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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,

Plaintiffs,

and

DEAN MARTIN, *et al.*,

Plaintiff-Intervenors,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,

Defendants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant-Intervenor.

No. CV08-1550-PHX-ROS

DEFENDANTS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Roslyn O. Silver)

(Oral Argument Requested)

MOTION

Pursuant to Fed. R. Civ. P. 56(c), Defendants Arizona Secretary of State and Citizens Clean Elections Commissions ("Defendants") move for summary judgment as to both Plaintiffs' Second Amended Complaint and Plaintiff-Intervenors' Complaint in Intervention. This motion is supported by Defendants' Memorandum in Support of Motion for Summary Judgment, Defendants' and Defendant-Intervenors' Joint Statement of Undisputed Facts, the Declaration of Todd F. Lang and the Declaration of Counsel in support thereof, all of which are filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement.

This litigation marks at least the eighth attempt to overturn the Citizens Clean Election Act, A.R.S. §§ 16-940 *et seq.* (the "Act" or "Clean Elections Act"), or chisel away at its provisions. The Act has been a substantial and important component of Arizona elections for over ten years now. According to Plaintiffs and Plaintiff-Intervenors (collectively, "Plaintiffs"), public matching funds and disclosure requirements that make public funding a rational alternative are a burden on First Amendment rights. Despite Plaintiffs' claim that the Act impairs their ability to campaign effectively, 33% of the candidates for statewide and legislative office in 2008 opted for private funding and that group won 44% of the overall seats. [SOF 42][1] Moreover, the Act is designed to increase the amount of political speech.

Plaintiffs consist of four incumbent legislators, the State Treasurer who previously served as a State Senator, one first time 2008 challenger, and two political action committees ("PACs"). [SOF 20, 26] Although Plaintiff candidates have triggered matching funds for their opponents, all but the first time challenger won a seat in the Arizona Legislature. [SOF 23, 30] Indeed, when three of the four incumbents first ran for office, they received public funding under the Act. [SOF 21, 31] Despite having accepted public funding when they did not yet have the private connections to support fundraising efforts, those Plaintiffs now claim this system infringes on their rights.

[1] "SOF" refers to Defendants and Defendant-Intervenors' Joint Statement of Undisputed Facts which is filed herewith.

Plaintiffs seek to establish a right to be free from rebuttal from participating candidates. But their arguments are antithetical to the First Amendment's "marketplace of ideas," and this Court should not allow Plaintiffs to silence participating candidates by eliminating matching funds.

II. Statement Of Undisputed Facts.

Arizona voters approved the Act in 1998. A.R.S. § 16-940 (historical annotation). The enactment of this citizens' initiative came in the wake of a decade of political scandals in Arizona. In 1988, Governor Evan Mecham was indicted on charges of perjury, fraud and failure to report a campaign contribution and was later impeached and ousted from office. [SOF 1] Next, a furor erupted with the collapse of the financial empire of Arizona savings-and-loan tycoon Charles Keating whose relationship with Arizona politicians prompted multiple Senate ethics investigations. [SOF 2] The "AZSCAM" scandal broke in 1991. [SOF 4] That scandal resulted in the indictment of 23 people, including lobbyists and state legislators who were caught in a "sting" operation which featured secretly videotaped scenes of the legislators accepting bribes from an undercover agent ostensibly pushing a bill to legalize casino gambling. [SOF 4, 6] Later, in the early 1990s Governor Fife Symington was investigated over a conflict of interest, and in 1997 he was convicted of bank fraud and resigned from office. [SOF 3]

A central purpose of the Clean Elections initiative was to "improve the integrity of Arizona state government by diminishing the influence of special-interest money." A.R.S. § 16-940. The Act furthered this purpose by creating an optional public funding program for candidates for state office.[2] *See* A.R.S. §§ 16-940 to -961. Funding for candidates comes from the Clean Elections Fund, which includes monies from surcharges on fines and penalties, and monies received through a tax credit provided in the Act. A.R.S. § 16-954. The public funding program is implemented by the non-partisan Citizens Clean Elections Commission. A.R.S. § 16-955.

