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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al, Plaintiffs, v. KEN BENNETT, in his official capacity as Arizona Secretary of State, et al, Defendants.	) Civil Action No. CV-081550-PHX-ROS)) Hon. Roslyn O. Silver, presiding)) **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**)) ORAL ARGUMENTS REQUESTED

Introduction

Based on the inescapable logic of the Supreme Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008), this Court has already ruled twice that the matching funds provision of Arizona's Clean Elections Act, A.R.S. § 16-952 (A)-(C) ("Matching Funds"), burden the exercise of First Amendment rights. The Court nevertheless refrained from preliminarily enjoining Matching Funds in the early stages of litigation; instead, the Court invited the State to more fully develop the record "regarding possible compelling state interests that justify the Act's burden on free speech." *McComish v. Brewer*, 2008 WL 4629337, *9 (D. Ariz. 2008). In response, the State has ignored the Court's invitation.

Despite more than ten months of intensive litigation, the State has not produced

any admissible evidence that Matching Funds are narrowly tailored to advance any compelling state interest. No doubt this is because there is no such evidence. The irony of the "Clean" Elections Act is that to the very extent that private funding is alleged to render traditional candidates beholden to special interests, the Act actually enables and incentivizes gaming strategies that render subsidized candidates "beholden" to special interests to an even greater degree. (Plaintiffs' Separate Statement of Facts ("PSF"), ¶¶ 121-63.) That's why the Court should grant summary judgment in favor of Plaintiffs as a matter of law, and permanently enjoin Matching Funds.

I. Statement of Facts

A. Whether Matching Funds Burden Free Speech.

Plaintiffs and Plaintiff-Intervenors are no longer the only witnesses who have testified that Matching Funds create a drag on campaign spending and fundraising. They are now joined by Defendant Clean Elections Commissioner Lori Daniels. During her deposition, Commissioner Daniels was asked, "You would agree that the availability of matching funds can influence whether a candidate makes or doesn't make expenditures?" Commissioner Daniels replied "Yes". (PSF, ¶ 71.) Similarly, when asked, "You would agree that the availability of matching funds can influence whether an independent expenditure committee makes or doesn't make expenditures?" Again, Commissioner Daniels replied affirmatively with the response, "Yes". (*Id.*) In response to the question, "Why don't you think the matching funds provisions of the Act are constitutional?" Commissioner Daniels testified: "Freedom of speech, First Amendment. I think when you do that you're basically saying that—you're eliminating my-my

constitutional right as an outside individual to expressly advocate for a candidate that I want. And so I think when you do that with matching funds, you violate First Amendment rights." (PSF, ¶ 72.) When asked, "[f]or those individuals who are aware of the impact of matching funds and for those individuals who are engaged in decisions about fund-raising or expenditures in support of their campaign, wouldn't you agree that there would always be a chilling effect of some magnitude on their fund-raising and expenditure decisions?" Commissioner Daniels said, "The majority of the time, is it a chilling effect with matching funds, Yes." (PSF, ¶ 73.) Commissioner Daniels eventually admitted to being familiar with the strategies of ten candidates and that "at least 80 percent" would be chilled by matching funds. (PSF, ¶ 74.) She also testified that there is "nothing inherently incredible" about Plaintiffs' testimony that they had "been chilled by matching funds in the course of their candidacies." (PSF, ¶ 75.)

Executive Director Todd Lang, Rule 30(b)(6) representative of the Citizens Clean Elections Commission ("CCEC"), has admitted, "I suppose a person might refrain in contributing if they thought it might trigger matching funds." (PSF, ¶ 76.) And Democratic Representative David Lujan, a previously disclosed defense witness, has also testified that Matching Funds can deter the speech of independent expenditure committees stating, "I think under clean elections they are less likely to make an independent expenditure if they see that the value of that independent expenditure is going to be weakened because it's matched by the clean elections system." (PSF, ¶¶ 77-78.)

In addition, political action committees unconnected to the parties have

confirmed the deterrent effect of Matching Funds. In particular, while this lawsuit was pending, in October 2008, two political action committees, Victory 2008 and Arizonans for a Healthy Economy ("AFHE") brought a lawsuit seeking to block the issuance of matching funds. (PSF, ¶ 79.) They claimed that the CCEC had led them to believe that that matching funds would not be available in that district, and further testified that they would not have made independent expenditures had they known matching funds were available. (PSF, ¶ 79-82.) Significantly, when responding to the question, "In making the decision as to whether or not to make an expenditure, can you tell us generally—and then we'll get specifically to LD 25, Legislative District 25—what role the matching funds provisions under Clean Elections plays?" AFHE's representative replied, "It played a huge role. And Arizonans for a Healthy Economy conducted efforts in numerous districts. And we actually had more districts that we would like to be in. But because of the matching funds issue, there were decisions made to not advocate in specific districts because—because of the matching-funds issue. That was one step. The second step was other districts that we didn't want to go into—we didn't want to advocate in until very late because of the matching-funds issue." (PSF, ¶ 82.)

