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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, et al.,

Plaintiffs,

and

DEAN MARTIN, et al.,

Plaintiff-Intervenors,

vs.

KEN BENNETT, et al.,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

CASE NO. CV-08-1550-PHX-ROS

(Assigned to the Honorable Roslyn O. Silver)

***AMICUS CURIAE* CAMPAIGN LEGAL CENTER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs and Plaintiff-Intervenors (collectively "Plaintiffs") challenge the constitutionality of the Citizens Clean Elections Act (CCEA) matching funds provision, Ariz. Rev. Stat. § 16-952 (A), (B) and (C), largely basing their arguments on the "inescapable logic of the Supreme Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008)," as well as *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), an Eighth Circuit decision cited without discussion by the *Davis* Court. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. 1 (Dkt. # 297); Pls.' Combined Br. in Opp'n to Defs.'/Def.-Intervenor's Mot. for Summ. J. 5 (Dkt. # 347); Pls. 2nd Am. Compl. at ¶ 2. However, the logic employed by the Supreme Court in *Davis*, while clearly applicable in the context of asymmetrical contribution limits for opposing candidates such as those challenged in *Davis*, is inapplicable to public financing matching funds provisions, which were not at issue or even mentioned in *Davis*. Further, the Eighth Circuit's decision in *Day*, striking down a matching funds provision, is inconsistent with decisions in the First, Fourth and Sixth Circuits upholding similar matching fund provisions and has been called into question by the Eighth Circuit's more recent decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). Simply put, the foundation of Plaintiffs' argument—a Supreme Court decision in which matching funds were not even discussed, let alone analyzed, and an Eighth Circuit decision that runs counter to the weight of Circuit Court authority on the subject—is unsound.

Arizona's matching funds provision does not substantially burden speech and is narrowly tailored to serve the compelling governmental interests of reducing corruption,

facilitating candidate communication, reducing candidate time spent fundraising, and preserving the public fisc, recognized by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

This Court should decline to apply *Davis* in the context of matching funds, and instead follow the sound jurisprudence of the First, Fourth, Sixth, and Eighth Circuits, left intact by the Supreme Court's post-*Davis* denial of *certiorari* in *North Carolina Right to Life v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008) ("*NCRL*"), a Fourth Circuit decision upholding against constitutional challenge a matching funds provision nearly identical to the one at issue here. The CCEA matching funds provision does not burden speech and is narrowly tailored to serve compelling governmental interests. Therefore, the CLC respectfully urges this Court to deny Plaintiffs' and Plaintiff-Intervenors' motions for summary judgment and to uphold the constitutionality of the CCEA matching funds provision.

**ARGUMENT**

Analyzing a First Amendment challenge to a law entails a two-step process. First, the Court must determine if the challenged law burdens speech. Second, if the Court determines the challenged law does burden speech, the Court must determine whether the burden is justified by a sufficient governmental interest. The degree of scrutiny to be applied by the Court depends on the nature of the burden. The Ninth Circuit has made clear that, if a challenged law "places a severe burden on fully protected speech and associational freedoms, [a court is to] apply strict scrutiny." *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2001) (citing *Fed. Election Comm'n*

*v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985); *Buckley*, 424 U.S. at 44-45). By contrast, the Ninth Circuit has explained, if a challenged law "places only a minimal burden on fully protected speech and associational freedoms, . . . [a court is to] apply a lower level of constitutional scrutiny." *Lincoln Club of Orange County*, 292 F.3d at 938 (citing *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-88 (2000); *Buckley*, 424 U.S. at 20-21, 25). *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 138-40, n.40 (2003) ("Since our decision in *Buckley*, we have consistently applied less rigorous scrutiny to contribution restrictions . . . ."); *Buckley*, 424 U.S. at 95-96 (applying less rigorous scrutiny in upholding the Presidential public financing scheme because it furthers "significant" and "sufficiently important" governmental interests).

