

1 **SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION**  
2 **GOLDWATER INSTITUTE**

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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF ARIZONA**

11 JOHN MCCOMISH, NANCY MCLAIN,  
12 AND TONY BOUIE,

13 Plaintiffs,

14 and

15 DEAN MARTIN, ROBERT BURNS,  
16 RICK MURPHY, ARIZONA FREE  
17 ENTERPRISE CLUB'S FREEDOM  
18 CLUB PAC, AND ARIZONA  
19 TAXPAYERS ACTION COMMITTEE,

20 Plaintiff-Intervenors,

21 v.

22 KEN BENNETT, in his official capacity as  
23 Secretary of State of the State of  
24 Arizona; and GARY SCARAMAZZO,  
25 ROYANN J. PARKER, JEFFREY L.  
26 FAIRMAN, DONALD LINDHOLM and  
27 LORI S. DANIELS, in their official  
28 capacity as members of the ARIZONA  
CITIZENS CLEAN ELECTIONS  
COMMISSION,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

No. CV08-1550-PHX-ROS

**SECOND AMENDED COMPLAINT**

(Assigned to the Honorable  
Roslyn O. Silver)



1 1994), which struck down the Minnesotan predecessor of the Arizona Clean Elections  
2  
3 Act.

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5 3. Under *Davis* and *Day*, the matching funds provisions of Arizona Clean  
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7 Elections Act unconstitutionally chill free speech by imposing a significant  
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9 discriminatory burden on supporting a traditional candidate that would not otherwise  
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11 exist and also by skewing electoral competition in favor of candidates who participate in  
12  
13 the Act's scheme of government-subsidized campaign speech. The burden consists  
14  
15 primarily of the subsidies the "Clean Elections" system showers on "participating"  
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17 candidates to "equalize" campaign contributions and expenditures which benefit  
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19 Plaintiffs and other traditional candidates. And the discrimination predominantly arises  
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21 from the fact that, even though "participating" candidates receive subsidies to  
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23 "equalize" independent expenditures that benefit traditional candidates, no  
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25 corresponding benefit accrues to traditional candidates when independent  
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27 expenditures are made to the benefit of "participating" candidates.  
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1 7. Venue properly lies with this Court under 28 U.S.C. § 1391(b).

2  
3 PARTIES

4  
5 8. Plaintiff John McComish is a citizen of the United States, a resident of the  
6 State of Arizona, and the current Arizona State House of Representatives Majority  
7 Whip, who had been running for reelection in Legislative District 20.  
8

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10 9. Plaintiff Nancy McLain is a citizen of the United States, a resident of the  
11 State of Arizona, and a current member of the Arizona State House of Representatives,  
12 who is running for reelection in Legislative District 3.  
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14  
15 10. Plaintiff Tony Bouie is a citizen of the United States, a resident of the State  
16 of Arizona, Chairman and CEO of Halo Cups, Inc., and a candidate who had been  
17 running for election to the Arizona State House of Representatives in Legislative  
18 District 6.  
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22  
23 11. Defendant Ken Bennett is the Secretary of State of the State of Arizona,  
24 and is sued in his official capacity. As Secretary of State, Bennett's office is the  
25 repository for all campaign-finance reports filed pursuant to the Arizona Citizens Clean  
26  
27  
28

1 Elections Act, and is responsible for setting campaign contribution and spending limits.

2  
3 A.R.S. §§ 16-924, 16-941(B), 16-958, and 16-959.

4  
5 12. Defendants Gary Scarmazzo, Royann J. Parker, Jeffrey L. Fairman, Donald  
6 Lindholm, and Lori S. Daniels, and any individuals subsequently appointed, are  
7  
8 members of the Arizona Citizens Clean Elections Commission (the “Commission”), and  
9  
10 are sued in their official capacity. The Commission is granted rulemaking and  
11  
12 enforcement authority under the Act. A.R.S. §§16-955-57.