The foregoing testimony is consistent with the findings of an article published in the peer-reviewed academic publication, "*Gaming Arizona: Public Money and Shifting Candidate Strategies*" (2008), which concluded that the disincentives created by matching funds burdened campaign expenditures and fundraising of traditional candidates during the 2006 election cycle. (PSF, ¶¶ 83-86.) It is also consistent with the extensive Arizona-based campaign consulting experience of Plaintiffs' expert, Dr.

Marcus Osborn, who testifies to a reasonable degree of scientific and professional certainty that matching funds restrict speech and change the campaign communication efforts of candidates. (PSF, ¶¶ 90-104.)

This is in addition to testimony that Matching Funds asymmetrically burden traditional candidates. First, matching funds are awarded to participating candidates without deducting the true out-of-pocket and opportunity costs incurred by traditional candidates in fundraising. (PSF, ¶¶ 108-10.) This gives participating candidates more real purchasing power to engage in campaign speech than is typically enjoyed by traditional candidates from their fundraising. (PSF, ¶ 110.) Second, because matching funds will be provided to participating candidates for independent expenditures that support traditional candidates, political action committees can run ineffective, unwished for advertising that generates funds for a participating opponent to use at her discretion. (PSF, ¶ 105-06.) Both McComish and McLain have testified that ineffective PAC expenditures have been made on their behalf without their prior knowledge. (PSF, ¶¶ 47, 65-67.) Third, when a traditional candidate faces multiple opposing participating candidates, the multiple of matching funds triggered by his expenditures or fundraising disproportionately drowns-out her campaign speech. (PSF, ¶¶ 45-47, 49, 107.)

B. Whether Matching Funds are Meant to Prevent Corruption or the Appearance of Corruption.

The successor of the ballot initiative proponents of the Act, the Clean Elections Institute ("CEI"), describes the purpose of Matching Funds as follows: "To combat the inequalities that exist with disproportionate funding, when a non-participating candidate

outspends his Clean Elections participating opponent, the CCEC provides the Clean Elections candidate with matching funds up to a preset limit." (PSF, ¶ 113.) Even the Executive Director of the CCEC, Todd Lang, admits that the relationship between matching funds and the goal of preventing corruption or the appearance of corruption is indirect. (PSF, ¶ 114.) Moreover, volumes of internal documents from Defendants detail the "leveling the playing field" and resource "equalizing" purpose of Matching Funds. (PSF, ¶¶ 115, 120.) For example, the Act itself and the CCEC have historically described matching funds as "equalizing" payments. (PSF, ¶ 118.) Todd Lang himself wrote a legal brief on behalf of the CCEC stating, "It can not be disputed that the purpose of the Citizens Clean Elections Act is to equalize the playing field and give participating candidates equal opportunity to get their message out." (PSF, ¶ 119.)

C. Whether Matching Funds are Well-Tailored to Preventing Corruption or the Appearance of Corruption.

There is no evidence that Matching Funds are well-tailored to preventing corruption or the appearance of corruption. The Court has already underscored the appearance of corruption associated with the "gaming" matching funds makes possible—the use of teaming strategies involving a mix of traditional and participating candidates who deliberately coordinate their campaigns, assist in fundraising, share campaign managers, and make joint expenditures. *McComish*, 2008 WL at 8, 9. (*See also* PSF, ¶¶ 123-37.) In fact, Tony Bouie was the victim of such a team strategy in the primary election. (PSF, ¶¶ 35, 36, 126.) Bouie had a traditional and a participating opponent who shared, at a minimum, common advertising urging voters to cast each of

their two votes for the two candidates. (PSF, ¶ 20.) As a result, every dollar spent above the spending cap by either Bouie or his traditional opponent generated matching funds for the participating opponent, who could then use those funds for the benefit of both teamed candidates. (PSF, ¶¶ 21, 22, 24.)

