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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN McCOMISH, *et al.*, Plaintiffs, v. JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants,	Civil Action No. CV08-1550-PHX-ROS **Plaintiffs-Intervenors' Motion for a Preliminary Injunction** (Assigned to the Honorable Roslyn O. Silver)

Pursuant to Fed. R. Civ. P. 65, Plaintiffs-Intervenors Robert Burns ("Burns"), Rick Murphy ("Murphy"), and the Arizona Taxpayers Action Committee ("Arizona Taxpayers") (and together, the "Intervenor Movants") hereby move this Court for a preliminary injunction prohibiting Defendants from implementing the "matching funds" provisions of Arizona's Citizens Clean Elections Act (the "Act"), Ariz. Rev. Stat. § 16-

* Application for admission *pro hac vice* pending.

952 (B), and (C) ("Equal funding of candidates") in the upcoming Arizona general election scheduled for November 4, 2008. This relief is necessary to prevent irreparable damage to the Intervenor Movants' fundamental First Amendment rights caused by Defendants' continued implementation of the Act's matching funds provisions, which this Court has already determined "violate[] the First Amendment of the U.S. Constitution." Order Den. TRO (the "Order").

Burns and Murphy, privately financed candidates, face the prospect of limiting their speech and abiding by the Act's expenditure limits or risk being outspent by their government funded opponents in the general election because of the Act's operation. *See* Attach. A, Decl. of Robert Burns ("Burns Decl.") ¶¶ 5-7; Attach. B, Decl. of Rick Murphy ("Murphy Decl.") ¶¶ 5-9. Arizona Taxpayers, an Arizona political committee, similarly faces the prospect of deciding whether, or to what extent, to engage in constitutionally protected advocacy by making independent expenditures in support of privately financed candidates or in opposition to a government funded candidate, when such support or opposition may aid the very candidates Arizona Taxpayers opposes. Attach. C, Decl. of Dennis Shane Wikfors ("Wikfors Decl.") ¶¶ 7-9.[1]

This Court should enjoin the enforcement of the Act's matching funds provisions. Intervenor Movants present a compelling case of a strong likelihood of success on the merits. Moreover, because the loss of First Amendment freedoms is per se irreparable

[1] Arizona Taxpayers will supplement its Declaration with a description of each specific race in which the Act will chill its expression once the primary results have come in on September 2, 2008.

injury, and because enforcement of these provisions will irreparably harm Intervenor Movants, they will continue to suffer irreparable harm unless Defendants are enjoined. Finally, the public interest will be served because, absent the issuance of an injunction, such provisions will chill free expression in an area falling within the core of First Amendment protections.

This Motion is based on the argument herein, the attached declarations, and the complaint and other records in this case. A proposed order accompanies this Motion.[2]

STATEMENT OF FACTS

I. The Parties

Burns and Murphy are both privately financed candidates for office in the 2008 general election whose First Amendment rights will be harmed by the Act's matching funds provisions absent an injunction. A.R.S. § 16-952 (B) and (C).

Burns is the current State Senator representing Legislative District 9. Burns Decl. ¶¶ 2-3. He is currently running for re-election to the Arizona State Senate as a privately financed candidate. *Id.* at ¶ 4. In the 2008 general election, Burns' opponent is running with taxpayer funds pursuant to the Act. Burns intends to curtail his speech so as to avoid triggering matching funds to his opponent. *Id.* at ¶ 6.

[2]As more fully described in the accompanying Motion to Intervene, Arizona Taxpayers is a plaintiff in *Martin v. Brewer*, No. CV04-0200 PHX EHC, addressing the same statute in a suit against the same defendants, currently pending in Judge Carroll's court. Arizona Taxpayers, like the other *Martin* Plaintiffs, supports consolidating these cases in one forum. Nonetheless, Arizona Taxpayers is filing this motion so that its interests are fully represented when this Court considers whether to enjoin the Act's operation.

Murphy is a current State Representative in Legislative District 9. Murphy Decl. ¶¶ 2-3. Murphy is currently running for re-election to the Arizona State House as a privately financed candidate. *Id.* at ¶ 4. In the 2008 general election, Murphy will have three government funded opponents in the general election; thus for every dollar he triggers in matching funds, the government will pay out three dollars to his government funded opponents. *Id.* at ¶ 7.

