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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, *et al.*, Plaintiff-Intervenors vs. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, *et al.*, Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	Civil Action No. 08-1550-PHX-ROS **MEMORANDUM IN SUPPORT OF PLAINTIFF–INTERVENORS' MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

[1] Admitted *pro hac vice*.

The State of Arizona has created a punitive campaign funding system that burdens speech and incentivizes silence, which is neither supported by a compelling government interest nor narrowly tailored to achieve any legitimate state interest. This Court already concluded that the provision at issue here "violates the First Amendment of the U.S. Constitution." Order Den. TRO 7 (Doc 30); *see also* Findings of Fact & Conclusions of Law (Findings) 16 (Doc 185) (movants had "shown a very high likelihood that their First Amendment rights of free speech are being restrained").[2] The facts adduced since then simply reinforce this conclusion. Plaintiff-Intervenors therefore respectfully request that this Court enter summary judgment to (1) declare that the "Equal Funding of Candidates" provision of the Arizona Citizens Clean Elections Act (the Act), A.R.S. § 16-952 (the Matching Funds Provision), is unconstitutional, both on its face and as as-applied to them; and (2) permanently enjoin its operation and enforcement.

STATEMENT OF FACTS

I. The Act

In 1998, the voters of Arizona narrowly passed the Act by a vote of 51% to 49%. Statement of Material Facts (Statement) ¶ 27. Interest groups ranging from the Service Employees International Union to the Communication Workers of America sponsored and promoted the Act, which sought to reduce the influence and relative voice of certain business groups by implementing "spending limits, getting rid of special interests, and leveling the playing field." Statement ¶¶ 1-26.

[2] Pursuant to LR Civ. 7.1(d)(2), Plaintiff-Intervenors incorporate by this reference all documents filed in support of their Motion for a Preliminary Injunction.

The Act provides public financing for candidates who opt in to the system and who collect enough "qualifying contributions." A.R.S. § 16-946. Candidates who qualify for public financing receive an initial disbursement of funds from the Citizens Clean Elections Fund (CCEF) and are also eligible to receive matching funds if they have privately financed opponents. A.R.S. §§ 16-951, 16-952.

> Once a traditional candidate's contributions and expenditures exceed the base-level grant given to participating candidates, her participating opponent or opponents will receive almost dollar-for-dollar matching funds from the CCEF. These funds cap out at three times the applicable spending limit. Independent expenditures by Political Action Committees ("PACs") made on behalf of a candidate—traditional or participating—or in opposition to her participating opponent also count towards the spending limit.

Findings 2 (footnote omitted); Statement ¶¶ 29-30; A.R.S. § 16-952. The publicly financed candidate receives an amount equal to the amount the privately financed candidate spent or received over the limit, minus 6%. A.R.S. § 16-952(A) and (B).

Matching funds go to *all* publicly financed candidates running against a privately financed candidate. Thus, if a privately financed candidate makes expenditures (in the primary election) or receives contributions (in the general election) of $10,000 and has four publicly financed opponents, each of these opponents receives a check from the CCEF for $9,400 ($10,000 minus 6%), for a total government subsidy of $37,600 to counter $10,000 of expressive activity by the privately financed candidate.

II. The Act Harms Plaintiff-Intervenors' Expressive Activity

A. Dean Martin

Dean Martin is the current Arizona State Treasurer and was elected to the State Senate in 2000, 2002, and 2004. Statement ¶¶ 45-46. In each of these campaigns, Martin ran as a privately funded candidate. In his experience, the Act punishes privately financed candidates for fundraising and spending money against a publicly financed candidate. For instance, in his 2004 Senate re-election campaign, Martin intentionally delayed fundraising to minimize the amount of matching funds to his publicly funded opponent. Statement ¶ 52. In his 2006 campaign, Martin avoided fundraising to prevent triggering matching funds to his publicly funded opponent. Statement ¶ 53.

The Act continues to harm Martin's political expression. Most candidates for Treasurer or other state-wide office would begin their campaign fundraising by now. Martin is avoiding early fundraising for any 2010 election to minimize CCEF's provision of matching funds to any potential publicly funded opponent. Statement ¶¶ 54-55. Also, Martin actively discourages groups from making independent expenditures on his behalf that might trigger matching funds. Statement ¶ 56.