13  
14 **GENERAL ALLEGATIONS**

15  
16 13. The Act, A.R.S. § 16-940 *et. seq.*, was a ballot initiative written and  
17  
18 sponsored by special-interest groups and was approved by a slim majority of Arizona  
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20 electors in the November 3, 1998 general election. On December 10, 1998, Governor  
21  
22 Jane Dee Hull issued a proclamation declaring this measure to be law.

23  
24 14. The Act creates a system of “matching funds” government campaign  
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26 subsidies for statewide and legislative elected offices within the State of Arizona, and  
27  
28 creates the Commission, a bureau of unelected individuals granted broad enforcement

1 and regulatory powers that extend not only to all candidates who choose to  
2  
3 “participate” in the government campaign subsidy system, but even to all candidates  
4  
5 who do not wish to run a government-subsidized campaign.

6           15. Plaintiffs are a diverse coalition of legislators and candidates, who may  
7  
8 disagree on politics, but who share the recent experience of being victims of the Act’s  
9  
10 matching funds provisions.

11           16. Plaintiffs are committed to enforcing the First and Fourteenth Amendments.  
12  
13 And they intend to expose how the Act’s matching funds provisions create a much  
14  
15 worse electoral system than would otherwise exist.

16  
17           **A. Decoding the Act’s Matching Funds Provisions.**

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19           17. The “matching funds” provisions of the Act, namely A.R.S. § 16-952 (A),  
20  
21 (B) and (C), determine the amount of government subsidies “participating” candidates  
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23 will receive when expenditures or contributions are made to the benefit of “traditional,”  
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25 privately-supported candidates, such as Plaintiffs.

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18. In essence, the Act distinguishes between matching funds given to “participating” candidates, which are triggered during the primary election season and the general election season, and it further differentiates between matching funds triggered by expenditures or contributions directly made by traditional, private-supported candidates, and matching funds triggered by expenditures made to the benefit of traditional candidates by independent organizations or groups, such as political action committees. In each category, matching funds are triggered only after a certain dollar threshold of expenditures or contributions for the benefit of a traditional candidate is reached.

19. More specifically, during a primary election season, A.R.S. § 16-952(A) authorizes the Commission to subsidize the “participating” candidate with “matching funds” in amounts that purportedly equalize *expenditures* made by traditional candidates above a certain threshold amount, which is called the “primary election spending limit.”



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20. Likewise, during the general election season, A.R.S. § 16-952(B) similarly authorizes the Commission to subsidize the “participating” candidate with “matching funds” equal to the amount of unspent contributions received by the traditional candidate during the “primary season” that exceed a certain threshold, which is called the “general election spending limit,” plus “matching funds” that purportedly equal to contributions made to traditional candidates during the general election cycle.

21. In short, A.R.S. § 16-952(A) bases “matching funds” given to participating candidates on *expenditures* made by traditional candidates above the “primary election spending limit,” whereas A.R.S. § 16-952(B) bases “matching funds” on *contributions* given to traditional candidates above the “general election spending limit.”

22. Both A.R.S. § 16-952(A) and (B) base the amount of “matching funds” to participating candidates on a formula that is essentially dollar-for-dollar subtracting only 6% “for a nonparticipating candidate's fund-raising expenses” from expenditures or contributions that trigger matching funds.

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23. Once the respective primary or general election “spending limit” threshold has been met by a traditional candidate, A.R.S. § 16-952(C) also authorizes the Commission to give the “participating” candidate “matching funds” equal to the value attributed to expenditures made by *independent organizations* to support a competing candidate or to oppose the “participating” candidate.

**B. The Act’s Matching Funds Provisions Create a “Drag” on the Exercise of First and Fourteenth Amendment rights.**

24. A.R.S. § 16-952(A) was applied to Plaintiff Tony Bouie in the Republican on August 13, 2008, after he filed an expenditure report indicating that he had spent \$31,731.69. This caused Bouie’s expenditures to exceed the “primary election spending limit” of \$19,382.00, thus triggering a “matching funds” subsidy to his opponent, Carl Seel, in the amount of \$11,171.61. Bouie faced the reality that his electoral competitor would receive nearly a dollar for every dollar Bouie spends on promoting his campaign and getting his message out, and also for every dollar spent by an independent organization which is entirely outside of Bouie’s control.

