

No. 10-238, 10-239

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IN THE  
**Supreme Court of the United States**

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ARIZONA FREE ENTERPRISE CLUB'S FREEDOM  
CLUB PAC, ET AL., AND JOHN MCCOMISH, ET AL.,

*Petitioners,*

*v.*

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS  
ARIZONA SECRETARY OF STATE, ET AL.,

*Respondents.*

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

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**BRIEF FOR *AMICI CURIAE***  
**COSTAS PANAGOPOULOS, PH.D., RYAN D. ENOS,**  
**PH.D., CONOR M. DOWLING, PH.D.**  
**AND ANTHONY FOWLER**

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**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici Curiae* (“*Amici*”) are scholars (political scientists) who are experts in the American electoral system including campaigns and elections, campaign strategy, voting behavior, public opinion, campaign finance, political psychology, racial politics, and state and local politics. In their research they routinely utilize econometric tools and statistical methods. The team leader, Costas Panagopoulos, Ph.D.,<sup>2</sup> is an Assistant Professor of Political Science, director of the Master’s Program in Elections and Campaign Management and founder and director of the Center for Electoral Politics at Fordham University. Dr. Panagopoulos is also an expert on public financing in American elections and editor of the forthcoming book volume, *Public Financing in American Elections* (Temple University Press). Ryan D. Enos, Ph.D. is an Assistant Professor of Government, Faculty Associate at the Institute of Quantitative Social Science, and a member of the Executive Committee for the Center for American Political Studies at Harvard University. Conor M. Dowling, Ph.D. is a postdoctoral associate in the Institution for Social & Policy Studies and the Center

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

2. A more detailed description of the credentials of each *Amici* can be found at Appendix 1, which includes *Amici*’s report “The Effects of Arizona’s Campaign Finance Laws on Campaign Spending and Free Speech” (“*Amici*’s Report”) at 2-3.

for the Study of American Politics at Yale University. Anthony Fowler is a Ph.D. student in the Department of Government at Harvard University.

*Amici* write to provide the Court with their original data analysis and the findings of their empirical testing of Petitioners' claim that the matching funds provision in Arizona's Citizens' Clean Elections Act (the "Act") inhibits the free spending of nonparticipating candidates and independent groups. *Amici* believe it is essential that the Court have empirical data regarding the systematic impact of the Act's matching funds provision on candidate spending behavior in Arizona. After conducting multiple, rigorous statistical tests, *Amici* found no empirical evidence to support the Petitioners' claim that the matching funds provision inhibits political spending (i.e., "chills" political speech). Rather, nonparticipating candidates and independent groups appear to spend just as much when the matching funds provision is applicable as they do in the absence of the law.

### **SUMMARY OF THE ARGUMENT**

Despite Petitioners' claims that the matching funds provision in the Act burdens political speech and, therefore, is subject to strict scrutiny, the empirical evidence demonstrates that the matching funds provision does not deter, limit, or otherwise restrain speech. Without such deterrence or restraint on speech, Petitioners cannot show that the matching funds provision imposes a direct and substantial burden on speech, as is necessary for this Court to apply strict scrutiny to the statute.

In an attempt to convince this Court otherwise, Petitioners have emphasized anecdote over empirical

reality. Petitioners' arguments are unavailing, however, as all available empirical evidence – the scientific studies currently in the record and the original data analyses performed by *Amici* – find no evidence that spending has been chilled. *Amici* tested whether nonparticipating candidates' spending tends to cluster below the matching funds provision's triggering threshold; if the provision actually inhibits spending by nonparticipating candidates, one would expect nonparticipating candidates to spend just below the threshold that would trigger additional funds to their participating opponents. *Amici*, however, found no evidence of such behavior. In addition, *Amici* tested whether spending by nonparticipating candidates and independent groups increased when the Act's matching funds provision was suspended by this Court's injunction in 2010. If the matching funds provision inhibited spending, one would expect a marked increase in spending by nonparticipating candidates once distribution of matching funds was suspended. Again, *Amici* found no evidence of such behavior. What do *Amici's* analyses and findings affirmatively demonstrate? (A) There is no statistically significant evidence of clustering below the triggering amount in Arizona elections between 2006 and 2010; and (B) Spending in Arizona's 2010 election, after the Court enjoined enforcement of the matching funds provision, did not increase relative to other states. *Amici's* research, analyses and findings conclusively establish that the matching funds provision does not deter or otherwise "chill" the propensity to speak by nonparticipating candidates and their supporters.

