THINK SMALL: THE FUTURE OF PUBLIC FINANCING AFTER *ARIZONA FREE ENTERPRISE*

> "It is money! . . . Money! Money! Not ideas, nor principles, but money that reigns supreme in American politics."[1]

Campaign spending in the 2010 midterm election cycle hit record levels following a string of United States Supreme Court rulings on campaign finance,[2] including *Citizens United v. FEC*[3] and *Davis v. FEC*.[4] Candidates, political parties, and outside groups spent four billion dollars in the midterm election—more than had been spent in any previous midterm election cycle—and the record spending in 2010 is likely to be trumped in 2012.[5] Overall spending by candidates in 2012 is predicted to exceed eight billion dollars.[6]

Thus, the Supreme Court's statement, back in 1976, that "[t]he increasing importance of the communications media . . . make[s] the raising of large sums of money an ever more essential ingredient of an effective candidacy," is even more true today, almost twenty-five years later.[7] As one author explained, "The need to spend large amounts of money in political campaigns is driven by the cost of mass communications."[8]

The crucial importance of money in elections contributes to an appearance of corruption in politics. The Supreme Court recognized the potential for corruption back in 1976 when it explained in *Buckley v. Valeo* that "[t]o the extent that large contributions are

1. Francis X. Clines, *Senators Bemoan Unshakeable Habit*, N.Y. TIMES, Mar. 20, 1997, at B12 (quoting Sen. Robert C. Byrd on the issue of campaign finance).
2. T.W. Farnam & Nathaniel Vaughn Kelso, *Campaign Cash: What Interest Groups Spent on 2010 Midterm Elections*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/ (last visited Apr. 10, 2012).
3. 130 S. Ct. 876 (2010).
4. 554 U.S. 724 (2008).
5. *See* Danielle Kurtzleben, *2010 Set Campaign Spending Records*, U.S. NEWS, Jan. 7, 2011, http://www.usnews.com/news/articles/2011/01/07/2010-set-campaign-spending-records.
6. Jim Meyers, *2012 Election Price Tag: $8 Billion*, NEWSMAX, Apr. 14, 2011, http://www.newsmax.com/InsideCover/election-cost-price-tag/2011/04/14/id/392926.
7. Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam).
8. Richard Esenberg, *Playing Out the String: Will Public Financing of Elections Survive* McComish v. Bennett*?*, 10 ELECTION L.J. 165, 166 (2011).

given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system . . . is undermined."[9]

One response to combating political corruption is public financing. In *Buckley v. Valeo*, the Supreme Court upheld, in part, the constitutionality of a public financing system, explaining that public financing serves "as a means of eliminating the improper influence of large private contributions . . . ."[10] The underlying principle of public financing is that "an increase in public funding will lessen the influence of private money in politics, decrease the amount of time that candidates spend fundraising, and expand political access for groups who traditionally have not had access to well-established fundraising networks."[11]

In the wake of *Buckley*, many states enacted public financing systems to reduce the importance of private fundraising. For example, in the mid-nineties, Maine[12] and Arizona[13] passed "two of the most comprehensive and ambitious" "Clean Elections" statutes in history.[14] These statutes provided "voluntary systems of full public funding of election campaigns for state offices, coupled with lowered campaign contribution limits for those who opt not to participate in the public funding system . . . ."[15] Additionally, in 2002, North Carolina passed a public finance statute for the state's judicial elections.[16]

Despite the lofty goals proponents of public financing have for combating corruption, those goals can only be achieved if candidates actually participate in the system. As the amount of money it takes to win an election keeps hitting new highs, public financing, which subjects participants to expenditure limitations, becomes less attractive to serious candidates who may not be able to compete with their privately financed opponents.

In an effort to attract candidates, many states began structuring public finance statutes to include "trigger" (or "rescue" or "matching") funds.[17] These funds are designed to enable a

9. *Buckley*, 424 U.S. at 26–27.

10. *Id.* at 96.

11. Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, 738 (2007) (citing ARIZ. REV. STAT. ANN. § 16-940(B) (2006)).

12. *See* Maine Clean Election Act, 1996 Me. Legis. Serv. Initated Bill Ch. 5 (West) (codified in scattered sections of ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (Supp. 2006)).

13. Citizens Clean Elections Act, 1998 Ariz. Legis. Serv. Prop. 200 (West) (codified at ARIZ. REV. STAT. ANN. §§ 16-901.01, -940 to -961 (2006) (amended 2011) (§ 944 repealed 2007)).

14. Frasco, *supra* note 11, at 734–35.

15. *Id.*

16. Judicial Campaign Reform Act, 2002 N.C. Sess. Laws 158 (codified as amended in scattered sections of N.C. GEN. STAT. § 163 (2005)).

17. *See* Eliza Newlin Carney, *Public Financing: One Step Up Or Two Steps Back?*, NATIONALJOURNAL.COM, http://www.nationaljournal.com/columns/rules-

publicly financed candidate to receive additional funds once her self-financed opponent's spending exceeds a certain threshold.

The constitutionality of trigger funds was at issue in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[18] Several past and future candidates for Arizona state offices filed suit and argued that "the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights."[19] In other words, but for the trigger-funding provision, the candidates would have spent more money on campaigns.

In *Arizona Free Enterprise*, the Supreme Court held that the trigger-funding provisions in Arizona's Clean Elections statute were unconstitutional because the provisions imposed a substantial burden on free speech and were not justified by a sufficiently compelling government interest.[20]

Although the Court did not declare public financing as a concept unconstitutional, since the Court's decision there have been challenges to the constitutionality of similar statutes across the country, including in North Carolina.[21] This Note explores the future of public financing in the aftermath of *Arizona Free Enterprise* and suggests that a small-donor public matching financing program provides a possible alternative to traditional, and now unconstitutional, trigger-funding-based public financing programs.