Similarly, during the 2008 primary and general election, Democratic Corporation Commission candidates coordinated advertising with each other and shared a common campaign manager. (PSF, ¶¶ 132-33.) And Republicans candidates plotted to do the same. (PSF, ¶ 134.)

The teaming strategy has the appearance of magnifying the contributions of special interests. For example, wealthy individuals can bypass contribution limits by running as self-financed traditional candidates in order to trigger corresponding amounts of matching funds to the participating candidate he wishes to support. (PSF, ¶ 131.) Sam George's self-financed traditional candidacy in the 2008 primary and general elections, which triggered nearly a million dollars to his "solar teammates," appears to have had this intent. (PSF, ¶ 133.) Additionally, special interests can fund traditional candidates with the expectation that they will also trigger matching funding to the participating candidate they also support—effectively bypassing limits on PAC contributions to participating candidates. (PSF, ¶¶ 128, 130.) Corporation Commissioner Paul Newman suspected that this is precisely what the energy industry intended to do when he heard that the Republicans were running a "team" of candidates for corporation commission. (PSF, ¶ 135.) But the slate strategy is not the only way in which Matching Funds mirror and magnify the appearance of corruption supposedly

associated with private campaign financing. As predicted by Plaintiffs' expert, Dr. Marc Osborn, discovery has yielded evidence that independent expenditures have been made for "reverse targeting" purposes. (PSF, ¶¶ 154-63.)

"Reverse targeting" occurs when someone creates an advertisement that appears to support a candidate, but which is actually designed to undermine that candidate. (PSF, ¶ 154.) Matching Funds incentivize such tactics because a candidate's supporters can circumvent contribution limits by triggering matching funds to their preferred participating candidate by appearing to support another candidate in ways that are not actually beneficial to that candidate. (PSF, ¶ 162.) And on at least four occasions during the 2008 election cycle, independent expenditures were made with the appearance of reverse targeting.

One of these expenditures involved a blast email sent by a gay rights political organization, Equality Arizona, during the 2008 primary, which favorably referenced the candidacy of socially conservative Republican Representative Eddie Farnsworth. (PSF, ¶ 157.) Three others involved signs posted during the general election, identifying candidates and stating "they promised to raise taxes help them keep the promise," "help them to support illegals," and "support open borders." (PSF, ¶ 160.) In each case, the participating candidate opposing the targeted candidate could have received matching funds; and in one case, the participating candidate opposing the targeted candidate actually requested matching funds. (PSF, ¶ 161.) These examples illustrate that reverse targeting occurs and that Matching Funds incentivize them.

In addition to teaming and reverse targeting strategies, the Act is also beset by the

appearance of corruption that is alleged to arise from the phenomena of "bundling." Under the Act, depending on the office, participating candidates are required to gather large numbers of $5.00 contributions, ranging from more than 200 to well over 4,000. A.R.S. § 16-950(D). There is nothing to prevent these qualifying contributions from being "bundled" just as private contributions are alleged to be bundled for traditional candidates. (PSF, ¶¶ 144-49.) Moreover, because of the difficulty of obtaining the requisite $5.00 contributions at a time when participating candidates have minimal resources, participating candidates have an even stronger incentive to rely on bundlers than do traditional candidates. (PSF, ¶ 151.) But unlike a traditional candidate, the value to a participating candidate of bundling is not just the amount bundled, but also the public financing triggered by qualifying under the Act. (PSF, ¶ 150.) Because matching funds can triple the original lump sum grant of public financing, the availability of matching funds greatly increases the value of bundling $5 contributions to participating candidates.

The Clean Elections system is now known as the "dirty elections" system in Arizona because of bundling, the gaming of the Matching Funds system, the CCEC's arbitrary enforcement procedures, the CCEC's aggressive lobbying of the Legislature, as well as scandals involving illegal contributions and expenditures by participating candidates, the combination of which replicates and magnifies all of the worst supposedly corrupting elements of the private campaign financing system,. (PSF, ¶¶ 121-201.) Most recently, a cover story in the Phoenix New Times aptly depicted "Mr. Clean" covered in grime as the symbol of the Clean Elections system. (PSF, ¶ 180.)

