COMMENT

LESS SPEECH IS MORE: PUBLIC FINANCING IN THE WAKE OF *ARIZONA FREE ENTERPRISE*

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Though money itself may not be speech, restricting the ability to fundraise and spend in any political campaign predictably impedes the ability to express ideas to a wide audience in today's society. Concerns for curbing the corruptive influence of money in politics and protecting freedom of expression in the political arena are therefore commonly in tension. Congress and state legislatures around the country seeking protective campaign finance legislation necessarily walk a fine line in balancing the two.

In striking this balance, many election reformers have turned to public financing systems, under which participating candidates voluntarily limit their spending in exchange for state or federal campaign grants. To ensure these systems remain responsive to the varying demands of each election, some systems have incorporated various trigger or matching funds provisions. These add flexibility to the systems by granting additional funding to participants at various times after an initial grant of public funding and ultimately help publicly financed candidates run consistently more competitive races.

The Supreme Court's decision in *Arizona Free Enterprise Club v. Bennett* is the most recent in a series of cases demonstrating the Roberts Court's hostility toward campaign finance regulation. There, the Court struck down a matching funds provision of Arizona's public financing system that aimed to protect public candidates if their privately financed opponents spent excessively. Viewing the matching funds provision as an unconstitutional penalty on private candidates for choosing to speak, the Court used the First Amendment to effectively justify less speech in elections. By removing funding to public candidates, the Court ultimately hinders political expression more than it protects it.

After analyzing and critiquing the Court's opinion in *Arizona Free Enterprise*, this Comment shifts to a discussion of the decision's impact on Wisconsin. Though the state has a proud progressive tradition of open government and clean elections, its public financing system is currently dead after decades of slow decline. As Wisconsin reformers work to craft a new system, matching funds should not be abandoned entirely in the wake of *Arizona Free Enterprise*. This Comment suggests multiple ways in which legislators can continue to use such provisions as valuable additions to a new, healthy, and durable public financing system.

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INTRODUCTION

In June 2011, the Supreme Court struck down a matching funds provision of Arizona's publicly financed election system established by the Arizona Citizens Clean Elections Act.[1] As the provision operated, once a privately financed candidate's spending reached a defined limit, any excess spending, either by that candidate or independent expenditures in that candidate's favor, triggered essentially dollar-for-dollar matching state disbursements to publicly financed opponents.[2] In its decision, the Court ruled that matching funds tied to the spending levels of political opponents and their supporters impermissibly violated the First Amendment by penalizing groups for exercising their right to political free speech.[3] Though the Act did not directly limit any candidate's political speech, the majority found that it imposed an unjustified substantial burden on speech by forcing

1. *Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806, 2813 (2011).
2. ARIZ. REV. STAT. ANN. § 16-952 (2011).
3. *See Ariz. Free Enter.*, 131 S. Ct. at 2818–21.

candidates to choose between expressing their views or granting their opponents fundraising windfalls.[4]

In a fiery dissent, Justice Elena Kagan argued that, rather than doing violence to the First Amendment's speech protections, the matching funds provision actually furthered the Amendment's values.[5] In her view, the government subsidies provided in response to excess spending by privately funded candidates resulted in more speech and more-robust political debate by giving recipients the means with which to reply to their opponents.[6] Viewing the Act's negative effects on speech to be minimal, Justice Kagan and the minority found that the Act's purpose to prevent corruption or the appearance of corruption was a sufficiently compelling governmental interest to withstand even a strict scrutiny analysis.[7] Rather than barring any candidate's ability to speak, at most the Act's subsidies had the practical effect of altering the strategic calculations of privately financed candidates in choosing to present their messages. In this context, Justice Kagan found no constitutional violation because the First Amendment "protects no person's, nor any candidate's, 'right to be free from vigorous debate.'"[8]

In the modern history of campaign finance law since *Buckley v. Valeo*,[9] the Supreme Court has consistently refused to recognize any legitimate government interest in "leveling the playing field" by regulating elections.[10] *Arizona Free Enterprise* is consistent with precedent in this respect, forcefully rejecting any basis for the law's effort—whether actual or merely anticipated by the Court—to equalize the political influence of candidates in Arizona elections.[11]

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4. *See id.* at 2818–19.

5. *Id.* at 2830 (Kagan, J., dissenting).

6. *Id.* at 2829, 2833 (Kagan, J., dissenting).

7. *Id.* at 2841–43 (Kagan, J., dissenting).

8. *Id.* at 2835 (Kagan, J., dissenting) (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986) (plurality opinion)).

9. 424 U.S. 1 (1976). *Buckley* is widely recognized as the foundational decision of modern campaign finance law. *See, e.g.*, DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 677 (4th ed. 2008) (describing *Buckley* as the "fountainhead of modern American campaign finance jurisprudence"). In analyzing provisions of the Federal Election Campaign Act of 1971, the Court's detailed 138-page *per curiam* decision set forth general principles and specific doctrinal details to guide campaign regulation moving forward. *Id.* at 680. For a discussion of *Buckley*'s main holdings, see *infra* Part I.B.

10. *Ariz. Free Enter.*, 131 S. Ct. at 2811; *see also Citizens United v. FEC*, 130 S. Ct. 876, 904–05 (2010); *Davis v. FEC*, 554 U.S. 724, 741 (2008); *Buckley*, 424 U.S. at 56.

11. *See Ariz. Free Enter.*, 131 S. Ct. at 2825–27.

However, in striking down Arizona's matching funds scheme of public finance, the *Arizona Free Enterprise* majority placed too heavy an emphasis on the buzzwords of "leveling the playing field."[12] By focusing on this convenient catchphrase, the Court largely avoided an honest consideration of what the State of Arizona claimed the law really sought to achieve: encouraging participation in public financing, and thereby reducing both corruption and the appearance of corruption in the state's electoral process.[13] In its reflexive rejection, the Court drifts from its own precedent, which merely held that a goal of leveling the playing field does not constitute a legitimate government interest sufficient to justify campaign regulations. In doing so, the Court advances toward the more extreme view that an effect of leveling the playing field may itself justify rejection of a regulatory scheme. This confuses the proper First Amendment analysis of campaign regulation.

The First Amendment does not guarantee speakers any particular level of influence of their expression. It guarantees only that individuals and groups be given the right to freely express their views and opinions.[14] Whether sufficient incentives exist to convince speakers to express their viewpoints is an issue outside constitutional concern as long as the decision and ability to speak remains theirs.

Contrary to the majority's holding, the matching funds involved in *Arizona Free Enterprise* are constitutional and consistent with Supreme Court precedent dating back to *Buckley*. The majority rejected the increased political debate resulting from the matching funds in favor of avoiding a largely theoretical risk that privately financed candidates may be marginally deterred from expressing their views.[15] In doing so, the Court tossed out a direct enhancement of political speech by subsidy, in the interest of preventing an indirect danger that the matching funds may render some candidates less strategically inclined to spend as much in their campaigns. Nothing in Arizona's scheme directly limited privately funded candidates' ability to freely express their ideas if they so chose.

