No. 10-13211-H

In the United States Court of Appeals for the Eleventh Circuit

RICHARD L. SCOTT,

Plaintiff-Appellant,

v.

DAWN K. ROBERTS, INTERIM SECRETARY OF STATE, STATE OF FLORIDA; and IRA WILLIAM McCOLLUM, JR.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF FOR APPELLEE DAWN K. ROBERTS, INTERIM SECRETARY OF STATE, STATE OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellant Procedure 26.1 and Eleventh Circuit Rule 26.1-1, I hereby certify that the following individuals or entities have or may have an interest in the outcome of this case:

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INTRODUCTION

Although the underlying case brought by Appellant Richard L. Scott ("Scott") involves a First Amendment issue of first impression in this Circuit, the issue presented by this appeal is much narrower: did the district court commit a clear abuse of its broad discretion in denying Scott's request for a preliminary injunction?

As set forth below, the district court acted properly in denying Scott's request to enjoin Florida's Secretary of State, Dawn K. Roberts from implementing the Florida Election Campaign Financing Act one month before the primary election. The district court did not abuse its discretion in determining that Scott had not satisfied his burden of clearly showing a substantial likelihood of success on the merits. The district court's decision also recognized the significant burdens that the requested injunction would have had on Appellees. A last-minute injunction would have disrupted the orderly operation of Florida's system of public campaign financing in the critical final weeks before the primary election. An injunction would have frustrated the State of Florida's compelling interest in preventing corruption and the appearance of corruption, as well as its interest in encouraging candidate participation in the public campaign financing system. Finally, the injunction would have denied Scott's electoral opponents the benefit of the bargain they struck when they agreed to participate in public campaign financing under the existing statute.

In its well-reasoned order, supplemented by an explanation from the bench, the district court balanced these interests and determined that Scott had not met his heavy burden to obtain the drastic remedy of a preliminary injunction. For these reasons and those set forth in detail below, Florida Secretary of State Dawn K. Roberts respectfully requests that this Court affirm the district court's order denying a preliminary injunction.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in refusing to preliminarily enjoin the Florida Secretary of State from providing matching funds to candidates participating in voluntary public campaign financing under longstanding provisions of the Florida Election Campaign Financing Act.

STATEMENT OF THE CASE AND THE FACTS

I. History of the Florida Election Campaign Financing Act

In 1986, the Florida Legislature adopted the Florida Election Campaign Finance Act, §§ 106.30-106.36, Florida Statutes (the "Act") the purpose of which is "to preserve the integrity of the election process by supporting candidates who are free from the influence of special interest money and to remove corruption and the appearance of corruption from that process." *Connor v. Division of Elections*, 643 So. 2d 75, 77 (Fla. 1st DCA 1994)) (citing *State v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992). The codified statement of legislative intent also expresses the concern that the public perceived that political contributions from "special interests" could unduly influence government officials to the detriment of the public interest. § 106.31, Fla. Stat. The Legislature therefore

intended the Act "to alleviate these factors, dispel the misperception, and encourage qualified persons to seek statewide elective office who would not, or could not, otherwise do so and to protect the effective competition by a candidate who used public funding." § 106.31, Fla. Stat.

The provision of the Act selectively challenged by Scott in this case is Section 106.355, which was adopted in 1991 as part of a comprehensive "campaign finance reform bill" that created a public matching fund option and reduced campaign contribution limits for statewide candidates from $3,000 to $500. Ch. 91-107, Laws of Fla. The Legislature expressed its anti-corruption purpose for enacting these reforms in the chapter law's preamble, which states in relevant part: (1) "the Legislature finds a compelling state interest in strengthening the integrity of, and public confidence in, the electoral process," and (2) "the Legislature seeks to serve that compelling state interest through campaign finance reform and by establishing public funding of political campaigns." Ch. 91-107, Laws of Fla.

II. Statutory and Regulatory Background

A. Overview of the Act

Although Scott challenges only Section 106.355, Florida Statutes, a review of the Act's larger statutory scheme is necessary to understand the operation of the Matching Funds provision, and its impact on both candidates who elect to receive public campaign financing ("participating candidates") and those who do not ("non-participating candidates").

Under the Act, public campaign financing is available to candidates for statewide office, *i.e.*, the Governor and members of the Cabinet.[1] § 106.33, Fla. Stat. Upon qualifying for office, candidates seeking to participate must file a request for public financing with the Division of Elections. *Id.* Participating candidates must also agree to abide by an expenditure limit of $2 per registered voter, which is $24,901,170 for the 2010 election cycle. §§ 106.33, 106.34, Fla. Stat.

Participating candidates must agree to limit loans or contributions from their own personal funds to $25,000 and to limit contributions from national, state, and county executive committees of a political party to $250,000 in the aggregate. § 106.33 (3), Fla. Stat.

All gubernatorial candidates, both participating and nonparticipating, must file regular reports of contributions received. § 106.07, Fla. Stat. The following chart sets forth the reporting schedule for the August 24, 2010, primary election:

2010 Primary Election Reports

Due Dates	**Period Covered**
Friday, July 23, 2010	April 1 – July 16, 2010
Friday, July 30, 2010	July 17 – July 23, 2010
Friday, August 6, 2010	July 24 – July 30, 2010
Friday, August 13, 2010	July 31 – August 6, 2010
Friday, August 20, 2010	August 7 – August 19, 2010

R-23.1-3 (Bradshaw Decl. ¶ 10).

[1] Because Scott is a candidate for Governor, the remainder of this brief will address the provisions of the Act applicable to gubernatorial candidates rather than the somewhat different standards for Cabinet candidates.

B. The Matching Funds Provision

The Act contains a "Matching Funds" provision providing additional public funds to participating candidates when a nonparticipating candidate exceeds the expenditure limit for participating candidates.[2] Within seven days after a request from a participating candidate, the Department of State must provide the candidate with funds equal to the amount by which the nonparticipating candidate has exceeded the expenditure limit. § 106.355, Fla. Stat. These matching funds are capped at twice the amount of the expenditure limit, or approximately $49.8 million for the 2010 election cycle. *Id.*

Section 106.355, Florida Statutes, also provides that all opposing participating candidates are released from the expenditure limit to the extent a nonparticipating candidate exceeded the limit. § 106.355, Fla. Stat. However, the participating candidates remain bound by the limits on personal and party contributions in Section 106.33(3), Florida Statutes.

III. The 2010 Election – Candidates for Governor

The qualifying period for the 2010 general election began on June 14, 2010 and ended on June 18, 2010. R-23.1-1 (Bradshaw Decl. ¶ 4). Fourteen candidates[3]

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[2] This brief follows the practice of the district court and other courts addressing this issue in referring to the public funds available under Section 106.355, Florida Statutes, as "matching funds." As used herein, the term "matching funds" does not include the separate category of "matching contributions" available under Section 106.35, Florida Statutes, which Scott has not challenged in his Complaint.

[3] The candidates who qualified for the office of Governor are: Peter L. Allen (IDP), Michael E. Arth (NPA), Karl Behm (WRI), Lawton "Bud" Chiles (NPA), Daniel Imperato (NPA), Farid Khavari (NPA), Josue Larose (WRI), Mike McCalister

qualified to seek the office of Governor. R-23.1-1 (Bradshaw Decl. ¶ 5). Of the fourteen qualified candidates, seven candidates submitted a request for public campaign financing. R-23.1-2 (Bradshaw Decl. ¶ 6). These "participating candidates" are Lawton "Bud" Chiles, Daniel Imperato, Farid Khavari, Josue Larose, Bill McCollum, C.C. Reed, and Alex Sink. R-23.1-2 (Bradshaw Decl. ¶ 6).

Scott did not submit a request to participate in public campaign financing. R-23.1-2 (Bradshaw Decl. ¶ 8).

IV. Course of Proceedings and Dispositions in the Court Below

Less than three weeks ago, on July 7, 2010, Scott filed a Complaint and Motion for a Preliminary Injunction to prevent the Secretary of State from implementing the Matching Funds provision of Section 106.355, Florida Statutes. The Complaint was served on the Secretary of State on July 8, 2010, who hired outside counsel on July 9, 2010. On Monday, July 12, the district court convened an emergency scheduling conference and, over objections by the Secretary, set a July 14 hearing on the preliminary injunction. Addendum 2 (7/12/10 Transcript pg.16) The district court denied the Secretary's request for an expedited discovery schedule and determined that the preliminary injunction hearing would proceed solely on arguments of counsel and declarations filed by the parties. Addendum 2 (7/12/10 Transcript pg.16). Over the objection of Scott, the district court allowed

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(REP), Bill McCollum (REP), Brian P. Moore (DEM), C.C. Reed (NPA), Rick Scott (REP), Alex Sink (DEM), and John Wayne Smith (LIB).

intervention by Bill McCollum, a participating candidate and Scott's opponent in the Republican primary election. R-18.

At the outset of the July 14 preliminary injunction hearing, Judge Hinkle stated that he had read everything that had been filed by the parties, i.e., "the whole record." R-28-4. Judge Hinkle also stated that he had read "every case on these issues, all of the substantive cases." R-28-4. At the conclusion of the arguments, the district court denied Scott's request for a preliminary injunction. R-28-85. The district court provided its reasoning from the bench, *see* R-28-85 to 103, later supplemented by a written order. R-27.

First, the district court determined that Scott was not likely to prevail on the merits. R-28-85 to 103. The district court found that the Matching Funds provision imposed a burden on Scott's speech, but that the burden was justified by the state's compelling interest in preventing corruption and the appearance of corruption. R-28-103. Specifically, the district court stated:

> My conclusion is that the defense is likely to win on the theory that this imposes a burden on Mr. Scott, which triggers strict scrutiny, but that it passes strict scrutiny because of the compelling state interest in avoiding corruption or the appearance of corruption.

