Buyer beware: Employers leasing employees are not immune from liabilities
Why companies are wrong to believe they are avoiding "big ticket" employment-related liabilities by using contingent workers. By Rebecca M. Aragon of Venable

Protecting the rich in the election system
The U.S. Supreme Court conservative majority makes clear their desire to protect the influence of the wealthy in the election process. By Erwin Chemerinsky of UCI Irvine, School of Law

Rise of the suitable seating suit: A new trend in employment class actions
Claims that employers are not providing suitable seating are on the rise across a broad spectrum of industries. By Shawn Khorrami and Katie McSweeney of Khorrami Pollard & Abir LLP

In defense of the common law duty of loyalty
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Got a minute? The de minimis standard in wage and hour law
Should courts allow employers to escape liability for small amounts of uncompensated time? By Scott Edward Cole and Hannah R. Salassi of Scott Cole & Associates APC

Judges and Judiciary
Administrators propose trial courts cuts
Faced with unparalleled cuts to the state judiciary branch's budget, the Administrative Office of the Courts has recommended deep cuts to every branch entity but stopped short of making long-term plans to absorb reductions.

Civil Rights
Gay couple fights to be listed on birth certificate
A gay couple has taken its fight to have their names listed as parents on the birth certificate of their adopted child to the U.S. Supreme Court, the first of several gay rights issues to reach the high court.

Mergers & Acquisitions
Wilson Sonsini advises EA in social gaming deal
Redwood City-based gaming giant Electronic Arts Inc. jumped into the social gaming space with both feet Tuesday with its $750 million purchase of PopCap Games Inc.

Admin/Regulatory
Despite proposed rules, questions persist about insurance exchanges
The U.S. Department of Health and Human Services released proposed rules for state health insurance exchanges required by last year's health care reform law, but questions remain about how the exchanges will be implemented.
Protecting the rich in the election system

The U.S. Supreme Court's decision in Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 2011 DJDAR 9489 (June 27, 2011), reflects the conservative majority's hostility to campaign finance regulation and its desire to protect the influence of the wealthy in the electoral process. Although the Court is careful to say that it is not invalidating all forms of public funding of elections, the practical effect will be to reduce greatly the likelihood that such systems can ease the corrosive effects of money in the political system.

The case involved an Arizona law, adopted through a voter-passed initiative, which provided for public funding of elections for state offices. Under the Arizona Citizens Clean Elections Act, no candidate was required to accept public funding for his or her election. A candidate wishing to accept such money could qualify for receiving public funds by obtaining a specified amount of donations. Candidates choosing to take public funds had to agree, among other things, to limit their expenditure of personal funds to $500, to participate in at least one public debate, to adhere to an overall expenditure cap, and to return all unspent public moneys to the state.

Once a set spending limit is exceeded by an opponent not taking public funds, a publicly financed candidate receives roughly one dollar for every dollar spent by the opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate or to oppose the publicly financed candidate. Matching funds top out at two times the initial authorized grant of public funding to the publicly financed candidate.

The Supreme Court, in a 5-4 decision, declared this law unconstitutional. Chief Justice John G. Roberts Jr. wrote for the Court.
and was joined by Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito Jr. The Court said that the Arizona law was unconstitutional because it penalized candidates who spent their own money in elections. The “penalty” was that their increased spending would be met with greater public funds for an opponent accepting such money. The Court found that the Arizona law violated the First Amendment because it would chill candidates, and their supporters, from spending money in elections.

In the absence of such evidence, the Court simply made a value choice that it was more important to protect rich people and their supporters from being chilled from spending money than it was to further the speech of candidates receiving public funds.

According to the Court, the case was controlled by its decision from three years ago in Davis v. Federal Election Commission, 554 U.S. 724 (2008). In that case, the Court, in a 5-4 decision with the same justices in the majority, struck down the “millionaires provision” of the Bipartisan Campaign Finance Reform Act. Under this provision, if a candidate spent more than $350,000 of his or her own money to get elected to federal office, opposing candidates could take advantage of higher contribution and expenditure limits. The Court declared this unconstitutional, in large part, because the effect would be to chill candidates from spending their own money in elections.

In Arizona Free Enterprise Club’s Freedom Fund, Chief Justice Roberts declared: “If the law at issue in Davis imposed a burden on candidate speech, the Arizona law unquestionably does so as well.” In fact, the Court saw the Arizona law as even worse than the one invalidated in Davis because it increased public funding based on both what the opponent and what supporters of the opponent spent in the election. The Court’s concern in both cases was that regulations would chill the spending of money in elections. It rejected the argument that the laws served a compelling interest in preventing corruption and the appearance of corruption or of equalizing influence in the electoral process.

