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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,

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

(Assigned to the Honorable Roslyn O. Silver)

DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

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I. INTRODUCTION

Plaintiffs' and Plaintiff-Intervenors' (collectively, "Plaintiffs") motions rely on two overarching, but mistaken, contentions: (1) that the Citizens Clean Elections Act (the "Act") chills, rather than promotes, free speech; and (2) that the Act is not appropriately tailored to serve a sufficient government interest. The evidence and law demonstrate the opposite, and it is therefore Defendants and Defendant-Intervenor Clean Elections Institute ("CEI"), not Plaintiffs, who are entitled to summary judgment.

The Act was expressly designed to promote free speech, and campaign expenditure data indisputably establishes that the Act has achieved that goal. Candidate expenditures, both overall and among high-spending non-participating candidates, have *increased* sharply since the Act's passage. Additionally, spending by non-participating candidates has not clustered just below the matching funds threshold—as would necessarily occur if matching funds in fact had a chilling effect on spending. Consistent with these compelling factual findings from Arizona, the prevailing view among the Circuit courts is that matching funds do not, as a matter of law, burden speech. *See North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437-38 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008).

Plaintiffs rely mainly on their own self-serving assertions that the Act has chilled their spending. But the actual data and deposition testimony reveal a far different story and flatly contradict Plaintiffs' assertions of harm. For example, Plaintiffs claim to have been chilled from spending beyond the matching funds threshold when in fact they almost uniformly *exceeded* the thresholds. Plaintiffs' conclusory assertions do not create a genuine issue of material fact in opposition to Defendants' motions, let alone resolve the burden issue in Plaintiffs' favor.

In any event, the Act is tailored to further multiple compelling interests. Although Plaintiffs claim the Act is targeted exclusively at "leveling the playing field," the Act's primary purposes were to deter corruption and its appearance while at the same time promoting free speech. In a pre-Act scandal known as AzScam, legislators were caught on tape taking bribes and campaign contributions in exchange for legislative favors. Moreover, newspapers reported that legislators and lobbyists circumvented existing laws and that legislative leaders threatened

lobbyists with reprisals for failing to raise funds for the leadership's chosen candidates.

Matching funds are a crucial component of the Act's anti-corruption strategy. The Act's voluntary public financing system gives candidates an alternative to the traditional system of private contributions and its attendant risks of corruption. To make public financing a viable alternative—without wasting State funds by making huge lump sum grants up front to every participating candidate—Arizona needed to assure candidates that, if opponents' spending exceeded the amount of the initial public grant, additional funds would become available. Otherwise, few if any would participate, the public financing alternative would die, and Arizona would return to the system of exclusively private financing that gave birth to AzScam.

In short, it is Plaintiffs, not Defendants, who have failed to adduce evidence sufficient to create a genuine issue of material fact. At a minimum, Plaintiffs' reliance on hundreds of disputed facts mandates denial of their motions for summary judgment.

II. FACTUAL BACKGROUND[1]

The Act is but the most recent attempt by voters to address the corrupting influence of campaign contributions in Arizona state campaigns. In 1986, the voters enacted contribution limits. Those limits were set at $200 per election for legislative candidates and up to $500 per election for statewide candidates. Ariz. Rev. Stat. §16-905 (2009) (historical note).

Contribution limits alone proved insufficient to counter corruption or the perception of corruption. Indeed, five years after such limits were enacted, Arizona voters witnessed an epic scandal that came to be known as AzScam, in which Phoenix police recorded Arizona legislators taking bribes and campaign contributions in exchange for supporting gambling legislation. (*State v. Walker*, 185 Ariz. 228, 231, 235 (Ct. App. 1995)). The sting, which received widespread media attention, produced indictments of 23 people, including nearly 10 percent of the Arizona legislature, and the conviction of a legislator on corruption-related charges. *State v. Walker*, 185 Ariz. at 231.[2]

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[1] A lengthier explanation of the factual background is set forth in CEI's Memorandum of Law In Support Of Its Motion For Summary Judgment.

[2] *See* Declaration of Puneet Sandhu In Support Of CEI's Motion for Summary Judgment ("Sandhu Decl."), Ex. A, Maricopa County Superior Court Docket, CR1991-000997 (reflecting

The public's perception that Post-AzScam reforms were insufficient to prevent a recurrence of corruption was further exacerbated in 1996 when a statewide newspaper published a series of articles on the influence of professional lobbyists in Phoenix and the strategies that lobbyists and elected officials employed to circumvent Arizona's contribution limits. These articles lamented:

> Reforms passed by voters in 1986 were supposed to prevent the practice known as bundling contributions, but candidates and lobbyists have found a loophole in the law. Bundling occurs when an individual collects a number of checks from individuals and then presents them to one candidate. Lawmakers get around that prohibition by appointing lobbyists to their campaign finance committees, a role that allows them to gather checks from others.