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12. *See id.*

13. *See id.* at 2841–42 (Kagan, J., dissenting).

14. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986) (plurality opinion) (recognizing that the First Amendment does not guarantee "the right to be free from vigorous debate"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (characterizing the First Amendment's freedom of speech guarantee as "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

15. *See Ariz. Free Enter.*, 131 S. Ct. at 2837 n.6 (Kagan, J., dissenting) (highlighting that the majority essentially concedes the lack of evidence of any actual deterrent effect of the matching funds by acknowledging that it is difficult to prove a negative).

The Court's discussion of public financing comes at an important time for Wisconsin in particular. Governor Scott Walker's 2011 budget bill effectively ended the state's system of public financing of legislative and state supreme court elections.[16] Though unsettling to public financing advocates,[17] abolition of the largely defunct Wisconsin system provides the state with an opportunity to approach the question of public financing anew. Reformers now have the opportunity to incorporate the best elements of state financing systems around the country into a new structure, unfettered by existing system constraints. Thus, it is crucial that reformers understand the relevant constitutional limits of such systems as interpreted by the judiciary.

This Comment examines the Supreme Court's First Amendment analysis of matching funds in *Arizona Free Enterprise*. In light of the Court's concerns for the unconstitutional chilling effects that such provisions can have on the freedom of speech, this Comment suggests potential reforms for Wisconsin that utilize triggering mechanisms going forward. Part I provides an overview of the evolution of campaign finance in Wisconsin and a summary of Supreme Court precedent relevant to contextualizing the Court's rejection of Arizona's matching fund provisions. Part II proceeds with two main components: (1) an analysis and critique of the majority's opinion in *Arizona Free Enterprise*, suggesting ways for Wisconsin reformers to address the Court's anxieties over regulatory speech burdens going forward, and (2) an analysis of Minnesota's current trigger provision as an illustration of the continued viability of such mechanisms in *Arizona Free Enterprise*'s aftermath.

I. EVOLUTION OF CAMPAIGN FINANCING

A. Campaign Regulation in the Dairy State

Wisconsin first attempted to regulate its campaigns in 1897 with an effort to combat the crudest forms of corruption, including bribery,

16. 2011 Wisconsin Act 32, secs. 13vb, 16a, 2011 Wis. Sess. Laws 172, 178 (repealing the Wisconsin Election Campaign Fund and Democracy Trust Fund, the sources of financing for public candidates in Wisconsin).

17. *See, e.g.*, Bill Lueders, *Campaign Financing Dead in Wisconsin*, WISCONSINWATCH.ORG, http://www.wisconsinwatch.org/2011/06/30/campaign-financing-dead-in-wisconsin (last updated July 1, 2011, 2:15 PM) (quoting the executive director of a Wisconsin watchdog group saying it is "pretty shocking and amazing that Wisconsin was one of the first states in the nation to institute a public financing system and now we have become the first state that I know of to eliminate public financing").

election fraud, voter intimidation, and illegal voting.[18] Eight years later, the legislature first banned corporate campaign contributions.[19] Building off these earlier reforms, the Progressive movement ushered in the Corrupt Practices Act in 1911, enhancing electoral disclosure requirements by requiring that candidates report all sources of funding and banning candidates from trading favors in return for donations from wealthy sources.[20]

Prompted by the Watergate scandal, major reforms continued in the 1970s. In 1973, Wisconsin created its State Elections Board to implement and enforce its election and campaign finance laws.[21] Four years later, Wisconsin became one of the first states to establish its own public financing regime. The legislature created the Wisconsin Election Campaign Fund (WECF) as a mechanism to pool public resources and disburse them to eligible candidates.[22] Wisconsin's system allowed candidates running for Governor, Lieutenant Governor, Attorney General, State Treasurer, Secretary of State, State Senator, Member of the Assembly, and Superintendent of Public Instruction to apply for a grant from the fund.[23] To sustain the WECF, the system gave taxpayers the option to voluntarily designate that one dollar be transferred from the state's general fund revenues to the WECF.[24] This system earmarked money to the fund from already-collected tax revenues without increasing the public's tax liability. In Wisconsin's system, participating candidates agreed to abide by personal contribution limits and spending limits that varied according to the office being sought.[25] In return, participating candidates received public funding for up to forty-five percent of the total spending limit for the office sought.[26]

Wisconsin's public financing system functioned well for roughly the next decade. In 1979, taxpayer participation in the voluntary

18. Act of May 1, 1897, ch. 358, 1897 Wis. Sess. Laws 912.

19. Act of June 27, 1905, ch. 492, 1905 Wis. Sess. Laws 869.

20. Act of July 13, 1911, ch. 650, 1911 Wis. Sess. Laws 883.

21. Act of July 6, 1974, ch. 334, 1973 Wis. Sess. Laws 1048.

22. Act of Oct. 20, 1977, ch. 107, 1977 Wis. Sess. Laws 588.

23. *See id.* In 2009, the Impartial Justice Act created the Democracy Trust Fund, similar to the WECF, which provided public financing in state supreme court races. *See* 2009 Wisconsin Act 89, 2009 Wis. Sess. Laws 1020; 2009 Wisconsin Act 216, 2009 Wis. Sess. Laws 1362.

24. Act of Oct. 20, 1977, ch. 107, sec. 51, § 71.095, 1977 Wis. Sess. Laws 588, 599.

25. See WIS. STAT. §§ 11.50(2)(g), .26, .31 (2009–10) for the most recent contribution and spending limitations imposed on voluntary participants.

26. § 11.50(9).

funding check-off peaked at 19.7% and raised $561,083.[27] By 1986, of the nearly 140 candidates eligible for state offices, nearly three-quarters opted in to the public financing system.[28] The same year though, the legislature voted to freeze spending limits and the corresponding maximum grant amounts under the system.[29] The rising costs of campaigns, coupled with decreasing taxpayer participation in the check-off over time, rendered participants increasingly less competitive against privately financed opponents and substantially reduced candidate participation in the system.[30]

Prompted by a high-profile state legislative caucus scandal, in which several legislators illegally used legislative caucus staff to perform campaign activities in the late 1990s,[31] the state Legislature passed Act 109 in 2001 to overhaul the state's ailing regulatory scheme.[32] The bill included increases in spending limits for WECF participants[33] and supplemental funds to participants to match non-participating candidates' expenditures above a defined limit.[34] The bill also provided matching grants to respond to independent advocacy and issue ad expenditures.[35] In 2002, the Western District of Wisconsin struck down a provision in the Act requiring prior disclosure of communications made within 30 days of an election that featured a candidate.[36] Because Act 109 contained a nonseverability clause, by striking down this single provision of the bill, the court effectively voided the entire Act, erasing all of the Act's reforms to the public financing system.[37]

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27. SUZANNE NOVAK & SEEMA SHAH, BRENNAN CENTER FOR JUSTICE REPORT: CAMPAIGN FINANCE IN WISCONSIN 14 (2007).