The Court's reasoning and holding are questionable and troubling on many levels. First, the Arizona law in no way restricted or regulated speech. The sole effect of the Arizona Citizens Clean Election Act was to increase money for candidates taking public funds. As Justice Elena Kagan noted in her dissent, Chief Justice Roberts’ majority opinion repeatedly characterizes the Act as limiting speech. "[b]ut Arizona's matching funds provision does not restrict, but instead subsidizes, speech."

Second, if one accepts that spending money in elections is a form of

plants awaiting protection under the Endangered Species Act by 2018 as part of a settlement with two conservation groups.

Intellectual Property
Samsung seeks to disqualify Palo Alto firm
Attorneys for Samsung Electronics Co. Ltd. filed a motion late Monday seeking to disqualify Palo Alto-based Bridges & Mavrakis LLP, one of the law firms representing Apple Inc., from their patent and trademark infringement lawsuit.

California Courts of Appeal
Appellate panel clears way around Concepcion
Plaintiffs’ lawyers were celebrating Tuesday after a California appellate court issued what’s believed to be the first published case addressing the ramifications of a recent U.S. Supreme Court ruling on class actions.

Environmental
Part of S.F. Candlestick development stopped until remediation completed
A Superior Court judge has stopped development at portions of the Candlestick Point-Hunters Point redevelopment project in San Francisco until the U.S. Navyfinalizes cleanup on contaminated parcels.

California Courts of Appeal
Voter fraud charges reinstated against state senator
An appellate court panel Tuesday reinstated two voter fraud charges against state Sen. Roderick Wright, who is accused of lying about where he lived in order to run in the 25th state Senate district.

Obituaries
Judge's work stretched beyond the bench
Weeks before he died, James P. Marion as "your honor." On weekends, the Orange County Superior Court judge with the big heart was just "dishwasher Jim."
speech protected by the First Amendment, then the Arizona law actually increases speech. In repeatedly striking down campaign finance laws, such as in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), the Court has based its decisions on the premise that spending money in elections is speech protected by the First Amendment. If so, then Arizona's law should be applauded by the conservatives on the Court who comprised the majority in *Citizens United* because it increases the amount of money spent in elections and thus the amount of expression through all of the things that money can buy, such as advertising, mailers, and rallies.

But that is not how the Court's conservative majority saw the Arizona law; they saw it as likely to decrease speech by chilling candidates from spending their own money. There is little evidence that this occurs. In fact, the law well could have the opposite effect of causing candidates not taking public funding (and their supporters) to spend even more in response to the greater public dollars. Thus, the public funding scheme well could have a multiplier effect in increasing spending and speech.

Ultimately, though, there is an empirical question: Will Arizona's law result in a net decrease in campaign expenditures as the wealthy and their supporters are chilled from spending, or will it result in more net spending because of the additional funds to candidates receiving public funding and expenditures made in response to them? The law is unconstitutional only if there was proof of the former and no such evidence exists. A Court that repeatedly has expressed a reluctance to declare laws to be facially unconstitutional without significant proof did exactly that in this case.

In the absence of such evidence, the Court simply made a value choice that it was more important to protect rich people and their supporters from being chilled from spending money than it was to further the speech of candidates receiving public funds. This is a troubling choice and little more than a naked preference to favor some over others in the election system.

Finally, the Court leaves open the possibility that other public funding systems might be allowed. It would seem that these systems would need to provide a lump sum to all candidates receiving public funding; there could be no increase based on the amount spent by an opponent. The problem with this is that it makes it far harder to design a public funding system that will attract the participation of candidates. The amount needed for a successful campaign varies tremendously depending on the election, the opponents, the overall spending, and the like. It is much less likely that candidates will choose to participate in public funding where their money is not increased when candidates not taking such money can spend far more.

Ultimately, what really separates the majority and the dissent is their perceptions about the importance of regulating campaign spending, especially to prevent corruption and the appearance of corruption. Arizona voters adopted the initiative after revelations of significant

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**Tax**

**DOJ targets lawyers over tax shelters**
Two ex-Manatt, Phelps & Phillips LLP attorneys have been permanently barred from promoting what federal officials allege are abusive tax shelters used for more than $112 million in fraudulent tax deductions.

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**Constitutional Law**

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corruption in its state legislature. Almost one-third of the states have some form of public funding of elections. Many of these are now unconstitutional even though they do not restrict or punish any speech, but rather just provide for more speech. It really does turn the First Amendment upside down.

U.S. Court of Appeals for the 9th Circuit Ninth Circuit sides with grocers A 9th U.S. Circuit Court of Appeals en banc panel on Tuesday reversed a 2010 decision and handed unions a major loss - along with some good news - in a long-running struggle over employers' use of profit-sharing to break strikes.