R-28-103. The district court acknowledged that its decision was a close one on the merits. R-28-104.

Second, the district court determined that either Scott or McCollum would suffer irreparable harm from the injunction decision depending on who was correct on the merits. R-28-106 to 107. The district court posited, during argument by

Scott's counsel, "[t]he harm here would be irreparable to either side that wrongfully lost; right? I mean, however this comes out, the impact on the other side is going to be irreparable either way." R-28-24 to 25.

Finally, the district court determined that the remaining equitable factors also favored whichever party was right on the merits. As to the Secretary of State, the district court noted that the public interest favored an orderly election process free from "chaos." R-28-107.

Within minutes of the ruling, Scott appealed the district court's order denying a preliminary injunction. Scott also filed a motion to expedite the appeal, to which the Secretary and McCollum filed responses suggesting an alternative expedited briefing schedule. On July 16, 2010, this Court issued an order setting an expedited briefing schedule.

Scott filed his initial brief on July 20, 2010. His initial brief in this Court largely repeats the arguments made unsuccessfully below.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the requested preliminary injunction. On the contrary, the district court's thorough and well-reasoned opinion correctly applied the precedents in this evolving area of law. To the extent the district's court's ruling on Scott's likelihood of success on the merits was a "close call," it was well within the bounds of the court's broad discretion at the preliminary injunction stage. Thus, this Court should not overturn the district court's decision even if it would have reached a different conclusion.

At the injunction hearing, the district court correctly concluded that Scott had failed to carry his heavy burden to justify a preliminary injunction altering the status quo. R-28-85 to 103. The court properly found that Scott had not demonstrated a substantial likelihood of success on the merits at this preliminary stage of the litigation because any burden that the Matching Funds provision imposed on Scott was justified by the state's compelling interest in preventing corruption and the appearance of corruption. R-28-103.

Given its preliminary determination on the merits, the district court found that the equitable considerations also favored the Secretary of State and McCollum. As to the Secretary, the court properly noted the public interest in avoiding chaos before an election. R-28-107.

Scott's Initial Brief fails to establish that the district court abused its discretion in denying his request for a preliminary injunction. Moreover, Scott's brief demonstrates that there is not a substantial likelihood of success on the merits. The district court's decision should therefore be affirmed.

ARGUMENT

The District Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for Preliminary Injunction

I. Standard of Review and a Movant's Burden in Seeking a Preliminary Injunction

A "preliminary injunction is an extraordinary and drastic remedy." *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001). Accordingly, a district court will not grant such an injunction unless the movant has "clearly

established the burden of persuasion" as to the four factors: (1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (internal quotations omitted).

This Court reviews a district court's denial of a preliminary injunction under an abuse of discretion standard, its findings of fact under a clearly erroneous standard, and its conclusions of law *de novo*. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Svcs, LLC*, 425 F.3d 964, 968 (11th Cir. 2005); *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193, 1200 (11th Cir. 2001); *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000) (en banc). Recognizing that the "grant or denial of a preliminary injunction is a decision within the sound discretion of the district court," this Court "do[es] not review the intrinsic merits of the case." *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1310 (11th Cir. 1999). Rather, this Court's review is limited to whether the district court's action was "a *clear* abuse of discretion." *Siegel*, 234 F.3d at 1175 (emphasis in original).

Stated differently, this Court will reverse a district court's determination on a preliminary injunction "only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). "Short of that, an

abuse of discretion standard recognizes a range of choice within which we will not reverse the district court even if we might have reached a different decision." *Id.*.

The district court's decision here demonstrates none of these failings. In an extensive and well-reasoned explanation from the bench, the district court applied the legal standard suggested by Scott: strict scrutiny. R-28-92. The district court acknowledged and addressed the various cases in this area of law, either adopting their reasoning or explaining why the district court was distinguishing them. R-28-91 to 94. In holding an extremely expedited hearing without discovery or time for adversary pleadings by the Secretary, the district court also adopted the procedures Scott requested. And to the extent that the district court made preliminary factual findings or inferences based on the limited record, Scott has not identified any of these findings as "clearly erroneous," "clearly unreasonable," or "[clearly] incorrect." Even if this Court may have reached a different decision in the first instance, the district court's determination was well within its broad discretion at the preliminary injunction stage.

The district court also acknowledged that its decision was a close one. R-27-3 ("The merits are close."); R-28-104 ("I have to tell you that it's in my view a very close issue"). Where a question is sufficiently close that the district court could have gone either way in issuing a preliminary injunction, this Court has determined that "there can be no abuse of discretion." *Ackerman v. Deaf & Hearing Connection of Tampa Bay, Inc.*, 197 Fed.Appx. 879, 2006 WL 2769380 (11th Cir. 2006) (affirming denial of preliminary injunction where district court noted that its decision was a "close call"), *citing Revette v. Int'l Ass'n of Bridge,*

Structural and Ornamental Iron Workers, 740 F.2d 892, 893 (11th Cir. 1984) (recognizing merit in appellant's contentions, but nonetheless affirming district court's decision because the issue presented "a sufficiently close question"). This Court's prior decision should result in a prompt affirmance. Even Scott's brief concedes that the district court found that the arguments presented a close case. (Scott Brief at pg. 10).

To prevail in this appeal, Scott must demonstrate that the district court's action was a "clear abuse of discretion" going beyond a "close call" against Scott on the merits. Scott has not satisfied this heavy burden. This Court should therefore affirm the district court's decision.

II. Scott Failed to Carry His Burden for a Preliminary Injunction

Scott's motion for preliminary injunction sought to alter the status quo and enjoin the Secretary from enforcing a decades-old provision of the Act that would provide public matching funds to Scott's opponents who have chosen to participate in Florida's public campaign financing system. But "[t]he chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (emphasis supplied). When, as here, the movant seeks to alter rather than maintain the status quo, courts generally exercise a higher degree of scrutiny. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27 (2d Cir. 1995).

The district court did not abuse its discretion in determining that Scott failed to meet his burden.

A. Scott Failed to Demonstrate a Substantial Likelihood of Success on the Merits

Since at least *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has recognized the compelling interests served by a public campaign finance system. In that seminal case, the Supreme Court found that public financing of elections "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. The Court therefore concluded that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* at 57 n. 65.

The Supreme Court has not squarely addressed the separate issue presented in this case: a constitutional challenge to a "matching fund" provision of a state's public campaign finance law. Nor has this Circuit addressed the issue. Other circuit courts that have considered the matter are split. *Compare McComish v. Bennett*, --- F.3d ----, 2010 WL 2595288 at *1 (9th Cir. June 23, 2010) (upholding matching fund provisions of Arizona's Citizens Clean Elections Act); *North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437-39 (4th Cir. 2008) (upholding matching fund provisions of the North Carolina Judicial Campaign Reform Act); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 463-65, 468-70 (1st Cir. 2000) (upholding matching fund provisions of the Maine Clean Election Act); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding Kentucky's public funding trigger provision), *with Day v. Holahan*, 34

F.3d 1356 (8th Cir. 1994) (striking provisions of Minnesota law); *Green Party of Connecticut v. Garfield*, --- F.3d ----, 2010 WL 2737153 at *23 (2d Cir. July 13, 2010) (finding "trigger provisions" of Connecticut Citizens Election Program unconstitutional on First Amendment grounds).

In sum, the Second Circuit (*Green Party of Connecticut*) and Eighth Circuit (*Day*) have held matching funds unconstitutional, while the First Circuit (*Daggett*), Fourth Circuit (*Leake*), Sixth Circuit (*Gable*), and Ninth Circuit (*McComish*) have upheld matching fund provisions against constitutional challenge. Contrary to Scott's arguments, the constitutional question at issue here is far from settled. At this point, however, a clear majority of the circuit courts have ruled against Scott's position.

Given this uncertainty it is notable that none of the district courts that first considered the constitutionality of matching funds enjoined the operation of the provisions mere weeks before an election. The remedy that Scott seeks, coupled with the timeframe within which Scott seeks to have these issues resolved, is unprecedented.[4]

The district court's decision to deny the preliminary injunction was based primarily on its determination that Scott had not shown a substantial likelihood of

[4] On July 16, 2010, the United States District Court for the District of Connecticut denied a motion to enjoin the matching fund provisions of Connecticut's Citizens' Election Program even after the Second Circuit's ruling in *Green Party of Connecticut*. *See Foley v. State Elections Enforcement Com'n*, 2010 WL 2836722 at *3 (D. Conn, July 16, 2010) (denying motion for temporary restraining order based on equitable factors, including strong public interest against judicial interference with ongoing elections, even though there was "no question" regarding plaintiff's likelihood of success on the merits).

success on the merits. R-28-85 to 103. In assessing the merits, the district court first concluded that the Matching Funds provision imposed a burden on Scott's speech requiring a strict scrutiny analysis under *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008). R-28-103. The district court then noted that the statute at issue in *Davis* did not involve public financing and that the state's interests here were readily distinguishable. R-28-92 to 93. Specifically, the district court distinguished *Davis* from this case by stating:

> Bottom line on *Davis* is, once the [*Davis*] court decided that there was a burden, it wasn't very hard to find that there was no compelling interest to uphold the different limit on contributions to the two candidates.
>
> Our case is different because the contribution limits remain in place. The match decreases the need for contributions, just like the original public financing. The first dollar of public financing decreases the need for contributions. That serves the legitimate interest in reducing corruption or the appearance of corruption. *Buckley* and *Nixon* so indicate.

