

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARIZONA FREE ENTERPRISE CLUB'S :

4 FREEDOM CLUB PAC, ET AL., :

5 Petitioners : No. 10-238

6 v. :

7 KEN BENNETT, IN HIS OFFICIAL :

8 CAPACITY AS ARIZONA SECRETARY OF :

9 STATE, ET AL. :

10 - - - - - x

11 and

12 - - - - - x

13 JOHN MCCOMISH, ET AL., :

14 Petitioners : No. 10-239

15 v. :

16 KEN BENNETT, IN HIS OFFICIAL :

17 CAPACITY AS ARIZONA SECRETARY OF :

18 STATE, ET AL. :

19 - - - - - x

20 Washington, D.C.

21 Monday, March 28, 2011

22

23 The above-entitled matter came on for oral
24 argument before the Supreme Court of the United States
25 at 10:03 a.m.

1 APPEARANCES:

2 WILLIAM R. MAURER, ESQ., Seattle, Washington; on behalf
3 of Petitioners.

4 BRADLEY S. PHILLIPS, ESQ., Los Angeles, California; on
5 behalf of Respondents.

6 WILLIAM M. JAY, ESQ., Assistant to the Solicitor
7 General, Department of Justice, Washington, D.C.; on
8 behalf of United States, as amicus curiae, supporting
9 Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 10-238, Arizona Free
5 Enterprise Club's Freedom Club PAC v. Bennett and the
6 consolidated case.

7 Mr. Maurer.

8 ORAL ARGUMENT OF WILLIAM R. MAURER

9 ON BEHALF OF THE PETITIONERS

10 MR. MAURER: Mr. Chief Justice, and may it
11 please the Court:

12 This case is about whether the government
13 may insert itself into elections and manipulate campaign
14 spending to favor its preferred candidates. Arizona
15 does this in a manner that is even more burdensome to
16 free speech than the law at issue in Davis v. FEC.
17 Arizona burdens the law of three groups that pose no
18 threat of corruption under this Court's precedents:
19 Independent expenditure groups, self-financed
20 candidates, and candidates who raise private funds under
21 one of the lowest contribution limits in the Nation.

22 Under Davis v. FEC and this Court's
23 well-established precedents, the matching funds
24 provision is unconstitutional and should be struck down.

25 JUSTICE GINSBURG: Mr. Maurer, you -- you

1 don't have any objection, you wouldn't have any
2 objection, if Arizona trebled the amount at the outset?
3 In other words, there was a maximum amount, the
4 so-called matching funds; if it were given all in one
5 lump and the publicly funded candidate was told, give it
6 back if you don't use it, that would be okay?

7 MR. MAURER: That would be constitutional
8 under Davis, Your Honor.

9 This case is not about whether the State of
10 Arizona may provide campaign financing using public
11 funds, nor is it about whether -- the ability of Arizona
12 to ensure that those who receive the public funds can
13 run effective campaigns. What this case is about is
14 whether the government can turn my act of speaking into
15 the vehicle by which my political opponents benefit with
16 direct government subsidies.

17 JUSTICE KAGAN: Could I try to understand
18 that argument a little bit better, Mr. Maurer?
19 Suppose -- and I know that you think this is not the
20 case, but just bear with the hypothetical. Suppose that
21 there were, in fact, no deterrent effect on your speech
22 or on the speech of any candidate; in other words, that
23 people thought, well, you know, I would rather be --
24 have me be the only person who talks, but -- but I would
25 rather talk than be silent, even if it means my opponent

1 can talk, too, so that there's no deterrent effect from
2 this law whatsoever.

3 Would there still be a constitutional
4 objection?

5 MR. MAURER: Your Honor, in Davis this Court
6 recognized that a trigger like this, a -- the law that
7 turns the choice of -- my choice to speak effectively
8 into fundraising advantages for my opponents constitutes
9 a substantial burden. So even if candidates continue to
10 speak, the law constitutes a substantial burden on their
11 speech.

12 JUSTICE KAGAN: Well, it constitutes a
13 substantial burden, so even if every single person makes
14 a choice, yes, I want to continue to speak, it does not
15 chill any speak -- any speech. I suppose I'm not sure
16 what it means to constitute a substantial burden if, in
17 fact, the law does not chill speech.

18 MR. MAURER: Well, Your -- Your Honor, this
19 Court in Davis recognized that when the government
20 reaches into a campaign and attempts to manipulate
21 campaign financing in order to -- in order to basically
22 effectuate the outcome, that constitutes a -- an
23 illegitimate governmental purpose.

24 JUSTICE SCALIA: Mr. Maurer, suppose --
25 suppose the government imposes a fine of \$500 for all

1 political speech, and people nonetheless continue to
2 engage in political speech and pay the \$500. Would that
3 make the \$500 penalty for political speech
4 constitutional?

5 MR. MAURER: No, it would not, Your Honor.

6 JUSTICE KAGAN: But, in fact, there's no
7 such restriction here, is there, Mr. Maurer? There's no
8 restriction at all here; it's more speech all the way
9 around?

10 MR. MAURER: I would disagree with that,
11 respectfully, Your Honor. There is a restriction here.
12 Every time an independent expenditure group or a
13 privately financed candidate speaks above a certain
14 amount, the government creates real penalties for them
15 to have engaged in unfettered political expression.

16 JUSTICE KAGAN: Well, doesn't the government
17 actually just give a selective subsidy? It's not a
18 penalty, it's just saying, in order to -- to run an
19 effective public financing system, when you speak, we're
20 going to give a subsidy over a certain amount. So the
21 trigger does not trigger a penalty; it triggers a
22 subsidy.

23 MR. MAURER: Your Honor, in Davis, this
24 Court recognized that in the context of competitive
25 elections, which are a zero-sum game, what benefits one

1 candidate will burden, necessarily, or harm the other
2 candidate.

3 JUSTICE SCALIA: Didn't they call it a
4 subsidy in Davis? I -- if I recall the argument, I
5 think that's what -- what it was characterized as there,
6 too. Did they characterize it as a penalty? I doubt
7 it.

8 MR. MAURER: In fact, it was not a subsidy
9 in Davis, Your Honor. The -- the effect of this law is
10 considerably harsher than the law at issue in Davis. In
11 Davis, the non-millionaires' candidate still had to go
12 out and actually raise the funds that the Millionaires'
13 Amendment permitted him to raise. In this case, the law
14 provides direct government subsidies, based on my act of
15 speaking, to my political opponents.

16 JUSTICE KAGAN: There is, though, a
17 significant difference between Davis and this case.
18 What the expenditure triggered in Davis was a
19 discriminatory restriction that would never be allowed
20 in and of itself. What the law triggers here is
21 something that, as Justice Ginsburg said, the government
22 could do from the get-go, which is subsidize the speech
23 of a candidate who decides to participate in a public
24 financing system.

25 MR. MAURER: Well, Your Honor, the -- I

1 would point out that independent expenditure groups do
2 not have that choice of participating in the subsidy or
3 not. So to the extent that Davis relied on the fact
4 that there was a discriminatory treatment of speakers in
5 the same race, this case -- this law replicates and
6 actually exacerbates the harm that was at issue in
7 Davis.

8 JUSTICE KAGAN: But there's no particular
9 as-applied challenge from independent speakers in this
10 lawsuit, is there?

