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IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	Civil Action No. 08-1550-PHX-ROS **Brief of *Amicus Curiae* Center for Competitive Politics In Support of Plaintiffs and Plaintiff-Intervenors on Summary Judgment** (Assigned to the Honorable Roslyn O. Silver)

BRIEF OF *AMICUS CURIAE*
CENTER FOR COMPETITIVE POLITICS
IN SUPPORT OF PLAINTIFFS AND PLAINTIFF-INTERVENORS
ON SUMMARY JUDGMENT

Pursuant to this Court's Order entered on June 10, 2009, *see* Order (Dkt. # 284), the Center for Competitive Politics (the "Center") hereby respectfully submits its Brief of *Amicus Curiae* in Support of Plaintiffs and Plaintiff-Intervenors on Summary Judgment.

I. INTRODUCTION

On two previous occasions, this Court has ruled that Plaintiffs and Plaintiff-Intervenors[1] "have shown a high likelihood of success on the merits" of their facial and as-applied constitutional challenges to the Matching Funds provisions[2] of Arizona's Citizens Clean Elections Act. Findings of Fact & Conclusions of Law (Dkt. #185), at 15:3; *see also* Order (Dkt. #30), at 7:18-19 ("Plaintiffs have established that the Matching Funds provision[s] of the Act violate[ ]the First Amendment"). Specifically, this Court has explained that, under the rule and rationale of the Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), Arizona's Matching Funds provisions impose the same type of unconstitutional penalty on "traditional candidates"[3] for exercising their First Amendment rights to make unlimited, lawful, and constitutionally-protected campaign expenditures as did the asymmetrical contribution limits scheme at issue in *Davis*. *See generally* Findings of Fact & Conclusions of Law

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[1] For ease, this Brief will refer to Plaintiffs and Plaintiff-Intervenors collectively as "Plaintiffs," unless specifically referring to one or the other. Likewise, this Brief will refer to Defendants and Defendant-Intervenor collectively as "Defendants," unless specifically referring to one or the other.

[2] Plaintiffs constitutionally challenge the provision of Matching Funds to competing participating candidates, *see* Ariz. Rev. Stat. §§ 16-952(A)-(C), as well as the disclosure requirements that enable the provision of such Matching Funds, *see* Ariz. Rev. Stat. §§ 16-941(B)(2) and 16-958.

[3] This Brief will refer to candidates who do not accept public funding under Arizona's Clean Elections Act as "traditional candidates," and those who do as "participating candidates."

(Dkt. #185), at 7:6-15:3; Order (Dkt. #30), at 5:17-7:19. Indeed, just like the Matching Funds provisions in Arizona, *see* Ariz. Rev. Stat. §§ 16-952(A)-(C), the asymmetrical contribution limits struck down in *Davis* were triggered by a "financial imbalance" between competing candidates, leading to "the effect of enabling [the triggering candidate's] opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of [the triggering candidate's] own speech," 128 S. Ct. at 2770. Nevertheless, this Court denied Plaintiffs' Motions for a Temporary Restraining Order and a Preliminary Injunction on the grounds that it would have been inappropriate for this Court to intervene in then ongoing campaigns and impending elections. *See* Findings of Fact & Conclusions of Law (Dkt. #185), at 15:15-18:21; Order (Dkt. #30), at 7:26-9:4.

The elections are now over, and the parties and intervenors have filed cross motions for summary judgment. Thus, this Court should now enter summary judgment for the Plaintiffs, declare the Matching Funds provisions of Arizona's Clean Elections Act unconstitutional on their face and as-applied, and permanently enjoin them. Such judicial action is necessary and appropriate because the Matching Funds provisions are subject to strict scrutiny and cannot pass constitutional muster under that "well-nigh insurmountable" standard. *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

II. THE MATCHING FUNDS PROVISIONS ARE SUBJECT TO CONSTITUTIONAL STRICT SCRUTINY

In their summary judgment motions, Defendants attempt to lower the level of constitutional scrutiny applicable to the Matching Funds provisions by arguing that the