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25. All Plaintiffs are similarly situated to Plaintiff Bouie as alleged in paragraph 28 in that, during either the Primary or General Election of 2008, each has similarly triggered or reasonably anticipates triggering matching fund subsidies to opposing candidates under A.R.S. § 16-952(A) or A.R.S. § 16-952(B), or they have been faced with the decision to cease, minimize or delay raising and/or spending money on their campaigns because of the threat of triggering matching fund subsidies to opposing candidates in their respective primary elections under A.R.S. § 16-952(A) or A.R.S. § 16-952(B), which has discouraged them from engaging in campaign speech protected by the First Amendment.

26. Plaintiffs McLain and McComish: a) anticipate the possibility of triggering matching fund subsidies for opposing “participating” candidates in the general election based on unspent primary contributions or new contributions above the general election spending limit; or b) making or being faced with the decision to cease, minimize or delay raising and/or spending money on their campaigns because of the

1 threat of triggering matching fund subsidies to opposing candidates in their respective  
2  
3 primary elections under A.R.S. § 16-952(B).

4  
5 27. Plaintiffs adopt and incorporate by reference the facts averred in the  
6 declarations and deposition excerpts previously filed in this matter under ECF  
7  
8 document numbers 13-5, 43-4, 43-5, 113, 114, 143-3 through 143-9, 144-1 through  
9  
10 144-7, 145-2, 145-3, 145-5, 145-6, 145-8 and 145-9.

11  
12 28. Each Plaintiff presently intends to run for statewide elected office again as  
13  
14 traditional candidates, which will subject them to the Act in the future.

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16 29. Simply put, the Act's matching funds provisions have undermined the  
17 legitimacy of Arizona's political process by unjustifiably and coercively chilling free  
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19 speech and discriminating against traditional candidates.

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21 30. In particular, as they approached the "primary election spending limit"  
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23 and/or "general election spending limit," which triggers matching funds, Plaintiffs have  
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25 found themselves either: a) increasingly reluctant to raise contributions, make  
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27 contributions or expenditures, engage in campaign speech or promote their campaign;  
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1 or b) changing the timing or manner of their contributions, expenditures, campaign  
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3 speech or campaign promotion, in such a way that the effectiveness of their campaign  
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5 speech is diminished from what would otherwise be the case in the absence of the  
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7 Act's matching funds provisions. Additionally, Bouie has been discouraged from  
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9 contributing to campaigns of one or more traditional candidates in the 2008 General  
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11 Election because of the possibility of matching funds to one or more participating  
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13 candidates he disdains.

14 31. Independent expenditures are seldom as effective in supporting a  
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16 candidate's campaign as expenditures made directly by the candidate. As a general  
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18 rule, therefore, Plaintiffs are placed at a relative competitive disadvantage when  
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20 independent expenditures trigger matching funds for opposing participating candidates.  
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22 This is because Plaintiffs have no control over independent expenditures that the  
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24 Commission deems benefit them, but their subsidized opponents will have absolute  
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26 control over the related matching funds that are triggered by such independent  
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28 expenditures. Additionally, Plaintiffs feel compelled to conserve money for damage-

1 control in anticipation of poorly-conceived independent expenditures backfiring after  
2  
3 they trigger matching funds to their opponents. That money would otherwise have  
4  
5 been spent on exercising their right to campaign speech, promoting their political ideas  
6  
7 and educating the public.

8           32. Additionally, after matching funds have been triggered, Plaintiffs have found  
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10 themselves either: a) even more reluctant to raise contributions, make contributions or  
11  
12 expenditures, engage in campaign speech or promote their campaign; or b) changing  
13  
14 the timing or manner of their contributions, expenditures, campaign speech or  
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16 campaign promotion, in such a way that the effectiveness of their campaign speech is  
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18 diminished from what would otherwise be the case in the absence of the Act's  
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20 matching funds provisions. This is because they are very conscious of the fact that the  
21  
22 opposing participating candidate will receive nearly one dollar for every dollar they  
23  
24 raise and spend, and also nearly one dollar for every dollar someone independently  
25  
26 spends to support their campaign. The Act's matching funds provisions thereby  
27  
28 impose a cost on the exercise of campaign speech rights that would otherwise not

1 exist, which increases in direct proportion to the extent to which Plaintiffs exercise their  
2  
3 right to free speech.

