny than restrictions on political contributions"); *see also Randall v. Sorrell*, 548 U.S. 230, 242 (2006) (noting that Court has "repeatedly adhered to *Buckley*'s constraints ... on expenditure limits.").

It is certainly true that fixed dollar limits on campaign spending are subject to—and inevitably fail—strict scrutiny. *See*, *e.g.*, *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 613-19 (1996) (rejecting limits on independent political party spending); *Fed. Election Comm'n v. National Conservative Pol. Action Comm.* ("NCPAC"), 470 U.S. 480, 493-501 (1985) (striking down $1,000 limit on independent expenditures); *Buckley*, 424 U.S. at 39-51 (rejecting dollar

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[2] The lone exception has been disclaimer and disclosure requirements, as explained below. *See infra* II.A.

limits on independent expenditures); *see also Randall*, 548 U.S. at 240-46 (rejecting limits on candidate expenditures). But this Court has also recognized that less direct restrictions on the amount of political spending must suffer the same fate. Thus, it has applied strict scrutiny to reject black-out periods for corporate political spending prior to elections, *Citizens United*, 130 S.Ct. 876; "asymmetrical contribution limits" triggered by the use of personal assets for campaign spending, *Davis*, 554 U.S. at 738-44; and even a forced choice between party coordinated spending and party independent spending, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 219 (2003). Increasingly creative approaches to limiting, burdening, or deterring the decisions of candidates, parties, and independent speakers to spend more money on political speech have met the same fate—invalidation under strict scrutiny.

B. The Matching Funds Provision Burdens Core Political Speech.

Although proponents of Arizona's so-called Clean Election Act claim the matching funds provision is merely an incentive for candidates to participate in the public financing system, the statute is in effect an expenditure restriction on core political speech by nonparticipating candidates and independent speakers.

On its face, the statute betrays unacceptable purposes. The preamble criticizes the prior Arizona campaign finance regulatory regime, which "[drove] up the cost of running for state office," and "[r]equire[d] that elected officials spend too much of

their time raising funds," A.R.S. § 16-940(B)(7) & (8). The matching funds provision is entitled "Equal funding of candidates," and imposes on nonparticipating candidates both "primary election spending limit[s]" and "general election spending limit[s]". *Id.* § 16-952(A) & (B). Nonparticipating candidates who exceed these primary and general election "spending limits" entitle their opponents to "equalizing funds" to offset this advantage; spending by independent speakers may also entitle participating candidates to "equalizing funds." *Id.* § 16-952(C)(4) & (5).[3] It is surprising, then, that the Court of Appeals refused to recognize the matching fund provisions as a spending limit, but instead justified it as an innocuous mechanism to encourage participation in the public funding scheme. *See McComish v. Bennett*, 611 F.3d 510, 522-27 (9th Cir. 2010).

The record confirms that the Act has caused serious burdens to candidates and independent speech organizations. For example, in 2008, Petitioner McComish faced three participating candidates in the Arizona primary. *See* Pet. Br. 30. Because he

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[3] Moreover, the Act declares that Arizona's former election campaign finance system "effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor a small number of *wealthy* special interests." A.R.S. § 16-940(B)(4); *see also* Ballot Proposition Publicity Pamphlet for the 1998 Arizona Election (hereafter "Pamphlet") available at http://www.azsos.gov/election/1998/Info/PubPamphlet/prop200.pdf (citing Former Arizona Governor Rose Mofford) ("The Clean Elections Act . . . limits campaign spending and enables candidates without access to wealth to run for office, waging a battle of ideas rather than bank accounts").

faced three opponents, each dollar he spent above the grant limit resulted in an additional $3 being spent against his candidacy. *See id.* at 30-31. Due to Petitioner's own spending, and the spending of independent groups supporting him, his opponents received additional public funding of at least $82,081.98. *See id.* Accordingly, the Petitioner decided to forego further campaign spending to avoid providing additional campaign resources to his opponents.