Matching Funds "promote[ ], rather than abridge[ ] free speech," and thus "do[ ] not have to survive a heightened level of scrutiny." Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. #286), at 12:14-15; *see also* Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 1:20 ("the Act is designed to increase the amount of political speech"), 5:24-26, 7:6-7 ("matching funds serve to advance First Amendment values"). But in so arguing, Defendants totally miss the actual issue raised in this litigation by attempting to distract the Court from the specific constitutional claims and injuries alleged by Plaintiffs. After all, by asserting an alleged increase in the totality of speech by all candidates, Defendants ignore and obscure the fact that the Matching Funds provisions burden, suppress, and chill campaign speech of *traditional* candidates (and their supporters) by triggering "[e]qual funding" for *opposing participating* candidates. Ariz. Rev. Stat. §§ 16-952. Thus, when properly focused on the constitutional claims alleged and injuries suffered by Plaintiffs, it is clear the Matching Funds provisions are subject to strict scrutiny because they (1) "impose[ ] a substantial burden on" traditional candidates' (and their supporters') "exercise of the[ir] First Amendment right[s]," *Davis*, 128 S. Ct. at 2772, and (2) act as impermissible *de facto* expenditure limitations on traditional candidates (and their supporters).

A. The Matching Funds Provisions Substantially Burden the First Amendment Rights of Traditional Candidates and Their Supporters

As this Court has recognized in its previous two rulings, Arizona's Matching Funds provisions substantially burden the First Amendment rights of traditional candidates (and their supporters) in precisely the same way as did the federal

Millionaire's Amendment in *Davis* — namely, by "impos[ing] an unprecedented penalty on any [traditional] candidate who" chooses to "robustly exercise[his or her] First Amendment right[s]."[4] 128 S. Ct. at 2771. Indeed, the penalty imposed by Arizona's Matching Funds provisions on traditional candidates is even more severe and direct than was imposed by the Millionaire's Amendment struck down in *Davis* because, if a traditional candidate (or his supporters) triggers Matching Funds to a participating opponent in Arizona, that opponent is *certain* to receive dollar-for-dollar opposition public funds, *see* Ariz. Rev. Stat. §§ 16-952(A)-(C), while under the Millionaire's Amendment the opposing candidate was provided with only the *opportunity* to raise additional funds under asymmetrical contribution limits, *see Davis*, 128 S. Ct. at 2766. Thus, even more so than in *Davis*, traditional candidates (and their supporters) in Arizona find that "the vigorous exercise of the[ir First Amendment] right[s] to use [lawfully contributed and constitutionally protected] funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772. As the Supreme Court held in *Davis*, such a regulatory scheme "imposes a

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[4] While it is true, as Defendants point out, *see* Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 6:25-26, n.7, that the First Amendment right being exercised in *Davis* was that of candidate self-financing, that fact does not make the constitutional rule and rationale derived from *Davis* inapplicable here. Not only has the Supreme Court been clear that the First Amendment protects the right of candidates to engage in unlimited expenditures of lawfully contributed campaign funds, whether they come from the candidates themselves, contributors, or PACs, *see*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 39-58 (1976), but also the unconstitutional choice imposed on traditional candidates by Arizona's Matching Funds provisions is the same as that struck down in *Davis* — either "abide by a limit on [campaign] expenditures or endure the burden that is placed on that [First Amendment] right by the activation of a scheme of discriminatory" counter-funding, 128 S. Ct. at 2772.

substantial burden on the exercise of the First Amendment right to use [candidate] funds for campaign speech," which "cannot stand unless it is 'justified by a compelling state interest'" and is narrowly tailored to that interest (*i.e.*, strict scrutiny). *Id*. (quoting *Federal Election Comm'n v. Mass. Citizens for Life, Inc*., 479 U.S. 238, 256 (1986) (citations omitted).

B. The Matching Funds Provisions Act as Expenditure Limitations Against Traditional Candidates and Their Supporters

Strict scrutiny is also applicable to Arizona's Matching Funds provisions because they act as *de facto* expenditure limitations against traditional candidates (and their supporters), despite the fact that traditional candidates (and their supporters) never agree to limit their First Amendment rights by participating in the public financing regime.

It is hornbook law that, while candidate contribution limits can be upheld as constitutionally permissible if they are "closely drawn to match a sufficiently important government interest," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136, n.39 (2003) (quotations omitted); *see also Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25), candidate expenditure limits are subject to strict scrutiny and must be struck down unless they are narrowly tailored to a compelling governmental interest, *see, e.g.*, *McConnell*, 540 U.S. at 291 (Kennedy, J. concurring in part and dissenting in part) ("*Buckley* subjected expenditure limits to strict scrutiny"); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990)) ("Expenditure limitations are subject to strict scrutiny and will be upheld only if

they are 'narrowly tailored to serve a compelling state interest.'); *see also generally Buckley*, 424 U.S. at 39-58 (striking down expenditure limits). Indeed, the Supreme Court has *never* upheld — or subjected to less than strict scrutiny — any expenditure limit imposed on candidates who reject public funding for their campaigns. *See, e.g.*, *Randall*, 548 U.S. at 242 ("Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints, including those on expenditure limits.") (citing cases).