Part I of this Note discusses the birth of modern campaign finance reform and the Supreme Court's decision in *Buckley v. Valeo*. Part II describes the history of traditional public financing statutes and trigger-funding provisions prior to *Arizona Free Enterprise*, focusing on challenges to those statutes. Part III explains the background of *Arizona Free Enterprise* and the Supreme Court's ruling in the case, focusing in particular on why the Supreme Court declared trigger funds unconstitutional. Finally, Part IV analyzes the implications of *Arizona Free Enterprise* on the future of public financing and suggests that a small-donor public matching financing program may serve as a viable alternative to traditional, trigger-funding-based programs.

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of-the-game/public-financing-one-step-up-or-two-steps-back—20100614 (last modified Dec. 16, 2010, 9:54 AM) (listing Connecticut, Maine, New Mexico, North Carolina, and Wisconsin among states with similar fund-matching systems).

18. 131 S. Ct. 2806, 2816 (2011).

19. *Id.*

20. *Id.* at 2813.

21. *See* Tom Breen, *Groups Seek to Overturn NC Campaign Spending Law*, REAL CLEAR POLITICS (Sept. 13, 2011), http://www.realclearpolitics.com/news/ap/politics/2011/Sep/13/groups_seek_to_overturn_nc_campaign_spending_law.html.

I. *BUCKLEY* AND THE BIRTH OF MODERN CAMPAIGN FINANCE

In 1974, in response to the corruption of the Watergate scandal, Congress amended the Federal Election Campaign Act of 1971 ("FECA") to create comprehensive campaign reform.[22] The FECA amendments, in part, introduced limits on the size of campaign contributions and expenditures, and created a system of public financing for presidential campaigns.[23] Two years later, various organizations, candidates for political office, and political parties challenged the constitutionality of those amendments, claiming that several provisions of the Act infringed on their First Amendment rights.[24]

In *Buckley v. Valeo*, a decisive case in modern campaign finance reform, the Supreme Court held that (1) provisions limiting expenditures by candidates on their own campaigns were unconstitutional;[25] (2) provisions limiting campaign contributions were constitutional;[26] and (3) the presidential public financing system was constitutional.[27]

First, the Court held that expenditure limits by candidates were unconstitutional because they represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[28] The Court explained that expenditure limits curtail political expression, which is "at the core of our electoral process and of the First Amendment freedoms,"[29] and that "equalizing the relative financial resources of candidates competing for elective office . . . is clearly not sufficient to justify . . . infringement of fundamental First Amendment rights."[30]

Second, the Court upheld the constitutionality of contribution limits, finding that they only impose a "marginal restriction upon the contributor's ability to engage in free communication."[31] The Court explained that "[a] limitation on the amount of money a person may give . . . involves little direct restraint on his political communication . . . but does not in any way infringe the contributor's freedom to discuss candidates and issues."[32] The Court held that preventing corruption was a government interest

22. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).
23. Buckley v. Valeo, 424 U.S. 1, 6–7 (1976).
24. *Id.* at 6–8.
25. *Id.* at 58–59.
26. *Id.* at 58.
27. *Id.* at 108.
28. *Id.* at 19.
29. *Id.* at 39 (citing Williams v. Rhodes, 393 U.S. 23, 32 (1968)); *id.* at 44–45.
30. *Id.* at 54.
31. *Id.* at 20–21.
32. *Id.* at 21.

legitimate enough to justify imposing contribution limits under intermediate scrutiny.[33]

Third, and most relevant to this Note, the Court also upheld a presidential public financing system, including a provision allowing campaign expenditures to be restricted as a condition of a candidate voluntarily accepting public funds.[34] Appellants argued that public financing should be struck down claiming it was "contrary to the 'general welfare' . . . because any scheme of public financing of election campaigns is inconsistent with the First Amendment . . . ."[35] The Court disagreed and identified three interests properly served by public funding: "(1) facilitating speech, not abridging it; (2) eliminating the improper influence of large contributions; and (3) relieving major party candidates of the rigors of fundraising."[36] The Court explained that public financing furthers the First Amendment because it is "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process."[37] The Court stated that the system furthers a significant government interest—that of preventing corruption—by "eliminating the improper influence of large private contributions."[38] Thus, with the help of the Supreme Court, public financing was born.

II. THE RISE OF PUBLIC FINANCING STATUTES AND CHALLENGES TO TRIGGER-FUNDING PROVISIONS

A. *Structure of Traditional Public Financing Statutes*

After *Buckley* established the foundation for the enactment of public financing statutes, several states began enacting similar "Clean Elections" statutes to provide public financing for all levels of government.[39] When *Arizona Free Enterprise* went before the Supreme Court, twenty-five states had some form of public financing.[40]

33. *Id.* at 26–27.
34. *Id.* at 107–08.
35. *Id.* at 90.
36. Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, CATO SUP. CT. REV., 2010–2011, at 124, *available at* http://www.cato.org/pubs/scr/2011/Alligators_Gora.pdf.
37. *Buckley*, 424 U.S. at 92–93.
38. *Id.* at 96.
39. Philip G. Rogers et al., *Voter-Owned Elections in North Carolina: Public Financing of Campaigns*, POPULAR GOV'T, Winter 2009, at 32, *available at* http://www.mpa.unc.edu/sites/www.mpa.unc.edu/files/article1_0.pdf.
40. *Id.*

Arizona's Citizens Clean Elections Act,[41] passed in 1998, provides a good example of the structure of a traditional public financing statute. Under Arizona's statute, candidates for several state offices may opt to receive public financing if they meet and agree to certain requirements.[42] For example, candidates must collect a certain number of five-dollar donations[43] and agree to certain campaign restrictions and obligations, such as limiting their expenditure of personal funds to $500,[44] participating in public debates,[45] adhering to various expenditure limits,[46] and returning any unused money to the state.[47]

Because the *Buckley* Court held that limits on expenditures were unconstitutional,[48] participation in public financing is voluntary. Practically speaking, this means that publicly financed candidates have to compete against privately financed candidates who have not subjected themselves to expenditure limitations.