11 MR. MAURER: Yes, there is, Your Honor. I
12 represent two independent expenditure groups.

13 JUSTICE KAGAN: My -- my understanding was
14 that the suit was brought as a facial challenge to the
15 entire law.

16 MR. MAURER: This is a facial and as-applied
17 challenge, Your Honor.

18 JUSTICE KENNEDY: In -- in this case, do you
19 think the law is content-neutral within its own
20 universe, which applies just to political speech, so
21 it's not content-neutral in that sense? But within the
22 scheme that it sets up, is it content-neutral?

23 MR. MAURER: Absolutely not, Your Honor.

24 JUSTICE KENNEDY: Why?

25 MR. MAURER: Because the only thing that

1 will trigger matching funds, particularly for
2 independent expenditure groups, is the content of the
3 message. If an independent expenditure group speaks in
4 favor of a privately financed candidate, they will not
5 trigger matching funds. If they speak against a
6 publicly financed candidate, they will trigger matching
7 funds. That not is only content-based; it is also a
8 rejection of the standard this Court enunciated in
9 Citizens United that the government cannot make
10 distinguishing burdens on the basis of an identity of a
11 speaker.

12 JUSTICE KENNEDY: In Justice Ginsburg's
13 hypothetical -- I'm still trying to think about --
14 suppose there is one candidate for the -- for the pink
15 party, and then three candidates for the orange party,
16 and all three candidates for the orange party received
17 the lump sum Justice Ginsburg was talking about. But
18 there's only one candidate on the other side, and he has
19 to face, or she has to face, three.

20 Is that constitutional?

21 MR. MAURER: It would not be -- I'm sorry.
22 It would be constitutional under Davis. And I -- and I
23 think that the point, Your Honor, is reflected --

24 JUSTICE SCALIA: I didn't understand the
25 hypothetical. I really didn't.

1 JUSTICE KENNEDY: One person is on one side;
2 three people are on the other side. And under the
3 Arizona law, if the three people on the other side are
4 all participating candidates, each of them gets a bonus
5 if there's only one person speaking on behalf of the
6 non-participating candidate, right?

7 MR. MAURER: Yes, that's absolutely true.

8 JUSTICE KENNEDY: All right. So \$10,000 by
9 the non-participating candidate triggers off \$30,000
10 against him?

11 MR. MAURER: That's exactly right.

12 JUSTICE KENNEDY: All right. In Justice
13 Ginsburg's hypothetical, wouldn't you have the same
14 problem in different terms, in that one candidate faces
15 three people, all of whom are funded by the -- by the
16 government?

17 MR. MAURER: Well, this case is not
18 challenging a public financing system, and --

19 JUSTICE KENNEDY: I'm just asking as a
20 theoretical matter whether there would be a
21 constitutional problem in the case that I put under
22 Justice Ginsburg's hypothetical.

23 MR. MAURER: Not under Davis, Your Honor.

24 JUSTICE GINSBURG: How about not under
25 Buckley?

1 JUSTICE KENNEDY: How about under the First
2 Amendment?

3 MR. MAURER: There may be -- there may be
4 instances where a public financing law is so lopsided
5 that it creates a coercive effect, and Buckley was quite
6 clear that one of the things that was acceptable about
7 the public financing system at issue in that case was
8 that it was voluntary.

9 But in this case, we're dealing with a very
10 different type of First Amendment harm. The trigger
11 matters, Your Honors. It is, in fact, determinative.
12 It is exactly the same kind of trigger --

13 JUSTICE GINSBURG: I thought that the point
14 of Buckley was that the public funding, which you can
15 accept or reject, the justification for it was that it
16 increased rather than decreased speech. And the -- I
17 think you were quite right in recognizing that matching
18 funds, this Court has said, do not conflict with the --
19 with the First Amendment.

20 MR. MAURER: Your Honor, if I -- if I had
21 said that, I was mistaken.

22 JUSTICE GINSBURG: Not matching funds.
23 Public funding.

24 MR. MAURER: Oh, okay.

25 JUSTICE GINSBURG: Public funding. And so

1 if it turns out that the States -- public funding isn't
2 being used because -- because the limits are low, and
3 yet the, the State wants to conserve the public fisc.
4 So instead of just increasing the amount at the outset,
5 it says the -- the -- the object is the same, but we're
6 economizing by not giving it out in one lump sum, we're
7 giving it out in installments.

8 MR. MAURER: Your Honor, in Riley v.
9 National Federation of the Blind, this Court recognized
10 that -- that the government cannot sacrifice speech for
11 efficiency, and what -- if -- if we accept the holding
12 of Davis v. FEC and accept that that is still a holding
13 that is viable under the First Amendment, then what
14 the -- the position of the Respondents is, is that they,
15 in fact, can sacrifice free speech in order to be more
16 efficient, but --

17 JUSTICE BREYER: Can you -- can you tell me
18 on that, because I take it you agree with Justice
19 Ginsburg about Buckley. In Buckley the Court says,
20 public financing is a means of eliminating the improper
21 influence of large private corporations, furthers a
22 significant government interest.

23 We both agree that's what it says?

24 MR. MAURER: Yes, that's what Buckley says,
25 Your Honor.

1 JUSTICE BREYER: I take it that's what it
2 means. All right.

3 Now, your objection is how much do they pay.

4 MR. MAURER: No.

5 JUSTICE BREYER: Here they have a trigger,
6 not -- not quantitatively. But here they say it's okay
7 to finance a public candidate publicly, okay to do that.
8 Now, what we're going to do is give them a million
9 dollars to start with, up to \$3 million to spend,
10 depending on how much their opponents spend. Now, you
11 think that's unconstitutional?

12 My question to you is, what would be a
13 constitutional system in your opinion?

14 MR. MAURER: Your Honor --

15 JUSTICE BREYER: That would be helpful.

16 MR. MAURER: Your Honor, in Buckley this
17 Court recognized --

18 JUSTICE BREYER: I'm not interested in
19 Buckley. I'm interested in your opinion. You object to
20 the amount being paid in installments. What, in your
21 opinion, would be a constitutional system? I don't need
22 to repeat my question, which I just did, but I want that
23 answer, your answer to that.

24 JUSTICE SCALIA: I assume your opinion can
25 be based upon Buckley, however.

1 (Laughter.)

2 MR. MAURER: Yes, the presidential financing
3 system is constitutional, Your Honor. And I would
4 also -- I would also respectfully disagree with your
5 characterization that the -- the nature of our objection
6 has to do with the fact that our opponents are receiving
7 money.

8 The problem here is not that our -- the
9 opponents of my clients are receiving money. It's what
10 triggers that, and what triggers that is my exercise of
11 my free speech rights.

12 JUSTICE ALITO: Would there be anything
13 unconstitutional about a system that worked roughly like
14 this? At the beginning -- at some point prior to each
15 election cycle, the commission that supervises this law
16 would make a calculation about how much money would be
17 needed for a candidate in a gubernatorial race or a
18 State senate race or an assembly race, if that's what
19 it's called in Arizona, to get that candidate's message
20 out to the electorate, and that would be the amount of
21 the public funding, period.

22 MR. MAURER: That would be a constitutional
23 system, Your Honor. There is no constitutional
24 objection or at least we're not raising any
25 constitutional objection to the idea that there is a --

1 that public financing means that people can't run
2 effective races. You can have a public financing system
3 with sufficient funds to run an effective race. But
4 what you cannot do is exactly what Arizona has done,
5 which is turn my act of speaking into the vehicle by
6 which my political opponents benefit.