Rather, the sole context in which the Supreme Court has upheld an expenditure limit is when a candidate voluntarily agrees to such an expenditure limitation as part of gaining access to public funds for his or her campaign. *See Buckley*, 424 U.S. at 57, n.65; *see also generally Buckley*, 424 U.S. at 85-108. Of course, this is not the case here with respect to Plaintiffs — and all traditional candidates — who decline to participate in Arizona's public financing scheme, instead choosing to be able to fully and freely exercise their First Amendment rights to raise and spend unlimited amounts of lawful campaign contributions by foregoing any public financing of their campaigns. This is why Plaintiffs complain that Arizona's Matching Funds provisions are unconstitutional. After all, by providing additional dollar-for-dollar counter-financing to participating candidates when a competing traditional candidate exceeds the limits that are accepted only by those who take public funding, the Matching Funds provisions end up imposing those same limitations on traditional candidates, who expressly reject public financing and the campaign finance limitations that come with it.

In other words, under Arizona's Matching Funds Provisions, traditional candidates are provided with no real choice at all. Sure they can reject public funding, but the consequence, as this Court has previously observed, "is substantially the same" because Arizona's Matching Funds provisions "force[ ] a [traditional] candidate to choose to 'abide by a limit on [campaign] expenditures' or else endure a burden placed on that right" via the dollar-for-dollar grant of additional public funding to each participating opponent when the traditional candidate exceeds the limits he or she rejected in the first place. Order (Dkt. #30), at 7:2-5 (quoting *Davis*, 128 S. Ct. at 2772); *see also* Findings of Fact & Conclusion of Law (Dkt. #185), at 10:18-27 (same).

As the Supreme Court explained in *Davis*, the *de facto* imposition of such limits on candidates who choose to exercise their First Amendment rights to receive and spend unlimited amounts of lawful and constitutionally protected campaign contributions subjects the scheme to strict scrutiny:

> The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice. In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. But the choice involved in *Buckley* was quite different from the choice imposed by [the Millionaire's Amendment]. In *Buckley*, a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, [the Millionaire's Amendment] does not provide any way in which a candidate can exercise that right without abridgment. . . . The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*.

128 S. Ct. at 2772 (citation omitted). Indeed, this Court has previously quoted that language as controlling with respect to why Arizona's Matching Funds provisions are

subject to strict scrutiny, *see* Findings of Fact & Conclusions of Law (Dkt. #185), at 10:18-27; and there is no reason this Court's previous reasoning that the Matching Funds provisions must be strictly scrutinized for impermissibly imposing *de facto* expenditure limitations on traditional candidates (and their supporters) should change.

III. NO COMPELLING STATE INTEREST SUPPORTS THE MATCHING FUNDS PROVISIONS

Being subject to strict scrutiny, Arizona's Matching Funds provisions must be supported by a compelling interest, but they are not. Rather, not only is it readily apparent that the purpose of the Matching Funds provisions is to unconstitutionally level the electoral opportunities between traditional and participating candidates, *see*, *e.g.*, *Davis*, 128 S. Ct. at 2773-74, but the Matching Funds provisions also undermine and provide new and additional opportunities to frustrate the only compelling governmental interest in sustaining campaign finance restrictions — preventing corruption or the appearance of corruption, *see*, *e.g.*, *id.* at 2773 (quoting *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 496-97 (1985)) (citation omitted).

A. The Obvious and Admitted Purpose of the Matching Funds Provisions Is to Level the Electoral Opportunities Between Competing Candidates

Even if it was not obvious from the Section's title — "Equal funding of candidates," Ariz. Rev. Stat. § 16-952 — that the purpose of Arizona's Matching Funds provisions is the constitutionally illegitimate one of leveling electoral opportunities between traditional and participating candidates, such a purpose is clear from both the operation of the Matching Funds provisions and the Defendants' defense of them as part

of Arizona's public funding scheme. After all, not only are there the self-evident financial equalization aims of the Matching Funds provisions — which provide additional dollar-for-dollar public financing to opposing participating candidates when traditional candidates (and their supporters) outspend participating candidates in the primary election period, *see* Ariz. Rev. Stat. §§ 16-952(A) & (C), and outraise or outspend participating candidates in the general election period, *see* Ariz. Rev. Stat. §§ 16-952(B) & (C) — but also Defendants are forced to admit in their briefs that the true intention of the Matching Funds provisions is to level electoral opportunities so that participating candidates will not face a financial disadvantage that would make them reluctant to accept public funding, *see*, *e.g.*, Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 5:24-26, 7:6-8, 12:12-17 & 21-22, 13:1-2; Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. #286), at 6:27-7:1.