II. Summary of Argument and Applicable Legal Standard

Matching Funds create an asymmetrical drag on the exercise of Plaintiffs' free speech rights that swamps the chilling effect of the campaign finance regulations struck down as violative of the First and Fourteenth Amendments in *Davis*. Moreover, unlike the lump sum public financing discussed in *Buckley v. Valeo*, 424 U.S. 1, 96 (1976), Matching Funds actually replicate and amplify all of the alleged opportunities for undue influence by special interests that are often ascribed to private funding of elections. This "potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere." *McComish v. Brewer*, 2008 WL 4629337, *9 (D. Ariz. 2008). That's why summary judgment should be entered in favor of Plaintiffs as a matter of law, and Matching Funds permanently enjoined under 42 U.S.C. § 1983, as well as the First and Fourteenth Amendments to the U.S. Constitution.[1]

The standard for summary judgment under Fed. R. Civ. P. 56(a) is satisfied when

[1] Plaintiffs have standing to challenge Matching Funds both facially and as-applied because: 1) each had been injured by their application when this lawsuit was filed; and 2) "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (internal quotations omitted). (*See* PSF, ¶¶ 15-104.) Additionally, although the 2008 election cycle is over, Plaintiffs' claims fall within the "capable of repetition, yet evading review" exception to mootness. *Davis*, 128 S.Ct. at 2769; *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 872 (9th Cir. 2007). (*See* PSF ¶¶ 16, 40, 59.) Lastly, Plaintiffs' facial challenge is well-founded because the burden imposed on free speech by Matching Funds is not content-neutral, and its lack of narrow tailoring guarantees that any conceivable application of the law entails "an unacceptable risk of the suppression of ideas." *Foti v. Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

the movant shows that the evidence viewed in the light most favorable to the non-movant justifies entry of judgment in her favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Plaintiffs satisfy this standard because, as discussed below, they have established their prima facie case and the State will be unable to produce evidence creating a genuine issue of material fact. *See, e.g.*, *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987); *Sepatis v. City of S.F.*, 217 F. Supp. 2d 992, 996 (N.D. Cal. 2002).

Of course, one suspects the State will disagree with this conclusion. But in the Ninth Circuit, "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Cal. Architectural Bldg. Prods., Inc.*, 818 F.2d at 1468. "A 'scintilla of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,' is not sufficient to present a genuine issue of material fact." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). Moreover, "the court is not free to disregard the testimony of a party that is not inherently incredible simply because it is self-serving." *Certain Underwriters at LLoyds, London v. Inlet Fisheries, Inc.*, 2006 WL 463877, at *3 (D. Alaska 2006) (citations omitted).

Plaintiffs' testimony that Matching Funds burden their campaign speech is not inherently incredible. (PSF, ¶ 75.) If anything, given the new testimonial evidence unearthed by eight months of discovery, the State's apparent claim that the Act's threat of triggering Matching Funds creates *no drag* on traditional candidates' campaign speech is utterly implausible. (PSF, ¶¶ 71-86.) And in the Ninth Circuit, "[i]f the facts

make a claim 'implausible,' the non-movant must present 'more persuasive evidence than would otherwise be necessary' in order to defeat a summary judgment motion." *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) (citations omitted). Following such precedent, the State should be required to advance especially persuasive evidence to refute the overwhelming evidence that Matching Funds logically and empirically burden free speech. It has not.

Additionally, because Matching Funds substantially burden free speech, the State has the burden of showing that they are narrowly tailored to preventing corruption or the appearance of corruption. *Davis*, 128 S. Ct. at 2771-73; *see also FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007). The State has refused to shoulder this burden. The State's refusal triggers the rule of law that "if the nonmoving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate." *Cal. Architectural Bldg. Prods., Inc.*, 818 F.2d at 1468.

Taken together, Plaintiffs should be granted summary judgment on their complaint for permanent injunctive relief from Matching Funds because: 1) the Court was obviously correct in its previous rulings that the provisions burden the exercise of First Amendment rights by traditional candidates and political action committees; and 2) despite the Court's invitation, the State has failed to show that Matching Funds are narrowly tailored to preventing corruption or the appearance of corruption.

A. Matching Funds Burden the Exercise of First Amendment Rights.

Ensuring free and uninhibited campaign speech is a core concern of the First Amendment. *Eu v. S. F. County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Moreover, campaign expenditures and contributions are protected under the First Amendment as campaign speech because they make speech possible and because political expression and association are manifested when citizens give financial support to candidates and also when candidates engage in campaign fundraising and spending. *Randall v. Sorrell*, 548 U.S. 230, 246-47 (2006).

In view of these principles, on August 29, 2008, the Court correctly ruled "Plaintiffs have established the Matching Funds provision of the Act violates the First Amendment of the U.S. Constitution" based on *Davis v. FEC*. (ECF 30, p. 7:18-19.) Later, on October 17, 2008, the Court correctly reiterated that Matching Funds places a "substantial burden on the First Amendment right to use personal funds for campaign speech." *McComish v. Brewer*, 2008 WL 4629337, *6 (D. Ariz. 2008). Plaintiffs incorporate by reference the compelling and correct legal analysis that gave rise to both rulings.