Id., Ex. O (Michael Murphy, "Holiday Premium on Fund-Raising," *The Arizona Republic*, Dec. 14, 1997, at p. A1). Further articles reported that the State Senate's Republican President had "assigned the state's most powerful lobbyists to raise money for specific candidates" and had "warned . . . lobbyists that they [would] suffer political retribution in the next session of the Legislature if they raise[d] money for Democrats." *Id.*, Ex.. P (Chris Moeser, "GOP Drafts Lobbyists For Help In Crucial Races; Senate Chief Reputedly Warns Them Not To Raise Funds For Democrats," *The Arizona Republic*, Aug. 20, 1998, at A1).

By 1998, Arizona voters believed that "[their] current election-financing system . . . [u]ndermined public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5). In an effort to curtail the corrosive effects of campaign contributions on the state legislative process, Arizona voters adopted the Clean Elections Act in 1998. The Act's express purposes include promoting "the integrity of Arizona state government" and "freedom of speech." *Id.* The Act combats corruption and promotes free speech by establishing a voluntary alternative to the traditional system of raising private contributions. Candidates may choose to opt into the public financing system created by the Act and obtain public funding, conditioned on their refusal of most private contributions, acceptance of spending limits, participation in public debates, and collection of a specified number of five-dollar qualifying contributions. Ariz. Rev.

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indictments); *id.*, Ex. B, F-H (collected news articles); *id.*, Ex. C at 46:25, 47:1-4 (Smoldon Dep.); *id.*, Ex. D at 36:5-13 (Aja Dep.) *id.*, Ex. E at 99:18-19 (Symington Dep.).

Stat. §§ 16-941, 16-945, 16-946, 16-950.

The Act's drafters carefully tailored funding levels to make public financing a viable alternative without setting the grants so high that public financing would become the only option, public funds would be wasted, and the Act's legitimacy would be undermined. The Act provides participating candidates with a portion of the total grant amount up front. Capped matching funds are given to participating candidates when: (1) a traditionally-funded opponent's expenditures (or, during the general election, a candidate's receipts, less expenditures made during the primary campaign) exceed the participating candidate's initial disbursement amount; (2) an independent expenditure committee makes an expenditure opposed to the participating candidate; or (3) an independent expenditure committee makes an expenditure in support of a participating candidate's opponent. *Id.* § 16-952(A), (C)(1)-(2).

The Act does not penalize a non-participating candidate's or independent expenditure committee's decision to spend funds. In fact, spending has risen since the Act was adopted, and campaign finance data indicates that non-participating candidates have not limited their spending because of the Act.[3] Matching funds have, however, become an essential component of the Act's public-financing system such that the injunction Plaintiffs seek would decimate participation rates, drive more candidates into the private financing system, and dramatically increase the risk of a second AzScam. *See* Declaration of Elisabeth Neubauer ("Neubauer Decl."), Ex. A at 71:14-17 (Daniels Dep.); Sandhu Decl., Ex. S at 33:2-24 (Querard Dep.).

III. ARGUMENT

A. APPLICABLE LEGAL STANDARD

In moving for summary judgment, Plaintiffs must show "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Even if Plaintiffs meet their burden, CEI can defeat summary judgment by submitting evidence that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538

[3] *See* Declaration of Donald Green in Support of CEI's Opposition ("Green Decl."), ¶¶ 10-19.

(1986). As the non-moving party, CEI's "evidence 'is to be believed, and all justifiable inferences are to be drawn in [CEI's] favor.'" *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999).[4]

B. LEVEL OF SCRUTINY

Because Plaintiffs have not proven any burden as a result of the Act, this Court need not reach the question of the appropriate standard of review. However, if this Court finds that Plaintiffs have proffered evidence of some modest burden, this Court should reject Plaintiffs' call for the application of strict scrutiny and instead apply an intermediate level of scrutiny. As the Ninth Circuit has held in the campaign-finance context:

> [T]he level of constitutional scrutiny that we apply to a statutory restriction on political speech and associational freedoms is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue. If the [challenged law] places a severe burden on fully protected speech and associational freedoms, we apply strict scrutiny. If [it] places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the *First Amendment*, we apply a lower level of constitutional scrutiny.