28. *Id.*

29. *See* CTR. FOR GOVERNMENTAL STUDIES, PUBLIC CAMPAIGN FINANCING: WISCONSIN 6–7 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/8788.pdf.

30. *Id.* at 21.

31. Editorial, *Caucus Reform Won't End at Budget Panel; McCallum and Some Legislators Want to See the System Changed*, WIS. ST. J., June 3, 2001, at B3.

32. 2001 Wisconsin Act 109, 2001 Wis. Sess. Laws 1327.

33. 2001 Wisconsin Act 109, secs. 1uep, 1uet, 1uez, 2001 Wis. Sess. Laws 1327, 1348–50.

34. 2001 Wisconsin Act 109, sec. 1ufz, 2001 Wis. Sess. Laws 1327, 1354–55.

35. *Id.*

36. *Wis. Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1090–93 (W.D. Wis. 2002).

37. 2001 Wisconsin Act 109, sec. 9115(2y), 2001 Wis. Sess. Laws 1327, 1581–82.

By 2002, taxpayer participation in funding the WECF had shrunk to five percent.[38] The recent Executive Budget Act of 2011 repealed the WECF and effectively ended Wisconsin's defunct public financing system.[39] The death of Wisconsin's system now presents the state with an ideal opportunity to rebuild an effective system from the ground up. In doing so, the state must recognize the implications of the U.S. Supreme Court's recent rejection of an increasingly popular mechanism which Wisconsin itself attempted to incorporate into its system in Act 109: matching funds.

B. Framework of Campaign Finance: Buckley v. Valeo

In 1976, the Supreme Court's landmark decision, *Buckley v. Valeo*, established the fundamental framework for analyzing the constitutional limits of campaign finance schemes in the United States.[40] The *Buckley* Court recognized that campaign finance regulation implicates free speech issues central to the First Amendment's protections.[41] Analyzing provisions of the Federal Election Campaign Act Amendments of 1974 (FECA) passed by Congress in the wake of the Watergate scandal, the Court resoundingly rejected provisions of the Act imposing spending limitations on candidates.[42] The Court recognized that any governmental interests claimed to be served by limiting candidate spending could not withstand First Amendment scrutiny.[43] In evaluating these interests, the Court forcefully rejected the government's argument that spending limits could be justified by a desire to equalize the ability of individuals or groups to influence election outcomes.[44] However, the Court upheld contribution

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38. NOVAK & SHAH, *supra* note 27, at 14.

39. 2011 Wisconsin Act 32, sec. 13vb, 2011 Wis. Sess. Laws 172, 178 (repealing WIS. STAT. § 11.50 (2009–10)).

40. LOWENSTEIN ET AL., *supra* note 9, at 681.

41. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.")).

42. *Id.* at 50–58 (rejecting restrictions on how much candidates could spend of their personal wealth, caps on overall campaign expenditures, and limitations on independent expenditures by third-party groups expressly advocating for the election or defeat of a clearly defined candidate).

43. *Id.* at 19. Recognizing the close relationship between money and political speech in modern society, the Court noted that "[a] restriction on the amount of money a person or group can spend in political communication during a campaign necessarily reduces the quantity of expression." *Id.*

44. *Id.* at 48–49. In its rejection of this "leveling-the-playing-field" rationale, the Court offered one of the opinion's most memorable statements: "[b]ut the concept

limitations[45] and disclosure requirements imposed upon donors contributing sums above a defined minimum threshold.[46]

The *Buckley* Court also analyzed the public financing scheme established under FECA for presidential elections. Though the Act barred private fundraising and imposed spending caps on any participant whose campaign received public funding, the Court determined that the scheme furthered a significant governmental interest by eliminating the improper influence of large private contributions from the electoral system.[47] In this context, the Court deemed the restrictions constitutionally permissible as long as participation in the scheme remained truly voluntary.[48]

C. Davis v. FEC

Following *Buckley*, the most significant decision relevant to the issue of matching funds came in 2008 in *Davis v. FEC*.[49] There, the Court considered the constitutionality of the Millionaire's Amendment to the Bipartisan Campaign Reform Act of 2002 (BCRA), which sought to temper the advantages of self-financed candidates in federal elections.[50] Under the amendment, if a self-financed candidate spent more than $350,000 of his or her personal money, his or her opponent became eligible for up to triple the normal contribution limits and up to unlimited party expenditures.[51] This imbalance continued as needed until the spending of the opponent rose to the level of the privately financed candidate.[52]

The Court struck down the scheme sanctioned by the amendment and recognized that "it impose[d] an unprecedented penalty on any candidate who robustly exercises [his or her] First Amendment right"

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that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.*

45. *Id.* at 35–36, 38 (upholding FECA's candidate-specific contribution limits for individuals and political action committees, as well as an aggregate individual limit capping total contributions to all candidates per election).

46. *Id.* at 72–74, 82–84 (upholding FECA's disclosure requirements, but acknowledging that parties must be exempted with a showing of a reasonable probability that disclosure will subject contributors to "threats, harassment, or reprisals").

47. *Id.* at 86–88, 95–96.

48. *Id.* at 95.

49. 554 U.S. 724 (2008).

50. *Id.* at 741.

51. *Id.* at 729 (citing the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441a-1(a)(1) (2006)).

52. *Id.* (citing 2 U.S.C. § 441a-1(a)(3)).

to advocate for his or her own election.[53] Though the provision attached its consequence to a statutorily-imposed choice, the Court rejected the restriction because the statute imposed "a special and potentially significant burden" based on a candidate's choice between exercising his or her "First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."[54] Unlike the public financing system considered in *Buckley*, the statute's imposed limitations were not voluntary because they left self-financed candidates no way to exercise their speech rights without activating the Amendment's corresponding burdens.[55]

D. Circuit Split over Matching Funds

Before *Davis*, three circuits had ruled on the constitutionality of matching funds tied to the spending of political opponents. First, in *Day v. Holahan*,[56] the Eighth Circuit invalidated Minnesota's matching funds scheme, which granted half of all independent expenditures to the adversely affected candidate and raised the candidate's expenditure ceiling.[57] There, the court ruled that the self-censorship that would occur when one's speech in favor of a candidate would directly lead to an opposing candidate's benefit was as constitutionally impermissible as direct government censorship.[58]

Two other circuits upheld matching funds in the face of constitutional challenges. In *Daggett v. Commission on Governmental Ethics & Elections Practices*,[59] the First Circuit upheld a provision of the Maine Clean Elections Act, which matched dollar-for-dollar contributions and expenditures made against public candidates, up to double the system's original public funding disbursement.[60] The court found the system constitutionally permissible because it did nothing to directly restrict the spending of privately funded candidates, and because the First Amendment guarantees "no right to speak free from response."[61] Similarly, in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*,[62] the Fourth

53. *Id.* at 738–39.
54. *Id.* at 739–40.
55. *Id.*
56. 34 F.3d 1356 (8th Cir. 1994).
57. *Id.* at 1359–61.
58. *Id.* at 1360.
59. 205 F.3d 445 (1st Cir. 2000).
60. *Id.* at 463–64.
61. *Id.* at 464.
62. 524 F.3d 427 (4th Cir. 2008).