Without any such deterrence, Petitioners have simply failed to demonstrate that the matching funds provision imposes a burden on speech. However, even if this Court decides, like the Ninth Circuit, that the Act's matching



funds provision might indirectly and incidentally burden speech, the matching funds provision is only subject to intermediate scrutiny. Under intermediate scrutiny, the Ninth Circuit correctly held that the matching funds provision did not violate the First Amendment because there was a substantial relation between the Act's matching funds provision and Arizona's important and compelling government interest in preventing and combating corruption. Accordingly, the Ninth Circuit's judgment should be affirmed.

## ARGUMENT

### 1. **AMICI'S RESEARCH, ANALYSES AND FINDINGS DEMONSTRATE THAT THE MATCHING FUNDS PROVISION IN THE ACT DOES NOT IMPOSE A DIRECT AND SUBSTANTIAL BURDEN ON SPEECH**

Unlike the expenditure bans struck down in *Buckley* and *Citizens United*, and unlike the discriminatory contribution limitations struck down in *Davis*, Arizona's matching funds provision does not limit or restrict the campaign spending of nonparticipating candidates in any way. Instead, the matching funds provision is simply a triggering mechanism for the fair and efficient distribution of public funding. Confronted with this clear distinction between regulations that directly and substantially burden speech and the challenged matching funds provision, Petitioners have relied on personal, anecdotal evidence – not empirical data and scientific analysis – to claim that fundraising and spending have been unconstitutionally burdened. The *Amici's* research, however, shows that Petitioners' claims of "burden" are

overstated and unsupported and, thus, that their argument for the application of strict scrutiny is fatally flawed.

**A. Petitioners Levy Weak Support for Their Claims That the Matching Funds Provision Burdens Speech**

Petitioners rely almost exclusively on anecdotal evidence to support their assertion that the impact of the matching funds provision is to create a direct and substantial burden on speech. Yet such anecdotal evidence, because it is grounded in human attribution that, by its very nature cannot control for multi-variable causation; accordingly, such evidence, cannot foreclose the possibility that, notwithstanding the good faith beliefs or perceptions of those who gave such testimony in the proceedings below, variables *other* than the matching funds provision actually drove spending decisions. Therefore, Petitioners' evidence fails to establish definitively any causal effect between the matching funds provision and the amount of speech actually disseminated by a single candidate or Arizona candidates as a group. For example, Petitioners rely on testimony that Petitioner McLain and former gubernatorial candidate John Munger both decided to forego or minimize self-financing after considering the effect of matching funds on the competitiveness of their campaigns. However, these representations by the parties-in-interest in this case say nothing about the total amount of money ultimately spent by their respective campaigns. Nor do they definitively establish that *matching funds* (rather than, for example, a particularly strong oppositional candidate) was the causal force behind such a decision. A rational candidate will always consider her own resources and prospective resources, the resources and prospective resources of

her opponents, and the marginal value of any additional dollar spent at any given time or place, in determining an optimal campaign spending strategy.<sup>3</sup> That this is so, and that in certain circumstances the analysis of an opponent’s potential resources may involve reference to the matching funds provision, says nothing about what that opponent’s resources would have been in the absence of a public finance system or that, in the absence of the matching funds provision, the testifying candidates would necessarily have spent more money or disseminated more speech. Indeed, Petitioners themselves present several examples of candidates and independent expenditure groups making expenditures notwithstanding the presence of matching funds. *See e.g.*, Brief for Petitioners McComish *et al.* (“McComish Brief”) at 41 (noting gubernatorial candidate Matt Salmon held fundraiser notwithstanding disbursement of matching funds to his opponent); Brief for Petitioners Arizona Free Enterprise Club’s Freedom Club Pac, *et al.* at 18 -19 (“Committee Brief”) (citing independent expenditures made by Republican Party on behalf of Matt Salmon, despite the availability of matching