The challenged matching funds provision does not burden speech at all. *See* argument *infra* Part I. However, if the Court concludes otherwise, the CLC respectfully urges the court to recognize that any burden on Plaintiffs' First Amendment rights is at most indirect and "minimal," and to evaluate the challenged matching funds provision under the less rigorous scrutiny appropriate for such statutes. *See Lincoln Club of Orange County*, 292 F.3d at 938. Regardless of the degree of scrutiny applied, the challenged statute should be upheld because it is narrowly tailored to Arizona's compelling interests in curbing political corruption, facilitating candidate communication, reducing candidate time spent fundraising, and preserving the public fisc. *See infra* Part II.

## I. The Matching Funds Provision Does Not Burden Speech.

The *Davis* Court's analytical starting point was the fact that "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat and their authorized committees." 128 S. Ct. at 2765. This simply is not the case in the context of the CCEA public financing system. Under the usual circumstances of Arizona's public financing system, the same restrictions do not apply to all the competitors for a seat. Candidates participating in the public financing system subject themselves to a variety of restrictions inapplicable to non-participating candidates. For this reason, the "burdens" analysis is entirely different with respect to the challenged matching funds provision by comparison to the statute challenged and invalidated in *Davis*. And this difference should lead the Court to a different result.

### A. The *Davis* Court's Reasoning Is Inapplicable To the Challenged Matching Funds Provision.

In *Davis*, the Supreme Court considered the constitutionality of the so-called "Millionaire's Amendment" of the federal Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. At the time the Supreme Court decided *Davis*, contributions to all candidates for federal office were limited to $2,300 per election.[1] *See Davis*, 128 S. Ct. at 2765. Under the "Millionaire's Amendment," when a candidate

[1] The statutory limit is $2,000, but the statute provides for periodic adjustment of the limit to reflect changes in the cost of living. *See* 2 U.S.C. § 441a(a)(1)(A) (contribution limit); 2 U.S.C. § 441a(c) (cost of living adjustment).

spent personal funds in excess of a specified threshold,[2] the contribution limit applicable to that self-funded candidate's opponent increased by either threefold[3] ($6,900) or sixfold[4] ($13,800), depending on the magnitude of the self-funded candidate's expenditure of personal funds and the office sought—while the self-funded candidate's contribution limit remained $2,300. *Id.* at 2766.

The Court began its analysis by noting: "If [the Millionaire's Amendment] simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Id.* at 2770. But the Court continued:

> [The "Millionaire's Amendment"], however, does not raise the contribution limits across the board. Rather, it raises the limits only for the non-self-financing candidate and does so only when the self-financing candidate's expenditure of personal funds causes the OPFA threshold to be exceeded. We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech.

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[2] More precisely, when, as a result of a candidate's expenditure of personal funds, the "opposition personal funds amount" (OPFA) exceeded a specific threshold ($350,000 for House candidates and $150,000 + ($0.04 x voting age population) for Senate candidates), the contribution limit for the self-funded candidate's opponent was increased. As the *Davis* Court explained: "The OPFA, in simple terms, is a statistic that compares the expenditure of personal funds by competing candidates and also takes into account to some degree certain other fundraising." 128 S. Ct. at 2766. While the *Davis* decision only discusses the threshold and contribution limit increases for House candidates, because the plaintiff had been a candidate for the House, the Court's decision has been appropriately understood as invalidating the Millionaire's Amendment provisions applicable in Senate elections as well. *See* 2 U.S.C. §§ 441a(i) (Senate candidates) and 441a-1 (House candidates).

[3] *See* 2 U.S.C. §§ 441a(i)(1)(C)(i)(I) (Senate candidates) and 441a-1(a)(1)(A) (House candidates).

[4] *See* 2 U.S.C. § 441a(i)(1)(C)(ii)(I) (Senate candidates).

*Id.* (emphasis added). The Court concluded that the burden imposed on self-funded candidates by the "Millionaire's Amendment" was "not justified by any governmental interest in eliminating corruption or the perception of corruption" or any other sufficient governmental interest and, therefore, held the law unconstitutional. *Id*. at 2773-75.