R-28-93 to 94 (emphasis added).

The district court determined that the Florida Election Campaign Financing Act, unlike the statute in *Davis*, served the compelling interest of preventing corruption or the appearance of corruption, and that the Matching Funds provision furthered this interest. R-28-93. The district court therefore concluded – at least at the preliminary injunction stage – that Scott was not likely to prevail on the merits of his claim. R-28-103.

As set forth below, the district court did not abuse its discretion in reaching this conclusion.

1. The Act's Matching Funds provision is Constitutional under Strict Scrutiny or Intermediate Scrutiny

Although Scott concedes that the Act does not directly limit his ability to speak or spend money on behalf of his candidacy, he challenges the Matching Funds provision on the grounds that providing public funds to his opponents who are participating candidates impermissibly "chills" or "burdens" Scott's own speech. Whether this claim is analyzed under the rubric of "strict scrutiny" (as Scott contends) or "intermediate scrutiny" (as the Secretary contends) is immaterial. The district court upheld the law under strict scrutiny, but the Act passes constitutional muster under either approach.

The Supreme Court has not addressed the standard for reviewing this type of claim, and the two most recent circuit court opinions on the question take different approaches. *Compare McComish*, 2010 WL 2595288 at *11-12 (analyzing and upholding Arizona matching funds provision under "intermediate scrutiny"), *with Green Party of Connecticut v. Garfield*, 2010 WL 2737153 at *27 (analyzing and striking Connecticut matching funds provision under "strict scrutiny").

In *McComish*, the Ninth Circuit concluded that an Arizona matching funds provision should be examined under "intermediate scrutiny" because the provision "does not actually prevent anyone from speaking in the first place or cap campaign expenditures." *McComish*, 2010 WL 2595288 at *11. The *McComish* court analogized the minimal or indirect burden created by matching funds to "the

burden of disclosure and disclaimer requirements in *Buckley* and *Citizens United*" that were upheld under intermediate scrutiny. *McComish* 2010 WL 2595288 at *12.

Courts will uphold a statute under intermediate scrutiny if there is a "substantial relation" between the law and a "sufficiently important" governmental interest. *Id.* (citing *Citizens United*, 130 S.Ct at 914) (internal quotation marks omitted). The Ninth Circuit found that the Arizona matching funds provision satisfied this burden because it furthered that state's sufficiently important interests in "preventing corruption and the appearance of corruption," and in "providing matching funds to encourage participation in its public funding scheme." *Id.* The *McComish* court also found that matching funds bear a substantial relation to the state's anti-corruption interest because they promote high participation in the program and reduce corruption or the appearance of corruption among participating candidates. *Id.* at *13.

In *Green Party of Connecticut v. Garfield*, the Second Circuit applied strict scrutiny to a Connecticut matching funds provision and found that the provision was not justified by a "compelling state interest." 2010 WL 2737153 at *27. The Second Circuit found, contrary to *McComish*, that the Supreme Court's opinion in *Davis* "directly governs" the challenge to Connecticut's matching funds provision. *Id.* at *26. With little analysis, the Second Circuit rejected the anti-corruption interest asserted by the state and concluded that the Connecticut law violated the First Amendment. *Id.* at *27.

The district court here followed the reasoning of the *Green Party of Connecticut* court in applying strict scrutiny to Florida's Matching Funds provision. R-28-92. Unlike the Second Circuit, however, the district court upheld the Matching Funds provision on the grounds that it serves the state's compelling interest in preventing corruption or the appearance of corruption and was narrowly tailored to serve that interest. R-28-103. The district court disagreed with the Second Circuit's reasoning, finding its treatment of the compelling interest analysis "superficial" in not addressing the significant differences between the Millionaire's Amendment at issue in *Davis* and a system of public matching funds. R-28-94. In evaluating of the state's compelling interests, the district court adopted much of the Ninth Circuit's analysis in *McComish*. R-28-94 to 103.

Because the district court here upheld the Act under strict scrutiny, the state's interests plainly would have met the lesser burden of intermediate scrutiny. Thus, the Matching Funds provision of the Act is constitutional under either strict scrutiny or intermediate scrutiny.

2. Precedent supports Florida's compelling interests in enacting a public financing system and encouraging participation in that system.

In *Buckley v. Valeo*, the Supreme Court affirmed the constitutionality of the public financing provisions of the Federal Election Campaign Act, finding that public financing "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93. Given these interests, the Supreme Court held that it "cannot be gainsaid that public financing as a means of eliminating the improper influence of

large private contributions furthers a significant governmental interest." *Buckley*, 424 U.S. at 96.

Here, the district court properly found that the Florida Election Campaign Financing Act serves these same interests. R-28-93 to 94. Citing *Buckley*, the district court correctly noted that "[t]he first dollar of public financing decreases the need for contributions. That serves the legitimate interest in reducing corruption or the appearance of corruption." R-28-93 to 94.

Florida courts have recognized that the purpose of the Act is "to preserve the integrity of the election process by supporting candidates who are free from the influence of special interest money and to remove corruption and the appearance of corruption from that process." *Connor*, 643 So. 2d at 77. See also Ch. 91-107, Laws of Florida (expressing Legislature's finding of compelling interest in "strengthening the integrity of, and public confidence in, the electoral process"). The Act also furthers First Amendment values in helping to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (citing *Buckley*, 424 U.S. at 49) (internal quotations omitted).

By providing public financing for candidates who voluntarily agree to limitations on private financing, the Act also prevents corruption and the appearance of corruption among participating candidates. Participating candidates who have accepted public financing and agreed to limit their campaign expenditures are less reliant on potentially corrupting private contributions. The state's interests in preventing corruption and the appearance of corruption have

have long been recognized as sufficiently "compelling" to justify campaign finance regulations. *Citizens United,* 130 S.Ct. at 901 (citing *Buckley).*

Moreover, as the district court correctly noted, the Matching Funds provision serves the separately compelling interest in encouraging candidate participation in the public campaign financing system as a means of combating corruption and the appearance of corruption. R-28-99; *See, e.g., Vote Choice v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (finding that the state has a "compelling" interest in "having candidates accept public financing"); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) (holding that the state "has a compelling interest in stimulating candidate participation in its public financing scheme"). *See also McComish*, 2010 WL 2595288 at *12 (acknowledging state interest served by encouraging candidate participation in public financing without deciding whether that interest is "compelling"). The district court stated that "[e]ncouraging participation can be a compelling interest, if it serves the anti-corruption goal." R-28-99.

Any burden imposed by the Act on Scott's First Amendment rights is sufficiently justified by the state's compelling interests in preventing corruption and the appearance of corruption in participating candidates, and also by the state's interest in encouraging candidate participation in public financing. The district court therefore did not abuse its discretion in finding that Scott was unlikely to succeed on the merits of his challenge to the Act.

3. The district court properly found that the Matching Funds provision furthers the Act's anti-corruption purpose.

As the district court found, the Matching Funds provision of the Act furthers its anti-corruption purpose. R-28-93 to 94. As discussed above, when a state has adopted a public campaign financing alternative, the state "need not be completely neutral on the matter of public financing of elections." *Vote Choice*, 4 F.3d at 39 (1st Cir. 1993). Florida has a "valid interest in having candidates accept public financing because such programs...tend to combat corruption." *Id.* (citing *Buckley*, 424 U.S. at 91). As set forth above, the Matching Funds provision serves this purpose.

Scott's Brief repeatedly mischaracterizes the basis for the district court's decision denying his motion for preliminary injunction in a transparent attempt to have this Court find that Judge Hinkle abused his discretion in ruling against Scott. Scott's Brief incorrectly asserts that the district court did not accept that the matching funds provision was justified by the compelling interest in preventing corruption or the appearance of corruption. Scott Brief p. 8. Instead, his Brief characterizes the court's "rationale" as follows:

> Based on the conclusion that the $500 limit served a compelling state interest in preventing corruption or the appearance of corruption (through participation in the public financing system), and that the Excess Subsidy provision was necessary to counteract the effects of that limit, the court held that Mr. Scott was unlikely to prevail on his First Amendment claim.

Scott Brief, p. 9.

However, this characterization of the court's rationale is plainly wrong. The district court specifically held:

> My conclusion is that the defense is likely to win on the theory that this imposes a burden on Mr. Scott, which triggers strict scrutiny, but that it passes strict scrutiny because of the compelling state interest in avoiding corruption or the appearance of corruption.

R-28-103 (emphasis added). The district court's analysis of the anti-corruption purpose was based on the holdings in *Buckley* and *Nixon*. R-28-94. Specifically, the court found that Section 106.355, Florida Statutes, "decreases the need for contributions, just like the original public financing" and "[t]he first dollar of public financing decreases the need for contributions." R-28-93 to 94. The district court then stated "[t]hat serves the legitimate interest in reducing corruption or the appearance of corruption." R-28-94.

Scott unsuccessfully mischaracterizes the district court's thorough analysis of the *other* interests that the State had advanced to justify the matching funds provision as the "rationale" for the court's decision. However, the court's discussion of the state's other interests; namely, that the matching funds provision promotes participation in public financing, R-28-94, 99-103, or that the provision levels the playing field, R-28-95 to 97, did not form the basis for the "compelling interest" that survives strict scrutiny. In fact, the district court specifically stated that the state could pursue these other purposes, even if they did not survive strict scrutiny, so long as "there is another theory that is itself compelling and sufficient

to support the provision." R-28-97. In this instance, the district court specifically found that the state's interest in reducing corruption or the appearance of corruption was a compelling interest. R-28-103. Scott's Brief is premised on the omission of this critical finding.