7 JUSTICE KAGAN: But that's interesting,
8 Mr. Maurer, because I don't see all that much of a
9 difference between Justice Alito's hypothetical and the
10 facts here. In other words, you said that Justice
11 Alito's hypothetical would be constitutional, even
12 though under Justice Alito's hypothetical the State is
13 trying to figure out how much money it takes to run a
14 competitive race and giving people who enter the public
15 financing system that amount of money. That's exactly
16 what the State is doing here, but it's doing it in
17 actually a more accurate way.

18 So if Justice Alito's hypothetical is
19 constitutional, why isn't this? They're both trying to
20 do the same thing, which is to put sufficient money in
21 the hands of people who enter the public financing
22 system in order to run a competitive race.

23 MR. MAURER: Your Honor, one of the things
24 that would distinguish that is that it -- Justice
25 Alito's hypothetical completely divorces the amount of

1 the grant from my political activity or the political
2 activity of people who don't want to or cannot take
3 public funds in Arizona.

4 JUSTICE KAGAN: Well, I think, to the
5 contrary, in Justice Alito's hypothetical, just the
6 State is estimating how much a person will spend. Here
7 the State is measuring how much a person will spend.
8 The only difference is that one is more accurate than
9 the other.

10 MR. MAURER: Your Honor, I believe the
11 distinction would lie in the fact that the purpose of
12 this law is not to provide necessarily the ability of
13 candidates to run effective publicly financed campaigns.
14 The purpose of this law is to limit spending in
15 elections and to level the playing field. Justice
16 Alito's hypothetical --

17 JUSTICE KAGAN: I think the purpose of this
18 law is to prevent corruption. That's what the purpose
19 of all public financing systems are.

20 MR. MAURER: Your Honor, I would
21 respectfully disagree that the purpose of this law is to
22 prevent corruption, and I would like to read from the
23 executive director of the Clean Elections Commission who
24 said that: "It cannot be disputed that the purpose of
25 the Clean Elections Act is to equalize the playing field

1 and to give participating candidates equal opportunity
2 to get their message out," which is at Joint Appendix
3 236.

4 JUSTICE KAGAN: Well, Mr. Maurer, some
5 people may use certain buzz words and other people don't
6 use those buzz words, but isn't it true that for 40
7 years what public financing systems have been based upon
8 is the idea that when there is a lot of private money
9 floating around the political system, that candidates
10 and then public office holders get beholden to various
11 people who are giving that money and make actions based
12 on how much they receive from those people, and that's
13 the idea of a public financing system is to try to
14 prevent that?

15 MR. MAURER: Well, that is the basis of
16 public financing systems in general, but this system
17 does not actually address that because this Court --

18 JUSTICE SCALIA: We have the contrary argue
19 here. I'm sure that in some of the public financing
20 cases that we've heard argued, it was asserted that the
21 purpose was to level the playing field, and that that
22 was an entirely valid purpose. I'm unaware that all
23 public financing laws have had as their purpose simply
24 to avoid corruption.

25 MR. MAURER: Your Honor, it -- when this law

1 was promoted, when it was drafted, when it was
2 propagated and -- and -- and campaigned about to the
3 people of the State of Arizona, it was presented as
4 doing two things: Leveling the playing field and
5 limiting spending in campaigns.

6 It wasn't until this Court's decision in --
7 in Davis that the State of Arizona suddenly discovered
8 that the purpose of the law was actually to fight
9 corruption or the primary purpose was to actually fight
10 corruption.

11 JUSTICE GINSBURG: What about all the
12 background, there had been a number of scandals in
13 Arizona, there had been vote buying? I thought that
14 that was part of the origin of this law, was not as you
15 now say had nothing to do with corruption. I thought it
16 emerged out of that, those startling incidents of people
17 actually selling their votes.

18 MR. MAURER: Well, they were selling their
19 votes for outright bribes, Your Honor. They weren't
20 selling them for campaign contributions. And if this
21 law was aimed at the single narrow exception that this
22 Court recognized to the -- to the general principle that
23 restrictions on political activity violate the First
24 Amendment, then they would not have structured this law
25 in the way that they did, which is to burden the speech

1 of three political speakers that pose no threat of
2 corruption under this Court's precedents. It's --

3 JUSTICE SOTOMAYOR: Counsel, you keep --
4 I -- I just want to understand exactly what you claim
5 the burden is, because I thought that what the circuit
6 and the courts below said was that there was no evidence
7 that any candidate actually didn't speak or didn't fund
8 raise because of this law. There's some claims to the
9 contrary in your briefs before us, but I've looked for
10 that below, and there doesn't appear to be any record of
11 that.

12 So, I'm going to start from that -- that
13 assumption, that there was no evidence in the courts
14 below that any candidate stopped speaking because of or
15 stopped collecting money because of this. So exactly
16 what is the burden otherwise? What are you claiming the
17 burden is? The burden is that the -- that the
18 government is choosing to give someone else money?

19 MR. MAURER: No, Your Honor. First, I would
20 respectfully disagree with the characterization of the
21 Ninth Circuit of the evidence produced at the district
22 court. There was considerable evidence of people not
23 making expenditures, of slowing their fund-raising,
24 as -- as one of my clients put it, to a crawl in order
25 to avoid triggering matching funds. But even if that

1 were relevant, the -- or even if that -- that material
2 did not exist, in Davis this Court recognized that the
3 inherent structure of the Act constitutes a substantial
4 burden on speech because it presents the choice of
5 having to either engage --

6 JUSTICE SOTOMAYOR: I -- I want to go, not
7 rely on Davis, but just articulate for me, assuming my
8 hypothetical, the burden is that you have to delay
9 fund-raising or delay expenditures because you're
10 choosing to do so.

11 MR. MAURER: We are not choosing to do so.
12 We're -- we are being coerced into do -- doing so by the
13 government.

14 JUSTICE SOTOMAYOR: No, if you spend it --
15 if you spend it at the time you want to, you collect it
16 at the time you want, no one's -- the law's not telling
17 you not to do it. You find it an advantage not to do
18 it, correct?

19 MR. MAURER: No.

20 JUSTICE SOTOMAYOR: Because your opponent
21 won't speak as loud and won't respond, correct?

22 MR. MAURER: I -- I would respectfully
23 disagree, Your Honor. What the harm in delaying your
24 speech is that in order to minimize the -- the
25 triggering of substantial, and I would -- I would also

1 add unfair benefits to a publicly financed candidate
2 based on one's act of unfettered political expression,
3 candidates and independent expenditure groups all
4 testified, all the Petitioners testified that they
5 delayed speaking in order to minimize the effect of
6 matching funds, and the --

7 JUSTICE ALITO: Suppose the -- suppose the
8 Court after this argument sent you a letter saying if
9 you would like to file an additional brief, you have the
10 opportunity to do so, and we're not going to allow your
11 opponent to file a brief. Would you take advantage of
12 that opportunity?

13 MR. MAURER: All thing -- all else things
14 being equal, yes, Your Honor.

15 JUSTICE ALITO: Now, if we said you can file
16 an extra brief, but if you do that your opponent will
17 also be able to file an extra brief. Would that figure
18 in your thinking?

19 MR. MAURER: It certainly would, Your Honor;
20 and under Arizona's system, if you applied Arizona's
21 system to this hypothetical, not only would Mr. Phillips
22 be able to file an additional brief, but the State of
23 Arizona would be able to file an additional brief, and
24 the Solicitor General's office would be able to file an
25 additional brief, and anyone who weighed in on the other

1 side would be able to file an additional brief.

2 That's the very nature of this law, in that
3 it creates -- it is entirely structured to create
4 disincentives, as the proponents of this act were quite
5 clear, it was to create disincentives on people speaking
6 or engaging in political activity more than the
7 government preferred.