Under the "Millionaire's Amendment," all candidates started their campaigns under the same rules, but when a candidate spent personal funds in excess of a specified threshold, that candidate was placed at a competitive disadvantage *vis-à-vis* her opponent, through application of a more restrictive contribution limit than the limit applicable to the opponent. No such disadvantage is suffered by self-funded candidates under Arizona law.

Indeed, as a general matter, publicly financed candidates accept significant burdens and disadvantages in exchange for public funding *vis-à-vis* privately financed candidates. *See Buckley*, 424 U.S. at 95 (recognizing that publicly financed candidates were burdened by expenditure limits). Even when public matching funds are triggered, publicly financed candidates still face a greater burden on speech than do privately financed candidates such as the plaintiffs.

To begin with, participating candidates are prohibited from accepting contributions from sources other than the CCEA public fund, except for a limited number of five-dollar qualifying contributions. Ariz. Rev. Stat. § 16-941(A)(1). Participating candidates' expenditure of personal funds may not exceed $500, in the case of candidates for the state legislature, and $1,000, in the case of candidates for statewide office. Ariz. Rev. Stat. § 16-941(A)(2). Participating candidates must abide by expenditure limits in

both the primary and general election. Ariz. Rev. Stat. § 16-941(A)(3)-(4). Participating candidates can only spend their public campaign funds "for reasonable and necessary expenses that are directly related to the campaign of that participating candidate," Ariz. Admin. Code § 2-20-701, and are explicitly prohibited from spending campaign funds to pay for the certain items their non-participating opponents are free to pay for with campaign funds (*e.g.*, the costs of legal defense in campaign law enforcement proceedings). *See* Ariz. Admin. Code § 2-20-702. Finally, in addition to complying with the campaign finance reporting requirements applicable to all candidates, participating candidates must comply with additional reporting requirements (*e.g.*, reports filed at the beginning and end of the public financing qualifying period, as well as primary election and general election "recap" reports). Ariz. Admin. Code § 2-20-109(B).

The practical effect of opting into the public financing system is the loss of the right to raise and spend money freely. Participating candidates give up the fundamental right at issue in *Davis*—namely, to spend unlimited personal funds to get elected. Ariz. Rev. Stat. § 16-941(A)(2). Participating candidates give up the right to transfer unused funds to other candidates or political committees, or to hold the money over to campaign for reelection. Ariz. Rev. Stat. § 16-953. Participating candidates give up the right to spend as much money as they can possibly amass. Ariz. Rev. Stat. § 16-941(A)(3)-(4).

Plaintiffs contend that the purpose of the matching funds provision is to equalize resources. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. 17 (Dkt. # 297). However, even if matching funds are triggered, the lag in time between the Clean Elections Commission's receipt of notice of spending in excess of the threshold and its subsequent

distribution of matching funds to a participating candidate has the practical effect of making those funds less useful. Whereas a privately financed candidate can budget for expenditures in excess of the trigger amount from the outset, a participating candidate is forced to spend matching funds on the fly, often too late to be truly effective in response to negative ads. Additionally, matching funds are capped at three times the initial allocation of public funds, ultimately allowing a wealthy candidate to outspend a publicly financed opponent. *See* Ariz. Rev. Stat. § 16-952. Under no circumstances do participating candidates enjoy a fundraising advantage of the sort enjoyed by non-self-funded candidates under the "Millionaire's Amendment." Arizona's publicly financed candidates are always at a disadvantage playing catch-up with high-spending, privately financed opponents.

Comparing a system in which candidates start under the same rules (*i.e.*, the "Millionaire's Amendment" system) to a system in which candidates start under different rules and remain under those different rules throughout (*i.e.*, the CCEA) is comparing apples to oranges. Unlike the "Millionaire's Amendment" context, where the self-financed candidate was subject to more restrictive campaign finance laws than a non-self financed opponent, a self-financed candidate in the public financing context operates under less restrictive campaign finance laws than a publicly financed opponent, even when a matching funds provision is in effect.