The Act's funding trigger directly discourages campaign spending. Whenever a nonparticipating candidate reaches the statutory cap on spending, he or she must decide whether the benefit of increased political speech is worth incurring the consequence of triggering additional public funding for his or her opponent. Even more stark is the decision facing an independent speaker, who must decide whether the provision makes it unwise to speak at all.

The penalty on the nonparticipating candidate is worse than the burden faced by the Petitioner in *Davis*, 554 U.S. at 744-45. At issue in *Davis* was the so-called "Millionaire's Amendment" created as part of the Bipartisan Campaign Reform Act ("BCRA"). *Id.* at 729 (citing the BCRA § 319(a), 116 Stat. 109, 2 U.S.C. § 441a(1)(a)). According to that provision, whenever a candidate spent specified amounts of his or her own money, the opposing candidate would benefit from increased contribution limits, up to three times the standard limit, with no similar increase for the self-financing candidate. *Id.* at 729. The benefit enjoyed by the opposing candidate "impermissibly burden[ed]" the self-financing

candidate's right to spend personal money for campaign speech. *Id.* at 738. Employing strict scrutiny, the Court held the Millionaire's Amendment violated the First Amendment.

The Arizona statute parallels the Millionaire's Amendment because both provide benefits to an opposing candidate based solely on the nonparticipating candidate's decision to spend more money on political speech. But the Arizona matching funds provision imposes a more certain and more substantial penalty. Whereas the Millionaire's Amendment gave the opposing candidate the *opportunity* to *raise* more money—requiring resources and effort—the Arizona statute *automatically* injects an equivalent amount (less six percent) into the opponent's coffers. The Millionaire's Amendment restricts candidate spending above a threshold of personal funds; the Arizona statute restricts nonparticipating candidate spending above a threshold of all funds. Perhaps even more troubling, the Arizona statute reaches beyond the candidate-versus-candidate contest to impose a burden on independent speakers. Other courts have recognized that mechanisms of this nature impose a heavy burden on speech.[4]

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[4] Several Circuit Courts—including the Ninth Circuit below—acknowledge that the funding trigger used by the Act burdens core First Amendment speech. *See Scott v. Roberts*, 612 F.3d 1279, 1291 (11th Cir. 2010) (applying strict scrutiny to enjoin excess spending subsidy to participating candidate) ("[W]e know of no court that doubts that a subsidy like the one at issue here burdens nonparticipants, apart from whether it is a substantial burden under the First Amendment.") (citing *Green Party of Conn. v. Garfield*, 616 F.3d 213, 245 (2d Cir.

Accordingly, because the matching funds provision has a direct and substantial effect on spending by nonparticipating candidates and independent speakers, it is an expenditure limitation. As an expenditure limitation, it is subject to strict scrutiny, and must be narrowly tailored to serve a "compelling government interest."

II. STRICT SCRUTINY REQUIRES THAT BURDENS ON FIRST AMENDMENT RIGHTS MUST BE NARROWLY TAILORED TO PREVENT *QUID PRO QUO* CORRUPTION OR THE APPEARANCE OF *QUID PRO QUO* CORRUPTION.

This case presents an important opportunity for the Court to reaffirm that the only government interests compelling enough to justify restrictions in campaign spending are the prevention of corruption or the appearance of corruption. Further, the Court

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2010); *McComish*, 611 F.3d at 524 ("[W]e recognize that under the Supreme Court's jurisprudence, even laws that create only potential chilling effects impose some First Amendment burden."); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008) (acknowledging potential "chilling effect" stemming "from the realization that one group's speech will enable another to speak in response," but not equating chilling effect with government censorship); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000) (applying strict scrutiny to matching fund provision)); *see also Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (reasoning that potential "self-censorship" created by matching funds provision "is no less a burden on speech . . . than is direct government censorship").

can and should clarify that the anticorruption interest is narrow, and confined only to prohibiting the exchange of money for political favors.