8 JUSTICE KENNEDY: Do you think it would be a
9 fair characterization of this law to say that its
10 purpose and its effect are to produce less speech in
11 political campaigns?

12 MR. MAURER: I believe that that is a -- a
13 goal, and I believe that's the effect. The entire --
14 the entire motivation of this law was to limit the --
15 limit spending in leveling the playing field. Limiting
16 spending indicates that they wanted less political
17 speech in the State of Arizona, and that's what they've
18 got.

19 JUSTICE BREYER: Do you think that if Joe
20 Smith doesn't have much money, takes public finance at
21 all, that that could discourage some other people, Brown
22 and Johnson, from running?

23 MR. MAURER: No, I don't believe so.

24 JUSTICE BREYER: No, there's not -- it's not
25 going to -- it's not going to be a situation where

1 government paying a million dollars to Smith to help him
2 in the campaign would discourage some other person from
3 running?

4 MR. MAURER: I don't believe so, Your Honor.
5 It -- it's not --

6 JUSTICE BREYER: If we -- if we say, you can
7 file a brief and if you do, other people can file, is
8 that my -- forget the briefs. It's too farfetched.

9 (Laughter.)

10 JUSTICE SCALIA: It's very clear, however.
11 (Laughter.)

12 JUSTICE BREYER: I did -- I did think you
13 would give the other answer, to tell you the truth,
14 because I just don't see why giving somebody a million
15 dollars might not discourage a -- a poorer candidate
16 from running.

17 MR. MAURER: Well, Your Honor, the courts
18 that have looked at public financing systems, including
19 the Buckley court, noticed or were made clear that one
20 of the things that constitutes a constitutional public
21 financing system is its voluntariness. At certain
22 margins --

23 JUSTICE BREYER: No, no. Joe, the guy who
24 wants it, it's voluntary for him; but his opponents
25 can't do anything about that.

1 I'm just saying Joe takes the money, so
2 Brown and Smith say: Oh my God, he has a million
3 dollars, forget it. I'll stay home. I won't run.

4 MR. MAURER: Well --

5 JUSTICE BREYER: And you say that just
6 doesn't happen?

7 MR. MAURER: I --

8 JUSTICE BREYER: Never happens? Okay.

9 MR. MAURER: I --

10 JUSTICE BREYER: And I gather that people
11 who have looked into the Arizona scheme also say what
12 you think will happen never happens, either.

13 MR. MAURER: Your -- Your Honor --

14 JUSTICE BREYER: So should we look at both
15 instances?

16 MR. MAURER: Your Honor, it's not the
17 question of people being dissuaded from running because
18 their opponent may be able to mount an effective
19 campaign. The issue is the government turning my speech
20 into the vehicle by which my entire political message is
21 undercut.

22 And if there are no further questions, I would
23 like to reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Phillips.

1 ORAL ARGUMENT OF BRADLEY S. PHILLIPS
2 ON BEHALF OF THE RESPONDENTS

3 MR. PHILLIPS: Mr. Chief Justice, and may it
4 please the Court:

5 Public funding of elections results in more
6 speech and more electoral competition and directly
7 furthers the government's compelling interest in
8 combatting real and apparent corruption in politics.
9 There was a suggestion in response, I believe, to
10 Justice Kagan's question that this law was not intended
11 to combat corruption, but I --

12 CHIEF JUSTICE ROBERTS: But counsel, how --
13 the supposition that it results in more speech, let's
14 take the independent expenditure example. You've got
15 one candidate running against three others. There's an
16 independent expenditure on behalf of the one candidate.
17 That means, say \$10,000. That means each of the other
18 three get \$10,000 of their own. Now, that might promote
19 more speech, but the effect may well be for the
20 independent expenditure to say, I'm not going to spend
21 the money, and so the other candidates don't get the
22 money and you have less speech.

23 MR. PHILLIPS: Well, Your Honor, it would
24 result in more speech certainly if all the candidates
25 got the \$10,000. There's no evidence in the record of

1 anyone actually not spending, any independent group not
2 spending money either in that circumstance or any other
3 circumstance.

4 CHIEF JUSTICE ROBERTS: How would you --
5 what would that evidence look like?

6 MR. PHILLIPS: The evidence would -- would
7 simply look -- plausibly, even just someone saying that
8 they didn't spend money because of that, although that
9 would be not very hard evidence. But there isn't even
10 that sort of evidence with respect to independent groups
11 here, Your Honor. And it makes sense, Your Honor --

12 CHIEF JUSTICE ROBERTS: Well, other than
13 somebody saying it, I'm just curious what the evidence
14 would look like. You're -- it's -- you're proving a
15 negative. You're saying, well, this person didn't do
16 something because of this, and that's pretty hard to do.

17 MR. PHILLIPS: I -- that's possibly true,
18 Your Honor. The statistical data, however, here
19 indicates that individual expenditures have in fact gone
20 up since the implementation of matching funds in
21 Arizona. That obviously doesn't directly address the
22 three-candidate situation, I acknowledge that. But
23 there's no evidence that independent expenditures have
24 been suppressed at all, Your Honor. And I would -- I
25 think the question here, Your Honor, is --

1 JUSTICE SCALIA: May I ask how it -- how it
2 combats corruption unless it suppresses large
3 contributions --

4 MR. PHILLIPS: It combats --

5 JUSTICE SCALIA: -- by certain entities? I
6 mean, I can understand you say, well, it will stop big
7 donors from giving \$10 million to somebody's campaign
8 and having that person in his pocket. But that -- that
9 donor is still going to have that -- that senator or
10 whoever it is just as much indebted to him if he gives
11 \$10 million, regardless of whether everybody else gets
12 \$10 million as well.

13 How does it -- how does it combat corruption
14 unless -- unless the other side is correct that its
15 whole purpose is to suppress the contribution of \$10
16 million, to make it unworthwhile for anybody to give \$10
17 million?

18 MR. PHILLIPS: Your Honor, Arizona's
19 triggered matching funds provision combats corruption in
20 the same manner that public funding combats corruption,
21 because that -- the law is designed to encourage
22 candidates to accept public funding because it offers a
23 viable public funding option to them while conserving
24 the State's resources. And public funding serves the
25 anticorruption rationale in two fundamental ways.

1 First, it frees the candidates who accept public funding
2 from the need to accept potentially corrupting private
3 contributions.

4 JUSTICE ALITO: Well, there are States that
5 have public funding without having a matching fund
6 provision. I would appreciate it if you would compare
7 these two regimes. The first is exactly what Arizona
8 has now. The second is exactly what Arizona has now
9 minus the matching fund provision. So under the second
10 one you have very strict contribution limits, and you
11 have reporting of all contributions. Now, why does the
12 addition of the matching fund provision serve an
13 anticorruption interest?

14 MR. PHILLIPS: Well, Your Honor, I think for
15 the same reasons I think that are implicit in the
16 Buckley Court's upholding of public funding at the same
17 time that the Court upheld contribution limits and
18 disclosure requirements, I think implicitly therefore
19 holding that the three could go together, serving the
20 anticorruption interests. And I think it does that,
21 first, by, first by -- first by freeing, as I said,
22 freeing the publicly funded candidates from the need
23 even to take the limited privately -- private
24 contributions that would be allowed under the law, and
25 which this Court has never held there's a minimum at

1 which that no longer conceivably becomes corrupting.