B. Robert Burns

Robert Burns is an Arizona State Senator and the President of the Arizona Senate. Burns ran for his current position in 2002, and was re-elected in 2004, 2006, and 2008. He also served in the Arizona House before the Act's adoption. Statement ¶¶ 58-59. Burns ran each of his Senate campaigns as a privately funded candidate because he opposes publicly financed campaigns. Statement ¶ 61. The Matching Funds Provision

causes Burns to alter his expenditures and fundraising to limit, delay, or entirely avoid the triggering of matching funds. Statement ¶ 63. During his 2008 general election campaign, Burns decided to limit his fundraising to one event to avoid triggering matching funds to his publicly financed opponent, who did not have an opponent during her primary election. Statement ¶ 64. This opponent received the full primary disbursement of $12,921, which she was able to use against Burns in the general election. Statement ¶ 66. In the 2008 general election, Burns' publicly funded opponent received $28,250 in matching funds, in addition to a $19,382 initial disbursement, for a total subsidy of $47,633. Thus, thanks to "equal funding," Burns' publicly funded opponent had $7,263 more than Burns to run her campaign. Statement ¶ 67.

C. Rick Murphy

Rick Murphy is an Arizona State Representative. He first ran for the Arizona House in 2004, and was re-elected in 2006 and 2008. Statement ¶¶ 70-71. In 2004, Murphy was coerced into accepting public funding because the Matching Funds Provision penalizes privately financed candidates. Because he opposes publicly financed campaigns, Murphy ran in 2006 and 2008 as a privately financed candidate. Statement ¶ 73. Murphy has fully experienced the discriminatory and asymmetrical nature of the Matching Funds Provision. In the 2006 general election, Murphy stopped actively raising money so that he would not exceed the general election trigger amount and thereby trigger matching funds to his publicly financed opponent. Statement ¶ 74. In the 2008 primary election, Murphy did not send out a mail piece in order to conserve his resources for the 2008 general election in which he faced three publicly financed candidates and

accurately anticipated being massively outspent. Statement ¶ 75. In the 2008 general election against these three publicly financed candidates, Murphy was penalized each time his opponents received matching funds based on independent expenditures. Two of his publicly funded opponents received matching funds of $38,764 for a total public subsidy of $58,146 each, while a third received $6,818 in matching funds, for a total public subsidy of his opponents of approximately $150,000. Statement ¶¶ 77-78. Murphy decided not to fundraise in the 2008 general election because of the uncertainty of independent expenditures and the possibility of triggering almost $3 in matching funds for every $1 he raised beyond the general election trigger amount. Statement ¶ 79.

In contrast to the benefits showered on his opponents, Murphy was the target of three opposing independent expenditures totaling $11,546, yet he did not receive any matching funds based on these expenditures. Statement ¶¶ 81-86. In contrast, when an independent expenditure was made in his favor in the amount of $3,627 on October 21, 2008, Murphy's three publicly funded opponents each received $3,627 minus 6% in matching funds. Statement ¶ 87.

D. AZ Free Enterprise Club's Freedom Club PAC

AZ Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is a Candidate Support or Opposition Committee. Statement ¶ 92. The Act has harmed the Freedom Club PAC because, in 2006 and 2008, money contributed by the Freedom Club PAC to Arizonans for a Sound Economy for independent expenditures triggered matching funds to publicly financed candidates whom the Freedom Club PAC opposed. Statement ¶¶ 98-104.

E. Arizona Taxpayers Action Committee

Arizona Taxpayers Action Committee ("Arizona Taxpayers"), an Independent Expenditures Committee, currently makes independent expenditures regarding state elections. Statement ¶ 106. Arizona Taxpayers did not to speak in opposition to a publicly funded candidate in the District 1 2006 Senate primary race to avoid triggering matching funds to that candidate. Statement ¶ 109. In 2008, Arizona Taxpayers chose to make expenditures in late October 2008 to ensure that any matching funds would not be triggered until as late in the campaign cycle as possible. Statement ¶ 113.

ARGUMENT

1. The Applicable Standards

A. Summary Judgment

Summary judgment is appropriate when the pleadings and documents demonstrate that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986).