A. The Prevention of Corruption or the Appearance of Corruption Is the Government's Only Interest in Restricting Political Speech.

In upholding federal candidate contribution limits in *Buckley*, the Court held that only one government interest, the prevention of corruption and the appearance of corruption, justified this interference with protected First Amendment rights. *Buckley*, 424 U.S. at 25-29. Based on the record of corruption regarding the 1972 election, the Court specifically found that democracy is undermined when "*large contributions* are given *to secure political quid pro quo's* [sic] from current and potential office holders." *Id.* at 26 (emphasis added). The Court also found that harm arises from "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large individual financial contributions*." *Id.* at 27 (emphasis added). Thus, the Court defined the anti-corruption interest based on the corruptive influences caused by large contributions, and *quid pro quo* arrangements between contributors and candidates.

Since *Buckley*, the Court has reviewed at least seven different government interests that have been suggested as justifications for contribution and expenditure limits. Nevertheless, the only interest deemed sufficient to outweigh First Amendment rights is the government's interest in preventing

corruption or the appearance of that corruption. *See NCPAC*, 470 U.S. at 496-97. ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances."). *Citizens United* reaffirmed and emphasized this point, stating: "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. . ." *Citizens United*, 130 S.Ct. at 910.

Other interests have either been rejected outright, or, after temporary acceptance, have been disapproved by the Court. *Buckley* rejected an asserted interest in "mut[ing] the voices of affluent persons and groups. . . to equalize the relative ability of all citizens to affect the outcome of elections." *Buckley*, 424 U.S. at 25-26. The Court showed no sympathy at all for this purported interest: "[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*." *Id.* at 48-49 (emphasis added).

The *Buckley* Court also held insufficient the government's asserted interest in curbing "the skyrocketing cost of political campaigns . . . to open the political system more widely to candidates without access to sources of large amounts of money." *Buckley*, 424 U.S. at 26.

In *Randall*, 548 U.S. at 245-46, the Court rejected any government interest in "reduc[ing] the amount of time candidates must spend raising money." The Court specifically held that this interest was inadequate to justify an expenditure limit. *Id.*[5]

For a time, the Court appeared to accept a government interest in fighting "circumvention of valid contribution limits." *Colorado Republican II*, 533 U.S. at 456. This anticircumvention interest expanded dramatically in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2002), which upheld the BCRA's ban on national, state, and local political parties raising and spending nonfederal contributions to political parties. This restriction was based on Congress's finding that the solicitation, transfer, and spending of nonfederal funds enabled political parties and candidates to circumvent the Federal Election Campaign Act's contribution limits. *Id.* at 126. More recently, however, the Court has recognized that "anticircumvention" could be used to justify all manner of restraints on core speech, even restraints with but an attenuated relationship to actual or apparent corruption. Accordingly, in *WRTL*, 551 U.S. at 479, the Court admonished that "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."

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[5] The Clean Elections Act was passed nearly two years after *Randall*, yet the law was still justified by the notion "that elected officials spend too much of their time raising funds rather than representing the public." A.R.S. § 16-940(8).

The *McConnell* Court also accepted a notion of "access corruption," by crediting a government interest in "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" 540 U.S. at 150. "Access corruption" involved selling *access* to candidates and officeholders, which purportedly gave rise to the appearance of undue influence. *Id.* at 153-54. But Last Term in *Citizens United*, the Court clarified that "[i]ngratiation and access . . . are not corruption," *Citizens United*, 130 S.Ct. at 910. Nor will "[t]he appearance of influence or access . . . cause the electorate to lose faith in our democracy." *Id.*

Also in *Citizens United*, the Court revisited and rejected an "antidistortion" rationale—a purported government interest in preventing the corrosive and distorting effects of immense aggregations of wealth accumulated by corporations. *Citizens United*, 130 S.Ct. at 907. On rebriefing, the Government "did little to defend [the antidistortion rationale]." *Id.* at 904. The Court concluded that the antidistortion rationale was an aberration, provided no basis for limiting corporate independent expenditures, and could not serve as a legitimate government interest in the strict scrutiny analysis. *Id.* at 898, 907, 913.