2 But secondly, it -- it combats corruption by
3 providing for more candidates running, more political
4 speech, and more electoral competition, all of which
5 have happened in Arizona. And where you have more
6 candidates and more electoral competition, you have less
7 -- you are going to have less corruption. The record --

8 CHIEF JUSTICE ROBERTS: So -- so the idea is
9 this is a way of encouraging candidates to take the
10 public financing, right?

11 MR. PHILLIPS: Yes.

12 CHIEF JUSTICE ROBERTS: Would it encourage
13 more candidates to do that if you doubled the amount
14 that was available for every additional amount that the
15 privately financed candidate spends? He spends \$1,000
16 over the amount and the publicly financed candidate gets
17 \$2,000. A lot more people are going to do the publicly
18 financing route if that were the case.

19 MR. PHILLIPS: It would encourage them more,
20 Your Honor. It's not our contention that anything that
21 a State or Congress did to encourage public funding
22 would necessarily be constitutional. I think the
23 question would be different if it were a two to one or,
24 to make a more stark contrast, a ten to one match. I
25 think that would raise multiple questions.

1 One question would be, looking at the
2 statute in its entirety, has the public funding scheme
3 become coercive rather than voluntary? It would raise
4 the question whether the purpose of the law were really
5 to simply provide viable funding to candidates --

6 CHIEF JUSTICE ROBERTS: But that's kind of
7 an odd line to find in the First Amendment, isn't it?
8 That you get a 100 percent matching as opposed to, say,
9 110 percent or 150 percent? Somewhere in the First
10 Amendment the line is drawn on the amount?

11 MR. PHILLIPS: I think somewhere in the
12 First Amendment there is a line, Your Honor, implicit in
13 Buckley, where a public funding law provides such
14 substantial benefits without sufficient countervailing
15 burdens to publicly funded candidates that it becomes
16 coercive rather than voluntary, and therefore you have
17 coerced someone into accepting a spending limit, which I
18 believe would be certainly subject to strict scrutiny
19 and almost surely unconstitutional. And I think that is
20 -- the Court would need to assess that in each instance,
21 and I think it could be done. I certainly don't think
22 that here you have a coercive system. A third of the
23 candidates don't accept public funding, and most of
24 those who don't and accept -- and face publicly funded
25 candidates actually win.

1 CHIEF JUSTICE ROBERTS: So it doesn't work?

2 MR. PHILLIPS: Certainly it doesn't work in
3 the sense, Your Honor, if the goal were for everyone to
4 accept public funding, it doesn't work in that sense.
5 But it certainly works in the sense that two-thirds of
6 the candidates do, and it works in the sense that there
7 hasn't been a repeat of the public corruption scandals
8 in Arizona since the law was passed.

9 JUSTICE KENNEDY: Do you think that one
10 reason for people to decline participation in the
11 program is because they do not want to deter independent
12 expenditures? And let me -- we'll talk about
13 independent expenditures for just a few minutes if you
14 don't mind. You indicated independent expenditure has
15 gone up. I thought there was some data in the record
16 that showed the population has gone up and so there's an
17 argument about that. But just as a common sense matter,
18 if I'm someone with the capacity and the will to make an
19 independent expenditure, why don't I think twice if this
20 is going to generate an equal amount on the other side,
21 which might be better spent. Sometimes an independent
22 expenditure is not really that effective, it's in a bad
23 market, it's a bad message. But this results in cash to
24 the participating candidate, who then can use it in the
25 most effective way.

1 MR. PHILLIPS: Your Honor, independent --

2 JUSTICE KENNEDY: All of which is designed
3 to probe this idea that this somehow does not deter
4 independent expenditures. I frankly am tempted to
5 believe the opposite view, so you can tell me about
6 that.

7 MR. PHILLIPS: Well, Your Honor, independent
8 expenditure groups -- there's no evidence that it really
9 in fact has been deterred. Your Honor, independent
10 expenditure groups essentially have to take their
11 candidates as they find them, if they will. There's no
12 discrimination among someone who is speaking in favor of
13 a privately financed candidate and one who is speaking
14 in favor of a participating candidate.

15 The different treatment is the different
16 treatment of the candidates. Someone who speaks against
17 a privately financed candidate runs the risk that that
18 person is going to use the ad against them to do all of
19 the things that the public financed candidate may not
20 do. He can raise private contributions, he can take
21 money from his political party, he can spend his own
22 money and he can spend unlimited amounts of money.

23 JUSTICE SCALIA: I don't know how you can
24 say that there's no evidence that it's been deterred.
25 Is something true just because you say it? There are in

1 the briefs statistical evidence of how much the
2 population of Arizona has increased and how much less
3 since the enactment of this law the total expenditures
4 have increased.

5 There was testimony in the, in the district
6 court from individuals who said that they withheld their
7 contributions because of this. It's -- it's obvious
8 statistically also that many of the expenditures were
9 made late in the game, where perhaps they were not as
10 effective, in order to be unable to trigger the matching
11 funds in time for the opposing candidate to do anything
12 about it. I do not understand how you can say that
13 there is no evidence. I mean, maybe you might say I do
14 not find the evidence persuasive, but don't tell me
15 there's no evidence.

16 MR. PHILLIPS: Maybe I should say there's no
17 significant evidence, Your Honor.

18 JUSTICE SCALIA: Ah.

19 MR. PHILLIPS: But with respect to each of
20 the items that you mentioned: With respect to the
21 population point, Your Honor, there is no evidence in
22 the record and it does not make sense that expenditures
23 either by candidates or by independent groups would
24 increase proportionally to the population of a State
25 because most of the expenses of a campaign are fixed and

1 --

2 JUSTICE SCALIA: Rhode Island --

3 MR. PHILLIPS: -- and not variable.

4 JUSTICE SCALIA: -- has the same
5 expenditures as New York State?

6 MR. PHILLIPS: No, no, Your Honor. Of
7 course not.

8 JUSTICE SCALIA: You don't expect the two to
9 have any relationship?

10 MR. PHILLIPS: Of course not, Your Honor. I
11 don't suggest that there's no relationship between
12 population and expenditures, but you wouldn't expect it
13 to go up proportionally, which is what the argument that
14 the Petitioners make, is that it didn't go up
15 proportionally. You wouldn't expect that, particularly
16 given what the demographics of the population increase
17 have been in Arizona and elsewhere in the country.

18 With respect to the evidence of individuals,
19 there are two Petitioner independent committees in this
20 case, Your Honor, the Arizona Taxpayers Action Committee
21 and the Arizona Free Enterprise Club. At Joint Appendix
22 584 is the testimony of the first that they never
23 withheld money from a race because of matching funds and
24 can't recall any contributor to them doing so. And the
25 Arizona Free Enterprise Club at Joint Appendix 666 and

1 670, the treasurer testified that matching funds never
2 caused them not to make a contribution and that the PAC
3 to which they contribute at JA 670 didn't recall making
4 a decision not to spend money because of matching funds
5 with respect to --

6 CHIEF JUSTICE ROBERTS: On that, there's a
7 back and forth about the record and common sense. As a
8 matter of common sense -- I think this has already been
9 asked -- if you knew that a \$10,000 expenditure that you
10 would make that would support a candidate would result
11 in \$30,000, 40,000, 50,000, depending on how many
12 opposition candidates there were available for them,
13 wouldn't you think twice about it?

14 MR. PHILLIPS: I might think twice about it,
15 Your Honor. But first, I think thinking twice is not a
16 severe burden. I think I might think twice in some
17 circumstances if I knew that by spending a certain
18 amount of money I had to disclose the fact that I was
19 doing that and what my political views were and lose my
20 anonymity, but thinking twice this Court has held in
21 that circumstance doesn't create a severe burden, and we
22 would submit that thinking twice here similarly does
23 not.