For these reasons, the Supreme Court's *Davis* decision is inapplicable to the present case.

**B. After Deciding *Davis*, the Supreme Court Denied *Certiorari* In *NCRL*—A Case Upholding a Matching Funds Provision—Leaving Undisturbed the Weight of Circuit Court Authority Establishing That Matching Funds Provisions Do Not Burden Speech.**

Despite Plaintiffs' assertions that the Supreme Court's decision in *Davis* should be interpreted to mean that the matching funds provision challenged in this case violates the First Amendment, the Supreme Court post-*Davis* denied *certiorari* in *NCRL* and left standing a Fourth Circuit decision upholding a North Carolina matching funds provision, as well as decisions in the First, Sixth and Eighth Circuits likewise upholding matching funds provisions. *See NCRL*, 524 F.3d 427 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 490 (2008), *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding matching funds for publicly financed candidates triggered by independent expenditure groups); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding a public financing scheme that matched contributions to publicly financed candidates 2 to 1 once a privately financed opponent raised a certain threshold amount); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996) (approving the lifting of expenditure caps on publicly financed candidates once a non-publicly financed opponent raised a threshold amount).

The Fourth Circuit's decision in *NCRL* upheld a matching funds provision nearly identical to the one challenged here and is directly applicable to the present case. The public financing scheme at issue in *NCRL* provided publicly financed candidates with matching funds when a privately financed opponent's contributions or expenditures plus independent expenditures in support of the non-participant exceeded a threshold amount.

524 F.3d at 433. The Fourth Circuit concluded that matching funds "further[], not abridge[], pertinent First Amendment values" by ensuring publicly financed candidates can respond to non-publicly financed opponents. *Id.* at 437 (quoting *Buckley*, 424 U.S. at 92-93). In upholding North Carolina's matching funds provision, the Fourth Circuit in *NCRL* rejected the logic of the Eighth Circuit's decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994)—a case relied heavily upon by Plaintiffs in the present case. The Eighth Circuit in *Day* relied on the Supreme Court's concern in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759-60 (1988), "that speakers would be chilled from expressing criticism of a mayor because a city ordinance gave the mayor broad discretion in granting or denying permits to place news racks on city sidewalks." *NCRL*, 524 F.3d at 438. The *NCRL* Court distinguished *Lakewood* as a case involving the potential for self-censorship induced by a direct threat of government regulation, inapplicable to the North Carolina matching funds scheme because the potential for self-censorship at issue was based on political calculations to prevent a publicly financed opponent from being able to "speak in response." *Id.* at 438-39. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (noting that the First Amendment neither guarantees a right to outraise and outspend an opponent, nor a right to speak free from response).

Further evidence of *Day*'s misplaced logic can be found in a more recent Eighth Circuit decision rejecting the "burden" analysis of *Day*. In *Rosenstiel v. Rodriguez*, the Court upheld a statute lifting the spending limit applicable to publicly financed candidates once a privately financed opponent raised or spent a threshold amount. 101

F.3d at 1546-48. The Court recognized that its "first task" was "to determine whether the challenged provisions impose any burden at all on the First Amendment rights of candidates." *Id.* at 1549. But, whereas the Eighth Circuit in *Day* concluded that a statute lifting a spending limit and providing additional public funds in response to independent political expenditures burdened the First Amendment rights of the spenders, 34 F.3d at 1360, the Eighth Circuit later in *Rosenstiel* concluded that "Appellants' argument that their First Amendment rights are burdened is without merit." *Id.* at 1550.