B. First Amendment Claims

When a law burdens political speech, courts subject it to "strict scrutiny." *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S. Ct. 2652, 2664 (2007). Under strict scrutiny, "the *Government* must prove that [the law] furthers a compelling government interest and is narrowly tailored to achieve that interest." *Id.* Moreover, "[a] court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *Id.* at 2672. Restrictions that exist simply to enable other portions of a statute to operate do not satisfy strict scrutiny. *See id.* at 2672 ("But such a

prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."). "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496-97 (1985). "Because the government has the burden of demonstrating its state interest, any empirical evidence it offers must overcome any evidence to the contrary presented by the plaintiff." *Citizens for Clean Gov't v. City of San Diego,* 474 F.3d 647, 653 (9th Cir. 2007) (citations omitted). "[H]ypotheticals, accompanied by vague allusions to practical experience, [cannot] demonstrate a sufficiently important state interest." *Id.* at 654.

Under strict scrutiny, a law burdening speech may "be employed only where it is '*necessary* to serve the asserted [compelling] interest.'" *R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992) (quoting *Burson v. Freeman,* 504 U.S. 191, 199 (1992) (plurality opinion)). Statutes must actually achieve their goals, be directed precisely at the harm they seek to prevent, and not regulate more speech than is necessary. *See Arizona Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1011 (9th Cir. 2003) ("Restrictions that severely burden First Amendment rights must be the least drastic means of protecting the government interest involved; its restrictions may be no greater than necessary or essential to the protection of the governmental interest.") (quotation marks omitted); *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (narrow tailoring requires the government to prove "that the regulation will in fact alleviate [the government's claimed] harms in a direct and material way"); *Video Software Dealers*

Ass'n v. Schwarzeneger, 556 F.3d 950, 958 (9th Cir. 2009) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (quotation marks omitted).

Courts examine the "fit between the state's regulation and the stated purposes." *Arizona Right to Life,* 320 F.3d at 1011 (quotation marks omitted). The "less than noble motivation" of enhancing the speech of some by burdening the expression of others "diminishes the substantiality of the government's interest … and increases the resulting impact on expression." *Pac. West Cable Corp. v. City of Sacramento,* 672 F. Supp. 1322, 1338 (E.D. Cal. 1987). Leveling electoral opportunities is not a compelling, or even legitimate, state interest. *Davis v. FEC,* __ U.S. __, 128 S. Ct. 2759, 2773 (2008).[3]

Finally, regulations that distinguish among speakers based on content "are presumptively invalid." *R.A.V.*, 505 U.S. at 382. A regulation "is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." *Video Software Dealers,* 556 F.3d at 958 (quotation marks omitted).[4]

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[3] Moreover, "[t]he fact that measures designed to eliminate the prospect and appearance of corruption … may reflect a compelling governmental interest does not mean that a particular form of regulation is required." *DePaul v. Commonwealth,* 969 A. 2d 536, 2009 Pa. LEXIS 670, at *42 (Sup. Ct. Apr. 30, 2009).

[4] Because independent expenditures lie at the core of our electoral process and First Amendment freedoms, "restrictions on independent expenditures that burden political speech must be narrowly tailored to support a 'compelling state interest.'" *Free Mkt. Found. v. Reisman,* 573 F. Supp. 2d 952, 955 (W.D. Tex. 2008) (quoting *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 251 (1986)).

The Matching Funds Provision (i) burdens political speech, (ii) does not serve a compelling or even legitimate government interest, and (iii) is not narrowly tailored.

2. The Matching Funds Provision Burdens Speech

A. It Is Well-Established That Laws That Result in a Speaker Enabling Speech with Which She Disagrees Burden Free Expression

The Supreme Court has consistently struck down laws that incentivize silence.

In *Davis*, the Court struck down the "Millionaire's Amendment," which allowed opponents of self-financed candidates to raise money from individuals three times the maximum contribution limit if their self-financed opponents spent more than a certain amount of their own funds. The Court concluded that this "asymmetrical" treatment of opposing candidates "impermissibly burden[ed] [the self-financing candidate's] First Amendment right to spend his own money for campaign speech." *Davis,* 128 S. Ct. at 2771. The law created an "unprecedented penalty" on any self-financing candidate that robustly exercised their First Amendment rights: if she "engage[s] in unfettered political speech" she will be subject "to discriminatory fundraising limitations." *Id.* Self-financing candidates could still spend their own money, "but they must shoulder a special and potentially significant burden if they make that choice." *Id.* at 2772.[5] The Court

[5] Defendants have argued that the Millionaire's Amendment in *Davis* differs from the Matching Funds Provision because the Millionaire's Amendment discouraged candidates from spending their own money and a candidate spending their own money reduces the candidate's dependence on outside funds and any attendant pressures. Prelim. Inj. Hr'g Tr. 52; *Davis,* 128 S. Ct. at 2771. But the Matching Funds Provision kicks in when a privately financed candidate spends their own money to advance their own candidacy or gifts or loans money to their own campaign. *See* A.R.S. § 16-901(5) ("Contribution" means any "gift" or "loan" for the purpose of influencing an election); Ariz. Rev. Stat. §

agreed with Davis that this system "unconstitutionally burden[ed] his exercise of his First Amendment right to make unlimited expenditures of his personal funds because making expenditures that create the imbalance has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis' own speech." *Id.* at 2770.