Circuit considered North Carolina's public financing system for judicial campaigns, which granted funds to match money that exceeded a set trigger amount spent or raised on behalf of a privately financed candidate.[63] The court viewed the funds as imposing no penalty on speech, but rather as furthering the First Amendment's purposes "by ensuring that the participating candidate will have an opportunity to engage in responsive speech."[64]

Following *Davis*, both the Second and Eleventh Circuits struck down matching funds as impermissible burdens on the First Amendment.[65] The Ninth Circuit, in *McComish v. Bennett*,[66] upheld matching funds.[67] There, the court concluded that given the scant support in the record of evidence for any chilling effects on speech, the funding provision's burden was "indirect or minimal."[68] Consequently, the court evaluated the provision under intermediate scrutiny and found that the matching funds bore a "substantial relation" to the "'sufficiently important' governmental interest" of preventing corruption or its appearance.[69]

II. ANALYSIS OF *ARIZONA FREE ENTERPRISE CLUB V. BENNETT*

The Roberts Court has demonstrated a clear aversion toward campaign finance, striking down or limiting various state and federal election laws by casting its decisions in language aggressively protective of the First Amendment.[70] The Court did so in each of the

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63. *Id.* at 432–33.

64. *Id.* at 437.

65. *Green Party of Conn. v. Garfield*, 616 F.3d 213, 244–46 (2d Cir. 2010) (rejecting matching funds as unconstitutional "penalt[ies]" for the speech of nonparticipating candidates and their independent supporters); *Scott v. Roberts*, 612 F.3d 1279, 1293–94 (11th Cir. 2010) (agreeing that Florida's matching funds were unconstitutional because they were not the least-restrictive means available for incentivizing participation in the state's public financing system).

66. 611 F.3d 510 (9th Cir. 2010).

67. *Id.* at 527. This ruling was later appealed to the United States Supreme Court as *Arizona Free Enterprise Club v. Bennett*, 131 S. Ct. 2806 (2011).

68. *McComish*, 611 F.3d at 523–24.

69. *Id.* at 525 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 909, 914 (2010)).

70. *See* Erwin Chemerinsky, *Isaac Marks Memorial Lecture: Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 733 (2011) (considering the Roberts Court's campaign finance decisions and concluding that the Court has been motivated more by a hostility to campaign finance reform in general than any commitment to freedom of speech).

four campaign finance cases it heard through 2010.[71] It is with this pessimistic backdrop that the Court granted certiorari to hear *Arizona Free Enterprise Club v. Bennett*,[72] its most recent campaign finance case. Troubling to many election reformers, the majority's resulting decision continues the Court's hostile trend.

A. What the Roberts Court Said and Why It Got It Wrong

Reviewing the Ninth Circuit's decision in *McComish*, the Supreme Court struck down a matching funds provision of Arizona's publicly financed election system established by the Arizona Citizens Clean Elections Act.[73] Triggered when the sum of a privately financed candidate's spending and independent expenditures by outside groups in that candidate's favor exceeded the initial allotment of state funds to publicly financed opponents, the provision granted essentially dollar-for-dollar matching state disbursements to publicly financed candidates for any further spending.[74] These matching disbursements continued as necessary up to a maximum of three times the initial grant to the public candidate.[75]

A majority of the Court ruled that these matching funds tied to the spending levels of political opponents and their supporters impermissibly violated the First Amendment by penalizing these groups for exercising their rights to political free speech.[76] In so ruling, the majority structured its opinion in two main parts. First, the Court analyzed the level of burden that the matching funds imposed on the speech rights of privately financed candidates.[77] Second, after finding that the funding provisions imposed a "substantial burden" on speech, the Court moved to apply strict scrutiny to determine whether this burden was justified by a compelling state interest.[78]

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71. *See id.* at 732–33 (briefly summarizing the Court's decisions in *Randall v. Sorrell*, 548 U.S. 230 (2006); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Davis v. FEC*, 554 U.S. 724 (2008); and *Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

72. 131 S. Ct. 2806 (2011).

73. *Id.* at 2813.

74. *Id.* at 2813–14.

75. ARIZ. REV. STAT. ANN. § 16-952(E) (2011).

76. *Ariz. Free Enter.*, 131 S. Ct. at 2818.

77. *Id.* at 2818–24.

78. *Id.* at 2824–29.

1. SPEECH BURDEN OF MATCHING FUNDS

As the *Arizona Free Enterprise* majority acknowledged, there is little debate that matching fund provisions such as Arizona's impose *some* burden on the speech rights of privately financed candidates.[79] With respect to regulation of campaign-related speech, however, the Court has upheld regulations imposing minor burdens after applying a low level of scrutiny.[80]

Relying largely on a comparison to its decision in *Davis v. FEC*, the *Arizona Free Enterprise* Court found that Arizona's matching funds regime imposed a substantial burden on speech.[81] Though the Act did not directly limit any candidate's political speech, the majority found that it imposed a constitutionally-unjustified burden on speech by forcing candidates to choose between expressing their views or granting their opponents fundraising windfalls.[82] The Court viewed this burden as even more onerous than the burdens in *Davis* for three main reasons.[83] First, unlike in *Davis*—where excessive personal spending by a privately financed candidate triggered rises in contribution limits to public candidates, granting them an *opportunity* to raise more money to match their opponent—Arizona's system triggered the *direct* release of money to public candidates.[84] Second, in races with multiple public candidates, a single dollar spent by a private candidate could immediately trigger multiple dollars spent against him or her.[85] Third, the triggering of matching funds was, to an extent, out of the hands of the private candidate because independent expenditures could also act as triggers.[86]

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79. *See id.* at 2823–24 (citing *Green Party of Conn. v. Garfield*, 616 F.3d 213, 242 (2d Cir. 2010); *McComish v. Bennett*, 611 F.3d 510, 524 (9th Cir. 2010); and *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010) as examples of lower court opinions since *Davis*, which all recognize some level of chilling effect or burden caused by matching funds).

80. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 916–17 (2010) (upholding disclosure requirements of donor identities); *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) (upholding caps on coordinated party expenditures); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000); *Buckley v. Valeo*, 424 U.S. 1, 23–35 (1976) (upholding contribution limits).

81. *Ariz. Free Enter.*, 131 S. Ct. at 2818.

82. *See id.* at 2818–19.

83. *Id.* at 2818.

84. *Id.* at 2818–19.

85. *Id.* at 2819 (describing this as a "political hydra" effect).