Despite the Court's prior rulings, the State will likely continue to contend that the burden Matching Funds impose on the exercise of First Amendment rights is insignificant, non-existent, or somehow unproven. But this contention should be rejected for two reasons. First, there is no such thing as an insignificant loss of First Amendment freedoms. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Second, under *Davis*,

Matching Funds would still burden free speech even if no one ever engaged in self-censorship because of the threat of triggering Matching Funds. The plaintiff in *Davis*, after all, did not file his ultimately successful lawsuit until after he went ahead and spent the money that triggered elevated contribution limits under the Millionaire's Amendment not in just one, but in two election cycles. Even after Davis triggered the elevated contribution limits, his opponent did not raise any more money. The Supreme Court nevertheless found that the "Millionaire's Amendment" created a drag on the exercise of First Amendment rights that substantially burdened free speech. The Supreme Court reached this holding because the First Amendment entitles individuals to be free from government-imposed disadvantages when they exercise their First Amendment rights.[2] *Davis, S. Ct. at* 2772 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 14 (1986)).

Of course, the truth is that it is utterly implausible for the State to claim that Matching Funds pose no risk of self-censorship. Rational candidates obviously want to maximize their chances of winning. Raising and spending money to get a candidate's name and message out is central to a candidate's chances of winning. (PSF, ¶ 90.) Matching Funds impose a "cost," or competitive disadvantage, in raising and spending money that would not exist in a world without Matching Funds. (PSF, ¶¶ 18, 43, 62, 78,

[2] Notably, proof of actual self-censorship is not a prerequisite to showing a law substantially burdens free speech. The mere "potential" for "self-censorship is abhorrent to the First Amendment." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 318 (1979); *see also Virginia*, 484 U.S. at 392-93. Moreover, free speech is burdened by regulations that cause political actors merely to be "discouraged from engaging in speech safeguarded by the First Amendment." *Center for Individual Freedom, Inc. v. Ireland*, 2008 WL 1837324, at *5 (S.D.W. Va. 2008) (citing past holding).

91-100.) Consequently, rational candidates and political action committees will seek to minimize that cost. (PSF, ¶¶ 18, 43, 62, 77-89, 101-04.) And that means candidates like Plaintiffs will naturally either minimize fundraising or spending to minimize Matching Funds or they will alter the mode of fundraising and spending in ways that minimize the benefit of Matching Funds to their competitor. (PSF, ¶¶ 18, 27, 43, 52, 62, 63, 77, 78, 83-88.) Likewise, rational political action committees will naturally minimize or alter the mode of their expenditures in campaigns where the candidate they oppose stands to gain Matching Funds. (PSF, ¶¶ 79-82, 89, 104.)

In short, in repeatedly ruling that Matching Funds create a drag on campaign speech, the Court clearly understood that for rational traditional candidates (who are not gaming the system), it is a logical necessity that Matching Funds would burden their campaign fundraising and campaign expenditures. The same is true of rational political action committees. And the Court's findings to this effect are now uniformly sustained by the testimony of novice candidates, veteran candidates, sophisticated political action committees, a peer-reviewed academic study and even one member of the CCEC itself. (PSF, ¶¶ 15-110.) Even CEI's supposed expert concedes that the whole point of Matching Funds is to diminish the so-called "arms race" in campaign fundraising and expenditures. (PSF, ¶ 116.) How could that happen, exactly, if Matching Funds were not meant to impose a substantial drag on campaign fundraising and expenditures?

The bottom line is that Matching Funds cause the vigorous exercise of First Amendment rights by Plaintiffs, political action committees and their supporters to produce fundraising advantages for their opposing government-subsidized candidates.

Like the Millionaire's Amendment in *Davis*, the Act thereby creates and was meant to create an asymmetrical[3] drag on the exercise of First Amendment rights by causing the campaign speech of Plaintiffs, political action committees and their supporters to "disseminate hostile views." *Pac. Gas & Elec. Co.*, 475 U.S. at 14. The implausible claims to the contrary advanced by the State require especially persuasive supporting evidence to survive summary judgment. *See United States ex rel. Anderson*, 52 F.3d at 815. There is no such evidence. And for this reason, the Court remains correct that Matching Funds substantially burden free speech.[4] Therefore, to survive summary judgment, the State must show that Matching Funds are narrowly tailored to prevent corruption or the appearance of corruption.