Plaintiffs contend that the CCEA matching funds put an asymmetrical "drag" on speech by discouraging privately financed candidates, or groups making independent expenditures on their behalf, from raising and spending funds in excess of the trigger amounts for fear of providing a publicly financed opponent unintended financial benefits. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. 10 (Dkt. # 297). However, as pointed out by the Circuit Courts in *NCRL* and *Daggett*, claims of self-censorship are not on constitutional par with direct governmental censorship of speech. *See NCRL*, 524 F.3d at 438 ("*Day*'s key flaw is that it equates the potential for self-censorship created by a matching funds scheme with direct government censorship") (internal quotes omitted); *Daggett*, 205 F.3d at 465 ("We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker"). Privately financed candidates and those independent groups similarly situated remain free from government regulation to spend unlimited sums, regardless of whether a publicly financed opponent receives matching funds or not.

Any decision by a privately financed candidate to limit their expenditures is purely political—the government has nothing to do with forcing such a course of action. The CCEA simply provides an additional means by which candidates can choose to fund their campaigns, expanding political speech by providing candidates with a political choice that can be calculated to best further their chances of being elected. The Supreme Court has never ruled that a strategic choice, like opting out of the CCEA regime, impermissibly burdens speech. As the *Buckley* Court made clear: "Plainly, campaigns can be successfully carried out by means other than public financing: they have been up to this date, and this avenue is still open to all candidates." *Buckley*, 424 U.S. at 101.

Finally, Plaintiffs' statement that the Court has "repeatedly rul[ed] that Matching Funds create a drag on campaign speech" grossly mischaracterizes reality. The statement, unsupported by any citation to the "repeated rulings," is directly in conflict with decisions in the First, Fourth, Sixth and Eighth Circuits upholding matching funds in various forms that are still on the books today. Most importantly, the Supreme Court's recent, post-*Davis* denial of *certiorari* in *NCRL* provides confirmation that *Davis*, despite its mention of *Day*, does not alter the heavy weight of Circuit Court precedent that matching funds do not impermissibly "chill" or in any way burden First Amendment political speech. 129 S. Ct. 490 (2008) (denying *certiorari*). This Court should therefore deny Plaintiffs' and Plaintiff-Intervenors' motions for summary judgment.

## II. The Matching Funds Provision Is Narrowly Tailored To Advance Numerous Compelling Governmental Interests.

Even if the Court finds that the matching funds provision burdens speech, the Court should still uphold the provision because it is an integral part of a public financing scheme narrowly tailored to advance numerous compelling governmental interests.

### A. The Matching Funds Provision Advances Compelling Governmental Interests In Reducing Corruption, Facilitating Candidate Communication, Reducing Candidate Time Spent Fundraising, and Preserving the Public Fisc.

"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. But reducing the "deleterious influence of large contributions on the political process" is not the only governmental interest advanced by public financing. *Id.* at 91. Plaintiffs ignore other vital interests advanced by public financing recognized by the *Buckley* Court. The government has an interest in "facilitating communication by candidates with the electorate" and "free[ing] candidates from the rigors of fundraising." *Id.* Importantly, with respect to a matching funds provision, the government also has a compelling interest in designing a public financing system that does not "fund[] hopeless candidacies with large sums of public money." *Id.* at 96. In upholding the differential funding of major versus minor party candidates in the Presidential public financing system, the *Buckley* Court recognized that funding all candidates equally would "make it easy to raid the United States Treasury" and that Congress has a compelling interest in "protect[ing] the public fisc" when designing a public financing system. *See id.* at 98; *see also id*. at 103. The *Buckley* Court reasoned:

> [T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]

*Id.* at 97-98. The same can certainly be said of candidates running for office in Arizona—there are obvious differences between the needs of candidates depending on the races they find themselves in. The matching funds provision advances the governmental interest of meeting these differing needs while not raiding the State treasury.

Given that that the *Buckley* Court found that public financing generally is supported by strong governmental interests, the challenged matching funds provision, which is integral to (and designed to ensure) the viability of the public financing program, is supported by the same governmental interests.