Candidates who choose to participate in the Clean Elections public funding program are subject to stringent requirements. To qualify for funding, a candidate must

[2] *See* 2007-2008 Participating Candidate Guide for general information on the functions of the Act. Declaration of Tanja K. Shipman ("Shipman Decl.") at Ex. 10.

collect a specified number of $5 qualifying contributions from registered voters within their respective district. A.R.S. §§ 16-946 (defining qualifying contribution), - 950 (requirements to qualify for public funding). If they qualify for public funding, candidates receive a basic grant amount depending on the office.[3] A.R.S. § 16-950. The grant amounts are $12,921 for the primary and $19,382 for the general for legislative candidates and $82,680 for the primary and $124,020 for the general for Corporation Commission candidates.[4] A.R.S. § 16-961(G).

In addition to this basic grant amount, the Act provides for limited "matching funds" if certain criteria are met based on contributions to or expenditures of the opposing candidate and independent expenditures in a particular race. A.R.S. § 16-952. Matching funds are only available up to a statutory capped limit of three times the amount of the basic grant for the respective office. A.R.S. § 16-952(E).

Not every expenditure or contribution triggers matching funds, however. Rather, they are triggered by an opposing traditional candidate only when relevant contributions or expenditures in a race exceed the base amount allocated to candidates. *See* A.R.S. §16-952. In a primary election, matching funds are triggered when "expenditures during the election cycle to date exceed[] the original primary election spending limit." A.R.S. § 16-952(A). In a general election, matching funds are paid when "contributions during the election cycle to date less the amount of expenditures the traditional candidate made through the end of the primary election period exceed[] the original general election spending limit." A.R.S. § 16-952(B). Independent expenditures against a participating candidate or in favor of a traditional candidate also trigger matching funds for a participating candidate. A.R.S. § 16-952(C).

The Act has been in place for the past five election cycles and is now a substantial part of the Arizona election framework. Declaration of Todd F. Lang ("Lang Decl.") at ¶ 3. Candidate participation in the program for general elections has been between 52% and 67% since the 2002 election cycle. [SOF 43] The public funding of elections is now

[3] Herein, candidates who choose to participate in the system supported by the Act are referred to as "participating candidates" and candidates who choose to obtain private funding in support of their campaigns are referred to as "traditional candidates."
[4] These amounts are adjusted for inflation every two years. A.R.S. § 16-959.

an established program in Arizona which has provided the means by which many candidates, including three Plaintiffs, run for legislature or state office. [SOF 31, 35, 36] As demonstrated below, the Act does not burden Plaintiffs' speech. Even if it is determined that the Act imposes some burden, however, the Act is valid because it complies with even the strictest constitutional standards.

III. Argument.

A. The Applicable Legal Standard.

Summary judgment is appropriate upon a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Once a defendant has identified those parts of the record that indicate an absence of an issue of material fact, "the nonmoving party must 'designate specific facts showing that there is a genuine issue for trial.'" *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

"A facial challenge to a [statute] is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1190 (2008) ("a facial challenge must fail where the statute has a plainly legitimate sweep") (citations omitted). As-applied challenges, by comparison, "contend[] that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). As described below, Plaintiffs demonstrate neither type of challenge and Defendants are entitled to summary judgment.

B. Summary Judgment Is Warranted Because The Clean Elections Act Does Not Violate The First Amendment.

Plaintiffs challenge the matching funds provisions in the Act based on claims that they "chill" or create a "drag" on traditional candidates' and PACs' speech. (Pl. Compl.

at ¶¶ 49-55; Pl-Int. Compl. at ¶¶ 52-64.)[5] "When deciding whether a state election law violates [First Amendment rights], we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (citations omitted).