Moreover, contrary to Scott's contention that the simultaneous enactment of the $500 limit on contributions and the Matching Fund provision was an issue "not advanced by any of the parties," the issue was raised by the Secretary and was addressed by the parties at the hearing. Scott's suggestion otherwise defies explanation. At page 3 of the Secretary's Response in Opposition to Plaintiff's Motion for Preliminary Injunction, the Secretary stated:

> The provision of the act challenged in this case, §106.355, was adopted in 1991 as part of a comprehensive "Campaign Finance Reform Bill" that, among other things, reduced campaign contribution limits for statewide candidates from $3,000 to $500 prohibited the solicitation or acceptance of campaign contributions in government buildings and amended other provisions of the act. Ch. 91-107, Laws of Florida.

Counsel for the Secretary also addressed the issue during the preliminary injunction hearing:

> Mr. Nordby: Judge, we pointed out at p.3 of our Memorandum that the reduction in the contribution limit and the Act that they are challenging were both enacted by the Florida Legislature, Chapter 91-107, Laws of Florida. We don't think severability is an issue to be decided today. It may become an issue later on in the case. But I wanted to point it out. Your understanding is correct, that they were in the same Act.

R-28-85.

The Court had previously asked counsel for Mr. Scott whether the $500 cap was to be considered. Judge Hinkle stated: "The Legislature adopted it at the same time as the $500 cap: Right?" R-28-80. Counsel for Scott answered: "I do not know the answer to that, your Honor." R-28-80. Scott's counsel further stated that the two provisions should be considered "apples and oranges." R-28-84. We suggest that this does nothing to invalidate Judge Hinkle's analysis that the simultaneous passage of both provisions in the same reform legislation was noteworthy.

Contrary to Scott's argument, the district court ruled that the Matching Funds provision furthered the state's compelling interest in preventing corruption and the appearance of corruption.

4. The district court correctly concluded that neither *Davis v. Federal Election Commission* nor the Supreme Court's order in *McComish v. Bennett* directly controls the result in this case.

In his Initial Brief before this Court, as in his motion below, Scott relies heavily on two decisions: (1) *Davis v. Federal Election Commission*, a 2008 Supreme Court decision striking down the so-called "Millionaire's Amendment" contained in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441a-1(a); and (2) the Supreme Court's June 8, 2010 order granting a stay of the Ninth Circuit's mandate in *McComish*. However, as the district court recognized, neither of these decisions supports Scott's argument.

(a) *Davis* does not address the constitutionality of matching funds or public campaign financing.

In *Davis v. Federal Election Commission,* , the Supreme Court addressed the constitutionality of a provision intended to "level electoral opportunities for candidates of different personal wealth" by creating "a new, asymmetrical regulatory scheme" in any congressional race in which one candidate's expenditure of personal funds exceeded $350,000. *Davis*, 128 S.Ct at 2667, 2773. Under the scheme, the "self-financing" candidate remained subject to the ordinary limits on contributions but was burdened with additional disclosure requirements. *Id.* at 2766-2777. The "non-self-financed candidate," however, could accept individual contributions three times greater than the ordinary limit and could accept coordinated party expenditures without limit. *Id.* at 2766.

The Supreme Court struck down the Millionaire's Amendment, reasoning that the imposition of asymmetrical contribution limits impermissibly burdened the self-funding candidate's right to use personal funds for campaign speech. *Id.* at 2771-72. It noted, however, that the self-funding candidate's argument "would plainly fail" if the law had simply raised the contribution limits for all candidates. *Id.* at 2770. The Court went on to conclude that the burden imposed on self-funding candidates was not justified by any interest in preventing corruption and that "leveling" of electoral opportunities for candidates of different personal wealth is not a compelling interest. *Id.* at 2773.

As the district court noted, the Matching Funds provision challenged by Scott differs from the provision at issue in *Davis* in several ways. R-28-92 to 94. First, unlike the Millionaire's Amendment, the matching funds available to participating candidates under Florida law are linked to total campaign expenditures by a nonparticipating candidate, not to the expenditure of personal funds. To that end, the district court stated:

> [T]he provision at issue in *Davis* didn't promote the purpose of combating corruption or its appearance. What involved in *Davis [sic]* was self-funding by the candidate challenging the provision. Self-funding poses no risk of corruption.

R-28-92. Although Scott has largely chosen to self-finance his campaign, this choice does not subject him to any differential treatment under the Act.

Second, the *Davis* court's concerns with the "asymmetric regulatory scheme" do not apply with the same force in a voluntary public campaign financing system such as the Act. The Supreme Court recognized in *Buckley*, and the Ninth Circuit recognized in *McComish*, that

> it is constitutional to subject candidates running against each other for the same office to entirely different regulatory schemes when some candidates voluntarily choose to participate in a public financing system. '[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes.'

McComish, at *9 (quoting *Buckley*, 424 U.S. at 97) (citation omitted). A public financing system necessarily imposes different benefits and burdens on participating and non-participating candidates. Unlike *Davis*, however, the Florida

Election Code does not impose asymmetric caps on individual campaign contributions. The individual contribution limits are $500 for participating and non-participating candidates alike. § 106.08, Fla. Stat. The district court recognized this critical distinction.

Third, the Supreme Court in *Davis* found that the Millionaire's Amendment did not serve a compelling interest. The Court rejected the government's suggestion that "leveling electoral opportunities for candidates of different financial resources" was a compelling interest. As for the purported anti-corruption interest, the Supreme Court noted that the Millionaire's Amendment actually *increased* the risk of corruption and the appearance of corruption by raising the private contribution limits for the non-self-financed candidate. The Matching Funds provision here presents an entirely different state interest. As the district court here noted, increased public financing for participating candidates does further an anti-corruption interest, unlike the Millionaire's Amendment. R-28-93 to 94.

Fourth, the Supreme Court in *Davis* actually upheld the concept of a "trigger" based on personal expenditures. The Court noted that if the Millionaire's Amendment had "simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Davis*, 128 S.Ct at 2770. To the extent Scott challenges the "trigger" aspect of Section 106.355, Florida Statutes, his argument plainly fails under *Davis*.

Scott has also conceded that it would not impose a substantial burden on his First Amendment right to spend money on campaign speech if Florida's program

had simply "provided a large initial grant to all participating candidates." Scott Brief, p. 31-32. Given this concession, and the Supreme Court's endorsement in *Davis* of a "trigger" mechanism based on one candidate's exercise of First Amendment rights, it is difficult to discern the remaining basis for Scott's First Amendment challenge. If Scott would concede that a "large initial grant" of $49.8 million to his participating opponents would not burden his right to speak, on what grounds would the mere possibility of a grant capped at this amount under the Matching Funds provision impose an unconstitutional burden?

During the proceedings below and in this appeal, Scott has relied heavily on *Davis* as a basis for arguing that the Florida statute is unconstitutional. But Scott ignores the critical and dispositive differences between the Florida Matching Fund provision and the Millionaire's Amendment at issue in *Davis*. These differences were discussed at length by the district court and formed the basis for its decision that Scott was unlikely to succeed on the merits.

(b) The Supreme Court's Order in *McComish* does not address the merits of the Ninth Circuit's opinion.

Scott asks this Court to ignore the Ninth Circuit's unanimous panel opinion in *McComish*, 2010 WL 2595288, and rely instead on the Supreme Court's recent Order staying the Ninth Circuit's mandate pending review of a petition for certiorari. *McComish v. Bennett*, No. 09A1163, 2010 WL 2265319 at *1 (U.S. June 8, 2010). The district court properly declined to consider the stay as a basis to conclude that the Supreme Court will declare the Arizona matching funds

provision unconstitutional. As Judge Hinkle succinctly stated, "it is hard to tell why the Supreme Court did what it did." R-28-109.

In its one-paragraph order in *McComish*, the Supreme Court granted an application to vacate the stay of the United States District Court for the District of Arizona's injunction and to stay the Ninth Circuit's mandate pending the filing and disposition of a petition for writ of certiorari. Scott argued below that this one-paragraph Order provides "an even stronger indication" that Arizona's matching funds provision will be declared unconstitutional. However, as Scott himself concedes, the decision to stay a mandate is not a decision on the merits of the underlying legal issues. *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275, 2276 (2009). Rather, "the propriety of [a stay] is dependent upon the circumstances of the particular case," and the "traditional stay factors contemplate individualized judgments in each case." *Chrysler*, 129 S.Ct at 2276.

Even in cases in which an identical issue was being considered, this Court has repeatedly held that it is improper to rely on the grant of certiorari in another case as a basis to stay an execution. *Schwab v. Dep't of Corrections*, 507 F.3d 1297, 1298 (11th Cir. 2007). In *Schwab*, the Eleventh Circuit stated:

> The district court's action in granting the stay is contrary to the unequivocal law of this circuit that, because grants of certiorari do not themselves change the law, they must not be used by courts of this circuit as a basis for granting a stay of execution that would otherwise be denied. *Rutherford v. Crosby*, 438 F.3d 1087, 1093 (11th Cir. 2006) ("At least four times over the years, we have been asked to issue a stay of execution based on a grant of

> certiorari in another case raising an issue identical to one that the movant was raising in the case before us, an issue foreclosed by existing circuit precedent that might be overruled by the Supreme Court. All four times we have declined to do so because the grant of certiorari does not change circuit precedent, and it makes sense to let the Court that is going to be deciding the issue determine whether there should be a stay in another case raising it.

Id. at 1298; *see also Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004) (declining to grant a stay pending the Supreme Court's decision in another case because "the grant of certiorari alone is not enough to change the law of this circuit or to justify this Court in granting a stay of execution on the possibility that the Supreme Court may overturn circuit law.")