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3. *See e.g.*, Adam Nagourney & Jeff Zeleny, *Obama Forgoes Public Funds in First for Major Candidate*, N.Y. TIMES, June 20, 2008 (discussing factors underlying presidential candidates Barack Obama’s and John McCain’s respective decisions to reject and accept public financing, including assessments of how much the other had raised and could raise); Stanton A. Glantz *et al.*, *Election Outcomes: Whose Money Matters?*, 38 J. POL. 1033 (1976) (presenting research that marginal value of election money spent is greater for challengers than incumbents); Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 686 (2010) (underscoring the “importance of tactical maneuvering in political campaigns”), 695–698 (discussing strategies for maximizing the campaign value of political speech).

funds); McComish Brief at 32 (noting the Arizona Realtors Association made independent expenditures of \$6,500 for the election of Petitioner McComish, triggering \$18,330 to his opponents). Thus, many concrete examples in the historical record that are cited by Petitioners – rather than abstract speculation regarding what might have happened under different circumstances – show that candidates and their supporters have not been chilled by matching funds, but instead have chosen to speak, fundraise and spend without regard for the matching funds provision.

As such, although the record discusses the various *perceptions* and *attributions* of various interested parties regarding the impact of matching funds on campaign spending, such testimony is of limited value because it cannot, by its very nature, scientifically control for the possibility that factors other than matching funds affected spending choices or the alternate possibility that campaign spending has not, in adjusted terms, changed at all as a result of the matching funds provision.<sup>4</sup> Moreover, this anecdotal evidence is contradicted by the behavior of the Petitioners themselves, many of whom triggered the matching funds by exceeding the threshold despite their knowledge of the Act. *See e.g.*, Respondent Clean Elections Institute, Inc. Brief (“Clean Elections Brief”) at 6-7 (noting Senator Burns paid no attention to his opponents’ receipt or expenditure of matching funds and spent freely above

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4. Wilson, *supra*, at 699 (discussing research demonstrating “that individuals who are predisposed to a certain position or explanation are significantly less likely to generate or be receptive to disconfirming or challenging information.”); Charles G. Lord *et al.*, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

the matching funds threshold; Petitioners McComish, Bouie, and McLain each exceeded the spending limit despite the distribution of matching funds; Petitioner Martin triggered matching funds in contradiction of his sworn testimony that he could not recall having done so; matching funds never caused Petitioners Murphy or McLain to reject a contribution or stop fundraising) (citing JA 433-34; JA 704; JA 384-85; 545-46; ECF 369-2, 370-2; JA 574-75, 755; JA 410; 594-95; JA 412; JA 416.)<sup>5</sup>

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5. In addition to relying exclusively on anecdotal evidence, Petitioners mischaracterize aspects of the operation of the Act. For example, they mistakenly claim the existence of a so-called multiplier effect where multiple privately financed candidates run against a single publicly financed candidate. Petitioners suggest that in this scenario, if \$10,000 in expenditures above the spending limit are made by or on behalf of each privately financed candidate, the single publicly funded candidate will receive \$28,200 in matching funds (\$30,000 minus six percent). Committee Brief at 5; *see also* McComish Brief at 31-32. However, Petitioners have failed to acknowledge the fact that the disbursement of matching funds adjusts the spending limit for a publicly funded candidate. *See* A.R.S. § 16-952. Thus, in Petitioners' scenario, where one publicly financed candidate competes against three privately financed candidates and all candidates have spent up to (but not exceeded) a spending limit, \$10,000, for example, if an independent expenditure of \$10,000 is made on behalf of one privately funded candidate, the publicly funded candidate will receive \$10,000 in matching funds (minus six percent) and the spending limit will be adjusted upward to \$20,000. If a second or third independent expenditure of \$10,000 is made on behalf of a second or third privately funded candidate, no additional matching funds will be disbursed because the adjusted spending limit of \$20,000 has not been exceeded. All candidates have spent up to, but not exceeded, the adjusted spending limit. Thus, Petitioners' so-called "multiplier effect" simply does not exist.

**B. *Amici's* Research Extends and Confirms the Research Already in the Record Showing That the Matching Funds Provision Does Not Cause Clustering and Has No Impact on Overall Spending**

**1. Professor Green's research indicates that clustering did not occur at the Act's matching funds provision's threshold amount**

Professor Donald Green is the A. Whitney Griswold Professor of Political Science at Yale University. JA 874-75 at ¶ 2. Professor Green wanted to assess empirically whether clustering occurred at the Act's matching funds provision's threshold amount. His methodology was: (1) reviewing all campaign expenditures in 1998 before implementation of the Act; (2) reviewing all campaign expenditures in 2006 after the Act was applied; and (3) reviewing patterns of spending by nonparticipating candidates in 2006 who were opposed in the general election by at least one participating candidate. JA 943 at ¶ 10.