1. The Act's Matching Funds Provisions Do Not Burden Free Speech.

Matching funds provisions similar to the ones at issue have repeatedly been found to be constitutional as a matter of law against similar claims. *See, e.g.*, *Daggett v. Comm'n on Gov't Ethics & Elec. Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (finding Maine's clean election statute constitutional); *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998) (finding Kentucky's public funding trigger provision constitutional). Most recently, in *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437-39 (4th Cir. 2008), the Fourth Circuit held that North Carolina's similar scheme of optional public funding for candidates seeking election to the state's supreme court and court of appeals did not chill free speech.[6] That court rejected appellants' identical argument that their speech was chilled because they choose to spend less money (and thus engage in less political speech) in order to prevent candidates they oppose from receiving matching or trigger funds. *Id.* at 437. The Court found that "[t]he plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Id.* Moreover, the distribution of matching funds, "'furthers, not abridges, pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Id.*

[5] Herein, "Pl. Compl." refers to Plaintiffs' Second Amended Complaint [Dkt. 260] and "Pl-Int. Compl." refers to Plaintiff-Intervenors' Complaint in Intervention [Dkt. 58].

[6] A petition was recently filed with the United States Supreme Court for review of this case in light of *Davis v. FEC*, 128 S.Ct. 2759 (2008). The Court denied certiorari. *Duke v. Leake*, 129 S.Ct. 490 (2008).

(quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

In this case, Plaintiffs rely primarily on *Davis v. FEC*, 128 S.Ct. 2759 (2008), to support their claim that the Act burdens protected speech. (Pl.Compl. at ¶ 2; Pl-Int. Compl. at ¶ 58.) The provision at issue in *Davis*, however, was very different than the Act, including its matching funds provisions. The *Davis* Court reviewed the so-called "Millionaire's Amendment" which provided that "when a candidate spends more than $350,000 in personal funds and creates what the statute apparently regards as a financial imbalance, that candidate's opponent may qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures." *Id.* at 2770. The Millionaire's Amendment thus penalized a candidate for spending personal funds over a certain amount by relaxing restrictions on her opponent. While the Court had no objection to increasing contribution limits "across the board," it found the increase of those limits for only one candidate to be asymmetrical and unconstitutional. *Id.* at 2771, 2773 (stating that "we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech").

By contrast, the Clean Elections Act imposes no asymmetrical burden on a traditional candidate's ability to contribute or expend her own money on her campaign. Rather, the contribution and expenditure restrictions imposed upon a participating candidate are *never* relaxed as a result of a traditional candidate's spending of personal funds or a PAC's independent expenditure. *See* A.R.S. §§ 16-941, -952. Thus, unlike the self-funded candidate challenger in *Davis*, a traditional candidate in Arizona may raise and spend unlimited amounts of money to run against a participating candidate. It is the participating candidate – not the traditional candidate – who must agree to spending limits. Moreover, the challenger in *Davis* showed a "drag" on the expenditure of a self-financed candidate's personal money only.[7] *Davis*, 128 S.Ct. at 2771. By contrast, Plaintiffs have not even alleged, much less shown, any such "drag" on their personal

[7] This Court recognized the narrow holding of *Davis* in its ruling on the earlier motions for preliminary injunction when it preliminarily found only that "[t]he Arizona Act imposes a substantial burden on the First Amendment right to use personal funds for campaign speech." (Findings of Fact and Conclusions of Law [Docket 185] at 10.)

expenditures here.

Thus, to the extent the Act imposes any burden on speech, it is imposed only on the participating candidate who must agree to profound restrictions on fundraising and spending for her campaign in order to accept public funding. *Davis* does not support a finding that Arizona's public funding system imposes a burden on traditional candidates or independent expenditure committees. Rather, matching funds serve to advance First Amendment values "by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Leake*, 524 F.3d at 437.