4  
5 33. Furthermore, Plaintiff McComish had been in an electoral contest involving  
6 multiple subsidized candidates and experienced how the Act's matching funds  
7 provisions generate vastly disproportionate support for his opposing subsidized  
8 candidates. For example, for every dollar McComish spent promoting his campaign,  
9  
10 nearly one dollar went to each of McComish's subsidized opposing candidates.  
11  
12 Confronted by three subsidized candidates, the Act's matching funds provisions  
13 caused nearly three dollars to be spent opposing McComish for every dollar spent to  
14 support him.  
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19 34. The Act's matching funds provisions not only create a "drag" on the exercise  
20 of First Amendment rights as discussed above, they also establish a discriminatory  
21 legal framework that, on its face and as applied to Plaintiffs, systematically causes  
22 competitive electoral processes to generate more speech and more effective speech to  
23 the benefit of subsidized candidates than to the benefit of traditional candidates.  
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1           35. For example, campaign fundraising costs can substantially exceed 6% of  
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3 the gross amount of contributions received. By failing to adjust matching funds to  
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5 reflect the actual fundraising costs incurred by traditional candidates in the  
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7 determination of matching funds, A.R.S. § 16-952(A) and (B) ensure that government-  
8  
9 subsidized opponents will almost always have more financial resources than privately  
10 financed candidates.

11  
12           36. The independent expenditure matching funds provision, A.R.S. § 16-952(C),  
13  
14 also skews electoral competition in favor of subsidized candidates. It requires the  
15  
16 payment of matching funds to subsidized candidates who face traditional opponents  
17  
18 whenever an independent campaign expenditure is made that either opposes the  
19  
20 subsidized candidate or supports the traditional candidate. By comparison, no benefit  
21  
22 whatsoever accrues to a traditional candidate, when independent expenditures are  
23  
24 made to oppose a traditional candidate or otherwise to support a subsidized candidate.

25           37. The combined chilling and discriminatory effect of the Act's matching funds  
26  
27 provisions is so great, that the provisions penalize Plaintiffs, other traditional  
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1 candidates, and their supporters for choosing not to participate in the Act's subsidy  
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3 program and for refusing to submit to the Act's scheme of strict contribution and  
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5 expenditure limitations, which, standing alone and apart from the illusory option of  
6  
7 choosing to run as a traditional candidate, would be clearly unconstitutional.

8 **C. The Act's Matching Funds Provisions Undermine the Legitimacy of the**  
9 **Electoral Process.**

10  
11 38. It is easy for special interests to game the Act's matching funds system. For  
12  
13 example, special interests are free to promote two or more candidates, encouraging  
14  
15 one to run as a "traditional" candidate and the others to run as "participating"  
16  
17 candidates. When this happens, and there are reports that it does happen, special  
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19 interests can multiply the speech impact of their contributions to the traditional  
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21 candidate and independent expenditures in support of their preferred traditional  
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23 candidate, which then results in waves of matching funds going to each of their  
24  
25 preferred subsidized candidates.

26  
27 39. Additionally, special interests are free to similarly multiply the speech impact  
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of their independent expenditures by spending money on ineffective, confusing or



1 as here, unequal treatment under the law burdens the exercise of the fundamental right  
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3 to free speech under the First Amendment.