Recognizing the need to attract candidates to participate in public financing systems, statutes often include trigger-funding, or rescue-funding provisions.[49] Under Arizona's trigger-funding provision, if a publicly financed candidate's privately financed opponent, or an independent group supporting the opponent, spends more than the initial allotment of state funds to the publicly financed candidate, a matching-funds provision is triggered.[50] Each additional dollar the privately financed candidate spends results in one dollar of additional funding for the publicly financed candidate.[51] The additional funds are capped at three times the initial grant to the publicly financed candidate.[52] In defending its trigger-funding provision, Arizona explained:

> By linking the amount of public funding in individual races to the amount of money being spent in these races, the State is able to allocate its funding among races of varying levels of

41. ARIZ. REV. STAT. ANN. §§ 16-940–19-961 (2006 & Supp. 2011).

42. *See id.* § 16-950(D) (making public financing available to candidates for governor, secretary of state, attorney general, treasurer, superintendent of public instruction or corporation commission, mine inspector, and state legislator).

43. *Id.* § 16-941(A)(1).

44. *Id.* § 16-941(A)(2).

45. *Id.* § 16-956(A)(2).

46. *Id.* § 16-941(A).

47. *Id.* § 16-953.

48. Buckley v. Valeo, 424 U.S. 1, 58–59 (1976).

49. *See* Eric H. Wexler, *A Trigger Too Far?: The Future of Trigger Funding Provisions in Public Campaign Financing After* Davis v. FEC, 13 U. PA. J. CONST. L. 1141, 1151 (2011).

50. ARIZ. REV. STAT. ANN. §§ 16-952(A)–(C).

51. *Id.* § 16-952(A). This additional funding is subject to a six percent reduction to account for fundraising expenses. § 16-952(A) (amended 2011).

52. *Id.* § 16-952(E).

> competitiveness without having to make qualitative evaluations of which candidates are more "deserving" of funding beyond the base amounts provided to all publicly-funded [sic] candidates.[53]

Proponents of trigger-funding provisions argue that without the provisions, "candidates would be hesitant to participate in public financing because a non-participating candidate could drown out the participating candidate's message by spending potentially unlimited funds."[54] Proponents also argue that "money coarsens our debate and should be taken out of politics. To spend 'too much' on politics is intrinsically bad."[55] Furthermore, they say that "[a]dditional funding does not restrict the speech of nonparticipating candidates"; rather, it provides for the speech of others.[56]

On the other hand, opponents argue that trigger funds violate the First Amendment because they chill the nonparticipating candidate's speech since "spending in excess of the specified trigger results in public funds being dispersed to a participating candidate."[57] As one scholar puts it, "In the zero-sum game of an election, a subsidy for one necessarily penalizes the other."[58] Trigger funds "burden the speech of nonparticipants . . . by ensuring that, at least to a point, every dollar they spend in conveying their message will be met by taxpayer dollars funding a private message diametrically opposed to their own."[59] These arguments gave rise to constitutional challenges to trigger funding in public financing statutes.

*B. Challenges to Trigger-Funding Provisions Pre-*Davis.

Prior to 2008, public financing statutes with trigger-funding provisions did well in lower courts. The First, Fourth, and Sixth Circuits all found trigger-funding provisions constitutional.[60] In *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, for example, the Fourth Circuit upheld the constitutionality of the trigger-funding provisions in

53. George LoBiondo, *Pulling the Trigger on Public Campaign Finance: The Contextual Approach to Analyzing Trigger Funds*, 79 FORDHAM L. REV. 1743, 1749 (2011) (citing McComish v. Bennett, 611 F.3d 510, 527 (9th Cir. 2010)).

54. Wexler, *supra* note 49, at 1151 (citing Brief of State Respondents at 9, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (Nos. 10-238 & 10-239)).

55. Esenberg, *supra* note 8, at 166.

56. *Id.* at 169.

57. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008).

58. Esenburg, *supra* note 8, at 169.

59. *Id.*

60. *See Leake*, 524 F.3d at 432; Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445, 472 (1st Cir. 2000); Gable v. Patton, 142 F.3d 940, 949 (6th Cir. 1998).

North Carolina's Judicial Campaign Reform Act.[61] In upholding the statute, the court explained that the provision "'furthers, not abridges, pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech."[62] Furthermore, the court explained, "To the extent that the plaintiffs (or those similarly situated) are in fact deterred by [the statute] from spending in excess of the trigger amounts, the deterrence results from a strategic, political choice, not from a threat of government censure or prosecution."[63]

Only the Eighth Circuit, in *Day v. Holahan*, found trigger-funding provisions unconstitutional.[64] In *Day*, the Eighth Circuit declared a Minnesota statute unconstitutional and explained that the state's interest in encouraging participation in public financing was not a sufficiently compelling interest to justify the burden on free speech.[65]

C. Davis v. Federal Election Commission

The Supreme Court's approach to campaign finance reform shifted dramatically in 2008 when it considered the constitutionality of the "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002[66] in *Davis v. FEC*.[67] Although *Davis* did not directly involve a challenge to public financing statutes, it dramatically "altered the framework under which federal courts analyze trigger fund provisions."[68]

The Millionaire's Amendment at issue in *Davis* provided that if a candidate for the House of Representatives spent more than $350,000 of her own personal money on her campaign, that candidate's opponent would be permitted to collect contributions from individuals up to $6900 per person—three times the normal contribution limit of $2300.[69] However, the candidate who spent more than $350,000 of personal funds remained subject to the original contribution limit of $2300.[70]

The *Davis* Court declared the Millionaire's Amendment unconstitutional because it forced a candidate "to choose between the First Amendment right to engage in unfettered political speech

61. N.C. GEN. STAT. § 163-278.61–163-335 (2011); *Leake*, 524 F.3d at 432.
62. *Leake*, 524 F.3d. at 437 (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).
63. *Id.* at 438.
64. Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994).
65. *Id.* at 1361.
66. Bipartisan Campaign Reform Act of 2002 § 319(a), 2 U.S.C. § 441a-1 (2006).
67. 554 U.S. 724, 728 (2008).
68. LoBiondo, *supra* note 53, at 1752.
69. *Davis*, 554 U.S. at 729.
70. *Id.* (citing 2 U.S.C. §§ 441a-1(a)(1)(A)–(C) (2006)).