Lincoln Club of Orange v. City of Irvine, 292 F.3d 934, 938 (9th Cir. 2001) (internal citations omitted). The Supreme Court's review of campaign finance regulations reflects this flexible approach. *See McConnell v. Federal Election Commission*, 540 U.S. 93, 138-139 (2003) (assessing magnitude of burden and concluding that lesser scrutiny applied to soft money ban); *Buckley v. Valeo,* 424 U.S. 1, 21-23, 25, 44-45 (1976) (identifying magnitude of burden for both contribution and expenditure limits before applying different standards of review). Therefore, this Court must first determine the magnitude of the injury alleged by plaintiffs before determining the appropriate standard of review.[5] Because Plaintiffs cannot demonstrate that the

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[4] Contrary to Plaintiffs' implication, findings at the preliminary injunction stage are not binding at summary judgment or trial. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) (holding that the limited purpose of a preliminary injunction and "the haste that is often necessary" means that "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits"); *Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524, 528 n.4 (7th Cir. 2000) ("[A] court's findings and conclusions at the preliminary injunction stage are by nature preliminary . . . They are typically based on an incomplete record, using a different standard (likelihood of success on the merits), and therefore are not binding at summary judgment.") .

[5] *Amici* attempts to circumvent this threshold step by characterizing the Act as a *de facto* expenditure limit. However, the Supreme Court and the Ninth Circuit have rejected similar

Act imposes any burden on their speech, let alone a "severe burden," this Court should not apply strict scrutiny. Instead, this Court should apply the same intermediate level of scrutiny that the Court in *Buckley* applied to its review of a public funding program—the only applicable precedent here. *Buckley*, 424 U.S. at 96 (upholding a public financing system against First Amendment and Equal Protection challenges because the program was "further[ed]" by "significant" and "important" interests.).

C. THE ACT PROMOTES FIRST AMENDMENT VALUES.

1. PLAINTIFFS' SELF-SERVING CLAIMS THAT THEIR SPEECH HAS BEEN CHILLED ARE INHERENTLY INCREDIBLE.

Although Plaintiffs rely heavily on their own self-serving declarations, their campaign finance reports and testimony definitively contradict their claims to have been "chilled" by the Act, and in fact provide overwhelming evidence that the Act does not abridge speech.

a. STATE TREASURER DEAN MARTIN

Although Plaintiff-Intervenors claim Martin delayed fundraising in 2004 because of matching funds, the record shows otherwise. Martin did not have a publicly-funded opponent in the 2004 election. Even if he had, he would have triggered more than $9,000 in matching funds at the *beginning* of the election period. (Sandhu Decl., Ex. R at 56:16-5:7 (Martin Dep.); Neubauer Decl., Ex. B (List of All Candidate Committees for the 2004 General Election Cycle)).[6]

Plaintiff-Intervenors' claim that "[i]n his 2006 campaign, Martin avoided fundraising to prevent triggering matching funds to his publicly funded opponent" also conflicts with the public record. *See* Plaintiff-Intervenors' Br. ("P-Is' Br.") at 3. Martin did trigger matching funds for his

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arguments and have instead engaged in the flexible standard articulated above. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 138-39, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (rejecting plaintiffs' argument that strict scrutiny applies to ban on the receipt and solicitation of soft money by national parties because the ban was a *de facto* spending limit); *Lincoln Club,* 292 F.3d at 938 (applying the flexible standard despite plaintiffs' claim that the contribution limit in question was really a *de facto* expenditure limit).

[6] By the end of the primary, Martin had received $76,807 and spent only $50,730. Neubauer Decl., Ex. E, (Vote Dean Martin - 2004, 2004 Post-Primary Election Report). The difference of $26,077 was $9,097 more than the initial disbursement amount for participating candidates in the 2004 general election and thus would have triggered $9,097 in matching funds. *See* A.R.S. § 16-952(B) (formula for calculating matching funds in a general election); Neubauer Decl., Ex. B, List of All Candidate Committees for the 2004 General Election Cycle (showing general initial disbursement amount of $16,980 for legislative candidates).

general election opponent in the 2006 election and won his race by 13 points. Neubauer Decl., Ex. C at 1 (List of All Candidate Committees for the 2006 General Election Cycle); *Id.*, Ex. D (2006 General Election Results). Showing just how unimportant matching funds are to Martin's electoral calculus, he could not recall at deposition whether he had ever triggered matching funds.[7] Sandhu Decl., Ex. R at 28:1-4 (Martin Dep.). Martin challenges matching funds, not because he is actually burdened by such funds, but because he is ideologically opposed to public funding as a whole, which he has long sought to "limit, neuter or repeal." *See id.* at 32:20-33:9.

b. STATE SENATOR ROBERT BURNS

Plaintiff-Intervenor Burns, who also categorically "opposes publicly financed campaigns," claims matching funds affected his campaign financing in the 2008 general election. P-Is' Br. at 4-5. Public reports once again tell a different story. In 2008, Burns significantly exceeded the matching funds threshold (as he had done in 2002, 2004 and 2006), by $17,707. Neubauer Decl., Ex. F at 1 (Participating Primary Winner Candidates for the 2008 General Election, Dist. 9); Sandhu Decl., Exs. V-X (CCEC Disbursement Data for 2002-2006).