Likewise, the Court rejected a "shareholder protection" interest in *Citizens United*. As support for the federal corporate expenditure ban, the Federal Election Commission argued the government had an interest in "protecting dissenting shareholders from being compelled to fund corporate political speech." *Id.* at 911. This interest was dismissed by the Court

on various grounds, including overbreadth and underinclusiveness. *Id.*

In short, *Citizens United* has returned the strict scrutiny analysis to the focus set forth in *Buckley*: whenever expenditure restrictions are at issue, they are invalid unless they are narrowly tailored to prevent corruption or the appearance of corruption.

B. The Anticorruption Interest Is Limited to Preventing Actual or Apparent Quid Pro Quo Corruption.

The *quid pro quo*, or exchange of dollars for political favors, is the "hallmark of corruption. *NCPAC*, 470 U.S. at 497. The Court experimented with broadening the notion of "corruption" to encompass many things, but none have passed the test of time, analysis, and experience to supplant or supplement the original definition: "corruption" is one thing and one thing only, *quid pro quo* corruption, the actual or apparent exchange of dollars for political favors.

The *Buckley* Court explained that this corruption arises from a campaign contribution (the "*quid*") that is large enough to persuade the candidate to take it in exchange for a legislative favor or official action (the "*quo*"). *See Buckley*, 424 U.S. at 25-29. The threshold sum at which a contribution becomes an actual or apparent corruptive influence is a legislative judgment. Thus, a contribution limitation enables government to "focus[] precisely on the problem of large campaign contributions." *Id.* at 28.

Although the anticorruption interest has served to justify contribution limits, which are not subject to strict scrutiny, the Court has repeatedly found it insufficient to justify restrictions on the expenditure of funds for political speech. *See Citizens United*, 130 S.Ct. at 909 ("[W]e now conclude that independent expenditures . . . do not give rise to corruption or the appearance of corruption."); *NCPAC*, 470 U.S. at 498 ("exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more"); *Buckley*, 424 U.S. at 47 (expenditures not "a *quid pro quo* for improper commitments from the candidate.").

These precedents are supported by common sense. A candidate who is successful at raising many legal non-corrupting contributions from a broad range of contributors is less likely to be indebted to any single contributor; and in any event, having legally *raised* the money, there is no threat of corruption if the candidate *spends* it. Even less of a threat is the expenditure of a candidate's own resources. A candidate simply cannot corrupt himself. And the Court has repeatedly held that independent spending on political speech lacks the potential to corrupt the candidate. *See, e.g., NCPAC*, 470 U.S. at 498.

What more spending does imply, however, is more political speech, more debate, and more information for the voting public. According to the First Amendment, that is good. Such wide open, robust debate is exactly what the Speech Clause protects. *New York Times v. Sullivan* 376 U.S. 254, 270-71 (1963).

III. THE NINTH CIRCUIT ERRONEOUSLY FAILED TO APPLY STRICT SCRUTINY.

A. The Ninth Circuit Erred by Rejecting Strict Scrutiny in Favor of Intermediate Scrutiny.

The Ninth Circuit improperly chose to subject the Arizona statute to intermediate scrutiny. *McComish*, 611 F.3d at 525. It thus ignored *Buckley*'s ironclad rule mandating strict scrutiny for all significant governmental intrusions on the right of candidates and organizations to make spend money for political discussion. *See Buckley*, 424 U.S. 39-59.