Plaintiffs' reliance on *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), is similarly misplaced. This Court has already noted that a "substantial difference" exists between the facts of *Day* and those presented here.[8] *See* Findings of Fact and Conclusions of Law [Docket 185] at 8-9. In *Day*, the state sought to justify the independent expenditure match as an incentive to participation. Because participation already soared near 100%, the court concluded that no interest, no matter how compelling in the abstract, could be served by the matching funds. *Day*, 34 F.3d at 1361. The participation rate for Arizona candidates in the 2008 election was 66 %, far below that of *Day* and, applying *Day*'s logic, demonstrates that Arizona has a valid interest in providing an incentive for participation in the program. [*See* SOF 42] Moreover, unlike the Clean Elections Act, the Minnesota statute at issue in *Day* did not appear to have any cap on the amount a participating candidate could receive. *See Day*, 34 F.3d at 1360.

Finally, Plaintiff-Intervenors allege that the Act "violates Plaintiffs' right to freedom of association by encroaching upon the ability of like-minded persons to pool their resources in furtherance of common political goals." (Pl-Int. Compl. at ¶ 55.) The

[8] Both the First and Fourth Circuits have expressly rejected *Day*, which equated responsive speech with impairment of the initial speaker. *See Daggett*, 205 F.3d at 465 ("we cannot adopt the logic of *Day*"); *Leake*, 524 F.3d at 437 ("we reject as unpersuasive the Eighth Circuit's decision in *Day*"); *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996) (declining to extend *Day* in finding constitutional a provision which permitted contribution refunds available only for contributors to participating candidates' campaigns). *Day* was cited in *Davis* as support for the idea that candidates who can afford to make large personal expenditures in support of their campaigns may still choose to do so despite the Millionaire's Amendment but must "shoulder a special and significant burden if they make that choice." *See Davis*, 128 S.Ct. at 2772. Here the Act has no similar burden resulting from a traditional candidate's personal expenditures.

Act contains *no* restrictions, however, on the rights of Plaintiff PACs to associate or collect money in furtherance of their causes – indeed both PACs did collect money and did make expenditures in elections which triggered matching funds, thereby demonstrating that they were able to freely associate and communicate their message during the time the Act was operative. (Pl-Int. Compl. at ¶¶ 11, 12.) Notably, both Plaintiff PACs were formed *after* the Act was approved by voters in 1998, further undermining any claim that the Act has hindered their ability to associate. (*Id.* (both PACs established in 2006).)

Because the Act does not infringe on the ability of traditional candidates to personally fund their campaigns or to collect as many contributions or make as many expenditures as they desire to broadcast their political message, the Act does not burden speech as a matter of law.

2. Even If A Burden Exists, The Matching Funds Provisions Are Constitutional Under The Applicable Standard Of Review.

Even assuming Arizona's matching funds provisions impose some burden on Plaintiffs, the provisions do not violate the First Amendment when analyzed under Supreme Court jurisprudence on review of such restrictions. Under that jurisprudence, this Court should uphold a restriction against a First Amendment challenge if the restriction is "closely drawn" to serve a "sufficiently important interest." *E.g.*, *Buckley*, 424 U.S. at 24-25 (in addressing challenge to campaign contribution limits, stating that burdens on right of political association may be sustained if the restriction is "closely drawn" to achieve a "sufficiently important interest"); *McConnell v. FEC*, 540 U.S. 93, 136-37, 138 n.40 (2003) (stating that since *Buckley* the Court has "consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000) (stating that under *Buckley*, a less rigorous standard applies to review of contribution limits, which will be upheld if they are closely drawn to match a sufficiently important interest).

As explained below, Arizona's matching funds provisions easily meet each of

those criteria for constitutionality under the relevant case law.

a. Matching Funds Serve Important State Interests.

Providing a public funding option that limits the reliance on private contributions furthers the state's compelling interest in preventing corruption and the appearance of corruption. Corruption in the electoral system includes "the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. Legislation can "constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." *Id.* (quoting *Buckley*, 424 U.S. at 28). The appearance that "large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Id.* at 390.