Burns testified that he paid no attention to his opponents' receipt or expenditure of matching funds. Sandhu Decl., Ex. U at 40:11-41:10, 50:25-51:6 (Burns Dep.). Moreover, Burns, who also ran for office prior to the Act, acknowledged that he was unable to show that his communications with voters had decreased since the Act was adopted.[8] *Id.* at 100:15-103:9.

c. RICK MURPHY

Plaintiff-Intervenor Murphy, who ran as a privately-funded candidate in 2006 and 2008,

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[7] Martin has also alleged that he "may be" coerced into becoming a participating candidate in the 2010 elections. Martin, however, has declined public financing in each of his four prior campaigns. Having won all four campaigns, he has no argument that the traditional option is not a viable choice. Sandhu Decl., Exs. Z-CC (Martin Campaign Finance Reports 2002-2006). In any event, Martin has testified that he did not think an injunction against matching funds would affect his decision whether to accept public funding in 2010. *Id.*, Ex. R at 86:11-87:12 (Martin Dep.).

[8] Not only was Burns's spending uninhibited by matching funds, so, too was the spending of independent expenditure groups, which triggered $10,543 in matching funds for Burns's participating opponent in the 2008 general election. Neubauer Decl., Ex. F at 1 (Participating Primary Winner Candidates for the 2008 General Election, Dist. 9). All told, matching funds made $28,250 available for additional dialogue in Burns's 2008 race, without burdening the speech of Burns or of independent expenditure groups supporting his candidacy.

claims that he "was coerced into accepting public funding" in his first campaign for office in 2004 because of matching funds. P-Is' Br. at 4. That self-serving claim finds no support in the record and conflicts with the testimony of Murphy's own campaign consultant, who explained that as a challenger "in 2004 Rick Murphy would not have been elected if Clean Elections did not exist." Sandhu Decl., Ex. S at 79:17-22 (Querard Dep.). Asked whether Murphy had been coerced into accepting public funding in 2004, the consultant responded: "Coerced, I don't believe so. And he has been traditional the last couple of cycles." Neubauer Decl., Ex. R. at 84:21-24 (Querard Dep.).

Now, having chosen private financing, Murphy claims that matching funds deter him from fundraising and spending. Yet he concedes that matching funds have never led him to turn away a contribution. Neubauer Decl., Ex. G at 54:9-11 (Murphy Dep.). Instead, he claims to have "stopped actively raising money" in the 2006 and 2008 campaigns. P-Is' Br. at 4-6.

But Murphy has adduced no evidence that his fundraising activities (or lack thereof) were attributable to matching funds. In fact, the record reveals that the impetus for Murphy's minimal fundraising activities in 2006 was his choice to run simultaneously for the state legislature and his local school board; Murphy concedes he "didn't campaign as much because of the school board race." Neubauer Decl., Ex. G at 19:20-24, 41:2-9 (Murphy Dep.). Moreover, his consultant testified that Murphy never said that he stopped fundraising due to matching funds. Neubauer Decl., Ex. R at 88:18-89:19 (Querard Dep.).

d. ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC

Plaintiff-Intervenor Freedom Club PAC has no viable claim that the Act has chilled its speech. It does not make independent expenditures. Neubauer Decl., Ex. H at 51:24-52:7 (Voeller Dep.). Instead, it contributes money to Arizonans for a Sound Economy ("ASE"), which in turn makes independent expenditures. As the Freedom Club PAC's treasurer confirmed, matching funds have never prevented the PAC from donating to ASE. *Id.* at 76:8-11.

For its part, ASE has not been deterred from making independent expenditures that trigger matching funds. *Id.* at 64:9-15 ("I don't recall making a decision not to spend money" because of matching funds). Over the last two election cycles, ASE has spent at least $44,250 on

independent expenditures knowing that they could trigger matching funds. *Id.* at 59:14-64:8.

e. ARIZONA TAXPAYERS ACTION COMMITTEE ("ATAC")

Plaintiff-Intervenor ATAC has never failed to spend money because of a fear of triggering matching funds. *Id.*, Ex. I at 142:20-25 (Kirkpatrick Dep.). Contrary to ATAC's claims, any delay in its independent expenditures until late in the 2008 general election cycle had nothing to do with matching funds. As of September 2008, ATAC had just $50 in the bank and throughout the election cycle, it had neither plans nor the intention to raise additional funds. *Id.*, Ex. J at 61:17-22, 62:7-17; 65:10-25; 91:7-11; 67:2-6, 67:8-68:8; 68:9-25; 99:9-100:1 (Wikfors Dep.).