and subjection to discriminatory fundraising limitations."[71] The Court further explained that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . . ."[72]

In responding to the argument that the Millionaire's Amendment was similar to public financing, the Court explained that in a public financing system, a nonparticipating candidate "retain[ed] the unfettered right to make unlimited personal expenditures," a right which the Millionaire's Amendment burdened because a candidate's personal expenditures triggered a "scheme of discriminatory contribution limits."[73] The Court concluded that there was no government interest justifying the burden of the Millionaire's Amendment and declared the statute unconstitutional.[74]

D. *Challenges to Trigger-Funding Provisions Post-*Davis

The Court's rationale in *Davis* prompted a host of challenges to trigger-funding provisions of public financing statutes all across the country. Within months after *Davis*, both the Eleventh Circuit[75] and the Second Circuit[76] found trigger-funding provisions in public financing statutes unconstitutional. Both of these courts found trigger-funding provisions more troublesome than the Millionaire's Amendment in *Davis* because instead of just relaxing contribution limits, the trigger funds guaranteed that the spending-candidate's opponent would have additional money.[77]

The Ninth Circuit, on the other hand, found trigger-funding provisions constitutional in *McComish v. Bennett*.[78] Because of the split between circuits over this issue, the Supreme Court, on November 29, 2010, granted certiorari to *McComish v. Bennett*.[79]

71. *Id.* at 739.
72. *Id.* at 738.
73. *See* Wexler, *supra* note 49, at 1159–60 (citing *Davis*, 554 U.S. at 739–40).
74. *Davis*, 554 U.S. at 740.
75. Scott v. Roberts, 612 F.3d 1279, 1281 (11th Cir. 2010).
76. Green Party of Conn. v. Garfield, 616 F.3d 213, 218 (2d Cir. 2010).
77. *Id.* at 244–45; *Roberts*, 612 F.3d at 1291.
78. 611 F.3d 510, 513 (2010), *rev'd sub nom.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).
79. 131 S. Ct. 644, 644 (2010), *rev'd sub nom.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

III: THE CASE—*ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC V. BENNETT*

A. *District Court Decision*

The district court held that the trigger-funding provision in Arizona's statute was unconstitutional because it "constitute[d] a substantial burden" on free speech since it awarded funds to the publicly financed candidate on the basis of the privately financed candidate's free speech.[80] The court explained that there was "no compelling interest served" by the provision that might justify the burden imposed.[81]

The court analogized the trigger-funding provision to the "Millionaire's Amendment" that was addressed in *Davis v. FEC*.[82] The court explained that "[i]f the mere *potential* for your opponent to raise additional funds is a substantial burden, then the granting of additional funds to your opponent must also be a burden."[83] The court stated that

> [a]rguably . . . [matching funds] is more constitutionally objectionable than increasing an opponent's individual contribution limits. In the latter scenario, the opponent must still go out and raise the additional contributions. . . . [Matching funds], by contrast, ensure . . . that there will be additional money to counteract the excess expenditures by the non-participating candidate . . . .[84]

The court then issued an injunction against the enforcement of the matching funds provision.[85]

B. *The Ninth Circuit Decision*

The Ninth Circuit stayed the district court's injunction and, after hearing the case, reversed the decision.[86] The court concluded that the matching funds provision was constitutional because it only imposes a "minimal burden on First Amendment rights" since it "does not actually prevent anyone from speaking in the first place or

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80. McComish v. Brewer, CV-08-1550-PHX-ROS, 2010 WL 2292213, at *8–9 (D. Ariz. Jan. 20, 2010), *rev'd sub nom.*, McComish v. Bennett, 611 F.3d 510, 513–14 (9th Cir. 2010), *rev'd sub nom.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

81. *Id.* at *9.

82. *Id.* at *7 (citing Davis v. FEC, 554 U.S. 724, 736–44 (2008)).

83. *Id.* at *8 n.14.

84. *Id.* at *8 (quoting Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 373 (D. Conn. 2009), *aff'd in part*, *rev'd in part*, 616 F.3d 213 (2d Cir. 2010)).

85. *Id.* at *13.

86. McComish v. Bennett, 611 F.3d 510, 513–14 (9th Cir. 2010), *rev'd sub nom.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

cap campaign expenditures."[87] The court also found a substantial relation between the trigger-funding provision and the state's "sufficiently important interest in preventing corruption and the appearance of corruption."[88] The court evaluated the provision using intermediate scrutiny because it concluded that "the burden created by the Act is most analogous to the burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*."[89] Following those precedents, the court applied intermediate scrutiny.

The Ninth Circuit specifically disagreed with the district court's determination that the provisions bear no relation to reducing the appearance of quid pro quo corruption.[90] The court explained:

> The more candidates that run with public funding, the smaller the appearance among Arizona elected officials of being susceptible to *quid pro quo* corruption, because fewer of those elected officials will have accepted a private campaign contribution and thus be viewed as beholden to their campaign contributors or as susceptible to such influence.[91]

The court finally explained that without trigger funding, candidates would not be willing to participate in public financing, and, thus, the system would do nothing to reduce the existence or appearance of quid pro quo corruption.[92] The court stated:

> In order to promote participation in the program, and reduce the appearance of *quid pro quo* corruption, the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*. . . . A public financing system with no participants does nothing to reduce the . . . appearance of *quid pro quo* corruption.[93]

C. The Supreme Court Decision

1. The Majority Opinion

The Supreme Court granted certiorari on November 29, 2010,[94] and struck down the Arizona law in a five-four decision written by Chief Justice Roberts and joined by Justices Scalia, Kennedy,

87. *Id.* at 513, 525.
88. *Id.* at 525.
89. *Id.*
90. *Id.* at 526.
91. *Id.*
92. *Id.* at 526–27.
93. *Id.*
94. McComish v. Bennett, 131 S. Ct. 644, 644 (2010).