As Green hypothesized, if nonparticipating candidate behavior was in fact burdened by the matching funds provision's threshold limit, one would expect to see nonparticipating candidate spending cluster just below the threshold amount. In this way nonparticipating candidates could make the maximum amount of expenditures but avoid triggering the matching funds provision. Yet Professor Green's testimony is that his research unequivocally demonstrates that no such clustering occurred. *Id.* at ¶ 11.

For example, in 2006 the Act's matching funds threshold was \$17,918. *Id.* In that year 46 nonparticipating candidates faced a publicly financed opponent in the general election. *Id.* at ¶ 12. Of the 46 candidates, 39 spent less than \$15,000 and therefore never reached the matching funds threshold. JA 943-44 at ¶ 12. One candidate spent between \$15,000 and \$26,000; the remaining six candidates spent between \$26,000 and \$149,000. JA 944 at ¶ 12. Based on this "smooth" distribution, Professor Green concluded there was no tendency for nonparticipating candidates' expenditures to cluster just below the \$17,918 threshold limit. JA 943 at ¶ 11. Professor Green's findings suggest that nonparticipating candidates' behavior is not governed by the Act's matching funds provision and their speech is not burdened by the Act.

**2. The *Amici's* new research on clustering confirms that there is no statistically significant evidence of clustering in Arizona elections between 2006 and 2010**

*Amici*, like Professor Green, undertook an analysis to determine whether nonparticipating candidates in Arizona spent just below the matching funds provision's triggering threshold. Unlike Professor Green, *Amici* also included the 2010 election year in the analysis, as well as the 2006 and 2008 election years. In addition, *Amici* conducted rigorous statistical tests to determine if there was empirical evidence of systematic clustering at conventional levels of statistical significance in the election cycles they analyzed. The results of their analyses indicate that nonparticipating candidates' spending did not "cluster" below the triggering threshold.<sup>6</sup>

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6. *Amici* note that they cannot test whether spending was "chilled" for individual candidates, but they can look at

To test for clustering, *Amici* collected general election data for every nonparticipating state legislative candidate in 2006, 2008 and 2010 in Arizona who ran against at least one participating candidate. The distribution of spending for these nonparticipating candidates in each of the elections reveal no evidence of clustering below the triggering threshold, and therefore contradicts the contention that nonparticipating candidates intentionally spend below the threshold.<sup>7</sup> For 2006 and 2008, there were 88 nonparticipating candidates for state legislature running against a participating opponent in Arizona. Of those, 55 nonparticipating candidates spent less than \$10,000, which is well below the triggering thresholds in each cycle respectively. Of the remaining 33 candidates, 11 spent more than \$30,000, well above the triggering thresholds. These candidates do not appear to be deterred by the matching provision. That leaves only one-fourth of nonparticipating candidates in these election cycles whose spending could have been plausibly deterred by the matching funds provision. Among these candidates, *Amici* found no evidence that these candidates spent strategically below the threshold.<sup>8</sup>

Furthermore, this Court's issuance of an injunction suspending Arizona's matching funds provision in June 2010 failed to alter nonparticipating candidate spending behavior; as *Amici's* analysis shows, the distribution of

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the spending of many candidates to assess the extent to which candidates may have strategically held back their spending to avoid triggering matching funds.

7. For complete details on this analysis please see Appendix 1, *Amici's* Report at 4-9.

8. Appendix 1, *Amici's* Report at 5.



spending is similar for all three years, and there is no evidence of clustering in any year. In fact, in 2006 and 2008, more candidates spent just above the threshold than just below, which is the opposite behavior one would have expected if the matching provision chilled speech.<sup>9</sup>

As an additional test, the *Amici* conducted the same analytical method for the state of Maine, which has a similar, although not identical,<sup>10</sup> matching funds provision as Arizona, to test whether a similar pattern exists there. *Amici* compiled general election spending data from nonparticipating state legislative candidates from 2000-2010, and found no statistical evidence of clustering around the triggering threshold.<sup>11</sup> In short, analysis of clustering around the triggering threshold in Arizona and Maine indicates that nonparticipating candidates do not spend up to the threshold, and then strategically stop their spending to avoid triggering the matching funds.<sup>12</sup>

Accordingly, as Professor Green previously demonstrated, and *Amici* now confirm with original analyses of the 2006, 2008 and 2010 election cycles, the matching funds provision does not cause a clustering of spending below the triggering threshold, which in turn demonstrates that the matching funds provision does not deter or otherwise “chill” spending.