Through the Clean Elections Act, Arizona can combat the public perception that private donors influence politicians and can avoid an appearance that "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money in their campaigns." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

Indeed, the Act itself outlines problems that were intended to be addressed by the establishment of an optional public funding program. *See* A.R.S. § 16-940. A central purpose of this citizens' initiative was to "improve the integrity of Arizona state government by diminishing the influence of special-interest money." *Id.* The publicity pamphlet provided to voters reinforced this anti-corruption purpose.[9] One supporter of the Clean Elections initiative commented on Arizona's "reputation of a state rife with corruption and abuse of money in politics." [SOF 15]

National media concerning the initiative also noted that Arizona had developed a reputation for political corruption. According to one article, "[i]f there were ever a state ripe for campaign finance reform it is Arizona, whose government oozes with corruption and scandal." [SOF 16] Another article observed that "Arizona politics has been racked by one money scandal after another: state legislators indicted for bribery and

[9] Although some may assert that public funding "levels the playing field," this is not the compelling interest that supports the constitutionality of public funding. *See Rosenstiel*, 101 F.3d at 1553-54 (discussing compelling governmental interests in public financing schemes).

racketeering, two U.S. senators among the [infamous] Keating Five, a governor driven from office for fraud." [SOF 17] The Act attempts to combat corruption and the appearance of corruption in Arizona politics by, with limited exceptions, prohibiting candidates participating in Clean Elections from accepting private contributions. *See* A.R.S. §16-941.[10] Further, the fact that a majority of Arizona voters approved the Act as a statewide initiative demonstrates the popular perception that the Act's provisions are necessary to combat corruption and the appearance of corruption in the State. *See Shrink*, 528 U.S. at 394 ("the statewide vote on Proposition A certainly attested to the perception relied upon").

Indeed, public funding systems have already been found to serve important state interests, including the interest of reducing corruption or the appearance of corruption in elections. *See, e.g.*, *Daggett*, 205 F.3d at 455-58 (finding a "sufficiently important governmental interest" in abolishing the appearance of corruption in the political process); *Vote Choice*, 4 F.3d at 39-40 (finding that even if higher level of scrutiny applied, cap gap which increased likelihood of participation on public funding scheme was narrowly tailored to serve a compelling state interest including freeing candidates from "pressures of fundraising" and combating fraud); *Rosenstiel*, 101 F.3d at 1555 (finding compelling the state's interest in reducing the possibility for corruption that may arise from contributions and in reducing time spent by candidates in fundraising). Moreover, *Buckley* affirmed the constitutionality of public funding systems. *See Buckley*, 424 U.S. at 86. Taking *Buckley*'s cue, courts have supported efforts by Congress and the states to enact meaningful campaign finance reform.

For example, in *McConnell*, the Supreme Court upheld provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") designed "to purge national politics of what [is] conceived to be the pernicious influence of 'big money' campaign contributions." 540 U.S. at 115. In passing on the constitutionality of the BCRA, the Court reaffirmed the government's interest in addressing corruption. *See id.* at 143 ("Our

[10] Although participating candidates may accept private contributions during qualifying or exploratory periods, such contributions may be accepted only from individuals (A.R.S. §§ 16-945, -946), and all qualifying contributions must be from registered voters in their districts (A.R.S. § 16-946(B)(1)).

cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."). The Court also affirmed the deference to be afforded legislatures in implementing reform. *See id.* at 117 ("Congress' 'careful legislative adjustment of the federal election laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.'") (quoting *FEC v. Nat'l Right to Work Comm'n*, 459 U.S. 197, 209 (1982)).

Accordingly, the Clean Elections Act, including the matching funds provisions, serve the State's compelling interest in the integrity of its elections. It serves other interests as well, which the drafters set out in A.R.S. § 16-940. This includes, for example, permitting officials to spend time with the general public rather than raising money and promoting effective communication with voters by many qualified candidates. A.R.S. § 16-940(B) (3), (8). As the Supreme Court recognized in *Buckley*, public funding "facilitate[s] and enlarge[s] public discussion and participation in the electoral process." *Buckley*, 424 U.S. at 92-93.