This conclusion was consistent with precedent recognizing that the government chills speech when it creates a system under which the act of free speech enables the speaker's opposition to counter that speech, even when the government's goal is to promote more speech. The Court in *Davis* specifically cited to *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. 1, 14 (1986) (plurality opinion). In that case, California ordered a utility to make its newsletter available to a hostile group. The plurality stated, "Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id.* at 9. The plurality stated that the order "force[d] appellant to respond to views that others may hold." *Id.* at 11. Although the government sought to "offer the public a greater variety of views," this was impermissible viewpoint discrimination because access was limited to only those who disagreed with the utility. *Id.* at 12. Thus, "whenever [the utility] speaks out on a given

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16-901(8) ("Expenditure" means any "payment" or "distribution" made by a person for the purpose of influencing an election); A.R.S. § 16-952 (matching funds paid when a privately financed candidate's expenditures and contributions exceed the trigger amount). Thus, the Matching Funds Provision has the same infirmity as the Millionaire's Amendment, but adds additional restrictions.

issue, it may be forced … to help disseminate hostile views. Appellant might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Id.* at 14 (quotation marks omitted).

Similarly, in *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), the Court struck down a Florida law that granted candidates equal space to reply to criticism by a newspaper. The government claimed this regulation was necessary to ensure a variety of viewpoints reached the public and that the law did not prevent the newspaper from publishing what it wished. *Id.* at 247-48. The Court nonetheless concluded that the statute violated the First Amendment because it chilled expression about candidates and thus diminished free and robust debate: "under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* at 257; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 576 (1995) ("Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *Group W Cable, Inc. v. City of Santa Cruz,* 669 F. Supp. 954, 969 (N. D. Cal. 1987) (court struck down ordinance that gave a city unlimited discretion in renewing a franchise to dictate use of cable access time, concluding that "[l]ike the newspapers in *Miami Herald* and *Pacific Gas,* a cable operator in Santa Cruz may be deterred from airing its views for fear that this will trigger – indeed, force it to produce and fund – the response of an opposing group.").

The Matching Funds Provision suffers the same infirmities as the regulations in these cases. First, it presents the speaker with the choice to robustly engage in expressive activity and enable the dissemination of a message opposed to his own or not speak at all. Second, the Matching Funds Provision is content-based. It is only when a privately financed candidate engages in (i) political activity, (ii) against a publicly financed opponent, and (iii) above a certain point, that the Matching Funds Provision is triggered.[6] All other speech is unaffected.[7] Third, the Matching Funds Provision is discriminatory and asymmetrical. It provides funds only to publicly financed candidates and only on the basis of the speech of the opponents of such candidates. It provides funds to multiple publicly funded candidates in order to counter the speech by, or in support of, a single privately financed candidate. It provides the full amount to a publicly funded candidate minus six percent, even if a privately financed candidate's fundraising expenses were much higher. It provides funds directly to a publicly financed candidate based on the independent expenditures of third parties, regardless of whether such expenditures were wanted, helpful, or actually harmed the privately financed candidate. The Act's treatment of independent expenditures as congruent with candidate contributions or expenditures thus contradicts the Supreme Court's holding in *Buckley,* which explicitly

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[6] The goal of the Act's proponents to reduce the political effectiveness of certain groups suggests that this law is a viewpoint-based regulation as well, an egregious form of content-based discrimination. *See* Statement ¶¶ 9-15; *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995).

[7] The content-based nature of matching funds distinguishes it from the public financing system approved by the Court in *Buckley v. Valeo,* 424 U.S. 1, 85-96 (1976), which provided funds for candidates regardless of the speech activities of their opponents.

held that direct contributions and independent expenditures are very different. *See Buckley,* 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

The Matching Funds Provision thus matches and exceeds the burdens present in *Davis, Pacific Gas,* and *Miami Herald.* It is therefore subject to strict scrutiny.