ATAC's assertion that it did not spend money in a 2006 Senate race because of matching funds is directly contradicted by the testimony of ATAC's founder that the group has never withheld money from a race because of matching funds. *Id.*, Ex. I at 142:20-25 (Kirkpatrick Dep.). In fact, ATAC did not spend money in 2006 for the same reason it did not spend money in 2008: it just did not raise enough funds. *Id.*, Ex. J at 41:3-8, 15-22; 43:3-6 (Wikfors Dep.).[9]

In short, Plaintiffs' self-serving claims that their speech is burdened by matching funds are flatly contradicted by the evidence.[10]

2. PLAINTIFFS OVERLOOK CAMPAIGN FINANCE DATA THAT SHOWS THE ACT HAS PROMOTED, RATHER THAN ABRIDGED, FREE SPEECH.

In moving for summary judgment, Plaintiffs fail to mention, much less discredit, the expert findings of Professor Donald E. Green, Director of the Yale Institute for Social and Policy Studies that spending has increased since the Act went into effect and that non-participating candidates' spending has not clustered below the matching funds threshold. These findings in

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[9] The most that ATAC's treasurer could say was that he had heard from his colleague Chad Kirkpatrick that some donors had expressed a concern that their contributions would trigger matching funds. Wikfors could not identify any such contributors. When Kirkpatrick was asked about it at deposition, the only person he could name was Dean Reason, a member of the Free Enterprise Club, which controls Plaintiff-Intervenor Freedom Club PAC. Reason, however, did not say he would withhold donations because of matching funds. Neubauer Decl., Ex. I at 144:3-145:10 (Kirkpatrick Dep.).

[10] In their brief, Plaintiffs (as opposed to Plaintiff-Intervenors) do not discuss how matching funds have burdened them. This is for good reason; the clear evidence shows that neither McComish, Bouie nor McLean were burdened. All triggered matching funds by exceeding the threshold, spending as much as they pleased notwithstanding their knowledge of the Act. *See, e.g.*, Shipman Decl., Exs. 11 at 21; 12 at 9; 21 at 7; Lang Decl., Ex. C.

and of themselves are sufficient to defeat summary judgment, because they demonstrate that the Act has increased, not inhibited, campaign speech.

In dramatic contradiction of Plaintiffs' theory of the case, Green found that, between 1998 (the last election before the Act went into effect) and 2006, overall spending by candidates in Arizona legislative campaigns *increased by almost 400%*. Even among high-spending, non-participating candidates, inflation-adjusted spending increased by at least 20% over that eight-year period. Green Decl. ¶¶14-15, 19.

Green also has found that spending by non-participating candidates did not cluster just below the trigger matching threshold. *Id.* ¶12. That finding is key because, under Plaintiffs' theory that matching funds chill spending, privately-funded candidates in 2006 should have continued spending money *just up to, but not beyond*, the matching funds threshold of $17,918—which would show that potentially they had enough money and a desire to spend more, but chose not to do so because of matching funds. *Id.* ¶11. Green's analysis of expenditures in the 2006 elections, however, revealed no such clustering of spending just below the trigger threshold. *Id.* ¶12. Instead, most candidates either spent significantly less than the threshold—presumably either because they didn't have more or didn't think spending more was worthwhile—or spent more even though it would trigger matching funds. *Id.*

Neither of Plaintiffs' experts address this undisputed finding. Nor are their own findings reliable. Plaintiff-Intervenors' expert, Professor Primo, hypothesizes that non-participating candidates delay their spending until the end of the election to avoid triggering matching funds. As Green points out, under this hypothesis, one would expect to see the spending gap between those non-participating candidates who have participating opponents, on the one hand, and those non-participating candidates who do not have participating opponents, on the other, grow as the election neared—because the former are making their expenditures later in the campaign cycle. *Id.* ¶50; *see also* Neubauer Decl., Ex. K at 8 (Primo Rebuttal Report) (acknowledging that this pattern is "certainly one implication of my argument"). But as *both* Green and Primo found after analyzing Primo's own data, there is no statistically significant evidence that this pattern occurs. *Id.* at 8; Green Decl. ¶53. In addition to Primo's flawed approach of looking at the differences

between the two groups of candidates at a single point in time, the differences—$212.02 for house candidates and just $54.92 for senate candidates—are negligible in the time period Primo considers key. Green Decl. ¶56.

Osborn's opinions are even less reliable. Osborn has not statistically analyzed whether matching funds have any impact on the spending behavior of political actors. Instead, he improperly assumes the role of an advocate, summarizing an article and two pieces of unreliable deposition testimony. While Osborn trumpets the article as finding that "every non-participating candidate felt constrained by the matching funds component," the analysis depends on interviews of just four self-selected non-participating candidates, who Green notes are "sophisticated politicians who clearly understand the policy implications of their complaints about the campaign finance system." *Id.* ¶¶25-29.