Arizona Taxpayers is an Independent Expenditures Committee organized pursuant to Ariz. Rev. Stat. § 16-902. Wikfors Decl. ¶ 2. In the 2008 general election, it is likely that Arizona Taxpayers' participation will trigger matching funds in at least one race and thus Arizona Taxpayers must decide whether to engage in the political speech that represents its donors' interests and thereby aid the very candidate whom Arizona Taxpayers opposes. *Id.* It is possible Arizona Taxpayers will remain silent in order to avoid triggering the matching funds; alternatively, if Arizona Taxpayers does speak, that speech will be significantly diluted by the triggering of matching funds. *Id.*

Defendants are various Arizona state officials charged with implementing the Act, including enforcing its matching funds provisions. First Amended Complaint at 7, *Martin v. Brewer*, CV 04-0200-PHX-EHC (No. 75).

II. The Act

Arizona voters narrowly passed the "Citizens Clean Elections Act" by initiative in 1998. http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf. It applies to statewide and legislative races. Ariz. Rev. Stat. § 16-950 (D). When a candidate runs a campaign using taxpayer funds, that candidate must consent not to "accept any

additional contributions, including private contributions, in-kind contributions, or any contributions from the candidate personally. The candidate must further agree that all campaign expenditures come from public funds." Jason B. Frasco, Note, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 Cornell L. Rev. 733, 755 (2007) (footnote omitted).

The challenged portions of the Act are entitled "Equal funding of candidates," also known as the "matching funds" provisions. A.R.S. § 16-952. These provisions ensure that, under certain circumstances, taxpayer financed candidates are funded based on the actions of privately financed candidates, individual citizens, and independent groups. Under this scheme, if a privately financed candidate in a general election makes expenditures exceeding the taxpayer financed candidate's general election spending limit (which is the amount of a taxpayer funded candidate's initial lump sum disbursement), the government immediately pays the taxpayer financed candidate an amount equal to the amount the privately financed candidate spent over that limit, minus 6% for the privately financed candidate's fund raising expenses. A.R.S. § 16-952 (B).

This "equal funding" goes to *all* taxpayer-financed candidates running against a privately financed candidate. Thus, if a privately financed candidate makes expenditures of $10,000 and has four primary opponents that receive taxpayer funding, each one of these opponents receives a check for $9,400 ($10,000 minus 6%), for a total government subsidy of $37,600 to counter the privately financed candidate's expenditure of $10,000. This provision is particularly harmful to the free speech interests of Murphy, who faces numerous taxpayer funded opponents in the 2008 general election.

ARGUMENT

A party is entitled to a preliminary injunction upon a showing of either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002) (quotation marks omitted). "[T]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* (quotation marks omitted). In cases where the public interest is involved, the district court must also examine whether the public interest favors the moving party. *Id.* Intervenor Movants readily satisfy these criteria. Intervenor Movants have a strong case on the merits, face irreparable harm, and the public interest favors their position. Accordingly, this Court should issue the requested injunction.

I. Intervenor Movants Are Likely To Succeed On The Merits

As noted above, this Court has already determined that the Act's matching funds provisions "violate[] the First Amendment of the U.S. Constitution." Order at 7. This decision is correct and should continue to guide this Court.

A. The Act Chills Political Expression

i. Campaign Finance Schemes That Burden the Full Expression of Political Viewpoints Chill Speech

Public campaign finance schemes, like the Act, pay matching funds so that publicly financed candidates can counter speech intended to defeat them. Matching funds provisions thus require privately financed candidates and independent groups to

either agree to limit their expenditures or risk triggering the disbursement of public funds to the candidate they oppose. In this way, matching funds provisions impose a penalty on any privately funded candidate or independent group who robustly exercise their First Amendment rights. Many candidates and groups may choose to speak despite the matching funds, but when they speak they shoulder a special and potentially significant burden. *See Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2772 (2008) (citing *Day v. Holahan*, 34 F.3d 1356, 1359-1360 (8th Cir. 1994)).