Of course, being subject to strict scrutiny, Defendants cannot successfully seek to have this Court uphold the Matching Funds provisions as "an important component" part of Arizona's public funding scheme as a whole. Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 12:9. Instead, Defendants must prove the Matching Funds provisions, by themselves, are supported by a compelling interest because, as the Supreme Court has held, a "court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech." *Federal Election Comm'n v. Wis. Right to Life, Inc.* (*WRTL*), 127 S. Ct. 2652, 2672 (2007) (emphasis in original). Indeed, as Plaintiff-Intervenors correctly note, "[r]estrictions that exist simply to enable other portions of a statute to operate do not satisfy strict scrutiny." Mem. in

Supp. of Pl.-Intervenors' Mot. for Summ. J. (Dkt. #288-2), at 6:24-7:2 (citing *WRTL*, 127 S. Ct. at 2672).

Nevertheless, Defendants still pin their constitutional defense of the Matching Funds provisions on their being an integral part of Arizona's larger public funding scheme. Such a defense does not satisfy strict scrutiny, and only draws attention to the constitutionally illegitimate purpose of the Matching Funds provisions. Therefore, Defendants' statements that

> (1) "Matching funds play an important role in a candidate's decision to participate in the public funding system [because, without such Funds, a] participating candidate would receive only a modest public disbursement, after which she could be grossly outspent by a[traditional] opponent [and his supporters] unconstrained by limits on expenditures or contributions," Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 12:14-17; and
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> (2) "Without matching funds, 'the State could reasonably believe that far fewer candidates would enroll in its campaign finance program,' Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 13:1-2 (citation omitted);

must be seen for what they are — admissions that the Matching Funds provisions were designed and are intended to impermissibly level electoral opportunities between participating and traditional candidates.[5] Moreover, it becomes quite obvious that even Defendants cannot escape the fact that the Matching Funds provisions advance the illegitimate purpose of "'equalizing the financial resources of candidates'" rejected most

[5] The same is true of Defendant-Intervenor's statements that (1) "To encourage sufficient participation by counteracting the fear that a participating candidate will be outspent by a traditionally-funded opponent or an independent expenditure committee, the Act provides additional matching funds," Mem. in Supp. of Def.-Intervenor's Mot. for Summ. J. (Dkt. # 286), at 6:27-7:1; and (2) that the Matching Funds provisions are "an integral part of the package of benefits . . . that candidates accept when choosing whether to participate . . . and [are] necessary to incentivize the levels of candidate participation required to make the program successful," *id.* at 7:10-13.

recently in *Davis*, 128 S. Ct. at 2773 (quoting *Buckley*, 424 U.S. at 56), since throughout their submissions Defendants continue to insist that "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" — triggered, of course, by the exercise of traditional candidates' (and their supporters') First Amendment rights. *E.g.*, Defs.' Mot. & Mem. in Supp. of Mot. for Summ. J. (Dkt. #293), at 5:25-26 (citation omitted).

The Supreme Court has been consistently and unequivocally clear that such a purpose violates the First Amendment. Indeed, in soundly rejecting the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" in *Buckley*, the Court emphatically held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49; *see also Davis*, 128 S. Ct. 2773 (same). The *Davis* decision only amplifies the constitutional illegitimacy of the government using campaign finance restrictions for the purpose of leveling candidate electoral opportunities, noting that

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit [the government] to arrogate the voters' authority to evaluate the strengths of candidates competing for office. Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities 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 [the government], the power to choose the[ir elected

> r]epresentatives, . . . and it is a dangerous business for [the government] to use the election laws to influence the voters' choices.

128 S. Ct. 2773-74 (citations omitted). Because Arizona's Matching Funds provisions advance precisely that illegitimate purpose, they are unconstitutional both on their face and as-applied for that reason alone.