Thomas, and Alito.[95] The Court relied heavily on its reasoning in *Davis* and declared that "[i]f the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does as well."[96]

In analogizing the trigger-funding provision of the Arizona law to the Millionaire's Amendment, the Court noted that the Arizona law imposed a far heavier burden because it led to the direct and automatic release of public funds, rather than an ability to raise more funds.[97] Furthermore, under the Arizona law, spending by independent groups also triggered the matching funds, meaning that the burden that may be imposed on the privately financed candidate is somewhat out of the candidate's hands.[98] The Court explained, "That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate."[99]

Arizona, the Clean Elections Institute, and the United States argued that the provision does not have a chilling effect on speech, but rather, "results in more speech by 'increas[ing] debate about issues of public concern' . . . and 'promot[ing] the free and open debate that the First Amendment was intended to foster.'"[100] The Court disagreed and stated that "even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[101]

Next, the Court examined whether the provision was justified by a compelling state interest.[102] Arizona argued that the compelling state interest supporting the provision was in "combat[ing] corruption by eliminating the possibility of any *quid pro quo* between private interests and publicly funded candidates . . . ."[103] The Supreme Court disagreed, concluding that the real government interest behind the provision was in "leveling the playing field."[104] The Court stated that the provision does not

95. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2812 (2011), *rev'g by an equally divided court*, McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010).
96. *Id.* at 2818.
97. *Id.* at 2818–19.
98. *Id.* at 2819.
99. *Id.* at 2810.
100. *Id.* at 2820 (quoting Brief of State Respondents at 41, *Ariz. Free Enter.*, 131 S. Ct. 2806 (2011) (Nos. 10-238 & 10-239)).
101. *Id.* at 2821.
102. *Id.* at 2824.
103. *Id.* at 2825.
104. *Id.*

serve an anticorruption interest because "[t]he matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions" and because "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[105] The Court then reaffirmed that "it is not legitimate for the government to attempt to equalize electoral opportunities in this manner."[106]

The Court went on to explicitly state, "We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business."[107] However, the Court also explained that "the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment."[108] The Court found Arizona's statute inconsistent with the First Amendment, concluding that "[l]aws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."[109]

2. The Dissent

Justice Kagan wrote a fiery dissent disagreeing with all aspects of the majority opinion. Kagan stated that the statute neither imposes a restriction nor a substantial burden on expression; rather, "[t]he law has quite the opposite effect: It subsidizes and so produces *more* political speech."[110]

The dissent set forth three reasons why the Arizona provision does not constitute a "substantial" burden of free speech. First, it stated that the matching funds provision provides no greater a burden on privately financed candidates than a lump sum, which the Court upheld in *Buckley*.[111] Second, it stated that in the past the Court had had no difficulty upholding disclosure and disclaimer requirements, which the Court reasoned "may burden the ability to speak"[112] and "will deter some individuals" from engaging in expressive activity.[113] Third, "any burden that the Arizona law imposes does not exceed the burden associated with contribution limits," which the Court stated "impose *direct quantity restrictions* on political communication and association."[114]

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105. *Id.* at 2826 (citing Citizens United v. FEC, 130 S. Ct. 876, 909 (2010)).
106. *Id.*
107. *Id.* at 2828.
108. *Id.*
109. *Id.* at 2829.
110. *Id.* at 2833 (Kagan, J., dissenting).
111. *Id.* at 2837–38.
112. *Id.* at 2838 (quoting Citizens United v. FEC, 130 S. Ct. 876, 914 (2010)).
113. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 68 (1976)).
114. *Id.* (quoting *Buckley*, 424 U.S. at 18).

The dissent also disagreed with the majority's reliance on *Davis*.[115] In *Davis*, a candidate's spending triggered a discriminatory speech restriction, namely, imposing a different contribution limits scheme.[116] In contrast, the Arizona provision only triggered a nondiscriminatory speech subsidy.[117] "The constitutional infirmity in *Davis* was not the trigger mechanism, but rather . . . 'the asymmetrical contribution limits.'"[118]

Finally, the dissent disagreed with the majority's finding that Arizona did not have a compelling government interest justifying the statute. It explained, "Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest."[119] To the contrary, the compelling interest "appears on the very face of Arizona's public financing statute . . . [t]he public financing program . . . was 'inten[ded] to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money.'"[120]

IV. THE FUTURE OF PUBLIC FINANCING AFTER *ARIZONA FREE ENTERPRISE*

A. So Long, Trigger Funds . . . Hello, Small Donors

The Supreme Court's decision in *Arizona Free Enterprise* signals the death of traditional public financing statutes that rely on trigger funds to attract candidates. However, the death of traditional public financing was evident well before the Supreme Court decided *Arizona Free Enterprise*. Most telling was President Barack Obama's decision to opt out of public financing during the 2008 election—the first presidential candidate to do so since the system was created.[121] Even before that, in 2004, John McCain remarked, "[T]here are considerable incentives for some candidates to opt out of public financing."[122] The rising costs of campaigns

115. *Id.* at 2839.
116. *Id.*
117. *Id.*
118. *Id.* at 2840 (quoting *Ariz. Free Enter.*, 131 S. Ct. at 2820 (majority opinion)).
119. *Id.* at 2841 (citing Davis v. FEC, 554 U.S. 724, 741 (2008); FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496–97 (1985)).
120. *Ariz. Free Enter.*, 131 S. Ct. at 2841–42 (citing ARIZ. REV. STAT. ANN. § 16-940(A) (2006).
121. *An Important Campaign Announcement From Barack Obama*, YOUTUBE.COM, http://www.youtube.com/watch?v=Snsnqbq_OCo (announcing his decision to opt out of public funding, explaining that the system is flawed, and asking supporters for their continued financial support) (last visited Apr. 12, 2012).
122. John McCain, *Reclaiming Our Democracy: The Way Forward,* 3 ELECTION L.J. 115, 120 (2004).

make it impractical and unwise for serious candidates to participate, and the effectiveness of public financing as a means to combat corruption depends on candidates actually participating in the system.