4  
5 43. A.R.S. § 16-952 *et seq.* creates two classifications of candidates for public  
6 office in Arizona: those who “participate” in the Clean Elections system by accepting  
7 government financing, and those who do not participate in the system, choosing  
8 instead to run “traditional,” privately supported campaigns. These provisions then treat  
9 candidates differently with respect to direct expenditures, independent expenditures or  
10 contributions made on their behalf, based solely on their status as a subsidized or  
11 traditional candidate.  
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17 44. A.R.S. § 16-952(A), (B) and (C) give subsidized candidates a significant  
18 competitive advantage over traditional candidates running in the same election unless  
19 the traditional candidate is able to raise and spend more than three times the  
20 respective primary or general election spending limit. There is no compelling,  
21 important, substantial or legitimate state interest that justifies such discrimination  
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1 against traditional candidates who are unable to raise more than three times the  
2  
3 respective primary or general election spending limit.

4  
5 45. There is no compelling, important, substantial or legitimate state interest  
6 that justifies A.R.S. § 16-952(C)'s discriminatory distribution of benefits and  
7  
8 disadvantages from independent expenditures based on a candidate's status as a  
9  
10 traditional or subsidized candidate. Nor is such discrimination a least restrictive,  
11  
12 narrowly tailored, direct, proportionate or rational means of advancing any legitimate  
13  
14 state interest.

15  
16 46. There is no compelling, important, substantial or legitimate state interest  
17 that justifies A.R.S. § 16-952(A) and (B) giving subsidies to participating candidates  
18  
19 which substantially exceed the effective purchasing power of the traditional candidate's  
20  
21 triggering direct expenditure and/or contribution. Nor is such discrimination a least  
22  
23 restrictive, narrowly tailored, direct, proportionate or rational means of advancing any  
24  
25 legitimate state interest.  
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1 47. The Act's matching funds provisions, A.R.S. § 16-952(A), (B) and (C),  
2  
3 facially and as applied, violate Plaintiffs' right to equal protection of the law under the  
4  
5 Fourteenth Amendment and 42 U.S.C. § 1983.

6 48. Plaintiffs have directly suffered, will continue to suffer or are imminently  
7  
8 threatened with suffering irreparable injury to their right to equal protection of the law  
9  
10 under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983 by  
11  
12 virtue of the Act's matching funds provisions.

13  
14 COUNT II

15 (FIRST AND FOURTEENTH AMENDMENTS-FREE SPEECH)

16 49. Plaintiffs incorporate and reallege each and every allegation contained in  
17  
18 Paragraphs 1 through 41 and 43 through 46 of this Complaint as if set forth fully herein.

19  
20 50. Under the First and Fourteenth Amendments to the U.S. Constitution, 42  
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22 U.S.C. § 1983, *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, including *Randall*  
23  
24 *v. Sorrell*, 126 S. Ct. 2470 (2006), *Federal Election Commission v. Wisconsin Right to*  
25  
26 *Life, Inc.*, 127 S. Ct. 2652 (2007), and *Davis v. F.E.C.*, 128 S. Ct. 2759, 2764, 2771-73  
27  
28 (2008), a state cannot chill free speech through coercive or punitive means or

1 otherwise deter individuals or groups from exercising their right to freely speak without  
2  
3 a compelling state interest justifying placing such a burden on free speech.  
4

5 51. The Act's matching funds provisions ensure that when Plaintiffs, other  
6 traditional candidates, and their supporters exercise their First and Fourteenth  
7 Amendment rights to campaign speech, doing so produces substantial fundraising  
8 advantages for opposing or disfavored candidates. This chills free speech by creating  
9  
10 a coercive and punitive "drag" on the First Amendment rights, which can only be  
11  
12 sustained if it is narrowly tailored to serve a compelling state interest.  
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14

15 52. There is no compelling, important, substantial or legitimate state interest  
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17 that justifies the burden placed by A.R.S. § 16-952 (A), (B) and (C) on the free exercise  
18  
19 of First Amendment rights. Nor is placing such a burden on the free exercise of First  
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21 Amendment rights a least restrictive, narrowly tailored, direct, proportionate or rational  
22  
23 means of advancing any legitimate state interest.

24 53. The Act's matching funds provisions, A.R.S. § 16-952(A), (B) and (C),  
25  
26 facially and as applied, violate Plaintiffs' right to free speech, as well as that of other  
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1 traditional candidates and their supporters, under the First and Fourteenth  
2  
3 Amendments and 42 U.S.C. § 1983.