Instead, the Ninth Circuit employed a two-part test that asked 1) whether the statute imposes limitations on fully protected speech; and 2) how severely the statute burdens those expenditures. *McComish*, 611 F.3d at 520. Under this test, only those statutes that impose the most extreme limitations on expenditures would be subject to strict scrutiny; all other restrictions would be subjected to more deferential intermediate scrutiny. *Id.*[6]

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[6] The Ninth Circuit purports to rely on *Lincoln Club v. Irvine*, 292 F.3d 934 (9th Cir. 2002) as support for its two-part test. But *Lincoln Club* adopts no such test. To the contrary, *Lincoln Club* recognized the unwavering line of cases that have construed *Buckley* to require strict scrutiny of limitations on independent expenditures and intermediate scrutiny of limitations on contributions. *Lincoln Club*, 292 F.3d at 938 (citing *Colorado Republican II*, 533 U.S. 431, 121 S.Ct. at 2358) (observing that ever since *Buckley* the Court has understood that limits on expenditures deserve closer scrutiny than

The first inquiry asked whether the challenged statute limits expenditures (fully protected speech) or only contributions. The Ninth Circuit expressly found that "[t]he matching funds provision of the Act affects both contributions and expenditures," and therefore, must be "interpreted as though it affects fully protected speech." *Id.* Indeed, the Ninth Circuit noted that the Act affected the right of non-participating candidates and independent expenditure organizations to make unfettered expenditures of money for political speech. *Id.* Those who wish to expend monies above a certain threshold are burdened by the pain of directly benefiting their opponent. Accordingly, they may choose—and some have so chosen—to self-censor by foregoing further expenditures.

The Ninth Circuit next asked whether the challenged limitations are severe enough to require strict scrutiny. The only types of expenditure regulation this Court has ever found minimal enough to justify intermediate scrutiny are informational disclaimer and disclosure requirements. *See Buckley*, 424 U.S. at 60-84; *Citizens United*, 130 S.Ct. at 913-16. Although disclosure/disclaimer requirements arguably burden speech, they affect only the

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restrictions on contributions); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (construing *Buckley* as providing that contribution limitations warrant less compelling justification than expenditure limitations); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending").

speaker's initial decision to engage in a public debate, and do not impact the quantity, quality, or content of the speech. Thus, disclosure and disclaimer requirements are deemed minimal and require only intermediate scrutiny. All other limitations on expenditures have been deemed severe enough to require strict scrutiny.

The Ninth Circuit incorrectly analogized the Arizona matching fund penalty to disclosure/disclaimer requirements, rather than to expenditure limitations. *See McComish*, 611 F.3d at 525 (analogizing Arizona penalty to disclaimers and disclosures). As a result, the court said, "because the Act imposes only a minimal burden on fully protected speech, intermediate scrutiny applies." *Id.*

Of course, Arizona's matching funds penalty imposes a far more severe burden on expenditures than do disclaimer and disclosure requirements. In Arizona, both participating and nonparticipating candidates must comply with disclosure and disclaimer requirements. A.R.S. § 16-913 (requiring disclosures of receipts and disbursements). A speaker facing disclosure requirements must make the choice between staying mute or merely disclosing his or her identity and the amount spent. The requirement is neutral in all respects: all speakers on all covered subject matters in all amounts are subject to it.

By contrast, the Arizona matching funds provision imposes a direct and substantial burden on the speaker. It imposes almost a dollar-for-dollar penalty for any spending by a nonparticipating candi-

date above the statutory spending limit by providing an offsetting amount to each of the speaker's opposing candidates. It is not difficult to predict that many nonparticipating candidates will say "why bother?" and then muzzle themselves rather than trigger the additional funding against themselves.

It was precisely for this reason that *Davis* rejected the Millionaire's Amendment's increased contribution limits. *Davis*, 554 U.S. at 740-41. Under the Millionaire's Amendment, a self-funding candidate was forced into the choice of either self-censoring his or her speech, or speaking and thus bestowing on his or her opponent an asymmetrical increase in contribution limits. *Id.* at 739. The Court found that the prospect of conferring a benefit on the opponent created a severe burden on the self-funding candidate's speech.