Osborn also relies on the testimony of Lori Daniels, an ideological opponent of the Clean Elections Act who was a co-plaintiff of Dean Martin's in a virtually identical challenge to the Act.[11] Neubauer Decl., Ex. A at 74:3-75:3 (Daniels Dep.) ("I don't believe in publicly funded elections. I'm not an advocate of this in any way, shape or form."); *id.*, Ex. L (Complaint from *Association of American Physicians v. Brewer*). Daniels testified, however, that "matching funds, participating candidates didn't really play into what I was thinking . . . . [s]o there was no chilling effect for me personally." Neubauer Decl., Ex. A at 89:18-90:9.[12]

Finally, Osborn uncritically accepts the self-serving declarations of litigants who sued to prevent the Commission from providing matching funds to a participating candidate who had missed a debate and whom the litigants were targeting for defeat in the 2008 general election. Declarations and testimony from that case are not themselves admissible in this case. Fed. R. Evid. 801, 802, 804. Plaintiffs' proffer of Osborn's "expert" testimony does not transform these litigants' self-interested assertions into admissible or probative evidence. Green Decl. ¶34.

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[11] Daniels has since obtained an appointment to the Clean Elections Commission and thus is technically a defendant in this case.

[12] Plaintiffs cite the testimony of two deponents who speculated that it was possible that matching funds could in some unspecified circumstance lessen the likelihood of expenditures being made. *See* Plaintiffs' Br. at 3 (citing testimony of Todd Lang and David Lujan). Neither witness, however, testified that he had actually observed such an effect.

3. MATCHING FUNDS DO NOT BURDEN SPEECH AS A MATTER OF LAW

Plaintiffs' moving briefs entirely disregard the Circuit court decisions that have correctly held that matching funds do not burden free speech as a matter of law. The First Circuit has ruled that a system of matching funds "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). Similarly, the Fourth Circuit has upheld matching funds because the "plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire" and the "provision of matching funds is likely to result in more, not less, speech." *North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437-38 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008).

Ignoring this on-point authority, Plaintiffs focus their attention on the Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S.Ct. 2759, 2773 (2008), which did not address the constitutionality of matching funds or public financing.[13] Instead, *Davis* addressed the constitutionality of a provision of BCRA, the "Millionaire's Amendment," which allowed self-financed candidates' opponents (but not the self-financed candidates) to raise private contributions in larger increments. Importantly, the Court squarely rejected Davis's broad claim that the mere fact that the Millionaire's Amendment increased his opponents' contribution limits resulted in injury to his own speech. *Id.* at 2770 (stating that, if the Millionaire's Amendment had triggered increased "contribution limits for all candidates, Davis' argument would plainly fail"). Instead, the *Davis* Court held more narrowly that the Millionaire's Amendment's application of

[13] Even less relevant are the forced-access cases relied on by Plaintiff-Intervenors. *See* P-I's Opening Br. at 11-12. Those cases struck down laws that "required [the speaker] to use its property . . . to distribute the message of another"—*i.e.*, a utility to print the views of a consumer group in its billing envelopes, a newspaper to print the message of a candidate whom the newspaper had criticized, and parade organizers to allow groups they opposed into their parade. *See Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Because the Act does not require candidates or independent expenditure groups to include in their campaign communications the views of participating opponents, these cases have no significance here.

differential contribution limits to candidates competing against each other for private funds burdened speech because they were "asymmetrical" and "discriminatory." *Id.* at 2770-73.

Such "asymmetry" and "discrimination" between similarly situated privately financed candidates are not at issue in a public financing system. The Act affords all candidates a voluntary choice between the traditional and public financing systems. A candidate who chooses the public option may receive matching funds; but in exchange she must endure the burdens of qualifying, agree to spending limits, attend mandatory debates, and reject most private contributions—all burdens that do not apply to privately-financed candidates. By contrast, under the Millionaire's Amendment, those candidates who were subject to lower contribution limits than their opponent gained no corresponding advantages, and those who benefited from higher limits were subjected to no additional burdens. Matching funds thus are not like the asymmetrical contribution limits that the Millionaire's Amendment applied to privately-financed candidates. Matching funds are a crucial component of the public-financing alternative that the Act provides, an alternative that all candidates are free to pursue or decline and that the Court has upheld. *See Davis*, 128 S. Ct. at 2772, *Buckley*, 424 U.S. at 57 n.65.[14]

D. THE ACT IS APPROPRIATELY TAILORED TO SERVE MULTIPLE COMPELLING GOVERNMENT INTERESTS

Even if Plaintiffs had adduced undisputed evidence that the Act abridged their speech (which they have not), their motions would still be without merit, because the evidence clearly shows that the Act is narrowly tailored to combat the reality or appearance of corruption and promote free speech, both of which represent compelling government interests.[15]

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[14] Plaintiffs misguidedly contend that their First Amendment analysis supports their Equal Protection claim because matching funds "discriminate against traditional candidates for exercising their First Amendment rights by asymmetrically advantaging participating candidates." As explained above, and more fully in Defendant-Intervenor's motion for summary judgment, participating candidates and non-participating candidates are *not* similarly situated, and the Act's differing treatment of those candidates based on their "authentic choice" whether to participate does not implicate equal protection concerns. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 40 n.17 (1st Cir. 1993).