Without trigger funds, "a candidate . . . would be limited to receiving only the program's predetermined amount of funding, which would severely disadvantage the candidate if he or she faced a privately funded opponent who had significantly fewer financial restrictions."[123] As one scholar put it, "The whole point of the extra matching funds in the Arizona plan is to give candidates assurance they won't be vastly outspent in their election."[124] Without this added assurance, there is little to no incentive to participate.

Since *Arizona Free Enterprise*, the constitutionality of public financing statutes has been, or will be, challenged in several states,[125] and "[e]very jurisdiction that provides additional funds to publicly financed candidates in the face of either high spending, in the face of a privately-financed [sic] opponent or an outside expenditure group will have to reevaluate those provisions and probably take them off the books."[126]

However, as the Supreme Court explicitly noted in *Arizona Free Enterprise*, it did not "call into question the wisdom of public financing as a means of funding political candidacy"[127]—it only declared unconstitutional a grant of additional money to publicly financed candidates triggered by "a high-spending opponent or unexpectedly expensive outside attack ads."[128] The Court stated that "[w]e have said that governments 'may engage in public financing of election campaigns' and that doing so can further 'significant governmental interest[s],' such as the state interest in

123. Emily C. Schuman, Davis v. Federal Election Commission*: Muddying the Clean Money Landscape*, 42 LOY. L.A. L. REV. 737, 740 (2009).

124. Rick Hasen, *The Big Campaign Finance Story of 2011: An Effective End to Public Financing*, SUMMARY JUDGMENTS: LOYOLA L. SCH., L.A. FAC. L. BLOG (Nov. 28, 2010), http://summaryjudgments.lls.edu/2010/11/it-is-with-great-pleasure.html.

125. *See* Gora, *supra* note 36, at 122 n.80 ("A number of 'trigger' schemes have been declared unconstitutional or are being rewritten in Arizona, Maine, Florida, Albuquerque, San Francisco and Los Angeles."); *see also* Tom Breen, *Groups Seek to Overturn NC Campaign Spending Law*, REAL CLEAR POLITICS, (Sept. 13, 2011), http://www.realclearpolitics.com/news/ap/politics/2011/Sep/13/groups_seek_to_overturn_nc_campaign_spending_law.html.

126. Alec Hamilton, *Campaign Finance Ruling May Make NYC a Model for the Nation*, WNYC (June 21, 2011) (quoting Jessica A. Levinson, Director of Political Reform at the Center for Governmental Studies), http://www.wnyc.org/articles/its-free-country/2011/jun/21/campaign-finance-ruling-may-make-new-york-model-nation/.

127. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011).

128. Mark Ladov, *Public Financing Lives in New York City*, BRENNAN CENTER FOR JUSTICE (July 14, 2011), http://www.brennancenter.org/blog/archives/public_financing_lives_in_new_york_city/.

preventing corruption."[129] The Court's major issue with Arizona's trigger funding "was not that it gave public financing for elections to candidates, but that it pegged the amount of financing to the political spending of opponents or independent groups opposing the candidate."[130] As Michael Waldman, Director of the Brennan Center for Justice, declared, public financing "can exist and thrive without the kinds of triggers in the Arizona law."[131]

Not only *can* public financing exist and thrive without the kinds of triggers in the Arizona law, it *does* exist in the form of small-donor matching programs, such as the one in New York City. A small-donor matching program is a voluntary public financing system that provides matching funds for small contributions from local donors rather than matching funds to an opponent's high spending.[132] Since the New York City Council passed the New York City Campaign Finance Act in February 1988 establishing a small-donor matching program,[133] it has been met with surprising success.

This Part suggests that a small-donor matching program, such as the one in New York City, that provides matching funds for small donations from local donors, replaces spending limits with contribution limits, and provides incentives for small donors to engage in the political system provides a viable—and likely constitutional—alternative to traditional public financing. Small-donor matching programs may even be a more effective form of public financing "because the Internet makes low-dollar fund-raising [sic] so simple."[134]

B. *Following the Leader: The New York City Campaign Finance Act*

Like most public financing statutes, the New York City Campaign Finance Act was designed to prevent corruption; but unlike traditional statutes, the New York City Act also seeks "to

129. *Ariz. Free Enter.*, 131 S. Ct. at 2828 (citing Buckley v. Valeo, 424 U.S. 1, 57 n.65, 96 (1976)).

130. Richard Hasen, *The Arizona Campaign Finance Law: The Surprisingly Good News in the Supreme Court's New Decision*, NEW REPUBLIC (June 27, 2011), http://www.tnr.com/article/politics/90834/arizona-campaign-finance-supreme-court [hereinafter *Surprisingly Good News*].

131. Erik Opsal, *Public Financing Lives*, BRENNAN CENTER FOR JUSTICE (June 28, 2011), http://www.brennancenter.org/blog/archives/public_financing_lives/.

132. ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 4 (Brennan Center for Justice, 2010), *available at* http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf.

133. N.Y.C., N.Y., Local Law No. 8, of 1988 (codified at N.Y.C., N.Y. ADMIN. CODE § 3-702(3)).

134. Zephyr Teachout, *What the Court Did and Didn't Do*, ROOM FOR DEBATE, N.Y. TIMES OP. PAGES (June 27, 2011), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-publicfinancing/matching-funds-what-the-court-didnt-touch.

expand the role of citizens in elections from voter to that of financier and even candidate."[135]

Under the New York City small-donor matching program, participating candidates receive a six-to-one match in public financing for the first $175 they raise from each New York City voter, turning a $175 donation into a $1,225 donation.[136] To encourage candidates to engage local voters, only donations from New York City residents are matched.[137] These two provisions encourage participants to solicit support from a large donor base of New York City residents instead of focusing on obtaining larger contributions from a smaller group of wealthy donors, political parties, political action committees, and the like.[138] Thus, unlike Arizona's statute, which tied additional public funds to the high spending of privately financed opponents, New York City's statute ties public funds to the success of the candidate's own small-donor fundraising. And this, in turn, "avoids the constitutional problems raised in the [*Arizona Free Enterprise*] case, by ensuring that a candidate's public financing rises or falls based on her own success at campaigning."[139]