While executions are obviously factually distinct from elections, that line of cases is nonetheless compelling. Here, the Supreme Court's Order of June 8, 2010 provides no guidance as to whether the Court will even grant certiorari in *McComish*. It certainly does not presage a position on the merits. As the Eleventh Circuit stated in *Schwab*, "the Supreme Court itself probably does not know [how it will decide the case] given the fact that briefing has not even been completed in that case." *Schwab* at 1299.

Based on the foregoing, the district court did not abuse its discretion in concluding that Scott failed to meet his burden of proving a substantial likelihood of success on the merits.

B. The district court properly found that Scott failed to establish the remaining factors necessary to obtain a preliminary injunction.

During the hearing at which Judge Hinkle set out in substantial detail the basis for his decision to deny Scott's motion for preliminary injunction, Judge Hinkle properly recognized that the first factor necessary to obtain a preliminary injunction – substantial likelihood of success on the merits – is the most important factor in determining whether to grant or deny a party's request for preliminary injunction. R-28-90; *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). After making lengthy preliminary findings of fact and analyzing issues of law, the district court found that Scott had not shown a substantial likelihood of success on the merits and therefore denied the preliminary injunction. R-28-103. Judge Hinkle, however, also analyzed the three remaining factors – irreparable harm, balance of equities, and public interest – and found that Scott was not entitled to a preliminary injunction based on these remaining factors. R-28-105 to 109.

1. The district court properly determined the issue of irreparable harm.

The district court properly found that Scott could only show irreparable harm if the Florida Election Campaign Financing Act violated the First Amendment. R-28-105. In making this determination, the court recognized that the harm would be irreparable to either Scott or McCollum, depending on whether the court enjoined the operation of the matching funds provision. R-28-24; R-27-4 (Order Denying Preliminary Injunction)("Mr. Scott, if he were right on the merits, would suffer irreparable harm. So would Mr. McCollum, if he were wrongly enjoined.")

With regard to McCollum, the district court recognized that McCollum would be irreparably harmed by an erroneously-entered preliminary injunction that wrongfully enjoined the operation of the matching funds statute because "if the match is not available, Mr. McCollum will have substantially less to spend, and so will spend less money in his campaign." R-28-90. Conversely, the court found that "[i]f the matching funds provision remains in place, Mr. Scott probably will reduce his direct spending, either because he does not want to make funds available to Mr. McCollum, or because Mr. Scott will be able to get his message out through 527s, or in some indirect way." R-28-89. Significantly, however, the district court found that, up to the point of the filing of the lawsuit, Scott had not changed his behavior for fear that the match would be triggered. R-28-89.

Ultimately, the district court found that Scott would be irreparably harmed only if he were correct on the merits. The district court did not abuse its discretion in making this determination. Because the Matching Funds provision is constitutional, Scott has not, and will not, suffer any constitutionally-recognizable harm from the continued operation of the Act.

Scott is free to speak and spend money to promote his campaign without limitation, both directly and indirectly through 527s. As a non-participating candidate, Scott is not subjected to an expenditure limit, and he may choose to exceed the $24.9 million threshold for triggering matching funds.

Similar to campaign finance disclosure laws, Florida's matching funds statute "impose[s] no ceiling on campaign-related activities," and "do[es] not prevent anyone from speaking." *Citizens United,* 130 S.Ct. at 914; ; *Daggett,* F.3d

at 464 (holding that Maine's matching-funds provision "in no way limits ... the amount of money one can spend"); *Leake*, 524 F.3d at 437 (finding that under North Carolina's matching-funds provision, privately-funded candidates and independent-expenditure committees "remain free to raise and spend as much money ... as they desire").

Scott also failed to show irreparable injury based on his alleged strategic decisions regarding where and how to spend funds. "Many campaign finance regulations, particularly disclosure requirements, lead candidates to engage in such strategic behavior, but this does not make them unconstitutional." *McComish*, at *10. Even in the absence of a matching fund provision, a campaign may choose to delay its expenditures simply because, as the Supreme Court has noted, "the public begins to concentrate on elections only in the weeks immediately before they are held." *Citizens United*, 130 S.Ct at 895. To the extent that Scott is actually deterred from spending in excess of the threshold, "the deterrence results from a strategic, political choice, not from a threat of government censure or prosecution." *Leake*, 524 F.3d at 438.

In deciding where and how to allocate his campaign's resources, Scott is no differently situated than his opponents who have chosen to participate in the public campaign financing system. They, too, have likely made strategic decisions based on the requirements of the Florida Election Code – including the decision to opt in to the public campaign financing system based on an assessment of the advantages and disadvantages of the system under existing law.

2. The district court properly found that the balance of equities favored denying the preliminary injunction.

The district court did not abuse its discretion in finding that the balancing of equities favored the Defendants. Enjoining the Secretary of State from enforcing the Act and distributing matching funds to eligible candidates at this time would substantially injure the State and harm the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers...injury." *New Motor Vehicle Bd. of Cal. v.Orrin W. Fox Co*, 434 U.S. 1345 (1997), 1351 (1997) (Rehnquist, J., in chambers). A "presumption of constitutionality" attaches to every legislative act, and that presumption is "an equity to be considered in favor of . . . [the government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

As in its analysis of the irreparable harm, the district court properly found that the balance of equities favored denying the preliminary injunction because the Florida Election Campaign Financing Act does not violate the First Amendment. R-28-106. In reaching this conclusion, the district court balanced the equities of all parties in the case: Scott, McCollum, and the Secretary of State.

With regard to Scott, the district court noted the late filing of the complaint as a factor, but found that "[t]here is no basis for finding at this point that [Scott] purposely delayed filing the case or caused the emergency." R-28-106. With regard to McCollum, the district court found that that McCollum may or may not have relied on the match. R-28-106. However, the court posited a scenario in which the equities favored McCollum:

> If Mr. McCollum runs a campaign with a $500 cap, and he doesn't get the match, and the legislature adopted them both together, doesn't that mean Mr. Scott gets the benefit of the provision that helps him and doesn't have to deal with the one that doesn't?

R-28-83.

Ultimately, the district court found that the balancing of equities favored the Secretary of State's "strong public interest in avoiding chaos in the critical run-up to an election." R-28-107. It specifically found that this interest is "a factor that overall cuts toward the defense in this case" and furthermore that "[t]he equity is tilt toward whoever wins the case on the merits." R-28-106 to 107.

The harm to the public if the Secretary is enjoined from enforcing the public campaign financing law far outweighs Scott's alleged harm. Scott will continue to be able to lawfully spend any amount of money in furtherance of his candidacy. An injunction striking the matching funds provision of Section 106.355, Florida Statutes could threaten the viability of public campaign financing in Florida.

As the district court recognized, the Act serves Florida's interests in preventing corruption and the appearance of corruption by providing an optional public financing system for candidates who agree to limit their total campaign expenditures and, accordingly, their contributions. R-28-103; § 106.31, Fla. Stat. To accomplish the State's interest, the Act must present an attractive alternative in which candidates will participate. Candidates will be unlikely to participate in a system that so significantly disadvantages them compared to nonparticipating candidates. Section 106.355 is, therefore, critical to the accomplishment of the

State's interests. If the injunction is granted and the Act is stricken, candidates will not choose to participate in the system in the future and the State's interests in combating corruption will be frustrated.

Candidates who have chosen to participate in the public campaign financing system for the 2010 election cycle would also be harmed by an order enjoining the Act. These candidates opted into the system in reasonable reliance on the existing statute. Scott asked the district court to alter the bargain after the fact. Had the district court issued the preliminary injunction, participating candidates would have remained bound by the restrictions in the Act (including the $25,000 limit on personal contributions) but they would not have received the matching fund benefits of the Act on which they reasonably relied.

The district court's balancing of the interests is also consistent with the approach other courts have taken when considering preliminary injunctions against matching fund provisions. In *McComish*, the plaintiffs filed their complaint and motion for a temporary restraining order mere weeks before the primary election. The District Court refused to enjoin the operation of Arizona's matching funds statute given the disruption it would cause to the election process and the reliance by participating candidates on the availability of matching funds. The parties in *McComish* briefed the case on cross-motions for summary judgment in 2009. In January 2010, the District Court issued a final judgment declaring Arizona's law unconstitutional. The Court stayed its own decision pending review in the Ninth Circuit. After briefing and argument, the Ninth Circuit reversed the District Court's judgment and concluded that the program was constitutional. It was the

mandate from that Ninth Circuit decision that was stayed by the Supreme Court in June 2010. Thus, candidates for the 2010 election cycle in Arizona have been on notice for nearly two years that the state's matching funds program was in jeopardy.

Here, as the district court found, Scott filed his lawsuit at the eleventh hour. R-28-105. In weighing the relative burdens to Scott, McCollum and the Secretary of State, the district court properly adopted a similar approach to that taken by the district court in *McComish* and denied the motion for a preliminary injunction.

3. The district court properly found that the public interest would be harmed by the preliminary injunction.

The district court correctly identified the Secretary of State's "strong public interest in avoiding chaos in the critical run-up to an election." R-28-107. It specifically found that this interest is "a factor that overall cuts toward the defense in this case." R-28-107. The district court did not abuse its discretion in recognizing that the public interest would be disserved by an order enjoining the operation of Florida's public campaign financing system in the middle of an election process already underway.