[15] To be narrowly tailored, the Act "need not be the least restrictive means of furthering [the government's] interests, but the restriction may not burden substantially more speech than necessary to further the interests." *Menotti v. City of Seattle*, 409 F.3d 1113, 1130 -1131 (9th Cir. 2005) (quoting *United States v. Baugh,* 187 F.3d 1037, 1043 (9th Cir. 1999)).

1. ARIZONA VOTERS WERE MOTIVATED TO PASS THE ACT BY THEIR COMPELLING INTERESTS IN REDUCING CORRUPTION AND PROMOTING FREE SPEECH.

Although Plaintiffs argue that the Act serves *only* the purpose of "leveling the playing field," the Act's express purposes show that it was designed to further compelling interests. Reflecting the experience of AzScam,[16] the Act's findings expressly state that "our current election-financing system . . . [u]ndermines public confidence in the integrity of public officials." Ariz. Rev. Stat. § 16-940(B)(5). The voters further declared their intent in passing the Act was, among other things, to "improve the integrity of Arizona state government" and to "promote freedom of speech under the U.S. and Arizona Constitutions." Ariz. Rev. Stat. § 16-940(A).[17]

Plaintiffs do not and cannot dispute that combating corruption and the appearance of corruption are compelling interests. *See Buckley*, 424 U.S. at 25-27; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000). "Further[ing] . . . First Amendment values" is also an interest "vital to a self-governing people." *Buckley*, 424 U.S. 92-93.

Plaintiffs' contention that there was no "actual problem of corruption" that justified the Act's passage is meritless. *See* Plaintiffs' Br. at 19. AzScam and the subsequent reports of legislative leadership threatening lobbyists with retribution for failing to support the leadership's chosen candidates proved that the potential for corruption and a perception of corruption under Arizona's existing contribution-limits-only regime was real. *See supra* at 2-3. Plainly, the voters learned that contribution limits, by themselves, were insufficient to protect against corruption.

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[16] It is no answer to Arizonans' first-hand experience with corruption that academic studies have been unable to draw a conclusive link between campaign contributions and official acts. As the Supreme Court has recognized, the studies are conflicting and in any event there is an "absence of any reason to think that public perception has been influenced by the studies." *Nixon,* 528 U.S. at 394-95. Particularly in light of the very broad media coverage of AzScam, the public was well aware that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.*

[17] To the extent the intent of the drafters is relevant, the Act's drafters have also testified that they were concerned about "influence-buying by people giving campaign contributions" and "promoting freedom of speech." Sandhu Decl., Ex. Q at 19:13-25, 20:1-9, 38:23-43:25, 127:18 (Hoffman Dep.); Neubauer Decl., Ex. M at 3:17-22, 34:10-14 (Driscoll Dep.).

2. THE ACT IS TAILORED TO FURTHER THESE COMPELLING INTERESTS.

The principle that public financing furthers these compelling interests is not subject to serious dispute. As far back as *Buckley*, the Supreme Court recognized "public financing as a means of eliminating the improper influence of large private contributions" and as a way to "facilitate[] and enlarge[] public discussion and participation in the electoral process."[18] 424 U.S. at 92-93, 96. The First and Fourth Circuits similarly have recognized that public financing is a constitutional means to promote anti-corruption goals and further free speech. *See Daggett*, 205 F.3d at 471 (stating that a candidate who accepts public funding benefits from "the assurance that contributors will not have an opportunity to seek special access" and from "the avoidance of any appearance of corruption."); *Leake*, 524 F.3d at 438, 440-41 (noting that "the state's public financing system . . . is designed to promote the state's anti-corruption goals" and that matching funds are "likely to result in more, not less, speech").