B. Matching Funds Do Not Constitute a Narrowly Tailored Means of Preventing Actual or Apparent Corruption.

It is well established that "[a] court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 (2007) (emphasis added). Accordingly,

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[3] The asymmetry is most blatant when a traditional candidate faces multiple participating candidates, as did McComish in the 2008 election cycle. (PSF, ¶¶ 44-50.) But even in races involving only one opposing participating candidate, the matching funds awarded have more campaign speech "purchasing power" because the actual costs of raising campaign funds are not deducted from the subsidies they receive. (PSF, ¶¶ 11, 108-10.) Finally, the asymmetrical advantage is further compounded by the fact that ineffective independent expenditures generate nearly a dollar in matching funds to each participating candidate, which can then be spent more efficiently. (PSF, ¶¶ 9, 105-06.)

[4] The foregoing analysis also supports Plaintiffs' claim in Count II of their Second Amended Complaint that Matching Funds trigger strict scrutiny under the 14th Amendment's guarantee of equal protection because they discriminate against traditional candidates for exercising their First Amendment rights by asymmetrically advantaging participating candidates. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-99 (1972); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

strict scrutiny requires the State to show Matching Funds are narrowly tailored to achieving a compelling governmental interest. *Id. at 2664*; *see also Davis*, 128 S. Ct. at 2771-73. As will be shown, Matching Funds cannot possibly be seen as narrowly tailored to achieving a compelling state interest.

1. The Actual Purpose of Matching Funds is Not to Diminish Actual or Apparent Corruption, But to Equalize Resources.

The Clean Elections Act was enacted purportedly to serve several different purposes. But the goals of equalizing speech or financial resources between candidates or preventing wasteful or unnecessary campaign spending, which are among the purposes of the Clean Elections Act, have been explicitly rejected by the Supreme Court. *Davis*, 128 S. Ct. at 2771; *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996). Only the goals of preventing corruption or the appearance of corruption constitute compelling state interests that justify campaign finance regulation. *Davis*, 128 S. Ct. at 2771. And when applying strict scrutiny, the Court is free to look behind anticorruption claims and to make an independent assessment of legislative intent based on the entire record. *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 618 (concluding "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending"). For ballot measures such as the Clean Elections Act, under Arizona law, this assessment naturally includes the intentions and understanding of the initiative's proponents. *State v. Roman*, 30 P.3d 661, 662 (Ariz. Ct. App. 2001).

Over and over again, proponents and enforcers of the Act clearly state that its purpose is to equalize resources or "level the playing field" between candidates running for office. (PSF, ¶¶ 111-20.) Explicit anti-corruption goals are rarely, if ever, mentioned. Instead, the statutory text and much of the related advocacy literature for the Act focus on diminishing special interest "influence," elevating the "influence" of ordinary citizens or "removing special interest money." A.R.S. § 16-940. (*See also* PSF, ¶ 117.) But these goals should not be regarded as equivalent to those of diminishing corruption or the appearance of corruption. "Influence," after all, is the whole point of the exercise of First Amendment rights. And spending money to generate influence through persuasion is protected by the First Amendment as well. For these reasons, the goals of reducing special interest money and influence may evidence an objective of diminishing the exercise of First Amendment rights, just as much as they may evidence an anti-corruption purpose.

In any event, whatever they may be, the goals of the Act as a whole are not necessarily the goals of each of its components. *Wis. Right to Life, Inc.* requires strict scrutiny of "each application of a statute restricting speech." 127 S.Ct. at 2671. Accordingly, attention should be focused on ascertaining the primary purpose of *Matching Funds*.

From this perspective, discovery has made it readily apparent that Matching Funds have no real anti-corruption purpose. CEI, presumptive successor to the Act's ballot initiative proponents, has written: "To combat the inequalities that exist with disproportionate funding, when a non-participating candidate outspends his Clean

Elections participating opponent, the CCEC provides the Clean Elections candidate with matching funds up to a preset limit." (PSF, ¶ 113 (emphasis added).) This is compelling evidence of the actual purpose of Matching Funds. *Roman*, 30 P.3d at 662. Simply put, just as Matching Funds' statutory title, "Equal Funding of Candidates," indicates and the CCEC's voluminous business records confirm (*see* PSF, ¶¶ 115, 119, 120), the real purpose of Matching Funds is to equalize candidate resources and "not so much" to prevent corruption or the appearance of corruption. *Quoting Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 618. And for that very reason, Matching Funds violate the First Amendment. *Davis*, 128 S. Ct. at 2771. This conclusion is further justified by the utter lack of narrow tailoring between Matching Funds and anti-corruption purposes.