The State of Florida unquestionably has "a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). Moreover, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell* at 4. The courts have routinely recognized "that election cases are different from ordinary

injunction cases. Interference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

The United States District Court for the Northern District of Florida considered the disruption of the election process when a suit was brought challenging Florida's congressional districting plan seven weeks before the first primary election. In *Johnson v. Smith*, 1994 WL 907596 (N.D. Fla. 1994), the district court declined to enter a preliminary injunction "primarily because the court finds that the public interest would not be served by an act that would inevitably disrupt an election process already well underway." In *Johnson*, as in this case, the qualifying period for candidates had ended, and the candidates had begun to organize their campaigns, to raise funds, and to spend those funds in reliance on the then-existing districting scheme. The court found that the issuance of a preliminary injunction "would produce considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials."

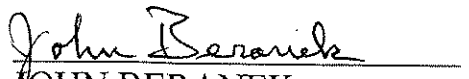
Similarly, in this case, the election process is well underway. The qualifying period for nonfederal candidates ended at noon on June 18, 2010. § 99.061, Fla. Stat. The end of qualifying was also the deadline for candidates to elect participation in public campaign financing under the Act. § 106.33, Fla. Stat. The deadline for supervisors of elections to mail primary election absentee ballots to absent uniformed services voters and overseas voters passed on July 10, 2010. § 101.62(4)(a), Fla. Stat. Early voting for the primary election begins on August 9, 2010, less than one month from now.

The candidates have presumably organized their campaigns, are raising funds, and are spending funds based on the existing statutory framework. At the last minute, Scott sought to upend this statutory scheme, leaving no doubt that the issuance of a preliminary injunction would produce considerable confusion, inconvenience, and uncertainty among voters, candidates, and election officials. The district court correctly found that the injunctive relief sought by Scott would disserve the public interest.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,440 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I, John Beranek, counsel for Appellee, Dawn K. Roberts and a member of the Bar of this Court, certify that on July 26, 2010, a copy of the attached Brief For Appellee Dawn K. Roberts, Interim Secretary Of State, State Of Florida was filed by electronic delivery to the Clerk of the Court. In addition, I certify that copies of this motion were sent, by electronic mail and by third party commercial carrier for delivery overnight, to the following counsel and to Clerk for Court:

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ADDENDUM

1 Sections 106.30-106.36, Florida Statutes

2 Transcript of July 12, 2010 Telephone Conference Before the Honorable Robert L. Hinkle, United States District Judge, Northern District of Florida, Case Number 4:10cv283/RH

TAB 1

FLORIDA STATUTES ANNOTATED 2009

106.30. Short title

Sections 106.30-106.36 may be cited as the "Florida Election Campaign Financing Act."

106.31. Legislative intent

The Legislature finds that the costs of running an effective campaign for statewide office have reached a level which tends to discourage persons from becoming candidates and to limit the persons who run for such office to those who are independently wealthy, who are supported by political committees representing special interests which are able to generate substantial campaign contributions, or who must appeal to special interest groups for campaign contributions. The Legislature further finds that campaign contributions generated by such political committees are having a disproportionate impact vis-a-vis contributions from unaffiliated individuals, which leads to the misperception of government officials unduly influenced by those special interests to the detriment of the public interest. Furthermore, it is the intent of the Legislature that the purpose of public campaign financing is to make candidates more responsive to the voters of the State of Florida and as insulated as possible from special interest groups. The Legislature intends ss. 106.30-106.36 to alleviate these factors, dispel the misperception, and encourage qualified persons to seek statewide elective office who would not, or could not otherwise do so and to protect the effective competition by a candidate who uses public funding.

106.32. Election Campaign Financing Trust Fund

(1) There is hereby established in the State Treasury an Election Campaign Financing Trust Fund[1] to be utilized by the Department of State as provided in ss. 106.30-106.36. If necessary, each year in which a general election is to be held for the election of the Governor and Cabinet, additional funds shall be transferred to the Election Campaign Financing Trust Fund[1] from general revenue in an amount sufficient to fund qualifying candidates pursuant to the provisions of ss. 106.30-106.36.

(2) Proceeds from filing fees pursuant to ss. 99.092, 99.093, and 105.031 shall be deposited into the Election Campaign Financing Trust Fund[1] as designated in those sections.

(3) Proceeds from assessments pursuant to ss. 106.04, 106.07, and 106.29 shall be deposited into the Election Campaign Financing Trust Fund[1] as designated in those sections.

106.33. Election campaign financing; eligibility

Each candidate for the office of Governor or member of the Cabinet who desires to receive contributions from the Election Campaign Financing Trust Fund[1] shall, upon qualifying for office, file a request for such contributions with the filing officer on forms provided by the Division of Elections. If a candidate requesting contributions from the fund desires to have such funds distributed by electronic fund transfers, the request shall include information necessary to implement that procedure. For the purposes of ss. 106.30-106.36, candidates for Governor and Lieutenant Governor on the same ticket shall be considered as a single candidate. To be eligible to receive contributions from the fund, a candidate may not be an unopposed candidate as defined in s. 106.011(15) and must:

(1) Agree to abide by the expenditure limits provided in s. 106.34.

(2)(a) Raise contributions as follows:

1. One hundred fifty thousand dollars for a candidate for Governor.

2. One hundred thousand dollars for a candidate for Cabinet office.

(b) Contributions from individuals who at the time of contributing are not state residents may not be used to meet the threshold amounts in paragraph (a). For purposes of this paragraph, any person validly registered to vote in this state shall be considered a state resident.

(3) Limit loans or contributions from the candidate's personal funds to $25,000 and contributions from national, state, and county executive committees of a political party to $250,000 in the aggregate, which loans or contributions shall not qualify for meeting the threshold amounts in subsection (2).

(4) Submit to a postelection audit of the campaign account by the division.

106.34. Expenditure limits

(1) Any candidate for Governor and Lieutenant Governor or Cabinet officer who requests contributions from the Election Campaign Financing Trust Fund[1] shall limit his or her total expenditures as follows:

(a) Governor and Lieutenant Governor: $2.00 for each Florida-registered voter.

(b) Cabinet officer: $1.00 for each Florida-registered voter.

(2) The expenditure limit for any candidate with primary election opposition only shall be 60 percent of the limit provided in subsection (1).

(3) For purposes of this section, "Florida-registered voter" means a voter who is registered to vote in Florida as of June 30 of each odd-numbered year. The Division of Elections shall certify the total number of Florida-registered voters no later than July 31 of each odd-numbered year. Such total number shall be calculated by adding the number of registered voters in each county as of June 30 in the year of the certification date. For the 2006 general election, the Division of Elections shall certify the total number of Florida-registered voters by July 31, 2005.

(4) For the purposes of this section, the term "expenditure" does not include the payment of compensation for legal and accounting services rendered on behalf of a candidate.

106.35. Distribution of funds

(1) The division shall review each request for contributions from the Election Campaign Financing Trust Fund[1] and certify whether the candidate is eligible for such contributions. Notice of the certification decision shall be provided to the candidate. An adverse decision may be appealed to the Florida Elections Commission. The division shall adopt rules providing a procedure for such appeals.

(2)(a) Each candidate who has been certified to receive contributions from the Election Campaign Financing Trust Fund[1] shall be entitled to distribution of funds as follows:

1. For qualifying matching contributions making up all or any portion of the threshold amounts specified in s. 106.33(2), distribution shall be on a two-to-one basis.

2. For all other qualifying matching contributions, distribution shall be on a one-to-one basis.

(b) Qualifying matching contributions are those of $250 or less from an individual, made after September 1 of the calendar year prior to the election. Any contribution received from an individual who is not a state resident at the time the contribution is made shall not be considered a qualifying matching contribution. For purposes of this paragraph, any person validly registered

to vote in this state shall be considered a state resident. Aggregate contributions from an individual in excess of $250 will be matched only up to $250. A contribution from an individual, if made by check, must be drawn on the personal bank account of the individual making the contribution, as opposed to any form of business account, regardless of whether the business account is for a corporation, partnership, sole proprietorship, trust, or other form of business arrangement. For contributions made by check from a personal joint account, the match shall only be for the individual who actually signs the check.

(3)(a) Certification and distribution of funds shall be based on contributions to the candidate reported to the division for such purpose. The division shall review each report and verify the amount of funds to be distributed prior to authorizing the release of funds. The division may prescribe separate reporting forms for candidates for Governor and Cabinet officer.

(b) Notwithstanding the provisions of s. 106.11, a candidate who is eligible for a distribution of funds based upon qualifying matching contributions received and certified to the division on the report due on the 4th day prior to the election, may obligate funds not to exceed the amount which the campaign treasurer's report shows the candidate is eligible to receive from the Election Campaign Financing Trust Fund[1] without the funds actually being on deposit in the campaign account.

(4) Distribution of funds shall be made beginning on the 32nd day prior to the primary and every 7 days thereafter.

(5) The division shall adopt rules providing for the weekly reports and certification and distribution of funds pursuant thereto required by this section. Such rules shall, at a minimum, provide for:

(a) Specifications for printed campaign treasurer's reports outlining the format for such reports, including size of paper, typeface, color of print, and placement of required information on the form.

(b)1. Specifications for electronically transmitted campaign treasurer's reports outlining communication parameters and protocol, data record formats, and provisions for ensuring security of data and transmission.

2. All electronically transmitted campaign treasurer's reports must also be filed in printed format. Printed format shall not include campaign treasurer's reports submitted by electronic facsimile transmission.

106.353. Candidates voluntarily abiding by election campaign financing limits but not requesting public funds; irrevocable statement required; penalty

(1) Not later than qualifying for office, each candidate for the office of Governor or member of the Cabinet who has not made a request to receive contributions from the Election Campaign Financing Trust Fund,[1] but who wishes to voluntarily abide by the applicable expenditure limit set forth in s. 106.34 and the contribution limits on personal and party funds set forth in s. 106.33, shall file an irrevocable statement to that effect with the Secretary of State.