The Act could not achieve its anti-corruption aims without the matching funds provision. "[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. This truth is supported by declarations of candidates in Arizona, who have confirmed that matching funds played a key role in their decision to accept public funding. Sandhu Decl., Ex. T at ¶5 (Burton Cahill Decl.). Republican campaign consultant Querard similarly testified that, absent matching funds, participation in the clean election system would decline. Sandhu Decl., Ex. S at 32:2-24. Even Commissioner Daniels, a staunch opponent of publicly-funded elections, testified that "we all are aware that if matching funds go away, the chance of candidates running as Clean Elections probably would stop or would put a real damper

[18] *Amici* offers opinion testimony in the form of two "studies" arguing that clean elections programs do not result in any anti-corruption benefit. See Br. (Dckt No. 336) at 13-15. CEI moves to strike this extra-record evidence. *See Friends of Yosemite Valley v. v. Norton*, 194 F. Supp. 2d 1074, (E.D. Ca. 2002) (striking extra-record evidence because such evidence "goes beyond the proper purpose of an amicus brief"). Even though Defendants have had no opportunity to conduct discovery regarding these studies, the studies on their face suffer from fatal design defects and do not support the broad ranging conclusions that are offered. Green Decl. ¶¶67-81.

on that." Neubauer Decl., Ex. A at 71:14-17.[19]

Critically, Plaintiffs present no evidence that participation rates would remain the same if the Court enjoined matching funds. Nor do Plaintiffs present evidence that a "lump sum" alternative would be an equally-effective alternative to matching funds. In fact, Louis Hoffman, the Act's lead drafter, testified that this alternative was considered but rejected because the "wide disparity . . . in the amount of money . . . spent on various races" would mean that any lump sum amount would, if it were low, under-fund most candidates and drive down participation rates *or*, if it were high, needlessly waste money, undermine public confidence in the system, and unduly pressure candidates into taking public funding.[20] Sandhu Decl., Ex. Q at 38:23-43:25.

In their attempt to eviscerate the voter-approved Act, Plaintiffs speculate about a gaming strategy that never actually occurred: so-called "reverse targeting," whereby independent expenditure committees might generate matching funds for a candidate they favor by running advertisements that appear to support, but in fact harm, the candidate they oppose. Plaintiffs claim that in 2008 "independent expenditures were made with the appearance of reverse targeting." Plaintiffs' Br. at 8. What Plaintiffs neglect to tell the Court is that *none* of these independent expenditures generated matching funds for the candidates the independent-expenditure committees supported.[21] In fact, Plaintiffs have not submitted any evidence that an independent expenditure committee has succeeded in triggering matching funds through a reverse-targeting strategy or that a reverse-targeting strategy was even motivated by matching funds. Plaintiffs also argue that candidates in two isolated races used a teaming strategy to trigger matching funds in a manner unanticipated by the Act.[22]

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[19] That individuals who are ideologically opposed to the Act see matching funds as central to candidate participation demonstrates that Plaintiffs hope to use their lawsuit challenging the matching funds provision to destroy the viability of the entirety of Arizona's public financing system. Thus, it is clear that even Plaintiffs see matching funds as inextricably intertwined with the body of the Act.

[20] That CCEC staff have suggested fallback legislation to address the possibility that this Court would enjoin matching funds does not show that Defendants believe the legislation would be an effective alternative to matching funds. Declaration of Todd F. Lang In Support Of Defendants' Response To Plaintiffs' and Plaintiff-Intervenors' Motions For Summary Judgment ¶¶22.

[21] Lang Decl. ¶¶19-20.

[22] CCEC staff has drafted a rule for presentation to the Commission in July 2009 that would

Even if this occurred in a handful of races, the Supreme Court has never held that a campaign finance system must be 100% fool-proof. Instead, the Supreme Court has afforded law making bodies the flexibility to craft solutions that address the circumvention strategies of the day. *See McConnell*, 540 U.S. at 223-224; *Buckley*, 424 U.S. at 105 ("reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (internal citation and quotation marks omitted)).

In short, the evidence clearly shows that Arizona's clean elections system has achieved its goals. It is undisputed that, since the passage of the Act, campaign speech in Arizona has increased, and the state has not suffered any political pay-to-play scandals on par with AzScam. Even if there have been isolated incidents where candidates or donors have attempted to manipulate the system, such occurrences are the rare exception rather than the rule.[23]

IV. CONCLUSION

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

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address the teaming strategy. Lang Decl. ¶23. Plaintiffs complain of a number of other supposed practices—specifically, the collection of $5.00 contributions, the CCEC's lobbying efforts, and the CCEC's enforcement procedures—that are unrelated to the matching funds provisions that Plaintiffs challenge. Plaintiffs have no admissible evidence that any of these practices has resulted in corruption or the appearance of corruption. More importantly, they are irrelevant to the constitutionality of matching funds.

[23] At most, Plaintiffs have shown that the teaming strategy was used in just 2 out of 429 races (.5%) in which there has been a participating candidate. *See* Declaration of Angela Migally In Support Of CEI's Motion For Summary Judgment ¶9.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 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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