86. *Id.*

a. Arizona's matching funds do not substantially burden speech

Contrary to the majority's view, the burdens imposed by Arizona's matching funds were not substantial; therefore, the Court should not have evaluated their constitutionality under strict scrutiny. The key difference between the contribution limit raises involved in *Davis* and Arizona's matching grants is that the latter constitute a direct *subsidy* of speech. As recognized by Justice Kagan in her *Arizona Free Enterprise* dissent, government subsidies provided in response to excess spending by privately funded candidates in fact result in more speech and more-robust political debate by giving recipients the means with which to reply to their opponents.[87] The First Amendment's protections are "concerned with persecution, not reprisal."[88] By challenging matching fund regimes with the ultimate aim of deterring public candidates from responding, "opponents of [matching funds] desire to monopolize the speech market."[89] Justifying such a result with the First Amendment is antithetical to the Amendment's historic interpretation, which favors more speech and more deliberation.[90] The Constitution "protects no person's, nor any candidate's, 'right to be free from vigorous debate.'"[91]

The Supreme Court has recognized that the government may subsidize speech, as long as it does so without discriminating among viewpoints.[92] In hastily rejecting the dissent's argument that the Arizona subsidy permissibly increases political debate, the majority claimed, "Any increase in speech . . . is of one kind and one kind only—that of publicly financed candidates."[93] The majority rejected the subsidy's viewpoint neutrality by reading discrimination into the government's support for public candidates.[94]

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87. *Id.* at 2833 (Kagan, J., dissenting).

88. Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems that Include "Triggers" Are Constitutional*, 24 J. LEGIS. 223, 233 (1998).

89. *Id.* at 234.

90. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (recognizing that the First Amendment was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources" (quoting *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945)).

91. *Ariz. Free Enter.*, 131 S. Ct. at 2835 (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986) (plurality opinion)).

92. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

93. *Ariz. Free Enter.*, 131 S. Ct. at 2820.

94. *See id.*

The majority's quick dismissal of the viewpoint neutrality of the Arizona subsidy is flawed.[95] The record contained no evidence that the distinction between publicly and privately financed candidates involved any relationship to particular viewpoints. Under the system, private candidates declined public funding by their personal choice, not because of any particular opinions they wished to express. Therefore, the classes of publicly and privately financed candidates were defined by their personal decisions to opt in or out of the system, and existed independently of their political viewpoints. By equating viewpoint discrimination with funding distinctions between public and private candidates and quickly dismissing them, the majority avoided a substantive discussion of the full extent to which matching funds promote more vibrant discussion of political campaign issues.

b. Mitigating the impact of Arizona Free Enterprise

As discussed, the majority in *Arizona Free Enterprise* expressed concern for the unconstitutional burdens placed on political speech as a result of three main effects of Arizona's matching funds provision. First, and most significantly, the majority rejected the provision's direct release of additional state funding to public candidates.[96] Second, the Court expressed concern over the provision's "political hydra" effect—that a single dollar could trigger multiple dollars spent in opposition.[97] Third, the Court was uncomfortable that the matching funds could be triggered by independent expenditures beyond the control of the privately financed candidate.[98] Though the decision is a significant setback for proponents of public campaign financing systems, the Court's concerns do not signal the death of all matching or triggering provisions. In the Wisconsin context, reformers can account for the Court's anxieties by reducing these mechanisms' burdens on political speech while still utilizing them to craft responsive, attractive public financing programs.

As one example, provisions triggered by the excessive spending of privately financed candidates that lift limitations imposed by a public

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95. The Supreme Court in *Buckley* rejected the argument that a public financing system which treats declared candidates differently necessarily "work[s] invidious discrimination." *Buckley*, 424 U.S. at 97. Instead, the Court recognized that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Id.* The *Arizona Free Enterprise* majority's quick conclusion that disbursing the matching funds to public candidates only establishes a discriminatory preference is therefore hasty.

96. *See supra* note 84 and accompanying text.

97. *See supra* note 85 and accompanying text.

98. *See supra* note 86 and accompanying text.

financing system on voluntary participants avoid the constitutional concerns raised in *Arizona Free Enterprise*. Wisconsin reformers can look to Minnesota's system for such an example. There, once privately financed candidates' spending exceeds a set threshold, spending limits imposed on public candidates are lifted, giving them the opportunity to raise additional funding to meet that of their opponents.[99] Such a provision avoids the *Arizona Free Enterprise* Court's concerns for the direct release of funding to opponents as a consequence of expression, as well as its concern for the "political hydra" effect. This is so because a provision like Minnesota's does not disburse any funds directly; it only lifts limitations imposed on candidates by the public financing system and allows the *ability* to raise and spend additional funding themselves. It is unclear how significant the Court's third concern alone may be on the burden analysis. While perhaps not significant enough by itself to substantially burden speech, reformers can follow the Minnesotan example and avoid the issue entirely by divorcing the trigger from independent expenditures and activating the provision based solely on a private candidate's spending.

Triggering provisions not directly tied to the political spending of private candidates also remain unaffected by *Arizona Free Enterprise*. For example, Wisconsin reformers can and should utilize a triggering mechanism that matches contributions raised by public candidates up to a set threshold with state funding. Michigan's public financing system for gubernatorial candidates does just this.[100] There, public candidates receive $2 for every dollar of donations of $100 or less.[101] To illustrate, a private donation of $75 to a public candidate triggers an additional $150 disbursement of public funding. Such provisions ensure that public funding is more closely tied to public support for a candidate, while still incentivizing participation in the public financing system by relieving a portion of the burden of political fundraising. Further, carefully crafted provisions can be designed to enhance the impact of small donors and reduce the incentives and relative influence of large, wealthy contributors.[102] The Wisconsin Democracy Campaign has already proposed such a provision, which would trigger a $4 state

99. *See supra* Part I.B.

100. *See* MICHAEL J. MALBIN ET AL., CAMPAIGN FIN. INST., PUBLIC FINANCING OF ELECTIONS AFTER *CITIZENS UNITED* AND *ARIZONA FREE ENTERPRISE* 7 (2011), *available at* http://www.cfinst.org/pdf/state/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July2011.pdf.

101. *Id.*

102. *See id.* at 10–16 (finding that a provision which triggers $5 for every dollar of a donation up to $50 would significantly enhance the relative importance of small donations in Wisconsin and substantially reduce candidate incentives to seek large contributions from wealthy donors).

disbursement for every dollar of a contribution of $50 or less.[103] Under the proposal, a single private donation of $50 would result in a total disbursement of $250 to the recipient public candidate.[104]

2. JUSTIFICATION FOR THE SPEECH BURDEN IN *ARIZONA FREE ENTERPRISE*

In 1976, the *Buckley* Court stressed, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[105] Since then, the Court has returned to this language, consistently rejecting any argument that equalizing the influence of candidates, or "leveling the playing field," may constitute a compelling government interest.[106] Drawing on this precedent in evaluating Arizona's matching funds regime, the *Arizona Free Enterprise* majority spent considerable time emphasizing its distaste for Arizona's efforts to level the electoral playing field in the state.[107] Focusing on the titles of statutory provisions and other word choices found within the Act, the Court concluded that, despite the state's claims to the contrary, "when confronted with a choice between fighting corruption and equalizing speech, the drafters of the matching funds provision chose the latter."[108]

In its decisions involving campaign finance, the Supreme Court has consistently recognized only a single compelling government interest: preventing corruption or the appearance of corruption.[109] Such is crucial to the vitality of our democracy for two reasons. First,

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103. *Id.* at 17.