24 CHIEF JUSTICE ROBERTS: Well, if you're
25 thinking twice and one way you're thinking is not to do

1 it, that sounds like a sufficient burden.

2 MR. PHILLIPS: Well, Your Honor, if it were
3 a sufficient burden, it would presumably have been a
4 sufficient burden with respect to disclosure, where this
5 Court has recognized that some people may not spend or
6 contribute because of the disclosure requirements.

7 CHIEF JUSTICE ROBERTS: Our cases, as you
8 know, have drawn a distinction between expression and
9 disclosure.

10 MR. PHILLIPS: Yes. Yes, Your Honor, but
11 the point I'm making is that the disclosure, this Court
12 has recognized, potentially chills, deters the
13 expression itself.

14 JUSTICE KENNEDY: Are you saying that
15 anything that has to be disclosed can also be
16 prohibited? I mean, I just don't see the equivalence
17 here.

18 MR. PHILLIPS: No, Your Honor, I wasn't
19 suggesting that. But I --

20 JUSTICE KENNEDY: It seems to me that this
21 law has a severe criticisms leveled at it, severe legal
22 invalidities alleged, quite without reference to
23 disclosure.

24 MR. PHILLIPS: Well, Your Honor, I was
25 making the analogy to disclosure in the sense of the

1 think-twice notion that Mr. Chief Justice raised, but I
2 don't think -- I don't think this creates any more of a
3 burden, indeed we would submit less of a burden, than a
4 disclosure requirement. You would expect somebody who
5 believes that their speech is more persuasive than the
6 other participants in the race, whether they be an
7 independent group or a candidate, to choose more speech,
8 because they think that, if I speak, even if the other
9 people speak, my message is going to get out there and
10 it's going to be preferable.

11 There may be some few candidates, although
12 there's not a record of that here, some few groups or
13 candidates who would decide that they would prefer less
14 speech. It's better for me if my opponent or the other
15 candidate doesn't speak more because he's going to be
16 more persuasive than I am.

17 CHIEF JUSTICE ROBERTS: Your focus on
18 persuasiveness -- your focus on persuasiveness is a
19 particular view of the political process that may not be
20 applicable in every case. Political scientists
21 sometimes tell you that it's not persuasion, but simply
22 playing to your base, getting them more actively
23 involved. So it's not the somewhat more academic view
24 that people are going to sit down and just regard which
25 one is persuasive. Is that a permissible objective for

1 the State to pursue, to value a particular view of the
2 electoral process over another?

3 MR. PHILLIPS: Well, Your Honor, I don't
4 think that the State is doing that. What I'm addressing
5 is the effect of the law, and I think Your Honor makes a
6 good point, which is that they assume, Petitioners
7 assume, that essentially this is a zero-sum game and
8 that because if I spend \$10,000 the other guy is going
9 to get \$10,000 to respond, that somehow that's a wash.
10 Well, it's not a wash, first, because I think my speech
11 is more persuasive so I'm going to do it anyway, because
12 I'd rather get it out there; and secondly, because I may
13 be spending my \$10,000 on getting out my voters, and I
14 need to do that regardless.

15 And that's why you don't see in the
16 statistics any evidence that this actually suppresses
17 speech. And as I said, there may be some few candidates
18 who would opt for less speech because it's strategically
19 better for them, but we would submit that that --

20 JUSTICE ALITO: But even if it is the case
21 that those candidates who choose not to participate are
22 willing to spend additional money even though it
23 triggers matching funds, I don't see what that proves.
24 A candidate who is deciding whether to participate or
25 not presumably makes a calculation at the beginning: Do

1 I want to spend more than the matching fund amount, even
2 though I know that if I do that, the other side will get
3 additional money?

4 Now, if they say, no, I don't -- I'm not
5 going to do it under those circumstances, they will take
6 the public financing. And if they choose the private
7 financing, it means they probably made a decision going
8 in that they're going to -- they're going to be one of
9 those who is willing to suffer the consequences of
10 spending over the amount. So I don't see what this -- I
11 don't see what that proves.

12 MR. PHILLIPS: Well, Your Honor, I think
13 what it proves is that you -- the key point in here is
14 that initial choice that is voluntarily made by each of
15 the candidates, whether the system of public financing
16 under which you may receive matching funds is better for
17 them or whether the system --

18 JUSTICE ALITO: Could I ask a question that
19 goes back to Justice Kennedy's question, which I don't
20 think you fully had a chance to -- or fully answered?
21 And that has to do with the independent expenditures.

22 Let's say there are two candidates running
23 for governor, and one who is a participating candidate
24 is taking a position on a very controversial Arizona
25 issue with which I disagree, and the other is a

1 non-participating candidate who is taking a position on
2 that controversial issue and I agree with that.

3 Now, if I choose to run an ad, pay for an ad
4 supporting the non-participating candidate, I know that
5 the -- the candidate that I dislike on that issue is
6 going to get an additional amount of funds, and -- but
7 if I choose to run an ad supporting the participating
8 candidate, the opposite doesn't happen. Now, why isn't
9 that a clear-cut discrimination based on the content of
10 speech?

11 MR. PHILLIPS: Because, Your Honor, the
12 discrimination, if you want to -- if you call it
13 discrimination or different treatment, is based on the
14 initial choices of the candidates as to how they're
15 going to finance their campaigns. It's not based on the
16 content of the speech.

17 There's -- matching funds do not turn in any
18 way on the ideas or the messages or the viewpoints or
19 the subject matter of the candidate or the independent
20 group's speech or on the identity of the speaker. It
21 turns entirely on what choice the candidate made at the
22 outset.

23 And it is analogous, in a sense, Your Honor,
24 to the situation that's faced by a contributor who is
25 deciding whether to contribute, for example, to a

1 501(c)(3) or a 501(c)(4) organization. If they
2 contribute to the organization that can lobby, they
3 don't get a tax deduction.

4 JUSTICE ALITO: But if I'm the
5 independent -- if I'm the independent expenditure maker,
6 I haven't made a choice at the beginning. I haven't
7 decided to participate or not participate. What I care
8 about is the issue that's being debated between these
9 two candidates.

10 MR. PHILLIPS: And -- and, Your Honor, two
11 points. You're free, of course, to run an ad that
12 addresses the issue without expressly advocating for or
13 against any candidate without triggering matching funds.
14 And secondly, the candidates made a choice, and if
15 you're the person who is -- who supports the
16 participating candidate, you can't make a contribution
17 to that candidate, while you could to the other
18 candidate because of the choice that was made. And you
19 can be responded to, if you run an ad criticizing the
20 non-participating candidate, you can be responded to
21 with unlimited amounts of money from -- taken from a
22 political party, the person's own money, whereas, too,
23 if you attack a privately financed candidate, you would
24 only be subject to being potentially responded to with
25 limited matching funds.

1 And it all flows from the voluntary choice
2 that is made at the outset by the candidates about which
3 system of financing is better for them.

4 And this is a system, the matching funds
5 system, is a mechanism that the State uses in order to
6 be able to offer viable public funding to candidates
7 without wasting public resources, and both the logic and
8 evidence demonstrates that it is, in fact, effective,
9 both at promoting speech by encouraging candidates to
10 run and, indeed, particularly resulting in more
11 competitive races for incumbents -- against incumbents
12 in Arizona and promoting speech.

13 And I would just like briefly to address
14 Justice Alito's question about the ex ante measurement
15 of the funds. Now, of course, we would submit that it's
16 not relevant because we're not in -- should not be in
17 strict scrutiny and therefore don't need to show this is
18 the least restrictive means, Your Honor.