(2) Any candidate who files such a statement and subsequently exceeds such limits shall pay to the Election Campaign Financing Trust Fund an amount equal to the amount of the excess contributions or expenditures. Such penalty shall not be an allowable campaign expense and shall be paid from personal funds of the candidate. However, if a nonparticipating candidate exceeds the expenditure limit as described in s. 106.355, a candidate signing the statement pursuant to this section may exceed the applicable expenditure limit to the extent the nonparticipating candidate exceeded the limit without being subject to a penalty.

106.355. Nonparticipating candidate exceeding limits

Whenever a candidate for the office of Governor or member of the Cabinet who has elected not to participate in election campaign financing under the provisions of ss. 106.30-106.36 exceeds the applicable expenditure limit provided in s. 106.34, all opposing candidates participating in such election campaign financing are, notwithstanding the provisions of s. 106.33 or any other provision requiring adherence to such limit, released from such expenditure limit to the extent the nonparticipating candidate exceeded the limit, are still eligible for matching contributions up to such limit, and shall not be required to reimburse any matching funds provided pursuant thereto. In addition, the Department of State shall, within 7 days after a request by a participating candidate, provide such candidate with funds from the Election Campaign Financing Trust Fund[1] equal to the amount by which the nonparticipating candidate exceeded the expenditure limit, not to exceed twice the amount of the maximum expenditure limits specified in s. 106.34(1)(a) and (b), which funds shall not be considered matching funds.

106.36. Penalties; fines

In addition to any other penalties which may be applicable under the election code, any candidate who receives contributions from the Election Campaign Financing Trust Fund[1] and who exceeds the applicable expenditure limit, except as authorized in ss. 106.353 and 106.355, or falsely reports qualifying matching contributions and thereby receives contributions from the Election Campaign Financing Trust Fund[1] to which the candidate was not entitled shall be fined an amount equal to three times the amount at issue, which shall be deposited in the Election Campaign Financing Trust Fund.

TAB 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD L. SCOTT,	
	Case No.: 4:10cv283/RH
Plaintiff,	
	Tallahassee, Florida
vs.	*July 12, 2010*
	10 A.M.
DAWN K. ROBERTS, in her official capacity as Interim Secretary of State of the State of Florida,	
Defendant.	
IRA WILLIAM "BILL" McCOLLUM, JR.,	
Intervenor-Defendant.	

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE ROBERT L. HINKLE,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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-and-

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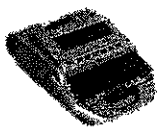

APPEARANCES: (Continued)

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Tallahassee, Florida 32399

IN CHAMBERS

THE COURT: Good morning. This is Judge Hinkle.

I understand I have Mr. Metz and Ms. Mainigi and Mr. Trippe for the plaintiff.

MS. MAINIGI: Correct, Your Honor.

THE COURT: And then Mr. Doran and Mr. Beranek for the defendant.

MR. BERANEK: That is correct, sir, and several other lawyers.

THE COURT: And then for the proposed intervenor, Mr. Lunny and Mr. Thomas.

MR. THOMAS: That is correct, Your Honor. We also have with us Mr. Tom Crabb of our office.

MR. BERANEK: And also in my office -- this is John Beranek -- we have Mr. Upton, who is general counsel to the Department, and Major Harding.

THE COURT: All right. Let me start with a couple of ground rules for the hearing.

The court reporter is here. It will help me, and help her even more, to know each time who is speaking. The quality of the equipment is not good enough to allow us reliably to recognize voices, even if we knew the voices. So each time you speak, if you would start by giving us your name, that will help.

The issue that I set the hearing for was just to

address timing and scheduling. Since then there has been the motion to intervene. And I guess in the nature of setting ground rules, we should at least determine whether the intervenors are going to be able to participate this morning.

The motion to intervene suggest that the plaintiff opposes the intervention.

Ms. Mainigi, do you oppose the intervention? Or whoever wants to speak to it from the plaintiff.

MS. MAINIGI: Yes, Your Honor. This is Enu Mainigi for the plaintiff.

We do oppose the intervention, and we will be filing papers within the hour noting our objections as well as laying out the reasons why.

THE COURT: Okay. I'll get to those promptly. What I'll do is allow the lawyers for the proposed intervenor at least to speak this morning, so we'll know where they stand on scheduling, if they should be allowed to intervene. And then I'll look at your papers as soon as I get them and try to deal with that very promptly.

Let me start, I guess, with the plaintiff and find out what you propose in terms of a schedule.

MS. MAINIGI: Your Honor, as we noted in our papers, Mr. Scott's First Amendment rights here are being irreparably harmed because he's --

THE COURT: Look, let's just stop. It's not a

hearing on the merits.

MS. MAINIGI: Understood, Your Honor.

THE COURT: We're just talking about schedule.

MS. MAINIGI: Your Honor, as we requested in our papers, for those reasons, we would like a preliminary injunction hearing -- we had requested by the 16th, and we are certainly amenable to the suggestion in your scheduling order that a hearing be conducted by July 14th.

THE COURT: All right. And the reason I said that is because of my schedule, so --

All right. Somebody for the defendant, what do you say?

MR. BERANEK: John Beranek for the Defendant Department.

Judge, we think a hearing on the 14th is going to be impossible. We can't prepare in time for a hearing on the 14th. And we -- the complaint was served on Thursday; we were retained on Friday, and we worked all the weekend, and we simply cannot get ready by the 14th; and we don't think there is any need for a hearing on the 14th.

THE COURT: When can you be ready?

MR. BERANEK: We would suggest a hearing be set on July 27th, and that would be before there would be any money disbursed. And based upon Mr. Scott's papers, that would be before any money is disbursed, because he's not going to go

over the cap until his, according to him, until his finance report, which will be filed on Friday, July the 30th, and then the Department has a week after that to disburse money. And we think it will probably be August 9th before any funds would be disbursed.

Therefore, a hearing on the 27th of July would be adequate and give us time to prepare, and that's all without regard to the position of the intervenor. And, incidentally, we agree --

THE COURT: I may have lost you. Mr. Beranek, are you still there? Mr. Beranek?

MR. BERANEK: Yes, I'm here.

THE COURT: Okay. I think I may have lost the last 10 or 15 seconds. So what you were telling me was that you consented to the intervention.

MR. BERANEK: And that we believe -- I mean, if you look at Mr. Scott's papers, his report, which will be filed on July the 30th, is the report that will indicate that he has exceeded the cap; and only at that point can the opposing candidates file written requests for the matching funds, and then the Department has seven days before they actually can disburse money.

This money is not sitting in a trust fund. The trust fund no longer exits. And they have to -- they have to procure the money from General Revenue, and then pay it over,

and we think that payment will probably occur on Monday, August 9th; therefore, a hearing for July 27th would be more than adequate.

THE COURT: All right. Tell me --

MS. MAINIGI: Your Honor, can I respond?

THE COURT: No. Let me talk to Mr. Beranek for a minute. You can respond, eventually, but let me finish with Mr. Beranek.

Tell me whether you anticipate there being any evidence, or you think this is just a legal question.

MR. BERANEK: Judge, we do believe there will be evidence; and we have not fully determined whether we will have to call live witnesses, but we certainly will be at least putting in documents, declarations. And we think that discovery of a limited nature will be necessary, definitely. And the papers say that this is an as-applied and a facial challenge. As an-applied challenge, obviously, it's a factual matter. We need to take discovery, and it will be a factual hearing.

THE COURT: So give me a feel for what the declaration or live witness would say. And I know it's early, so I don't need the testimony, but just what are you talking about? He's actually going to spend the money, or you're going to have an expert that says Florida has this many media markets, and here is what it cost to campaign for governor?

MR. BERANEK: Judge Hinkle, I'm sorry, but I really don't know the answer to all of these questions, yet. And, of course, some of this will be -- we will only know after we have gotten a chance to do some discovery, probably from Mr. Scott, as to, you know, when he has made these decisions, and some of them were strategic, political decisions. And we don't know if he could have filed this lawsuit earlier, and that is a matter that we're going have to go to in discovery.

THE COURT: All right. Now, let me ask my next question about your proposal:

Basically, your proposed schedule pretty much leaves the decision up to me. So that, for example, if we have a hearing, and I enter an injunction on August the 1st, Mr. Scott wins, and I enter an injunction, you're going to have a hard time getting a decision out of the Eleventh Circuit. If we go on the other side's schedule, and you lose, then you can go to Atlanta and get some papers filed before this time you're talking about.

So, when you start talking about having a decision by August the 9th, I guess my question is:

Don't you want to reserve the possibility of getting a decision out of Atlanta by August the 9th? Because if you lose, you're probably -- you know, either side that loses this is entitled to an immediate appeal.

MR. BERANEK: Yes, sir.

THE COURT: And there is just one of me. I can steer this ship a little quicker than they can there. Don't you think it prudent to save them some time?

MR. BERANEK: Of course, we would like the opportunity to appeal, if we lose, of course. However, there's only so much time, and the other side -- the other side has had adequate time to prepare for this suit. They filed it, and we're just doing the best we can; plus, we most certainly will -- a record and all of that has got to occur as quickly as possible, and we are trying to cooperate.

I think the suggestion of a hearing on the 27th is about the best we can do at the moment.

THE COURT: Well, let me tell you the problem. It's not going to be on the 27th.

MR. BERANEK: Judge, of course, we understand that it's your schedule that counts.

THE COURT: Well, not usually, but this time it does. I'm just not available from the 15th through the 29th. So, it's either going to be the 14th or not until the 30th, so --

All right. I hear you.

Mr. Lunny, Mr. Thomas, Mr. Crabb, do you have a view on this? Do you want to be heard?