In *Day*, the Eighth Circuit struck down the matching funds provision in Minnesota's public campaign finance scheme. The Eighth Circuit examined the effect on independent expenditures when the government pays matching funds to the political candidates whose election the independent expenditure is designed to defeat. *Day*, 34 F.3d at 1359. The court found that the threat of triggering payments to government funded candidates caused independent groups to self-censor. *Id.* at 1360. This is because

> [t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech.

Id.

The First Circuit confronted a similar challenge to Maine's matching funds provision, but declined to adopt *Day*'s sound logic. The First Circuit in *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000), upheld a matching funds provision similar to the provisions challenged in this case.

The First Circuit's rejection of *Day* is premised on the oft quoted proposition that, under the First Amendment, individuals "have no right to speak free from response." *Daggett,* 205 F.3d at 464. Intervenor Movants agree that the First Amendment does not protect a right to speak free from response. But objecting to being "directly responsible for adding to" the campaign coffers of a candidate the speaker opposes is a far cry from asserting a right to speak free from response. *Day*, 34 F.3d at 1360.

The First Circuit, like Defendants here, failed to account for the true cost to candidates and independent groups of triggering matching funds when they speak out against a government funded candidate: namely, there is a chilling effect on the exercise of constitutionally protected speech when the direct result of that speech is to provide one's opponent with a large cash subsidy. *See* Burns Decl. ¶ 5 ("These provisions force me to censor myself in order to avoid triggering matching funds to my government funded opponent."); Murphy Decl. ¶ 9 ("I may be forced by the operation of the Act to stop accepting contributions to my campaign to make sure that I do not exceed the Act's expenditure limitations for this race, despite the fact that I would like to continue to collect contributions in order to communicate with the voters of [] my district."); Wikfors Decl. ¶ 9 ("The knowledge that a candidate Arizona Taxpayers does not want to be elected will receive a government subsidy, as a direct result of Arizona Taxpayers speech, will prevent Arizona Taxpayers from the full and unrestricted exercise of its speech in such races."). Even courts that have upheld such provisions have recognized that matching funds are designed to, and do, interfere with the full expression of First Amendment rights. *See Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998) ("'Speech

will be stifled to some degree by the fear that the [government funded] candidate will clearly 'outspend' the [privately financed] candidate once the cap is lifted.'") (quoting the district court's opinion).

Quite simply, under the Act, the harder privately financed candidates, like Burns or Murphy, work at fundraising, the more their government funded opponents benefit. Matching funds give government funded candidates a free ride on their privately financed opponents' expressive coattails. The result is that privately funded candidates face two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme. The end result is a chilling of speech and a related diminution of information conveyed to the voters of this State.[3]

ii. The Act Has Chilled Political Expression by Privately Financed Candidates

The chilling effect of matching funds provisions recognized in the abstract by the Eighth Circuit has been borne out in reality. As discussed in the attached declaration of Dick Carpenter, the Act's effect in practice has been to significantly decrease spending on political campaigns by privately financed candidates, while providing funds for government financed candidates to significantly outspend any privately financed opponents. The end result of this disparity suggests that the Act's ultimate result is to chill political expression by any privately financed candidate with a corresponding

[$] Arizona's increased reporting requirements tie up privately financed candidates' time and resources without making the political process more transparent. The only purpose

expansion of political influence by their government funded opponents. *See* Attach. D, Decl. of Dick Carpenter.

B. The Act's Justification Is Not Compelling or Even Legitimate

A government restriction on speech may survive constitutional scrutiny if it is narrowly tailored to serve a compelling government interest. *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007). The governmental goal underlying matching fund provisions is to equalize the relative financial resources of publicly and privately funded candidates. *See* Ariz. Rev. Stat. § 16-952. Public campaign finance schemes intend to level the playing field so that privately financed candidates do not outspend their government funded opponents. But leveling the resources of competing speakers is not a compelling government interest—in fact, it is not even a legitimate one. As the Supreme Court recently recognized in *Davis*, it is a concept "'wholly foreign to the First Amendment.'" *Davis*, 128 S. Ct. at 2773 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

While *Davis* did not deal with a public campaign finance system, but rather with the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act of 2002, nonetheless, it has significant implications for public campaign finance systems. In particular, the Court found that:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office … Leveling electoral opportunities

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of the reporting requirements is to facilitate equalization payments to government subsidized candidates. #

> means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.