The penalty in the Arizona statute is even more offensive than the penalty struck down in *Davis* because the Arizona penalty burdens not just nonparticipating candidate speech but also independent speech, and guarantees that the competing candidate will have additional resources without the need to do anything. *McComish*, 611 F.3d at 515-17. If both a nonparticipating candidate and independent groups trigger the matching funds provision, the participating candidate may have more funding than even the nonparticipating candidate.

B. The Ninth Circuit Ignored the Adverse Impact the Arizona Penalty Has on Nonparticipants.

The Ninth Circuit found the matching funds penalty justified as an incentive for candidates to participate in the public financing system. *McComish,* 611 F.3d at 526. Providing matching funds as insurance against being outspent, it reasoned, would encourage candidates to participate in the public financing system. Further, since participating candidates would be receiving "clean" taxpayer money rather than legally-raised contributions, it concluded, the provision had the effect of reducing actual or apparent corruption.

The Ninth Circuit's analysis simply misses the point. By focusing on the government's interest in providing *benefits to participants* in the system, the Court entirely ignored the lack of government justification for imposing *penalties on the nonparticipants*. *Id.* (focusing exclusively on participating candidates). In the campaign finance context, this Court has never upheld restrictions on one candidate's speech because the restriction provided a benefit to a competing candidate. If regulation of speech could be so justified, the First Amendment guarantee of free speech would be swallowed by the exception.

It is true that *Buckley* approved expenditure limitations *on willing participants in the public financing scheme*, who voluntarily accept the limitations in return for a disbursement of public funds. *Buckley,* 424 U.S. at 108. *Buckley* did not hold,

however, that the government may incentivize participation in the public financing scheme by providing incremental benefits to participants based on the actions of nonparticipants.

Supporters of the Arizona statute argue that if the original public financing system is justified, then any penalty imposed on those who choose not to participate in the system is similarly justified as a means of encouraging participation (or discouraging non-participation). *See McComish*, 611 F.3d at 525-27. This reasoning is nonsensical, and the Court has rejected such "prophylaxis upon prophylaxis" reasoning as leading to ever-expansive restrictions. *See WRTL*, 551 U.S. at 479 (plurality opinion). If the Ninth Circuit's reasoning were sound, the First Amendment would permit a tax on campaign contributions raised by nonparticipants for use in "equalizing" funding for participants. The focus of strict scrutiny must be on the burden placed on the nonparticipant: is that burden narrowly tailored to prevent *quid pro quo* corruption? The Ninth Circuit's approach of asking whether the beneficiary candidate is assisted misstates the standard and renders it largely meaningless in protecting both nonparticipating candidates and independent speakers.

When properly viewed from the perspective of a candidate who has chosen not to participate, the Arizona statute imposes a substantial burden on the right to engage in unfettered political speech. No legitimate, much less compelling, government interest justifies this burden. Certainly, the anticorruption interest is not served by penalizing the nonpar-

ticipant. To the contrary, the statute incentivizes nonparticipants either to abandon their right to join the political discussion at any level above the disbursement threshold, or to engage in even more aggressive fundraising and spending so as to exceed the maximum government grant. As the Ninth Circuit noted, the nonparticipant reaches a fundraising advantage only when spending exceeds three times the initial state disbursement. *McComish,* 611 F.3d at 516-17.

The fallacy of the Ninth Circuit's purported justification is even more clear with respect to independent expenditure organizations. Independent spending may trigger dollar-for-dollar matching funds beginning with the very first dollar spent. Moreover, the statute offers no alternative of public financing for those who desire to make independent expenditures on behalf of or opposed to political candidates.

The Arizona matching funds provision is subject to strict scrutiny, and the justification advanced in its behalf is neither legitimate nor compelling. Accordingly, the Ninth Circuit's decision is in error, and the permanent injunction against the matching funds provision must be reinstated.

CONCLUSION

For the reasons set forth above, *amicus* Senator Mitch McConnell urges the Court to reverse the decision of the Ninth Circuit Court of Appeals and to affirm the district court's permanent injunction.

Respectfully submitted,

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