The New York City small-donor matching program does contain a "bonus" matching component which may be deemed unconstitutional in light of *Arizona Free Enterprise*. Under the bonus match provision of the statute, "[a] non-participant triggers additional public funding for participating opponents by spending or raising one-half of the established spending cap for that election."[140] However, statistics have shown that the bonus matching funds are not crucial to the success of the program for two reasons. First, from 1997 to 2005, only four percent of all public funding has come from the bonus payments.[141] Second, the bonus matching program was triggered in less than ten percent of New York City elections from 1989 to 2006.[142] Thus, even if *Arizona Free Enterprise* results in this provision being unconstitutional, it does not signal the end of the small-donor matching program as a whole.

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135. MIGALLY & LISS, *supra* note 133, at 3.
136. *Id.* at 5 (citing N.Y.C., N.Y., ADMIN. CODE § 3-705(2)(a) (2009)).
137. *Id.* (citing §§ 3-702(3), (1-a), (14)(a)(iii)).
138. Ladov, *supra* note 129.
139. *Id.*
140. Larry Levy & Andrew Rafalaf, *High Court's Recent Decision on Public Matching Funds Renders New York City's Campaign Finance System Ripe for Constitutional Attack*, ALBANY GOV'T L. REV. (July 11, 2011), http://aglr.wordpress.com/2011/07/11/high-courts-recent-decision-on-public-matching-funds-renders-new-york-citys-campaign-finance-system-ripe-for-constitutional-attack-2/#_ftn16 (citing N.Y.C., N.Y., ADMIN. CODE § 3-706(3)(a) (2011)).
141. N.Y.C. CAMPAIGN FIN. BD., THE IMPACT OF HIGH SPENDING NON-PARTICIPANTS ON THE CAMPAIGN FINANCE PROGRAM 10 (2006), *available at* http://www.nyccfb.info/PDF/issue_reports/High-Spending-White-Paper.pdf.
142. *Id.* at 3.

Since its initiation, the New York City program has been very successful. The program has led to "more competition, more small donors, more impact from small contributions, more grass roots [sic] campaigning, and more citizen participation in campaigns . . . [,][a]nd it has reduced the influence of big money in general and corporate money in particular."[143] For example, in 2009, ninety-three percent of primary candidates financed their campaigns through the public finance program and sixty-six percent of general election candidates participated in the program.[144] Not only does the system attract participation, it also produces results: in 2009, "the Public Advocate, the Comptroller, all five Borough Presidents, and all but two of the [fifty-one] City Council candidates who were elected" participated in the small-donor matching program.[145] Finally, the "system promotes voter choice by enabling a diverse pool of candidates with substantial grassroots support but little access to large donors to run competitive campaigns."[146]

The New York City Program has not been immune from criticism, however. One common question relating to all public financing programs is: How can candidates who voluntarily subject themselves to fundraising and spending limits successfully compete with privately financed candidates? In response, proponents of New York City's program argue that the system still provides participating candidates with more money to compete than they would otherwise have.[147] As Mark Green, Michael Bloomberg's opponent in the 2001 election for New York City Mayor, remarked, "It is irrational to argue against a system that enables a diverse group of people to run competitive campaigns because a wealthy candidate can occasionally outspend a participating candidate. The program benefits are not undermined by the rare occurrence of a Bloomberg candidate."[148]

The question now is whether New York City's program will stand up under judicial scrutiny. The short answer: most likely. As discussed above, the Court's decision in *Arizona Free Enterprise* is limited to trigger-funding provisions; it does not affect public financing as a whole. New York City's small-donor matching program "doesn't directly violate the rule in . . . [*Arizona Free Enterprise*], because the amount received is not triggered by opponent spending."[149] Instead, the success of the program is based on the ability of the candidate to raise her own funds from small

143. MIGALLY & LISS, *supra* note 133, at 21.
144. *Id.* at 10.
145. *Id.*
146. *Id.* at 2.
147. *Id.* at 22.
148. *Id.* (citing Telephone Interview by Angela Migally with Mark Green (June 26, 2010)).
149. Hasen, *Surprisingly Good News*, *supra* note 131.

donors. The only components of New York City's program likely open to attack are the provisions that increase the matching ratio and expenditure limits for candidates in races against opponents who spend above-threshold—but even without this provision, the small-donor matching program would likely still be successful.[150]

C. Small-Donor Matching Gains Traction

In 2011, in response to the success of New York City's program, the Wisconsin Democracy Campaign, a campaign reform organization, introduced a small-donor matching proposal for Wisconsin using New York City's approach as a model.[151] Under the Wisconsin proposal, qualifying contributions to candidates of less than fifty dollars would be matched at a ratio of four-to-one, and contributions between fifty and one hundred dollars would be matched three-to-one.[152] Furthermore, the Wisconsin approach "remov[es] spending limits as a condition for receiving public financing benefits, thereby allowing [candidates] to compete more freely while still weaning them from a heavy reliance on legal bribes from big-money special interests."[153]

The success of the small-donor matching program in New York City has also sparked the proposal of a similar program for congressional elections and a reform of the current presidential public financing program. The bipartisan Fair Elections Now Act, proposed in 2009, would establish, for the first time, public financing for congressional candidates.[154] The supporters of the Act declare that it will:

> [H]elp[] to reduce the ability to make large campaign contributions as a determinant of a citizen's influence within the political process by facilitating the expression of support by voters at every level of wealth, encourag[e] political participation, [and] incentiviz[e] participation on the part of Members through the matching of small dollar contributions.[155]

Under the proposed bill, the program would offer participating congressional candidates an initial sum of public money and would then match small contributions (of less than one hundred dollars) at