Although this Court previously expressed concern that individuals could exploit the matching funds provisions for strategic advantage, the potential for such conduct does not undermine the state's compelling interests in a viable public finance program. The state plainly has an interest in preventing corruption in elections caused by the money of special interest groups and in preventing the appearance of such corruption. Although additional reforms may be appropriate to address any potential abuses, the few isolated incidents where individuals have attempted to use matching funds as a strategic advantage does not undermine the state's compelling interests that are otherwise furthered by the Act.[11]

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[11] Courts do not require that reform legislation solve every potential problem that exists. *See, e.g.*, *McConnell*, 540 U.S. at 170-71 (deferring to Congress on the need for prophylactic rule); *Buckley*, 424 U.S. at 105 (legislature may first address "itself to the phase of the problem which seems most acute to the legislative mind"); *Ognibene v. Parkes*, 599 F.Supp.2d 434, 453 (S.D.N.Y. 2009) (stating that "a legislature need not address all aspects of a problem at the same time; reform may be made one step at a time" and stating that a legislature may first address "itself to the phase of the problem which seems most acute to the legislative mind") (citing *Buckley*, 424 U.S. at 105). Arizona voters adopted significant, innovative campaign finance reform when they

b. The Act Is Closely Drawn To Serve Arizona's Important Interest In Avoiding Corruption And The Appearance Of Corruption.

If a challenged provision is reasonably calculated to prevent actual or perceived corruption, then the Court should find that the provision is closely drawn to achieve that interest. *See Green Party of Conn. v. Garfield*, 590 F.Supp.2d 288, 322 (D. Conn. 2008) (upholding state law banning lobbyist and state contractor contribution and solicitations); *see also Buckley*, 424 U.S. at 29 (a contribution limit is closely drawn as long as it does not "undermine to any material degree the potential for robust and effective discussion").

Here, the matching funds provisions are an important component of the Act and are reasonably calculated to fully achieve the Act's anti-corruption purposes for at least two reasons: (1) the provisions make the choice of public financing a rational option and (2) as a practical matter, the provisions preserve the public's funds so that funding is provided only for necessary campaign expenditures made in response to an opponent's actions. Matching funds play an important role in a candidate's decision to participate in the public funding system. [*See* SOF 33, 44, 45] A participating candidate would receive only a modest public disbursement, after which she could be grossly outspent by an opponent unconstrained by limits on expenditures or contributions. [*See* SOF 34] Even with matching funds, a participating candidate can always be outspent by the traditional candidate because the Act caps the amount of matching funds that a participating candidate can receive.

The Act's matching provisions for independent expenditures are based on the same legitimate concern. *Cf. Caperton v. A.T. Massey Coal Co., Inc.*, 2009 WL 1576573, at *4, 6, 12 (S.Ct. June 8, 2009) (independent expenditures in favor of a judicial election campaign were among the contributions recently found to be indicative of judicial bias); *FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987) (upholding disclosure requirements and noting that the Supreme Court has recognized efforts in the past to thwart disclosure requirements by "the routing of campaign contributions through unrelated independent advertising").

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approved the Act in 1998. Any perceived need for improvements is an issue for state policy makers.

Without matching funds, "the State could reasonably believe that far fewer candidates would enroll in its campaign financing program." *Rosenstiel*, 101 F.3d at 1554; [SOF 45]. Such a result would at a minimum undermine the Act's effectiveness and defeat the purposes for which it was adopted – to avoid corruption or the appearance of corruption. In *Rosenstiel*, the court found that a provision which allowed a participating candidate to exceed the statutory spending limitations under certain circumstances was narrowly tailored to remove the disincentive a candidate may have to participate in the public funding scheme because of concern over "being grossly outspent by a privately financed opponent with no expenditure limit." *Id.* at 1551. The matching funds provisions are vital to serve the important – even compelling – interests of the public funding program. *See id.* at 1553; *Vote Choice*, 4 F.3d at 39.[12]