104. Each dollar of the $50 private donation would be matched with $4 of state funding, for a total state disbursement of $200 in addition to the original private donation. *See id.*

105. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

106. *See Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010); *Davis v. FEC*, 554 U.S. 724, 741–42 (2008); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 422 n.8 (2000); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790–91 (1978) (citing *Buckley* in its rejection of limitations on corporate expenditures and contributions in referenda elections).

107. *Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806, 2824–26 (2011).

108. *Id.* at 2825. In its discussion, the Court emphasized that the matching funds provision in the Arizona statute was titled "Equal funding of candidates" and the Act's reference to matching funds as "equalization funds." *Id.*

109. *See, e.g.*, *Citizens United*, 130 S. Ct. at 908–10 (evaluating regulations based only on the government's legitimate interest in preventing corruption or its appearance); *Buckley*, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for . . . contribution limitation[s].").

combating corruption protects the system's functional integrity.[110] Second, combating both corruption and its appearance preserves the legitimacy of the system by maintaining public confidence in its proper functioning.[111]

In *Arizona Free Enterprise*, the Court's application of strict scrutiny rejected any legitimate interest in leveling the playing field and found that the matching funds' substantial burdens on speech were not justified by the state's compelling anti-corruption interest.[112] First, the Court observed that the subsidy's burdens on a candidate's ability to spend personal funds ultimately hindered the state's aim in reducing corruption.[113] Second, the subsidy burdened the spending of independent groups in support of privately financed candidates.[114] Third, the Court found that though public funding systems may ultimately serve the anti-corruption interest, any indirect benefit that matching funds give by making participation in the system more attractive was not sufficient to justify its burdens.[115]

a. Arizona's matching funds serve the state's anti-corruption interest

The *Arizona Free Enterprise* Court was wrong to so quickly dismiss the anti-corruption interests furthered by Arizona's matching funds system. First, in focusing on the extent that matching funds burden private candidates' spending in this context, the majority applied *Buckley* in a manner that initially appears consistent with, but actually drifts from, the decision's underlying rationale. *Buckley*'s observation of the positive effects that personal financing can have on a candidate's independence is intuitive.[116] The *Buckley* Court implicitly recognized that by restricting candidates' abilities to spend their own personal money, candidates would be forced to rely more heavily on outside

110. *See Buckley*, 424 U.S. at 26–27.

111. *Id.* at 27.

112. *See Ariz. Free Enter.*, 131 S. Ct. at 2826.

113. *Id.* at 2826 (citing *Davis v. FEC*, 554 U.S. 724, 740–41 (2008); *Buckley*, 424 U.S. at 53). The *Buckley* Court recognized that personally financing one's campaign, in whole or part, may allow a candidate greater independence once elected. *Buckley*, 424 U.S. at 53. Reducing reliance on others for campaign funding thereby decreases the danger that candidates will be improperly beholden to their contributors. *Id.*

114. *Ariz. Free Enter.*, 131 S. Ct. at 2827. The Court has ruled that independent expenditures do not implicate concerns for corruption or its appearance. *See, e.g.*, *Citizens United*, 130 S. Ct. at 909 ("[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption . . . .").

115. *Ariz. Free Enter.*, 131 S. Ct. at 2827.

116. *See Buckley*, 424 U.S. at 53.

sources of funding, raising the risks of quid pro quo corruption.[117] The circumstances in Arizona and its system's effects are different. To the arguably limited extent that Arizona's matching funds system would have burdened private candidates' spending, it would have done so across the board, without singling out candidates' personal expenditures. Unlike the personal spending limits discussed in *Davis* and *Buckley*, where restrictions forced candidates to rely more heavily on potentially corruptive outside funding sources, if the Arizona system dissuaded any candidate from spending, the same disincentives for turning to outside funding sources would attach as well. Therefore, the majority's critique of personal financing restrictions was overstated.

To the extent that reliance on personal funding reduces corruption or its appearance, public financing does so even more effectively. The premise behind the Court's preference for personal financing is that candidates who can and do pay their own expenses will not be beholden to any particular donors once elected.[118] This is at least equally true for candidates who take public financing—the amount of state funding similarly reduces a candidate's reliance on outside donors to fund their campaign expenses. A key difference between the two, however, is that public candidates receive the benefit of increased independence from donors without incurring any financial liability. Because privately funded candidates by definition shoulder all or a significant portion of their campaign expenses, incentives to offset these personal costs still exist. Such candidates will be more inclined to accept various attractive contributions as opportunities present themselves. Public candidates have no such incentive and are more effectively insulated from corruptive external pressures.

The Court's second argument regarding the limited anti-corruption interest related to independent expenditures has the firmest legal footing. Consistent with precedent reaching back to *Buckley*, the Court has never recognized a compelling state interest in regulating independent expenditures.[119] Nevertheless, in its analysis, the *Arizona Free Enterprise* Court found that the state's interest in establishing the subsidies need only be compelling if the burden on independent groups' First Amendment rights was substantial.[120] For the reasons previously stated, the majority overstated the matching funds' burden on privately financed candidates' political expression.[121] Further, the dissent observed that between 1998 (when Arizona's system was enacted) and

117. *Id.*
118. *See id.*
119. *Citizens United*, 130 S. Ct. at 909.
120. *Ariz. Free Enter.*, 131 S. Ct. at 2824.
121. *See supra* Part II.A.1.a.

2006, the amount of money spent by independent groups in Arizona elections actually increased by 253%.[122]

Third, the Court's rejection of the matching fund's furtherance of the state's anti-corruption interest by facilitating the public financing system was also hasty. The majority did acknowledge that public financing systems may further "'significant governmental interest[s],' such as the state interest in preventing corruption."[123] Nevertheless, its quick rejection of matching funds as only indirect fine-tuning of the system understated their impact.[124] Matching funds have a considerable effect on both incentivizing participation in the public financing system and ensuring that the system is responsive.[125]

In supporting its rejection of the Arizona subsidies' indirect anti-corruption benefits, the majority extended the argument favoring subsidies for incentivizing participation to its logical extremes.[126] The majority suggested that the state's logic would permit matching grants of five dollars for every single dollar spent by a private candidate, or a $10,000 penalty to private candidates for choosing to opt out of the public system, because those incentives would also encourage participation in the system.[127] Nevertheless, these extremes need not follow by so justifying the subsidy. Just as the Court has placed reasonableness limitations on the extent of contribution limits and disclosure regulations since *Buckley*,[128] nothing prevents it from doing so here. The Court has accepted systems of public financing and the otherwise unconstitutional candidate spending limits that participation in these systems impose on candidates, as long as participation remains truly voluntary.[129] Evaluating public financing systems in other contexts, courts have struck down elements of systems that cross the threshold into coercing participation.[130] Here, requiring that matching

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122. *Ariz. Free Enter.*, 131 S. Ct. at 2834 n.2 (Kagan, J., dissenting).