MR. THOMAS: Yes, Your Honor. This is Mr. Thomas.

Obviously, we didn't see anything in this until about Saturday, but we want to intervene. And, as intervenors, we

take the case as we see it. We're not intervening for the purpose of slowing anything down, based on the expedited motion.

Nevertheless, in reviewing Mr. Scott's affidavit, it does appear there are some factual issues that can be explored. We would like an opportunity to do that. But we'll proceed at whatever time the court says, if we are permitted to intervene.

THE COURT: And then, Ms. Mainigi, you asked to respond, and you can do that.

MS. MAINIGI: Thank you, Your Honor. We think, Your Honor, that the issue here is a purely legal one; and, within the realm of cases, there are only a few cases that are actually relevant to this determination. There's the *Davis* case; there's the *McComish* case, and a few others issued by the Supreme Court. So I think the legal determination is actually fairly straightforward.

THE COURT: Well, there are a few circuit cases from around the country, too.

MS. MAINIGI: Yes, Your Honor. But I think that -- our view certainly would be that the *Davis* case, and some of the Supreme Court cases, are controlling here and actually quite on point.

There's no factual dispute, Your Honor, about how the statute works, what it does, the mechanism of the statute.

There is no factual dispute about the purposes underlying the statute. The legislative intent is written right into the statute itself.

The discovery, I think Mr. Scott's declaration is pretty clear and straightforward. I don't see any need for discovery regarding the specific nature of the chilling effect of the law.

THE COURT: How about this:

One of the things they say in defense is, well, Mr. Scott took the money knowing the scheme and waited to this point to file the lawsuit.

Now, I think I hear the defendants saying they want to take some discovery on that.

MR. BERANEK: That's correct.

THE COURT: I'm not entirely sure that's anything anybody needs to take any discovery on, just in the sense that, whenever it was that the decisions were made, whether to take the public funding or not take the public funding, everybody knew what the law said at the time, and I suppose everybody knew what the constitutional issues were, if it was raised by anybody.

But, I mean, I guess the question, Ms. Mainigi, whatever that issue is, is that one you think can be just decided by knowing what decisions were actually made and what the law said, without actually inquiring into anybody's

motivation?

MS. MAINIGI: Absolutely, Your Honor, because the law is either constitutional or it is unconstitutional. The challenge provision is either consistent with what the Supreme Court has said, is within the bounds of the First Amendment, or it is not. And the timing issue does not affect this at all.

Mr. Scott has submitted his declaration. That declaration clearly lays out -- and the preliminary injunction papers clearly lay out -- that he has been hampered in his ability to get his message out; and to this very day, as we sit here right now, he is unable to take certain actions and certain steps that he would like to take to get his message out because of the constitutional nature or the unconstitutional nature of this law.

Now, Mr. Scott had hoped, as he laid out in his declaration, that he would not have to file a challenge to the law; and, certainly, when he did not intend to exceed the cap, I would submit, Your Honor, that he would have had a potential challenge on standing. I think he may have overcome that, but he would have at that point had a potential challenge on standing.

So, as late as June 20th, I think he is out there in the public press indicating that it's not his intention to exceed the cap of 24.9 million. But sometime between then and

when we filed on July 7th, the determination was made that that was not going to be possible and still live within the bounds of what he wanted to do within his campaign in terms of getting his message out.

So that is why we are here, Your Honor, on an emergent basis asking for immediate relief, because his actions are being affected on a daily basis. And to wait until the end of July for that determination, Your Honor -- I realize that things wouldn't go unreported until the end of the month, but that's not the point. The point is that the actions that he is taking today are being chilled by the fact that, in our view, the statute is unconstitutional, and it is restricting him from doing that.

So the actions that are being influenced today are what count, not what report gets filed ultimately, because at that point it's a little late.

THE COURT: What do you propose to have happen Wednesday?

MS. MAINIGI: Well, Your Honor, I think a very simple preliminary injunction hearing, which is purely legal. Declarations could be submitted, obviously, for the court. But along the lines, as I understand it just based on our review of the papers that happened in *Broward Coalition* before Judge Mickle, which was a one-hour preliminary injunction hearing, as we read it, with -- also an election law issue

decided in the middle of an election, and Judge Mickle was kind enough to provide a timely opinion after that, recognizing the exigency of the circumstances.

Also, as I read the *Retail Federation* case, Your Honor, that also seemed to be a case where a preliminary injunction hearing was held, basically, on the basis of legal argument, because it was also a constitutional issue, and declarations were submitted.

But what gets said by Mr. Scott here and there in terms of exactly when he came to his thinking on this, and whether it was June 21st or June 24th, that has no relevance whatsoever to the ultimate issue of whether this provision is constitutional or not under controlling Supreme Court precedents.

MR. BERANEK: Judge Hinkle, this is John Beranek again.

THE COURT: Right.

MR. BERANEK: First of all, we certainly believe that there are other circuit opinions out there that are extremely relevant to this, and that this case is not a slam-dunk, as opposing counsel seems to suggest. There's a lot of law on this subject that needs to be analyzed.

THE COURT: I'm not up to speed fully, but it's not a slam-dunk for either side. This is one --

MR. BERANEK: In addition, Judge --

THE COURT: This is one that's a legitimate dispute between the two sides. So I understand that.

MR. BERANEK: We also think that we may well have an affirmative defense of laches here, if Mr. Scott intentionally, or even unintentionally, waited, when he could have brought this challenge in a much more timely manner, and we wouldn't all be facing trying to get ready to have a hearing in a day.

THE COURT: I understand.

MR. THOMAS: Your Honor, this is Harry Thomas. Can I be heard just a second?

THE COURT: Surely.

MR. THOMAS: One last point, even if Ms. Mainigi is correct, and you can simply determine the unconstitutionality of the statute based upon *Davis* and *McComish*, and the cases that are cited there, you still have to make a decision about whether a preliminary injunction is appropriate --

THE COURT: I understand.

MR. THOMAS: -- as was faced in the *McComish* case; and the facts with regard to the balancing of the equities here, or the harms between our client and Mr. Scott, is something that a little discovery could be used on to flesh out. But those are, I think, where the factual issues will arise, as opposed to so much with regard to the ultimate decision on the case law as to whether this is constitutional

or not.

THE COURT: All right. We're going to have a hearing Wednesday. We'll start at 10:00 Wednesday. No live testimony. You can submit declarations.

I hear the defense. The nature of preliminary injunction hearings is that they often are not full trials on the merits, and there is some judgment that has to be exercised about whether to go faster or go slower and be a little more thorough. Every case on my docket could go faster than it does or slower than it does. If I gave you until the middle of 2011, there would be enough to do to keep lawyers busy between now and then, including by then arguing about whether the case was moot.

It is a little unfortunate that my schedule is what it is. I rather give you another week, but that just can't be done.

I do think, from looking at this preliminarily, that the lion's share of the effort will be dealing with the legal issues, which are substantial. The body of law that directly bears on this is finite. One could spend years thinking about the underlying First Amendment issues, but one can master the limited case law that is directly relevant to this pretty quickly. And I suspect that all of the very good lawyers on the telephone have, or at least one of the very good lawyers for each party has read each of the cases that bear on this

very directly at all. Certainly, that will be true by Wednesday. And I will have read all of the cases that bear on this. I have not yet read them all, but I will have done it by Wednesday.

So I think at least by Wednesday we can have a good grip on the legal issues; we can have a pretty good grip on the factual issues; and at least know what the other potential factual issues are. And so we'll either have some certainty on things that matter, or we'll have a pretty good idea of what the uncertainty is, and we can address how to deal with that in the context of a preliminary injunction hearing.

MR. BERANEK: Your Honor, I have to ask as to what is the deadline for our filing of a response of some nature? This is Beranek again.

THE COURT: Yes. Anything you want to file, you should file by the end of the day on Tuesday. I guess that's tomorrow.

MR. BERANEK: That's tomorrow.

THE COURT: And that way the other side will have read it, and I will have read it. And as happens with emergency hearings, we'll deal with it as best we can. So you're not limited to what you put in the papers, but certainly it will help me to have whatever you can get. If you get it in sooner, I will have more time with it, but that's a pretty good effort to have it in by tomorrow. So do

your best with it. And, if you show up without filing anything and just talk about it, that will be okay, too.

MR. BERANEK: We will file something.

MR. THOMAS: Your Honor, this is Harry Thomas. I assume, if we are allowed to intervene, we will abide by the same deadline.

THE COURT: Exactly. What else can we accomplish this morning?

MS. MAINIGI: Your Honor, I take it, with respect to paragraph 3 of your scheduling order, then, I'm presuming, but I just want to confirm, that you would view declarations to be admissible, then, given the format that we've just laid out.

THE COURT: Yes, I will consider declarations.

So 10:00 here in Tallahassee in person, and we'll go from there.

MR. BERANEK: Your Honor, if we could inquire whether the plaintiff will be filing anything else in the way of declaration before this hearing.

MS. MAINIGI: Absolutely. Certainly, we have no intention of doing so.

THE COURT: Okay. So you've got everything the plaintiff is going to have filed; and the defense can file what you wish, and we'll take it up at 10:00 Wednesday. And, again, I understand that's a hardship to be on this short notice, but it is for me, too. We'll all just do what we have

to do and do the best we can by then.

Thank you all.

MR. BERANEK: Thank you, Your Honor.

MS. MAINIGI: Thank you very much, Your Honor.

MR. THOMAS: Thank you, Your Honor.

(*The proceedings adjourned at 10:27 a.m.*)

* * * * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

Judy A. Nolton, RMR, FCRR
Official U.S. Court Reporter

7/16/2010
Date