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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN McCOMISH; et al.,

Plaintiffs - Appellees,

and

DEAN MARTIN; et al.,

Plaintiff-intervenors - Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; et al.,

Defendants - Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-intervenor - Appellant.

Nos. 10-15165, 10-15166

D.C. No. 2:08-cv-01550-ROS
District of Arizona,
Phoenix

ORDER

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

LN/MOATT

The stay issued by the district court on January 20, 2010 is extended pending further action by the panel assigned to hear the merits of these appeals. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009).

These consolidated appeals are expedited. The briefing schedule is reset as follows. The opening briefs and excerpts of record are due February 9, 2010; the answering briefs are due February 16, 2010; and the optional reply briefs are due within 3 days after service of the last-served answering brief.

All parties on a side are encouraged to join in a single brief to the greatest extent practicable.

This case shall be heard during the week of April 12-16, 2010 in San Francisco, California.

BEA, Circuit Judge, dissenting.

I dissent. I agree with the district court's order of January 20, 2010, that this case is determined by *Davis v. Fed. Elec. Com'n*, ___ U.S. ___, 128 S. Ct. 2759 (2008), because state intervention in the funding of campaign contributions in a manner to benefit candidates when their opponents spend their own money on speech imposes a substantial burden on the exercise of the free speech of the candidate who spends his money. In *Davis,* if Davis spent more than $350,000 of his own money in his campaign, the contribution limitations placed on how much

others could contribute to his *opponents* were lifted, but not for contributions made by others to Davis. *Id*. at 2766–67. Quite naturally, this was found to be a disincentive to Davis spending money on his own campaign, lest the expenditure serve to give his opponents an advantage not open to him. Such a disincentive was found to impose a "substantial burden" on Davis' campaign speech which had to be justified under the "strict scrutiny" test. *Id*. at 2771–73.

The primary justification for limiting campaign contributions is to prevent people from giving money to buy influence from politicians. This consideration, however, is not present when a candidate finances his own campaign. *Buckley v. Valeo*, 424 U.S. 1, 23–35, 38, 46–47 and n.53 (1976) (per curiam). In *Buckley*, the Court found a limit on how much money a candidate could spend on his own campaign was not justified by "[t]he primary governmental interest" proffered in its defense, *i.e.*, "the prevention of actual and apparent corruption of the political process." *Id.* at 53. The Court expressly rejected the argument advanced here that the expenditure cap is justified on the ground that it serves an "ancillary interest in equalizing the relative financial resources of candidates competing for elective office." *Id.* at 54 (holding the interest in a level playing field was "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights.").

Similarly, here any expenditures by Plaintiffs in the primary are matched by funds from the State of Arizona given to the Plaintiffs' opponents. Plaintiffs know that if they buy a television advertisement, at a bargain rate now for June broadcasting, or hire a consultant who might go to the other side, that expenditure will result in "matching funds" going to the candidates they are trying to beat in the July primaries. Strategically, it makes no more sense for Plaintiffs to spend money now than for a poker player to make a bet if he knows the house is going to match his bet for his opponent.

But, I disagree with Judge Silver and with the majority of this panel that Defendant-Appellants have made a "strong showing" of a probability of success on appeal, which an applicant for a stay pending appeal is required to prove. *Nken v. Holder*, ___ U.S. ____, 129 S. Ct. 1749, 1761 (2009). Just the opposite. It is the Appellee-Plaintiffs who, on the basis of *Davis* and *Buckley*, have made a strong showing of the probability of success.

Further, I disagree with Judge Silver and with the majority of this panel that Defendants have shown the probability of "irreparable injury" to themselves should the stay not be granted, while Plaintiffs have not shown any injury in the immediate future.

That the "entire election landscape" would be changed by effecting the preliminary injunction does not state a particularized harm to any of the Defendants. That the Defendants, as "participating" (state-subsidized) candidates would have to change their fund-raising strategies—perhaps actually to do some fund-raising—does state some direct effect on them. But the "harm" claimed by fund-raising is simply the loss of state subsidies they would otherwise have if they did not raise these funds.

That "harm" is the mirror effect of the harm caused to the Plaintiffs by staying the district court's order. That is, once the stay is in effect, the Plaintiffs cannot expend money for campaign speech from now until the determination of the appeal—perhaps through the primary campaign—without causing money from the State of Arizona to flow to their opponents' coffers in equal measure to the Plaintiffs' expenditures.

In accounting terms, Plaintiffs' present expenditure of money on free speech in the campaign creates an immediate and equal account receivable for their opponents, due from the State of Arizona under the Matching Funds program, and to be paid by Arizona for use by the opponents against the Plaintiffs. Between having to hustle for campaign contributions (Defendant-Appellants' harm) and not being able to spend campaign money without helping one's opponents (Plaintiff-

Appellees' harm), the balance of harm caused seems greater to Plaintiffs-Appellees.

Yes, enforcement of the preliminary injunction would have a substantial effect on the Arizona 2010 election. However, change is always uncomfortable for the vested interests—here, that of "participating" candidates who look forward to state subsidies for their campaigns. But where First Amendment free speech interests are involved, the comfort level of those causing the "chilling effect" on speech is irrelevant.

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. . . . Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United v. Fed. Elec. Com'n*, ___ U.S. ___, 2010 WL 183856 at *18–19 (January 10, 2010).

Here, the participating candidates are "preferred" by the State of Arizona because Arizona matches the Plaintiffs' expenditures for speech with public monies which the preferred candidate can spend on speech.

Where, as here, the district court has found the Arizona statute would have a "chilling effect" on the Plaintiffs' free speech, we should respect that factual finding unless it constituted an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). The district court's finding that the Matching Funds given opponents will inhibit the Plaintiffs from spending their own money for campaign free speech is not (1) illogical, (2) implausible or (3) lacking inferences which can be based in the record. Thus, it is not an abuse of discretion. *Id*.

For these reasons, I respectfully dissent. I would deny the stay, and allow the preliminary injunction to take effect today, as the 10-day stay granted by the district court expires.