19 But, Justice Alito, an ex ante system would
20 run substantial risks of underfunding or overfunding
21 races, and in particular -- and therefore wouldn't serve
22 the State's interest in saving money or in properly
23 measuring -- but, in particular, would run the risk of
24 having an incumbent who might have been in office for
25 several terms unopposed and not having spent any money

1 in those races, and now you are measuring how much his
2 possibly now viable challenger will get in public
3 funding based upon some minuscule amount of money that
4 the incumbent has needed to spend.

5 So I think that that would not serve the
6 State's interests in ensuring the candidates actually
7 have viable public funding.

8 And I see my time has expired. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Phillips.

11 Mr. Jay.

12 ORAL ARGUMENT OF WILLIAM M. JAY,
13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE RESPONDENTS

15 MR. JAY: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to begin, if I may, with
18 Justice Alito's question to Mr. Phillips about whether
19 the independent expenditure aspect of this statute is
20 content-neutral, and I think that, looking at this in
21 the context of a multi-candidate race, which most races
22 in Arizona are, is important to set the context, because
23 most races in Arizona are not one candidate against
24 another candidate.

25 Every House district in Arizona has two --

1 has two members, so every general election has at least
2 four candidates. And it simply is not the case that
3 running an ad in support of a publicly financed
4 candidate does not trigger matching funds. It depends
5 not on what the ad says, not even on who the candidate
6 is being supported, but on whether another candidate in
7 the race takes public financing. So money spent to
8 support one publicly financed candidate may trigger
9 matching funds to another. That's not a content
10 discrimination.

11 JUSTICE SCALIA: Mr. Jay -- Mr. Jay, do you
12 agree with the -- the assertion of Mr. Phillips that
13 this does not favor incumbents?

14 I would have thought that if I'm an
15 incumbent with name recognition, I would love to be able
16 to not raise any money and just -- just take the public
17 funding, knowing that if worse comes to worse and I have
18 an opponent who does have a lot of independent
19 expenditures for him, I'll be able to get that money
20 free from the State. It seems to me it's very much
21 pro-incumbent rather than anti-incumbent.

22 MR. JAY: Oh, Justice Scalia --

23 JUSTICE SCALIA: Which -- which one should
24 expect campaign finance restrictions to be.

25 MR. JAY: Justice Scalia, I'm happy to -- to

1 endorse the sentiment, because I think that the
2 Petitioners' evidence in this case, the Petitioners who
3 were incumbent office holders and say that they did not
4 spend money because they were -- they feared the
5 response that would be paid for by matching funds, I
6 think their own evidence, including the declaration that
7 they put in at Joint Appendix 364, says: If I can keep
8 the spending down, me as an incumbent, I have a
9 tremendous advantage. That's an Arizona legislator
10 talking to one of the -- talking to the -- to one of
11 their experts.

12 And that's because -- and a race that
13 features low dollar amounts on both sides often
14 advantages an incumbent. And that is the purpose --
15 that is the purpose of the matching funds provision, to
16 allow -- to allow challengers to be competitively
17 funded. That's the purpose of the initial grant. The
18 reason that --

19 JUSTICE SCALIA: Your answer -- your answer
20 depends upon whether you believe that this scheme will
21 keep the expenditures down, or rather, will elevate the
22 expenditures. And if you believe that it will deter
23 people from making contributions, it will keep the
24 expenditures down.

25 MR. JAY: It's not -- it's not a matter of

1 deterring people from making contributions, Justice
2 Scalia. When there are competitive races, the matching
3 funds provision provides a formula for giving the
4 publicly funded candidate as much money as the private
5 -- as the privately funded candidate that they're
6 competing with. And in most cases the incentives on
7 both sides are for more speech, for both sides to get
8 out their message, run their ads, and persuade the
9 voters.

10 In some cases -- and we submit that the
11 anecdotal evidence the Petitioners have submitted
12 touches on these cases -- the privately funded candidate
13 may have an incentive to keep spending down, but we
14 don't think that's true systemically under this system.
15 We think that the -- that the public financing in
16 general and the matching funds provision in particular
17 facilitates speech, because the only consequence of
18 running an independent expenditure, for example, at
19 most, the consequence is that another party will get to
20 run a responsive ad, and the sum of speech will be
21 increased.

22 CHIEF JUSTICE ROBERTS: Counsel, do you
23 agree that under our precedents, leveling the playing
24 field for candidates is not a legitimate State purpose?

25 MR. JAY: We do, Mr. Chief Justice. That --

1 that, of course, is not what's at work here.

2 CHIEF JUSTICE ROBERTS: Well, I checked the
3 Citizens' Clean Elections Commission website this
4 morning, and it says that this act was passed to, quote,
5 "level the playing field" when it comes to running for
6 office. Why isn't that clear evidence that it's
7 unconstitutional?

8 MR. JAY: Well, Mr. Chief Justice, whatever
9 the Citizens Clean Elections Commission says on its web
10 site I think isn't dispositive of what the voters of
11 Arizona had in mind when they passed this initiative.
12 The Court -- this Court has recognized since Buckley
13 that public financing serves a valid anticorruption
14 purpose, and it does so because it eliminates the
15 influence of private contributions on the candidates who
16 take public financing. And it --

17 JUSTICE ALITO: But would you agree that the
18 matching fund provision by itself does not serve an
19 anticorruption purpose?

20 MR. JAY: Well, Justice Alito, the matching
21 funds provision the State of Arizona has concluded is an
22 important way of ensuring that candidates will take
23 public financing, because it is a formula of ensuring
24 that candidates will have enough money to run
25 competitive races without wasting the State's money

1 by -- by --

2 JUSTICE BREYER: And what about -- it's a
3 general question. Answer this if you wish. Don't if
4 you don't want to, and the same goes for your opponent.
5 But as I hear this argument, what's going through my
6 mind is we are deeply into the details of a very complex
7 bill. McCain-Feingold is hundreds of pages, and we
8 cannot possibly test each provision which is related to
9 the others on such a test of whether it equalizes or
10 incentivizes or some other thing, because the answer is
11 normally we don't know.

12 And it is better to say it's all illegal
13 than to subject these things to death by a thousand
14 cuts, because we don't know what will happen when we
15 start tinkering with one provision rather than another.
16 That thought went through my mind as I've heard this
17 discussion. Comment or not upon it as you wish.

18 (Laughter.)

19 MR. JAY: I -- I will comment in this way,
20 Justice Breyer. I think that it's remarkable -- I
21 appreciate the opportunity, and I will take it. The
22 parties in this case agree that public financing is
23 itself not objectionable. The parties in this case
24 agree that even a large government grant at the outset
25 which could be used to fund responsive ads to a -- to a

1 privately financed candidate or to independent
2 expenditures, that's not problematic.

3 JUSTICE SCALIA: But anything that, anything
4 that makes it more attractive to take the public
5 financing is okay?

6 MR. JAY: That's not our position.

7 JUSTICE SCALIA: I mean, what if -- what if
8 the State of Arizona says we're not going to give --
9 just give money to the other candidates; we're going to
10 send out officers of Arizona to argue on behalf of these
11 other candidates? That would be clearly banned, right?

12 MR. JAY: Yes --

13 JUSTICE SCALIA: And would you come in and
14 say, well, it's perfectly okay because its purpose is to
15 make public funding attractive to candidates? The mere
16 fact that it makes it more attractive does not answer
17 the question whether it's constitutional.