150. MIGALLY & LISS, *supra* note 133, at 23.
151. *Ending Welfare as We Know It*, WISCONSIN DEMOCRACY CAMPAIGN 1–2 (June 29, 2011), http://www.wisdc.org/proxy.php?filename=files/pdf%20(imported)/wealthfare/endingwealthfare.pdf.
152. *Id.* at 2–3.
153. *Id.* at 2.
154. Fair Elections Now Act, S. 752, 111th Cong. § 523(a) (2009); Fair Elections Now Act, H.R. 1826, 111th Cong. § 523(a) (2009) (introduced by Senators Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.), and by Representatives John Larson (D-Conn.) and Walter Jones (R-N.C.)).
155. S. 752, § 101(b)(3); H.R. 1826 § 101(b)(3).

a rate of four-to-one (or 400%) throughout the election up to a certain level.[156] Additionally, qualifying contributions would have to come from donors within the candidate's own state, thus reducing the influence of large donors outside the candidate's district.[157] Similarly, under the Presidential Funding Act, introduced in 2010, candidates would receive an initial sum of money and would receive thereafter a four-to-one match for contributors who gave $200 or less.[158] Although the Fair Elections Now bills have not emerged from Committee, the bills have seventy-eight co-sponsors in the House of Representatives and thirteen in the Senate.[159]

Studies have also examined the effect of implementing small-donor matching programs across the country. In 2008, the Campaign Finance Institute predicted the impact of small-donor matching public financing programs in six midwestern states.[160] The study showed that with a small donor matching program, the percentage of small donors ($0–$100) contributing to campaigns would likely greatly increase, while the percentage of high-spending donors ($1,000+) would decrease.[161] Although most of the money would still come from large donors, the "multiple matching fund increases the importance of [small donors] who already participate as well as creat[es] an incentive for candidates to recruit more [small donors] to join in."[162]

CONCLUSION

In the wake of the Supreme Court's decision in *Arizona Free Enterprise*, traditional public financing as we know it is dead. However, as the Court made clear, and as New York City's small-donor matching program has demonstrated, public financing as a concept is not.

The success of the New York City small-donor matching program serves as a model for public campaign finance reform. The New York City program has resulted in "more competition, more small donors, [greater] impact from small contributions, more grass

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156. S. 752, § 521–523; H.R. 1826 § 521–523.

157. S. 752, § 501(10)(b)(i).

158. Presidential Funding Act of 2010, S. 3681, 111th Cong. § 101(a)(1)(A) (2010); Presidential Funding Act of 2010, H.R. 6061, 111th Cong. § 101(a)(1)(A) (2010) (introduced by Senator Russell Feingold (D-Wis.) and Representatives Chris Van Hollen (D-Md.), David Price (D-N.C.), Michael Castle (R-Del.), and Todd Russell (R-Pa.)).

159. *Fair Elections Co-Sponsor Update*, FAIR ELECTIONS NOW (Oct. 26, 2011), http://fairelectionsnow.org/progress/news/fair-elections-co-sponsor-update.

160. MICHAEL J. MALBIN ET AL., THE CAMPAIGN FIN. INST., PUBLIC FINANCING OF ELECTIONS AFTER *CITIZENS UNITED* AND *ARIZONA FREE ENTERPRISE* 1–2 (2011), *available at* http://www.cfinst.org/pdf/state/CFI_Report_Small-Donors-in-Six-Midwestern-States-2July2011.pdf.

161. *Id.* at 2–3.

162. *Id.* at 11.

roots [sic] campaigning, and more citizen participation in campaigns."[163] Ultimately, New York City's program "has reduced the influence of big money in general and corporate money in particular."[164]

As states investigate implementing small-donor matching programs, they should focus on a program that utilizes two successful components of New York City's program. First, any program should make a small portion of funds available to qualifying candidates early on in the election cycle. This portion should "provide enough public money to give an underdog candidate a reasonable foundation for competing against a frontrunner, but should not make the race less competitive by giving a frontrunner a publicly funded financial advantage over the rest of the field."[165] Second, the bulk of the public funds distributed to the candidate should be in direct response to the candidate's own small-donor fundraising efforts. Tying public funds to a candidate's own fundraising efforts creates incentives for candidates to directly engage with the local population, "enhances the value of a small donation, and offers candidates an opportunity to raise substantial sums from small contributors."[166]

Will small-donor matching programs survive the scrutiny of the Supreme Court? Most likely, but with the recent pattern of the Supreme Court striking down campaign finance regulations, no one knows for sure.[167] As Rich Hasen remarked, small-donor programs "may be doomed if the [C]ourt views them as 'leveling the playing field,' an equality rationale for campaign finance laws that the [C]ourt majority has now rejected in three straight cases."[168]

Preventing corruption, and the appearance of corruption, in political campaigns is still a worthy goal for states to pursue, and *Arizona Free Enterprise* did not eliminate public financing as a way to accomplish it. Rather, *Arizona Free Enterprise* merely prompts states to re-examine current public financing programs and revise them to meet constitutional scrutiny and perhaps improve their effectiveness. In the face of the imminent death of public financing, small-donor matching programs may serve as a viable alternative.

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163. MIGALLY & LISS, *supra* note 133, at 21.

164. *Id.*

165. ANTHONY J. CORRADO ET AL., REFORM IN AN AGE OF NETWORKED CAMPAIGNS 45 (2010), *available at* http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{C997C6A5-8952-427D-A271-E45F92911F2E}.pdf.

166. *Id.* at 40.

167. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828–29 (2011); Citizens United v. FEC, 130 S. Ct. 876, 913–14 (2010); Davis v. FEC, 554 U.S. 724, 744 (2008).

168. Richard Hasen, *New York City as a Model?*, N.Y. TIMES (June 27, 2011), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/new-york-city-as-a-model-for-campaign-finance-laws.

A small-donor matching program may not work everywhere, but it is one option for public financing that is likely to survive *Arizona Free Enterprise*, and is an option that puts states one step closer to preventing corruption in political campaigns.

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