### B. The Matching Funds Provision Is Narrowly Tailored To Advancing the Aforementioned Governmental Interests.

Without the matching funds provision, the CCEA would not so effectively advance the State's interests in reducing corruption, facilitating candidate communication, reducing candidate time spent fundraising, and preserving the public fisc. Matching funds incentivize candidates to participate in the public financing program and, thus, make the program viable. "[W]ithout the matching funds . . . candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent." *Daggett*, 205 F.3d at 469. The matching funds provision is narrowly tailored to the State's interest in candidate

participation in the public financing program—a governmental interest inextricably linked not only to preventing corruption, but also to all of the other governmental interests advanced by public financing generally.

Plaintiffs argue that the overall scheme is not narrowly drawn to advance governmental interests because other alternatives to the system have been proposed in the Arizona legislature, including substituting increased contribution limits or "lump sum public financing" for the existing matching funds provision. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. 23-24 (Dkt. # 297). However, these alternatives demonstrate the opposite—both are less closely drawn means of achieving the governmental interests than the matching funds provision.

Increased candidate contribution limits, for example, undermine the governmental interest in curbing real and apparent corruption by injecting larger, potentially-corrupting private contributions into the system. Further, allowing participating candidates to raise private contributions would run directly counter to the governmental interest of reducing candidate time spent fundraising; by comparison, the much more narrowly tailored matching funds provision enables qualified candidates to spend no time raising money.

Similarly, the proposed alternative of allowing participating candidates to raise private contributions is far less tailored than the existing matching funds provision to the governmental interest of facilitating candidate communication. Every minute a candidate spends soliciting private contributions from the tiny segment of the population that can afford to make political contributions is a minute that candidate can not spend discussing substantive campaign issues with average voters. By contrast, the matching funds

provision is narrowly tailored to facilitating candidate communication and expanding First Amendment values by directly subsidizing political speech. The *Buckley* Court explained that:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media and preferential postal rates and antitrust exemptions for newspapers.

*Id.* at 93 n.127 (internal citations omitted). By providing publicly financed candidates with the resources necessary to communicate with voters, the government advances its interest in financing the expansion of free speech.

Finally, the matching funds provision is also narrowly tailored to the governmental interest of preserving limited State financial resources, whereas the proposed alternative "lump sum public financing" runs directly counter to this governmental interest. *See Buckley*, 424 U.S. at 98, 103. The matching funds provision ensures that publicly financed candidates receive adequate, but not excessive funding. Clearly it would be constitutional for the CCEA to provide every candidate with a lump sum allocation at the outset in an amount three times the current initial public funding allocation. This approach was considered and rejected for valid reasons by the architects of the CCEA. The lead drafter of the CCEA, Louis Hoffman, testified that because of the wide disparity in the amount of money spent on races around Arizona, a lump sum approach would result either in waste or low candidate participation, depending on whether the lump sum was an amount large enough to fund the most expensive races, or a much smaller amount based on the state's least expensive races. *See* Sandhu Decl., Ex. Q at 38:23-43:25. But

the *Buckley* Court made clear that the State need not choose between wasting money or enacting a public financing system with funding so meager that no serious candidates participate. Instead, the *Buckley* Court recognized the compelling governmental interest in protecting the public fisc, 424 U.S. at 98, 103, while providing an effective public financing system attractive to candidates. Just as a lump sum approach would be constitutional, so too is it constitutional under *Buckley* for the CCEA to target the State's precious financial resources through the matching funds provision to those races where the funds are most needed. Although occasional races demand funding in excess of the current initial allocation of public funds, providing to every participating candidate three times the current initial allocation at the outset would surely waste public money because the vast majority of races can be run competitively for far less than three times the current initial allocation. The matching funds provision is thus narrowly tailored to Arizona's compelling interest in "protect[ing] the public fisc," *Buckley*, 424 U.S. at 103, and is critical to the long-term financial sustainability of the public financing program.

## CONCLUSION

For the foregoing reasons, the CLC respectfully requests that the Court deny Plaintiffs' and Plaintiff-Intervenors' motions for summary judgment.

Respectfully submitted,

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Dated: July 24, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of July, 2009, I electronically transmitted the foregoing document to the Clerk's Office using the ECF System for filing, and transmittal of a Notice of Electronic Filing to the Following ECF registrants:

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