18 MR. JAY: It doesn't make -- it doesn't just
19 make it more attractive, Justice Scalia. It allows
20 publicly-funded candidates to run on the same footing as
21 privately-funded candidates, because they can spend
22 comparable amounts. That is the point that we're
23 making, not that any -- not that any incentive the State
24 could dream up would be constitutional.

25 But the mere fact that there is -- that

1 there are incentives and disincentives on both sides, I
2 think doesn't suffice to answer the question. The fact,
3 as Mr. Phillips pointed out, there may be disincentives
4 to engage in speech when a disclosure requirement takes
5 effect. Anyone who wishes to run an independent
6 expenditure under the system upheld in Buckley, anyone
7 who had spent over \$100 had to disclose. And the Court
8 recognized in Buckley that it was undeniably the case
9 that public disclosure would deter some individuals.
10 The Court nonetheless didn't apply strict scrutiny
11 because that is not the kind of severe burden that the
12 First Amendment recognizes. The Court --

13 JUSTICE ALITO: What you just said was that
14 this law aims to allow publicly financed candidates to
15 run on the same footing as privately financed
16 candidates; isn't that right?

17 MR. JAY: The same dollar amount footing,
18 Justice Alito. But there's a --

19 JUSTICE ALITO: Right, and that's equal --

20 MR. JAY: -- far different mix of benefits
21 and burdens --

22 JUSTICE ALITO: -- that's equal -- that's
23 leveling the playing field, isn't it?

24 MR. JAY: It's not, Justice Alito, because
25 there is a far different mix of benefits and burdens

1 that a publicly-financed candidate takes. There is an
2 absolute cap -- under this matching funds provision,
3 there is an absolute cap above which a publicly-financed
4 candidate cannot spend, no matter what.

5 Once a publicly-financed candidate reaches
6 that cap, which they've agreed to as a condition of
7 taking public financing, independent groups and their
8 opponents can -- can raise more money, can run more ads
9 against them, completely without limit, and you -- you
10 have to take that into consideration when you're
11 considering what incentives and what deterrent effect
12 the matching funds provision is having.

13 Publicly-funded candidates accept certain
14 limits, and one of those limits is an absolute limit on
15 spending. The matching funds provision simply adjusts
16 that limit based on how much is being spent in that
17 race.

18 CHIEF JUSTICE ROBERTS: Why -- why do you
19 think the elections commission then tells us its purpose
20 is to level the playing field?

21 MR. JAY: I can't -- I -- I don't speak for
22 the elections commission, Mr. Chief Justice, but the
23 State of Arizona has said in -- in this case that the
24 purpose of public financing, as indeed was the purpose
25 of the presidential public financing system that this

1 Court upheld in Buckley, is to combat corruption. And
2 public financing is a recognized way of combatting
3 corruption, and giving out these matching funds is a way
4 of encouraging candidates to participate.

5 JUSTICE KENNEDY: Well, in your hypothetical
6 of the -- of -- of a participating candidate who spends
7 up to the limit, what happens if independent
8 expenditures are then made on his behalf?

9 MR. JAY: Independent expenditures on his
10 behalf don't -- would trigger public matching funds to
11 any other matching --

12 JUSTICE KENNEDY: No, no.

13 MR. JAY: To any other candidate in the
14 race.

15 JUSTICE KENNEDY: There's -- there's --
16 there's two participants -- there's two candidates, one
17 who's a participating and one who's not. The
18 participating candidate spends up to his limit, he can't
19 spend any more money. But then he gets a lot of
20 additional support from independent groups, correct?

21 MR. JAY: In a two-person race, Justice
22 Kennedy --

23 JUSTICE KENNEDY: I mean, that could -- that
24 could happen?

25 MR. JAY: It could. And the privately

1 financed candidate, unlike the publicly financed
2 candidate who is the target of independent expenditures,
3 is free to raise more money and use that -- use those
4 additional funds to respond.

5 JUSTICE KENNEDY: But the -- but the point
6 that you made that the participating candidate is
7 limited leaves out the fact that there can be additional
8 expenditures on his behalf by independent groups?

9 MR. JAY: There can be -- may I finish the
10 sentence? There can be, but a candidate deciding
11 whether to participate by definition doesn't know in
12 advance whether there will be independent expenditures
13 on his behalf, and the matching funds provision allows
14 that candidate to know when he elects public financing
15 that he will have enough money to compete.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

17 Mr. Maurer, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF WILLIAM R. MAURER

19 ON BEHALF OF THE PETITIONERS

20 MR. MAURER: Thank you, Mr. Chief Justice.

21 With regard to the record evidence of an
22 actual chill, I would note that the record -- if this
23 Court takes the opportunity, as it's obliged to do under
24 the Bose Corp. decision to look at the entire record,
25 the evidence is replete with examples of people not

1 making expenditures such as Tony Bouie, who refrained
2 from sending out mailers, making auto calls or
3 distributing information, John McComish also had a
4 similar response, the Arizona Taxpayers Action Committee
5 did not engage in a particular campaign because it would
6 have triggered matching funds.

7 But ultimately when we get right down to it,
8 though, the question is does this create the same kind
9 of burden in -- as -- as in Davis, and I could go
10 through point by point, Mr. Phillips, and Mr. Jay's
11 argument, but they're all answered by Davis.

12 Davis recognized that this type of
13 interference with the -- with the voters' decision as to
14 who to elect to office and the purpose of doing that in
15 order to raise the voices of those the government thinks
16 is speaking too little and muffle the voices of those
17 the government think is speaking too much is completely
18 illegitimate.

19 This case is determined by Davis. For
20 instance, the -- the argument that Mr. Phillips made
21 that speech has gone up in -- in Arizona is -- is undone
22 by Davis, which recognizes that increases in the
23 aggregate of speech cannot justify restrictions on
24 individual First Amendment rights.

25 JUSTICE KAGAN: Mr. Maurer, Davis starts off

1 by saying that if what had been triggered was not an
2 inequitable contribution limit raised but instead both a
3 contribution raised for both candidates, that would have
4 been perfectly appropriate, notwithstanding that that
5 would have put many independent funders to a real
6 choice. The independent funder says, well, I'm not
7 taking any contributions, so that's only going to help
8 my opponent. What's the difference in that case?

9 MR. MAURER: I think what this Court was
10 recognizing in Davis is that when the -- when the
11 government relaxes restrictions on free speech, when
12 there's more freedom, that doesn't constitute a
13 violation of the First Amendment.

14 That's not what the government is doing
15 here. It's effectuating its goal of limiting spending
16 in leveling the playing field by burdening and
17 disincentivizing people to engage in their First
18 Amendment rights.

19 JUSTICE KAGAN: Well, as I said, the Davis
20 system that was -- the system that was specifically
21 approved in Davis would disincentivize many people, many
22 independent funders from speaking, would put that person
23 to a choice of the kind that you say that your clients
24 are being put to a choice, the exact same kind of
25 choice.

1 MR. MAURER: It would not have the unfair
2 trigger that this system has. The entire argument here
3 is not that -- that our clients have a concern with too
4 much speech. Our concern is that their speech is
5 turning into the mechanism by which their political
6 goals are undercut. So each time they speak, the more
7 work that they do, the more their opponents benefit.
8 That is -- that on its face creates a -- a -- a common
9 sense disincentive to engage in more and more political
10 activity.

11 If there are no further questions, Your
12 Honor, I'll thank the Court for its time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Counsel. The case is submitted.

15 (Whereupon, at 11:03 a.m., the case in the
16 above-entitled matter was submitted.)

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