123. *Id.* at 2828 (quoting *Buckley*, 424 U.S. at 57 n.65, 92–93, 96).

124. *See id.* at 2827 (dismissing quickly the dissent's argument for the subsidy's efficient support of the public financing system).

125. *See, e.g.*, George LoBiondo, *Pulling the Trigger on Public Campaign Finance: The Contextual Approach to Analyzing Trigger Funds*, 79 FORDHAM L. REV. 1743, 1749 (2011) (discussing trigger funds' operation as "correction devices" which help keep the "financ[ing] system current" (internal citation omitted)).

126. *Ariz. Free Enter.*, 131 S. Ct. at 2828.

127. *Id.*

128. *Buckley*, 424 U.S. at 83 (refusing to strike down disclosure provisions because their thresholds were not "wholly without rationality").

129. *Id.* at 57 n.65; *see also* Grant Davis-Denny, *Coercion in Campaign Finance Reform: A Closer Look at Footnote 65 of* Buckley v. Valeo, 50 UCLA L. REV. 205, 206–07 (2002).

130. *See, e.g.*, *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995) (finding heightened reporting requirements and source restrictions imposed

fund systems set reasonable allocation levels imposes a burden no different than requiring that contribution limits be high enough to allow for competitive elections, or that candidates maintain a genuine option to privately finance their races.

Though their benefits are substantial, matching fund allocations are not essential to public financing schemes.[131] Considering their indirect facilitation of the financing scheme alone, they indeed may fail to further the government's compelling anti-corruption interest enough to justify a substantial burden on speech. As discussed earlier, whether the justification must rise to this level depends upon finding that the funds indeed impose a substantial burden. The *Arizona Free Enterprise* majority concluded that the matching funds did substantially burden speech and brushed them aside. Nevertheless, these indirect benefits need not be considered in isolation. Matching funds' additional substantial benefits in directly combating corruption and its appearance by promoting candidate independence from contributors elevate them above this threshold.

b. Enhancing legitimate justification for speech burdens after Arizona Free Enterprise

As discussed, reformers can carefully craft public financing regimes that effectively utilize matching or trigger fund provisions to limit their burdens on political speech.[132] As added protection from legal challenges, Wisconsin reformers should also strengthen the legitimate justifications for any potential speech burdens which remain. This can be done by clearly signaling in the language of the statute the legislature's anti-corruption intent in passing the provisions.

Perhaps the simplest way of weakening challenges to matching funds or trigger provisions is to avoid any allusion to "leveling the

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on candidates refusing to abide by defined spending limits made "the limits coercive, not voluntary"); *Wilkinson v. Jones*, 876 F. Supp. 916, 929 (W.D. Ky. 1995) (acknowledging that regulatory incentives for public financing may be so high as to become "impermissibly coercive" and finding that Kentucky's system of imposing $100 contribution limits on private candidates and $500 limits on public candidates amounted to an impermissible penalty (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993))); *see also* Grant Davis-Denny, *supra* note 129, at 235–40 (discussing differing tests lower federal courts have established to evaluate whether public financing schemes are unconstitutionally coercive).

131. *See, e.g.*, ANTHONY GIERZYNSKI ET AL., UNIV. OF VT., MINNESOTA'S PUBLIC CAMPAIGN FINANCE PROGRAM 4–6 (2009), *available at* http://www.uvm.edu/~vlrs/PoliticalProcess/MinnesotaPublicFinancing.pdf (discussing data showing participation in Minnesota's public financing system at consistently high levels, even after matching fund provisions were removed).

132. *See supra* Part II.A.1.b.

playing field" or "equalizing" the influence of candidates in the title or text of the statute. In crafting a public financing scheme, this is largely a matter of semantics rather than substance. The issue is nevertheless significant because, as *Arizona Free Enterprise* demonstrates, the intent of a legislature in passing these types of provisions is significant to the Court's review.[133] The Court places considerable significance on word choice as an indication of legislative intent. For example, the Court found it an important indication of the Arizona legislature's intent that it had titled the matching funds provision in Arizona's statute "Equal funding of candidates" and that the statute referred to these funds as "equalization funds."[134] In some instances, the Court may also look to supporting documents or other outside sources as persuasive indications of the law's intent.[135]

Thus, going forward, Wisconsin reformers should avoid any references to equalization or similar language alluding to a "leveling-the-playing-field" motivation. The language is simply unnecessary to any statutory scheme and provides opponents with ready and effective ammunition with which to attack matching or trigger provisions. Though not necessarily dispositive, given the Court's consistently strong aversion to this rationale dating back to *Buckley*, use of this language casts an oppressive shadow over the Court's subsequent First Amendment analysis.

As discussed, the Supreme Court currently recognizes a single compelling governmental interest in regulating campaign-related speech: preventing corruption or its appearance.[136] Thus, while drafters must shift focus away from equalization rationales, they should deliberately emphasize the anti-corruption motives of the reforms in the text of their statutes. References should be made to "clean elections," "voter-owned elections," "anti-corruption," "honest government," or similar phrases that opponents cannot easily construe to shift a reviewing court's attention away from the provisions' aims to incentivize participation in public funding and reduce the corruptive influence of money in politics. Ultimately, these semantic strategies do not address the substantive effects of any financing provisions. Rather, they work to shift the overarching framework of a court's review of the

133. *See supra* text accompanying notes 107-108.

134. *See Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806, 2825 (2011).

135. *See, e.g.*, Transcript of Oral Argument at 48, *Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806 (2011) (No. 10-238), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-238.pdf. In this discussion, Chief Justice John Roberts raised a question regarding the Arizona Citizens Clean Election Commission's website, which stated that the Act was meant to "level the playing field." *Id.*

136. *See supra* text accompanying note 109.

provisions from a more critical, skeptical inquiry, like that used by the Court in *Arizona Free Enterprise*, to a more deferential approach that respects the acceptable end of combating political corruption.

B. Implications for Wisconsin Public Financing Reform

Despite criticisms of *Arizona Free Enterprise*, it remains the law of the land for the immediate future and impacts the electoral regulation schemes of the states. Matching fund provisions of public financing regimes were convenient mechanisms to promote the economical state administration of public financing systems, ensure that such systems were responsive to the unique circumstances of different elections, and ultimately incentivize voluntary candidate participation in the system.[137] As the waning participation in the now-defunct Wisconsin system demonstrates, maintaining an attractive, flexible, and economically practical system is a cornerstone of any healthy public financing system. By holding matching fund mechanisms unconstitutional, *Arizona Free Enterprise* has diminished a powerful tool in the hands of campaign regulators.