2. Matching Funds Are Not an Effective Means Of Remedying An Actual Problem Of Corruption.

For a law that burdens free speech to be regarded as narrowly tailored, the State must prove the law actually remedies real harms in a direct and material way; mere conjecture will not suffice. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The State cannot carry this burden of proof.

a) Matching Funds Do Not Target an Actual Problem of Corruption.

As observed in *Home Box Office, Inc. v. FCC*, "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" 567 F.2d 9, 36 (D.C. Cir. 1977) (citations omitted). Here, Matching Funds are especially capricious because no problem of actual or apparent corruption currently exists in Arizona's highly regulated private campaign finance system. (PSF,

¶¶ 166-78.) And it remains unclear just what sort of corruption problem Matching Funds were meant to target.

Maybe the "corruption" and "appearance of corruption" targeted by Matching Funds is that of a conscious *quid pro quo* of political favors for financial contributions, or the appearance of the same. If so, the State's own expert previously testified "[t]he academic literature has not found a strong relationship between campaign contributions and official acts, in part because we are unable to observe most of what elected officials do." *McComish v. Brewer*, 2008 WL 4629337, at *8 (D. Ariz. 2008) (internal quotations omitted). (*See also* PSF, ¶ 166.). In other words, there is no clear evidence such actual or apparent corruption exists.

Perhaps the State believes that the Court may simply presume that financial contributions to candidates and elected officials create "corruption" or the "appearance of corruption." If so, then certainly the same presumption would arise from the CCEC's own practice of lobbying and regulating the very elected officials it funds—especially in view of the CCEC's near-six figure lobbyist retention agreement, its arbitrary regulatory and funding discretion, and the fact that the CCEC has repeatedly awarded Matching Funds to participating candidates who did not request the awards. (PSF, ¶¶ 179-201.) Of course, the State will no doubt deny that such conduct necessarily gives rise to an appearance of corruption. One presumes, therefore, that the State's case must be based on the contention that Matching Funds target a different kind of actual "corruption" or "appearance of corruption." But what sort of corruption?

While the State previously unearthed media reports of the AZScam scandal of the

late 1980s and early 1990s, these reports do not evidence actual or apparent corruption that Matching Funds were meant to target. AZScam is not the gift that keeps on giving. In 1992 and 1993, immediately after AZScam and five years before the Clean Elections Act was enacted, sweeping constitutional and statutory reforms were enacted, including term limits, enhanced disclosure requirements and dramatically lowered contribution limits. (PSF, ¶ 111.) There is every reason to believe these reforms did the job of eliminating actual and apparent corruption from Arizona's privately financed campaign finance system. (PSF, ¶¶ 168-78.) It is pure conjecture for the State to claim that these reforms failed based on a handful of media reports that merely recycle old news. Mere conjecture, however, cannot carry the State's burden of establishing that Matching Funds are narrowly tailored to remedying actual harms. *Turner Broad. Sys., Inc.*, 512 U.S. at 664. And without advancing proof that an actual problem of corruption exists, the State cannot withstand entry of summary judgment in Plaintiffs' favor based on their prima facie case that Matching Funds burden campaign speech.

b) The State has Advanced No Proof that Matching Funds are an Effective Means of Preventing Corruption or the Appearance of Corruption.

To prove that Matching Funds are narrowly tailored, the State must establish not only that they target real harms, but also that the provisions "will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *see also City of L.A. v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986). Matching Funds, however, have the opposite effect of their supposed anti-corruption purpose.

Even if the influence supposedly tied to private financing of campaigns in

Arizona's highly regulated environment were the cause of actual or apparent political corruption, Matching Funds simply do not materially prevent such corruption. Instead, Matching Funds launder and amplify the very same financial influence because they incentivize the bundling of qualifying contributions for participating candidates and the teaming of traditional candidates and subsidized candidates. (PSF, ¶¶ 123-53.) Matching Funds also generate new incentives to engage in deceptive campaign strategies, such as "reverse targeting." (PSF, ¶¶ 154-63.) Combined with regulatory scandals embroiling participating candidates during every election cycle since the Act became effective, it is simply implausible for the State to claim that Matching Funds effectively prevent actual or apparent corruption. (PSF, ¶¶ 164-65.) If anything, the Clean Elections system has clearly backfired against any anti-corruption purpose. This is viscerally confirmed by the "dirty" reputation the Clean Elections system has already garnered. (PSF, ¶¶ 179-80, 187, 201.)