Id. at 2773-74.

Given that public financing efforts, including the Act, have been presented repeatedly and clearly as a means to "level the playing field" in elections, it is clear that this justification cannot provide sufficient support for a system that so heavily burdens First Amendment rights. As *Davis* made clear, the entire purpose behind the Act is simply not a legitimate government interest and cannot support *any* law that results in a reduction in free speech rights.

C. The Act's Justification Is Undermined By Its Capacity for Abuse

As this Court recognized in the Order denying the *McComish* Plaintiffs' motion for a temporary restraining order, "the Act opens up new avenues for possible corruption." Order at 7. Indeed, the very day this Court issued that Order, the *Arizona Daily Star* reported that candidates for the Arizona Corporation Commission have begun to run in privately funded/government funded "slates" in order to "kick[] up Clean Elections disbursements, as they pool their money for costly campaign expenses such as TV ads." Attach. E, Shelley Shelton, *Non-participant is boon for rivals in Clean Elections,* Az. Daily Star, Aug. 29, 2008. One candidate not receiving public funds described this approach as "'politics as usual. That's how politicians play the game. And it's how well-connected people move into these statewide positions with a vested

interest.'" *Id.* Thus, as this Court recognized in its Order regarding such a "slate" strategy, "[t]he possibility of such gamesmanship mitigates against any decrease in corruption or in the appearance of corruption." Order at 7.

II. Absent An Injunction, Intervenor Movants Will Be Irreparably Harmed

Intervenor Movants have demonstrated a strong likelihood of success on the merits because the Act violates their speech rights and is unsupported by a legitimate government interest. Because of the strength of the merits in this case, Intervenor Movants need only show a "possibility of irreparable harm" under the Ninth Circuit's standards. *Sammartano,* 303 F.3d at 965 (quotation marks omitted). Indeed, Plaintiffs have shown much more than a possibility of irreparable harm because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Moreover, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano*, 303 F.3d at 973 (quotation marks omitted). In the Ninth Circuit, "when the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness." *Id.* at 974. Because Intervenor Movants "have not only stated a colorable First Amendment claim, but one that is likely to prevail[,] they have thus established the potential for irreparable injury" entitling them

to a preliminary injunction. *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003).

III. The Balance of Harms and the Public Interest Weigh In Favor of Granting An Injunction

In determining whether to grant a preliminary injunction where the public interest is involved, a court must consider whether the balance of public interests weighs in favor of granting or denying injunctive relief. *Westlands Water Dist. v. Natural Res. Def. Council,* 43 F.3d 457, 459 (9th Cir. 1994). The public interest weighs heavily in favor of enjoining the continued enforcement of the Act's matching funds provisions. Unlike the *McComish* Plaintiffs' desired temporary restraining order, which sought to alter the funding mechanism for an election a few days away, the general election in Arizona is more than two months away from the date of this Motion. This is clearly enough time for government funded candidates to obtain traditional funding, especially in light of the fact that such candidates were on notice that such provisions were on shaky constitutional grounds after the U.S. Supreme Court's decision in *Davis,* and certainly after this Court's Order holding that the Act violated First Amendment rights.

In that regard, it is well established that allowing enforcement of unconstitutional laws does not advance the public interest. "Curtailing constitutionally protected speech will not advance the public interest, and neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Am. Civil Liberties Union v. Reno,* 217 F.3d 162, 180-81 (3rd Cir. 2000), *vacated on other grounds, Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564 (2002) (quotation marks omitted).

This is even more apparent when confronted with a law that chills political speech about the very people the voters of the state of Arizona will elect to govern them.

CONCLUSION

For the reasons set forth above, as supported by the materials filed concurrently with this Motion, Intervenor Movants respectfully request that this Court enter a preliminary injunction pursuant to Fed. R. Civ. P. 65 preventing Defendants and any officer, employee, or agent of the Defendants, from enforcing the Act's matching funds provisions pending this Court's final judgment in this action.

RESPECTFULLY SUBMITTED this 1st day of September, 2008.

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Certificate of Service

I hereby certify that on **September 1, 2008**, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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