Important to Wisconsin reformers, any attempt to reinstate the trigger fund mechanism found in 2001 Wisconsin Act 109 would almost certainly be found unconstitutional when challenged in court today due to its similarity to the triggers struck down in Arizona. Nevertheless, alternatives exist which can promote the interests served by matching funds, mitigating *Arizona Free Enterprise*'s impact. Reforms found in Minnesota's system, frequently cited as one of the most successful public financing schemes in the country, are particularly instructive.[138]

As already mentioned, in a 1994 opinion relying on a First Amendment interpretation similar to *Arizona Free Enterprise*, the Eighth Circuit struck down a matching funds provision triggered by independent expenditures as an unconstitutional infringement on free speech.[139] The mechanism was triggered once independent expenditures in favor of a privately financed candidate or against a publicly financed candidate rose above a set threshold.[140] Once triggered, the provision

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137. Justice Kagan described the provision at issue in *Arizona Free Enterprise* as helping to disburse the "Goldilocks solution" of public subsidy amount to candidate—one not so large that it is excessively burdensome on the public fisc, and one not so small that it bars recipients from running competitive races. *Ariz. Free Enter.*, 131 S. Ct. at 2831–32 (Kagan, J., dissenting).

138. *See, e.g.*, Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 572 (1999–2000).

139. *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

140. *Id.* at 1359 (citing MINN. STAT. § 10A.25 Subd. 13 (1993) (repealed 1999)).

prompted a new disbursement of public funds amounting to half the total amount of independent expenditures, and also raised the recipient candidate's expenditure limit.[141]

With language anticipating *Arizona Free Enterprise*'s constitutional concerns, the Eighth Circuit rejected the matching funds provision as an impermissible infringement of freedom of speech and, to a lesser extent, an infringement of freedom of association.[142] Because the funds were triggered by the speech of others and that trigger directly resulted in deposits of funding to political opponents of the speech, the court found the provision to have an impermissible chilling effect on speech.[143] Applying strict scrutiny, the court ruled that the mechanism was not narrowly tailored to serve any compelling governmental interest.[144]

Following the decision in *Day*, Minnesota reformers crafted a new provision to address the court's concerns while furthering the aim of incentivizing participation in public financing and keeping the system responsive. As it has operated since 1996,[145] the provision is triggered if a privately financed primary candidate spends a total of twenty percent or more of the spending limit imposed on publicly financed candidates before their primary election, or fifty percent or more of that limit any time during the election.[146] Once triggered, the mechanism lifts spending caps on publicly financed candidates while allowing them to retain the initial disbursement of public funding that they have already received.[147]

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141. *Id.*

142. *Id.* at 1359–60.

143. *Id.* The court highlighted the deterring effect on speech where expenditures made to defeat a candidate "become[] directly responsible for adding to her campaign coffers." *Id.* at 1360.

144. *Id.* at 1361. In justifying the matching fund provision, the state claimed that it served a compelling state interest in increasing public confidence in the political system by encouraging participation in the public financing system. *Id.* Recognizing that candidate participation in the system in 1992 before the provision was passed was already at ninety-seven percent, the Court denied that the provision could be narrowly tailored to any interest important enough to justify its speech-chilling impacts. *Id.*

145. Effective April 12, 1996, Minnesota amended section 10A.25 to trigger the lift of public candidates' spending limits based on the spending levels of their privately financed opponents. Act effective April 12, 1996, ch. 459, sec. 2, 1996 Minn. Laws 1516, 1517–18 (amending MINN. STAT. § 10A.25 Subd. 10 (1996)). Previously, a lift on the public candidates' cap had been triggered earlier by an opponent's decision to opt-out of the public financing system. *See, e.g.*, MINN. STAT. § 10A.25 Subd. 10 (1988).

146. MINN. STAT. § 10A.25 Subd. 10 (2011–12).

147. *Id.*

The Eighth Circuit found that this newer provision did not raise the same First Amendment concerns as the matching funds at issue in *Day*.[148] The court analyzed the scheme under *Buckley* and found the financing scheme constitutionally permissible because candidate participation in the system remained genuinely voluntary.[149] Though the court did not directly address any arguments regarding the provision's chilling effects on speech, it implicitly accepted their absence by concluding that the provisions promoted, rather than burdened, First Amendment values.[150]

Though Minnesota's current trigger has not been reevaluated since *Arizona Free Enterprise*, the decision has little novel impact beyond the Eighth Circuit's previous holding in *Day*, so the trigger is likely to withstand any new First Amendment challenge to its constitutionality. The Supreme Court's chief concern over matching funds is their chilling effect on speech, which arises when new additional funding for candidates is *directly* triggered by the spending or speech of those candidates' political opponents and effectively penalizes the speech.[151] Nevertheless, the Court recognized that the Arizona funds at issue would not pose the same constitutional challenges if disbursed in a lump sum up front.[152] The continuing constitutional question surrounding Minnesota's current trigger, therefore, is less about the initially disbursed subsidy. Rather, it centers on whether the triggered lift of a public candidate's expenditure limit constitutes a significant enough penalty on election spending in favor of privately financed candidates to excessively burden that speech. Directly addressing the question, the Eighth Circuit ruled that the scheme imposes no such burden on speech.[153] Thus, going forward, triggering mechanisms that do not disburse new funds directly, but create only the *opportunity* for public

148. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (1996).

149. *Id.* at 1549–50. Appellants challenged the law by arguing that the large benefits given to publicly financed candidates make opting into the program so attractive that participation is effectively coerced. *Id.* at 1549. Rejecting this argument, the Eighth Circuit found that the triggering provision established a useful incentive to participation in the financing scheme by helping to achieve "a relative balance between the benefits provided to publicly financed candidates and the restrictions the candidates must accept." *Id.* at 1550–51. Reformers must keep in mind though that the size of the subsidy could raise constitutional issues if so large that it renders participation in the system effectively coercive. *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

150. *Rosenstiel*, 101 F.3d at 1552.

151. *Ariz. Free Enter. Club v. Bennett*, 131 S. Ct. 2806, 2824 (2011).

152. *See id.* The Court explained that the constitutional issues were not created by the size of the public subsidy, but by "the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups." *Id.*

153. *Rosenstiel*, 101 F.3d at 1552–53.

candidates to raise and spend more funds themselves, are more likely to withstand First Amendment scrutiny.

Minnesota's current trigger demonstrates that after *Arizona Free Enterprise*, triggering funding provisions are not dead. They remain useful tools for crafting a system that is more flexible and responsive to the unique developments of each political campaign. They also incentivize participation in the system by helping to assure candidates up front that they will be able to run competitive elections against opponents who choose to privately finance their races. Though *Arizona Free Enterprise* restricts how robustly these triggers may operate, reformers in Wisconsin should continue to view them as valuable additions to any effort to design a new and vibrant public financing system.

CONCLUSION

This Comment raised concerns regarding the majority opinion's analysis of Arizona's matching funds provision in *Arizona Free Enterprise*. Though questionable on multiple grounds, accepting the Court's ruling does not signal the death of matching or trigger provisions in public financing systems going forward. Rather, through careful choices in wording, and by structuring provisions to avoid directly penalizing privately financed candidates for their expressions, matching fund mechanisms continue to remain constitutionally viable. Wisconsin is now poised to reform its long-defunct system of public financing. Legislators should incorporate these tools into reforms to ensure that any new system maintains the flexibility and responsiveness it needs to attract candidate participation and reduce the corruptive influence of large private donors in elections.