3. Matching Funds Are Not the Least Restrictive Means Of Remedying the Asserted Problem Of Actual or Apparent Corruption.

Even if Matching Funds were somehow shown to be the most effective means of preventing actual corruption or the appearance of corruption, the Ninth Circuit Court of Appeals recently re-emphasized that the State must still show that the law is also the least restrictive means of regulation. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 964-65 (9th Cir. 2009); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). A law is the least restrictive means of remedying an asserted harm only if it is the least drastic remedy, not overbroad, and no

more restrictive than necessary. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Williams v. Rhodes*, 393 U.S. 23, 31-33 (1968). The State's chosen means of regulation is not the least restrictive when there are reasonably effective less restrictive alternatives to the State's chosen means of regulation, and the State has not shown them to be implausible. *Reno v. ACLU*, 521 U.S. 844, 876-77 (1977); *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989). In the present case, Matching Funds fail to meet any of these requisites of narrow tailoring.

Even assuming *arguendo* that Matching Funds target actual corruption and the appearance of corruption, the CCEC's own recent lobbying activities in the 2009 legislative session shows that there are feasible alternatives to Matching Funds. (PSF, ¶ 178.) CCEC Lobbyist Mike Williams has been advocating a bill that replaces Matching Funds with elevated contribution and spending limits for participating candidates. (*Id.*) The proposed bill also increases contribution limits for traditional candidates. (*Id.*) Such lobbying constitutes an admission by conduct that the State knows there is only a tenuous connection between private campaign contributions and actual or apparent corruption. (*Id.*) In this regard, Plaintiffs' expert has testified that the existing private campaign finance system is already adequate; and if bundling is the problem, then regulating bundling is the solution, not Matching Funds. (PSF, ¶ 177.) But even if one were to believe CCEC Executive Director Lang's curious testimony that he drafted the bill only to prompt "discussion," the bill nevertheless shows the CCEC knows the Act

will not be mortally wounded if Matching Funds were struck down. The State is also well aware of feasible alternatives to Matching Funds.

Even for those who are adamant on eliminating private special interest money from campaign financing, there is one obviously plausible alternative to Matching Funds: Lump sum public financing. Unlike Matching Funds, lump sum public financing would not cause the exercise of First Amendment rights to disseminate hostile viewpoints. Equally important, lump sum public financing would avoid any actual or apparent corruption associated with the gaming strategies enabled by Matching Funds. Finally, lump sum public financing avoids the chilling effect the Act's matching funds provisions may have due to the lack of clear and objective standards constraining the Commission in awarding matching funds. *Roach v. Stouffer*, 560 F.3d 860, 870 n. 5 (8th Cir. 2009) (narrow tailoring requires clear and objective standards to guide agency discretion). (*See* PSF, ¶¶ 181-87.)

In short, there are less restrictive and more effective means of preventing corruption and the appearance of corruption than Matching Funds. And yet, the State has advanced no affirmative evidence refuting the plausibility of these alternatives. Indeed, the disclosed experts for both the State and CEI disclaim any affirmative case whatsoever. (PSF, ¶ 202.) In other words, the State has completely abandoned its burden of showing Matching Funds are narrowly tailored, and it cannot withstand Plaintiffs' motion for summary judgment. *Cal. Architectural Bldg. Prods., Inc.*, 818 F.2d at 1468-69.

Conclusion

This Court was correct to rule twice that Matching Funds cause the vigorous exercise of First Amendment rights to disseminate hostile viewpoints, and that this legal framework cannot withstand the holding of *Davis*. Because Matching Funds violate the First Amendment, they cause irreparable harm for which there is no adequate remedy at law. *Elrod*, 427 U.S. at 373-74. Accordingly, the public interest and equities favor permanently enjoining Matching Funds. *Service Employees Intern. Union, AFL-CIO, CLC v. Fair Political*, 721 F. Supp. 1172, 1179 (E.D. Cal. 1989). For these reasons, Plaintiffs respectfully request the Court to permanently enjoin A.R.S. § 16-952 (A)-(C) pursuant to 42 U.S.C. § 1983, as well as the First and Fourteenth Amendments to the U.S. Constitution, both facially and as-applied.

RESPECTFULLY SUBMITTED this 12th Day of June, 2009

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