B. Any Asserted Interest in Eliminating Corruption or Its Appearance Is Frustrated by the Matching Funds Provisions

As this Court has recognized previously, the only compelling state interest that can support the Matching Funds provisions such that they are able to survive strict scrutiny is the interest in preventing candidate corruption or the appearance of such corruption. *See* Findings of Fact & Conclusions of Law (Dkt. #185), at 11:17-22 (quoting *Davis*, 128 S. Ct. at 2773 (quoting *NCPAC*, 470 U.S. at 496-97)); *see also* Order (Dkt. #30), at 6:9-10. But, as Plaintiffs detail extensively in their submissions, the Matching Funds provisions actually provide new and additional opportunities that frustrate any alleged interest in eliminating candidate corruption or its appearance by allowing for (1) "teaming strategies" between traditional and participating candidates, and (2) "reverse targeting strategies" against traditional candidates, both to trigger Matching Funds, and hence additional campaign financing for the very candidates employing such strategies. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. (Dkt. #297), at 6:18-8:27; *see also* Findings of Fact & Conclusions of Law (Dkt. #185), at 12:18-14:3 (concluding "this potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere"); Order (Dkt. # 30), at 7:9-17. Additionally, Plaintiffs point

out that "the phenomena of 'bundling'" further undermines any interest in preventing corruption or its appearance because "participating candidates have an even stronger incentive to rely on bundlers than do traditional candidates" as a result of their "minimal resources," along with the fact that the need to qualify for public funds entitles participating candidates "not just [to] the amount bundled, but also the public financing," including matching funds that can triple the original lump sum grant of public financing." Mem. in Supp. of Pls.' Mot. for Summ. J. (Dkt. # 197), at 8:28-9:18.

Indeed, *Amicus*' own research concerning so-called "Clean Elections" programs in various states, including Arizona, has found no anti-corruption or anti-appearance benefit deriving from such regimes. Most notably, following a 2007 pilot "Clean Elections" program in New Jersey (that mimicked the features of Arizona's Clean Elections Act), *Amicus* studied the donors to participating candidates and their perceptions of their legislators through a survey mailed "to every individual who contributed $10 to at least one 'Clean Elections' candidate in either the 14th or 24th legislative districts." Sean Parnell, Laura Renz & Sarah Falkenstein, *Special Interests, Partisan Pouts, and the Usual Suspects: A Study of Donors to New Jersey's "Clean Elections" Candidates in 2007*, Feb. 2009, at 23 (in Appendix B – Methodology) (available at http://www.campaignfreedom.org/docLib/20090223_SR1NJ.pdf). Tellingly, the findings from that study directly contradict any assertion that "Clean Elections" programs, including Matching Funds, result in advancing any interest in reducing corruption or the perception of corruption on the part of donors. Indeed, perhaps the most notable finding of the survey showed that "[t]he donor group most supportive of 'clean elections' was

most likely to believe their own 'clean' legislators favored party and special interests over constituents interests." *Id.* at 7; *see also id.* at 7-9. Also important were the findings that (1) "Organized interest groups supplied nearly half of all qualifying contributions to 'clean election' candidates," and (2) "A majority of these interest group contributors were affiliated with just six groups." *Id.* at 19 (Summary of Findings and Conclusions); *see also id.* at 3-6. These dual findings provide empirical credence to Plaintiffs' argument that bundling (or soliciting) by interest groups plays a more prominent role for participating candidates than for traditional candidates, thus undermining any assertion that so-called "Clean Elections" programs serve any interest in reducing the perception of corruption (and the influence of special interests).

Another study by *Amicus* demonstrates that such a resulting lack of faith in the ability of "Clean Elections" programs to reduce corruption or its appearance, especially in Arizona, is well founded on the part of the public. In a paper published in September 2008, *Amicus* studied whether publicly financed campaigns in Arizona and Maine had led to reduced spending growth by those state governments. *See* Sean Parnell, *Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?*, Sept. 2008 (available at http://www.campaignfreedom.org/docLib/20080930_Issue_Analysis_4.pdf). The issue is particularly significant here, where one of the "Findings and declarations" supporting Arizona's Clean Election Act was that the "current [private] election-financing system . . . [c]osts average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors." Ariz. Rev. Stat. § 16-940(B)(6). However, *Amicus*' study found that, while "[b]oth Arizona and Maine had below-average spending

growth [compared to the national average] before taxpayer-funded campaigns were enacted[, o]nce legislators began relying upon taxpayer dollars to fund their political campaigns, both states' spending grew at a faster rate than the national average." *Id.* at 3. Thus, the study concluded that, "[b]ased on the actual experience of [Arizona], there is no evidence to support the claim that replacing private, voluntary contributions to candidates with public funds will lead to savings for taxpayers . . . in the form of reduced spending." *Id.*