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9. *Id.* at 5-6.

10. Maine’s matching funds provision can be found at 21-A Maine Revised Statutes (“M.R.S.”) § 1125(9).

11. Appendix 1, *Amici’s* Report at 6, 9.

12. *Id.* at 6-9.

**C. The *Amici's* Research and Analysis Demonstrates No Change in Political Spending in 2010 Despite this Court's Injunction Suspending the Act's Matching Funds Provision**

The Respondents' experts have previously demonstrated that the Act's matching funds provision did not create a reduction in privately financed candidates' or independent group's expenditures, but instead that expenditures of both have increased over time since the Act took effect in Arizona. *See, e.g.*, Clean Elections Brief at 6-7, 18-19. *Amici* recognized that this Court's injunction, which suspended the distribution of matching funds during the 2010 Arizona elections, provided a unique opportunity to test for the effects of the matching funds provision on overall campaign spending to see whether spending increased in 2010 more than would have been expected had the matching funds provision not been enjoined. *Amici*, therefore have collected and analyzed political expenditure data in Arizona in order to analyze the injunction's effect on spending. If, as Petitioners argue, the Act's matching funds provision deters political spending and therefore burdens speech, one would expect to see a marked increase in political spending in the 2010 election *after* suspension of the matching funds provision. Instead, the empirical data fail to demonstrate any statistically significant evidence of an increase in 2010 election spending in Arizona.<sup>13</sup>

Again using the Arizona spending data, *Amici* analyzed the mean and median levels of spending for

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13. For complete details of the analyses performed by *Amici* please see Appendix 1, *Amici's* Report, at 9-15.

nonparticipating state legislative candidates who ran against at least one publicly funded opponent in 2006, 2008 and 2010. The data revealed that the distribution and magnitude of spending was no different under a system of matching funds (2006 and 2008) than it was when the matching funds provision was removed in 2010. In fact, spending levels were lower in 2010 than in 2008. This is evidence that matching funds did not “chill” the spending of nonparticipating candidates because if they had, there would be more spending in 2010 after the injunction was issued.<sup>14</sup>

To test this hypothesis further, *Amici* compared Arizona and Maine since both states have similar matching funds programs and both states have similar levels of *per capita* campaign spending. Comparing Arizona and Maine, both states exhibit a similar trend in spending from 2002 to 2008. If, as Petitioners contend, the matching funds provision actually chilled political spending, the injunction in Arizona should have caused Arizona’s spending to significantly increase relative to Maine (where there was no injunction on the matching funds). However, the evidence shows that *per capita* spending overall in Maine actually increased more so than Arizona between 2008 and 2010, further proving that there is no evidence that the injunction increased spending in Arizona.<sup>15</sup>

For yet another test of this hypothesis, *Amici* collected data on overall campaign spending from 2000 through

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14. Appendix 1, *Amici’s* Report at 10.

15. *Id.* at 11.

2010 for as many states as possible.<sup>16</sup> For each state *Amici* obtained the following: (1) the total amount of spending by statewide and state legislative candidates and (2) total amount of spending by PACs and interest groups.<sup>17</sup> Next, *Amici* employed a statistical technique called synthetic control that allowed *Amici* to find the weighted average of other states that most closely mirror Arizona in terms of campaign spending, population, population growth and other demographic or political variables. Through multiple tests and specifications, *Amici* found no evidence that overall campaign spending increased in Arizona in 2010 relative to the synthetic control of other comparable states, despite the injunction. If anything, the increase in overall spending in Arizona between 2008 and 2010 was *smaller* than the increase in these other states.<sup>18</sup>

As a final test of the effects of the 2010 injunction, *Amici* employed the “difference-in-differences”<sup>19</sup> method to test whether election spending in Arizona in 2010 increased more than would have been expected in absence of the injunction. *Amici* then generated regression analyses (i.e., predictive statistical spending models) to test if the injunction caused the difference between

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16. *Id.* at Appendix Table 1.