C. Summary Judgment Is Warranted Because The Act's Reporting Requirements Do Not Violate The First Amendment.

Defendants also are entitled to summary judgment on Plaintiff-Intervenors' challenge to the reporting requirements for traditional candidates under A.R.S. §§ 16-941(B)(2), 16-941(D) and 16-958. Plaintiff-Intervenors claim that those requirements impermissibly coerce participation in Clean Elections by requiring traditional candidates to file additional campaign finance reports if certain criteria are met. (*See* Pl-Int. Compl. at ¶ 62.) Plaintiff-Intervenors mischaracterize the disclosure requirements as "stringent" and "daily." (*See id.*)

Although courts have subjected campaign finance disclosure requirements to exacting scrutiny, courts have long upheld such requirements as constitutional. *See, e.g.*, *Buckley*, 424 U.S. at 83-84 (upholding a reporting requirement for independent expenditures in excess of $100 in a calendar year); *Daggett*, 205 F.3d at 472 (upholding the reporting of independent expenditures exceeding $50 for a single election period); *McConnell*, 540 U.S. at 196 ("We agree...that the important state interests that prompted

[12] This brief analyzes whether matching funds are "closely drawn" to serve "important state interests" because that is the appropriate test to apply. Matching funds in the context of Arizona's public funding program also, however, satisfy the more stringent strict scrutiny test because for the reasons set forth above, it is narrowly tailored to serve compelling state interests.

the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full force to BCRA."). Such disclosure requirements are permissible if the challenged statute serves a compelling interest and if a substantial nexus exists between such interest and the required disclosure. *E.g.*, *Daggett*, 205 F.3d at 465 (citing *Vote Choice*, 4 F.3d at 32).

Here, the reports that may be required of traditional candidates are necessary to implement the Act's matching funds provisions, which as part of the Act serve a compelling State interest. *See* Lang Decl. at ¶ 11. All candidates must file six campaign finance reports with the Secretary of State in a given election cycle. Traditional candidates may also be required to file additional "trigger" reports when contributions and expenditures exceed certain thresholds. *See* A.R.S. § 16-958(B).

Contrary to Plaintiff-Intervenors' characterization, such additional reports can hardly be considered "stringent." Indeed, a trigger report is a one-page form that is electronically filed with the Secretary and which indicates merely the identity of the candidate committee, the filing date and reporting period, and the total amount of the contributions or expenditures. [SOF 22] Those reports need not contain a detailed breakdown of such contributions or expenditures. Neither must those reports include any identifying information about the contributors or the recipients of expenditures. Instead, the purpose of trigger reports is to enable the Commission effectively to enforce the matching funds provisions of the Act. Lang Decl. at ¶ 11. Without the information in those reports, it would be difficult if not impossible for the Commission to enforce the matching funds provisions in a uniform and fair manner.

Moreover, nothing on the face of the Act requires that all traditional candidates file daily campaign finance reports throughout an election cycle. *See* A.R.S. § 16-958. Even if the statutory thresholds for such reports are reached (*i.e.*, a traditional candidate has "reach[ed] the dollar amount for filing an original or supplemental report"), traditional candidates are required to file daily reports only in the last two weeks before a

primary or general election. A.R.S. § 16-958(B)(3). In any event, such a requirement is necessary to enable the Commission to approve matching funds to eligible candidates in a timely manner in the final two weeks of an election.

The disclosure requirements are reasonably necessary to enable enforcement of the matching funds provisions. Accordingly, the Court should reject Plaintiff-Intervenors' challenge to the Act's disclosure requirements. *E.g.*, *Daggett*, 205 F.3d at 466 (holding that the increased reporting requirements in Maine's clean elections act were constitutional because they "allow[] voters access to information about who supports a candidate financially and . . . allow[] the Commission to effectively administer the matching funds provision of the Act" and deter "corruption and its appearance").

D. Summary Judgment Is Warranted On Plaintiffs' Equal Protection Claims.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citations omitted). To maintain an equal protection claim, a plaintiff typically alleges that he "received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent."