All of these findings by *Amicus*' research only add to the already abundant submissions by Plaintiffs demonstrating that Arizona's Clean Elections Act — and more specifically its Matching Funds provisions — has neither reduced candidate and officeholder corruption nor the appearance of such corruption perceived by the public-at-large. That Defendants are able to turn up and point at a few decades-old examples of corruption — dealt with under existing and separate laws — does not, and cannot, change the fact that the Matching Funds provisions do nothing to prevent such public ills. In short, while the Matching Funds provisions advance the illegitimate interest in leveling electoral opportunities between traditional and participating candidates, those same provisions — and, indeed, the whole Clean Elections Act — have never been shown to advance the only constitutionally legitimate interest in preventing corruption or its appearance, and instead have only provided candidates (and their supporters) new and additional opportunities to frustrate that goal.

IV. THE MATCHING FUNDS PROVISIONS FAIL NARROW TAILORING BECAUSE PUBLIC FUNDING COULD OCCUR WITHOUT ABRIDGING THE FIRST AMENDMENT RIGHTS OF TRADITIONAL CANDIDATES

Once it is clear that Arizona's Matching Funds provisions advance not the legitimate compelling interest in preventing corruption and its appearance, but rather the illegitimate interest in "[e]qual funding of candidates," Ariz. Rev. Stat. § 16-952, it also becomes clear that the Matching Funds fail narrow tailoring because Arizona's public campaign financing could be implemented without abridging the First Amendment rights of traditional candidates. In fact, on the federal level, public financing proponents have dropped triggered Matching Funds from the "Fair Elections Now Act" — proposed not only in the current Congress after the *Davis* decision, but also in the previous one before that ruling — because of their understanding that the provision of participating candidate Matching Funds triggered by traditional candidate fundraising or spending violates both the constitutional rule and rationale of *Davis*, *see* 128 S. Ct. at 2770-74. *Compare*, *e.g.*, S. 752 (111th Cong. introduced Mar. 31, 2009) (excluding triggered matching funds); *with* S. 1285 (110th Cong. introduced May 3, 2007) (including them). Instead, under the current proposed "Fair Elections Now Act," public financing is provided to participating candidates through a combination of a lump sum allotment provided upon qualification for each election, additional financing provided though public quadrupling of qualifying small dollar contributions, and advertising vouchers. *See*, *e.g.*, S. 752 (111th Cong.), §§ 521-524. In other words, under the currently proposed "Fair Elections Now Act," the fundraising or spending of traditional candidates has nothing to do with the public financing available to participating candidates, which also means that the public funding

is not an unconstitutional punitive consequence of a traditional candidate's (or his supporters') exercise of First Amendment rights.

Of course, public financing need not be so elaborate. As Plaintiffs note, "there is one obviously plausible alternative to Matching Funds: Lump sum public financing." Mem. in Supp. of Pls.' Mot. for Summ. J. (Dkt. #297), at 24:5-6. But regardless of the public funding mechanism chosen, what is constitutionally obvious is that narrow tailoring means nothing and must be absent when opponents reap public financing rewards in the form of Matching Funds specifically tailored to and triggered by the exercise of First Amendment rights by traditional candidates, as is the case with Arizona's provisions.

V. THE MATCHING FUNDS DISCLOSURE REQUIREMENTS MUST FALL SINCE THE MATCHING FUNDS ARE UNCONSTITUTIONAL

Finally, just as in *Davis*, because Arizona's "disclosure requirements were designed to implement the" Matching Funds provisions provided for in Ariz. Rev. Stat. §§ 16-952(A)-(C), those disclosure requirements, *see* Ariz. Rev. Stat. §§ 16-941(B)(2) and 16-958, must fall, too, since their "burden . . . cannot be justified" when the Matching Funds provisions they implement are themselves unconstitutional. 128 S. Ct. at 2775.

VI. CONCLUSION

For the reasons stated herein, this Court should grant Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment, declare Arizona's Matching Funds provisions and disclosure requirements unconstitutional on their face and as-applied, and permanently enjoin them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2009, I served copies of the foregoing Brief of *Amicus Curiae* Center for Competitive Politics in Support of Plaintiffs and Plaintiff-Intervenors on Summary Judgment upon the following counsel of record reflected in the docket via the Court's CM/ECF system:

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