4  
5 54. Plaintiffs have directly suffered, will continue to suffer or are imminently  
6 threatened with suffering irreparable injury to their free speech rights under the First  
7 and Fourteenth Amendments to the U.S. Constitution by virtue of the Act's matching  
8 funds provisions.  
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11  
12 55. Plaintiffs have also suffered, will continue to suffer or are imminently  
13 threatened with suffering reasonably foreseeable irreparable injury arising from the  
14 Act's violation of the rights of Plaintiffs' supporters, including independent  
15 organizations, who wish to exercise their campaign speech rights to the benefit of  
16 Plaintiffs under the First and Fourteenth Amendments to the U.S. Constitution.  
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20  
21 **COUNT III**  
22 **(ENTITLEMENT TO DECLARATORY RELIEF)**

23  
24 56. Plaintiffs incorporate and reallege each and every allegation contained in  
25 Paragraphs 1 through 55 of this Complaint as if set forth fully herein.  
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57. For reasons including but not limited to those stated in this Complaint, an actual live controversy exists between Plaintiffs and Defendants, which parties have genuine and opposing interests, which interests are direct and substantial, and of which a judicial determination will be final and conclusive.

58. Plaintiffs are therefore entitled to a declaratory judgment that Defendants' actions are unconstitutional, as well as such other and further relief as may follow from entry of such a declaratory judgment.

**COUNT IV**  
**(ENTITLEMENT TO INJUNCTIVE RELIEF)**

59. Plaintiffs incorporate and reallege each and every allegation contained in Paragraphs 1 through 55 of this Complaint as if set forth fully herein.

60. For reasons including but not limited to those stated in this Complaint, as a direct and proximate result of Defendants' actions against Plaintiffs, Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and/or threatened irreparable harm to their constitutional rights. They have a likelihood of success on the merits of their constitutional claims. And the public



1 interest and equities favor entry of a court order barring enforcement of the Act's  
2  
3 matching funds provisions.

4  
5 61. Plaintiffs are, therefore, entitled to a preliminary and permanent injunction  
6 prohibiting the relevant Defendants from committing the above-described violations of  
7  
8 their constitutional rights, as well as such other and further relief as may follow from  
9  
10 entry of such injunctive relief.

11  
12 **REQUEST FOR RELIEF**

13  
14 Plaintiffs pray for judgment and ask this Court for the following:

15  
16 A. A declaration that §§ 16-952(A), (B) and (C) of the Arizona Citizens Clean  
17 Elections Act, and any Commission rules promulgated in furtherance thereof, violate  
18  
19 the right to equal protection under the law under the Fourteenth Amendment to the  
20  
21 United States Constitution;

22  
23 B. A declaration that §§ 16-952(A), (B) and (C) of the Arizona Citizens Clean  
24 Elections Act, and any Commission rules promulgated in furtherance thereof, violate  
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1 the right to free speech under the First and Fourteenth Amendments to the United  
2  
3 States Constitution;

4  
5 C. An Order that preliminarily and permanently enjoins the relevant  
6  
7 Defendants from further implementing and performing their duties in administering and  
8  
9 enforcing the above-referenced provisions either with respect to Plaintiffs or in general;

10 D. An award for Plaintiffs' reasonable attorneys' fees and costs pursuant to 42  
11  
12 U.S.C. § 1988; and

13  
14 E. Such further relief as this Court deems equitable, just, and proper.

15  
16 **RESPECTFULLY SUBMITTED** this 11<sup>th</sup> Day of May, 2009

17 s/Nicholas C. Dranias

18 Nicholas C. Dranias

19 SCHARF NORTON CENTER FOR

20 CONSTITUTIONAL LITIGATION

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27  
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1 CERTIFICATE OF SERVICE

2

3 I hereby certify that on May 11, 2009, at or before 5:00 p.m., I caused to be

4

5 electronically filed and also transmitted Plaintiffs' Second Amended Complaint to the

6

7 Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of

8

9 Electronic Filing to the following CM/ECF registrants:

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