17. For each state, campaign expenditure data was collected from the state’s official election web pages.

18. Appendix 1, *Amici’s Report* at 12-13 (providing an example of such a synthetic control analysis using California, Maine, Michigan and Tennessee).

19. A difference-in-differences method simply means looking at the differences in changes in spending from one election year to the next between sets of states.

Arizona in 2010 and previous years to be greater than the difference between 2010 and previous years for other states. The regression models test for the effect of the 2010 injunction in Arizona, while controlling for different average levels of spending in each state and for different spending levels in each year (captured through the use of state and year fixed effects variables in the models).<sup>20</sup> The regression models estimated the effect of the injunction on three types of spending: (1) total candidate spending, (2) total spending of privately funded, nonparticipating candidates, and (3) total spending by PACs and independent groups.<sup>21</sup> If matching provisions caused a “chill” on campaign spending before 2010, a large, positive effect of the injunction on spending would be expected. However, for all three types of spending, there was not a statistically significant or substantively significant effect of the injunction. In fact, the models indicate that candidate spending actually decreased after the injunction in 2010.<sup>22</sup> This is the opposite of what should happen if spending was chilled, as Petitioners contend. Indeed, focusing on the analysis of private and independent spending, the nonparticipating candidates spent three dollars per person less than expected and independent groups spent twenty-five cents per person more than expected.<sup>23</sup> Neither result, however, is statistically significant or substantively meaningful. In sum, there was no evidence found to support the notion that the injunction resulted in increased spending or

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20. Appendix 1, *Amici's Report* at 14.

21. *Id.*

22. *Id.* at 15.

23. *Id.*

that the matching funds provision inhibited spending in Arizona. Accordingly, Petitioners claim that the matching funds provision deters or otherwise “chills” spending is entirely unsupported by the empirical evidence.

**II. ALTHOUGH THE EMPIRICAL DATA REVEAL THAT THERE IS NO EVIDENCE THAT THE ACT’S MATCHING FUNDS PROVISION BURDENS SPEECH, IF THIS COURT FINDS THAT THERE MAY BE AN INCIDENTAL OR INDIRECT BURDEN, THE MATCHING FUNDS PROVISION IS SUBJECT ONLY TO INTERMEDIATE SCRUTINY REVIEW**

Given that Petitioners have failed to provide any concrete evidence that the Act substantially deters or in any way limits their spending, coupled with the fact that the empirical analyses reveal that no such burden on speech can be found in Arizona state elections, Petitioners have simply failed to demonstrate that the matching funds provision burdens their speech. However, even if this Court decides, like the Ninth Circuit, that the matching funds provision might indirectly and incidentally burden speech, the matching funds provision is subject to only intermediate scrutiny. *McComish v. Bennett*, 611 F.3d 510, 520 (9th Cir. 2010); *see also Buckley v. Valeo*, 424 U.S. 1, 52 (1976); *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 908 (2010); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 740 (2008). As the research and analyses performed by *Amici* demonstrate, there is no empirical evidence that the matching funds provision even incidentally burdens speech, as Arizona’s campaign spending continued to rise while the matching funds provision was in place, and there was no statistically significant increase in spending

when the matching funds provision was suspended by the injunction in 2010. *See supra* pp. 8-12.

Ultimately, Petitioners' complaint about the Act's matching funds provision is not that their speech has been silenced, but rather that their opponents' speech has been enabled. If the Court accepts this proposition it will allow Petitioners to use the First Amendment to condone a candidate's choice not to speak unless his can be the only voice heard. The Ninth Circuit properly rejected this argument, as did the First Circuit before it. *See* *McComish*, 611 F.3d at 524; *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (holding the First Amendment includes "no right to speak free from response"). The Court should do so as well.

**CONCLUSION**

Based on the foregoing, the Act's matching funds provision does not place a direct and substantial burden on political speech, subjecting the statute to intermediate, not strict scrutiny. Accordingly, because the matching funds provision directly furthers Arizona's compelling interest in combating corruption and enhancing political speech, the Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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