B. Plaintiff-Intervenors Have Testified To Significant Interference With Their Speech Caused By the Matching Funds Provision

As discussed above, the Matching Funds Provision has harmed, and continues to harm, the Plaintiff-Intervenors. *See supra* pp. 3-8; *see also* Statement ¶¶ 45-113.

C. The Matching Funds Provision Significantly Distorts and Alters The Timing and Extent of Candidates' Speech

As discussed in the Declaration of Dr. David Primo (the only expert in this case to conduct any statistical analysis of spending and contributions), the Act distorts political speech by changing the timing and frequency of contributions. Statement ¶ 34. Dr. Primo concludes, "the matching provisions lead to changes in fundraising and campaign spending in ways that are harmful to free expression." Statement ¶ 33. Dr. Primo's analysis thus demonstrates that candidates "have alter[ed] [their] own message as a consequence of the government's coercive action." *Pac. Gas & Elec.,* 475 U.S. at 17.

3. The Matching Funds Provision Does Not Support a Compelling, Or Even Legitimate, Governmental Interest

Defendants distribute matching funds to counter the non-corrupting spending by privately financed candidates and independent expenditures. These funds are also designed to create disincentives for candidates to receive, and donors to give, contributions within the contribution limits established by Arizona law. There is no evidence this effort reduces corruption. What interest does it serve, then?

"Clean Elections is NOT about public funding. It's about spending limits, getting rid of special interests, and leveling the playing field." Statement ¶ 20. As demonstrated in Exhibit 17, the Act has been, since its inception, about reducing the amount of money in campaigns and "leveling the playing field." Reducing corruption has been simply the gown in which the proponents have attempted to dress their efforts to reduce the influence of political forces with which they disagree. Statement ¶¶ 9-15. *Davis* is clear that this is not a legitimate, much less compelling, interest. *Davis,* 128 S. Ct. at 2773.

4. The Matching Funds Provision Is Not Narrowly Tailored

There is no evidence that the Act has achieved any of the goals, legitimate or not, sought by its passage. Statement ¶¶ 128-149. It is difficult to imagine a law that has failed so spectacularly at "directly and materially" advancing any governmental interest. Indeed, to this day, the Act is largely a mystery to Arizona voters and thus not a "necessary" tool to combat perceptions of corruption. Statement ¶¶ 142-148. Moreover, it has opened avenues for gaming that promote the very activities the Act was designed to discourage. Statement ¶¶ 153-155. At the end of the day, the most that can be said, in a

1 generous viewing, is that the Act "marginally" increased competition in Arizona.
2 Statement ¶ 150. Given the harm to free expression occasioned by the Act, this meager
3 achievement, assuming it is true, cannot support the Matching Funds Provision's
4 continued vitality. The Act is therefore not narrowly tailored.

5 **5. The Matching Funds Provision Is Facially Invalid**

6 The Matching Funds Provision burdens the speech of not only the Plaintiff-
7 Intervenors, but also the Plaintiffs and third parties. *See* Statement ¶¶ 114-127.
8 Moreover, Dr. Primo has demonstrated the significant effects the Matching Funds
9 Provision has had on the amount and timing of candidate fundraising in Arizona
10 elections. Statement ¶¶ 31-38. It is thus clear that a substantial number of the Matching
11 Funds Provision's applications are unconstitutional under the statute's supposedly
12 legitimate sweep—which, as noted above, does not exist. *See Washington State Grange*
13 *v. Washington State Republican Party,* __ U.S. __, 128 S. Ct. 1184, 1191 n. 6 (2008).
14 Like the Millionaire's Amendment in *Davis*, the Matching Funds Provision is
15 unconstitutional on its face because it burdens speech far beyond the legitimate scope of
16 the government's power.

17 **CONCLUSION**

18 Plaintiff-Intervenors respectfully request that this Court (i) declare the Matching
19 Funds Provision unconstitutional on its face and as applied to them, (ii) permanently
20 enjoin its operation and Defendants' enforcement of same, and (iii) declare that Plaintiff-
21 Intervenors are prevailing parties in this matter for purposes of 42 U.S.C. § 1988.

22 Respectfully submitted this 12th day of June, 2009.

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Certificate of Service

I hereby certify that on **June 12, 2009,** I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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