1. <u>The Act Does Not Violate Plaintiff Candidates' Equal Protection Rights.</u>

Plaintiffs allege that the Act violates equal protection by classifying candidates as either participating or traditional and treating them differently with respect to independent expenditures, contributions and reporting requirements. (*See* Pl.Compl. at ¶¶ 42-48; Pl-Int. Compl. at ¶¶ 71-74.) In *Vote Choice*, the Court rejected a virtually identical equal protection challenge to Rhode Island's public funding laws with the following remarks:

> We do not tarry over Leonard's claim that the contribution cap gap violates her right to equal protection. First, the statute does not impose unequal treatment but gives candidates an authentic choice. Second, the statute treats candidates differently on the basis of their actions rather than their beliefs—actions which, as we have seen, possess differing implications for

> the integrity and effectiveness of the electoral process. The equal protection clause does not interdict such classifications.

4 F.3d at 40 n.17 (citations omitted).

Further, the premise of any equal protection claim is that the challenged statute is flawed because it treats similarly situated entities differently. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981). Here, as in *Vote Choice*, the candidates are not similarly situated to begin with because they have voluntarily chosen to be treated differently as a condition of acceptance or rejection of public funding. Indeed, participating candidates are situated much differently than traditional candidates. When they decide to accept public funds, they agree to comply with an expenditure cap that does not apply to privately-funded candidates, to accept very limited private contributions, and to be subject to stringent penalties for violating the Act's requirements, which include forfeiture of office. "The Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Buckley*, 424 U.S. at 97. As such, Plaintiffs' arguments in this regard are based on a faulty premise.

Plaintiffs' claims that the Act must treat participating and traditional candidates the same is also contrary to *Buckley*, 425 U.S. at 92-93, and the numerous other decisions recognizing the state's compelling interest in public funding. *E.g.*, *Rostenstiel*, 101 F.3d at 1555 ("the state need not be completely neutral on the matter of public financing of elections"). As recognized in *Vote Choice*, the Equal Protection Clause does not prohibit the state from creating legislative classifications. *See also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Equal Protection Clause is satisfied as long as the classification rationally furthers a legitimate state interest. *Id.*

As described above, it is well established that Arizona has an important interest in avoiding corruption and the appearance of corruption with a public funding system for elections. Because any such public funding system must be voluntary, necessary characterizations of candidates as either participating in the system or not participating in the system naturally arise. Any such distinction is not unconstitutional – it is merely descriptive. When a state has a voluntary public campaign finance program, the publicly

funded candidates are necessarily subject to different rules than traditional candidates.

2. Plaintiff-Intervenor PACs' Equal Protection Rights Are Not Burdened.

Plaintiff-Intervenors also argue that the Act violates the Equal Protection Clause by classifying the political messages broadcast by the PACs in order to determine whether matching funds should be issued. (Pl-Int. Compl. at ¶¶ 66-69.) However, there is no classification being made here. There is no restriction whatsoever on PACs with regard to contributions or expenditures. To the extent the PACs are complaining, they're complaining about a so-called "chill" on their First Amendment freedoms. As explained above, Plaintiff-Intervenors' First Amendment claims fail. In any event, because there is no classification or unequal treatment (either facially or as applied) to the PACs by the matching funds provisions, they have no equal protection claim. The same is likely true for the individual plaintiffs. They have the choice of accepting more stringent regulation by becoming a participating candidate. If they do not choose to do so, they have more lenient contribution and expenditure restrictions than participating candidates. Their only complaint is that their speech is "chilled" by matching funds. But this is a First Amendment claim, not an equal protection claim. They have neither argued nor shown with evidence on summary judgment any classification that would give rise to an Equal Protection Clause violation.

IV. Conclusion.

For these reasons and the reasons identified in Defenant-Intervenors' Motion for Summary Judgment, Defendants request that this Court grant Defendants' Motion.

RESPECTFULLY SUBMITTED this 12th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2009, I electronically transmitted the attached 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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COPY also served the following business day, the 15th day of June, 2009, by U.S. Mail with Notice of Electronic Filing, on:

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