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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*, Plaintiffs, and DEAN MARTIN, *et al.*, Plaintiff-Intervenors, v. KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*, Defendants, and CLEAN ELECTIONS INSTITUTE, INC., Defendant-Intervenor.	No. CV08-1550-PHX-ROS **DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT** (Assigned to the Honorable Roslyn O. Silver) **(Oral Argument Requested)**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement.

Plaintiffs and Plaintiff-Intervenors fail to meet their burden in moving for summary judgment because many of the facts they submit as material to their motion are disputed by the evidence. "The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). In addition, as demonstrated in Defendants' and Defendant-Intervenor's responses to Plaintiffs' and Plaintiff-Intervenors' factual submission, much of the evidence upon which Plaintiffs and Intervenors rely is inadmissible or does not support the "fact" for which it is cited. Apart from the factual disputes and evidentiary deficiencies, however, Plaintiffs and Intervenors argue for the application of the wrong legal standard. As explained herein, none of their authorities support any entry of judgment as a matter of law here.

II. Argument.

A. <u>Plaintiffs and Plaintiff-Intervenors Fail To Establish That The Clean Elections Act Burdens First Amendment Rights.</u>

Both sets of Plaintiffs challenge the matching funds provisions in the Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.* (the "Act") based on claims that those positions "chill" or create a "drag" on traditional candidates' and PACs' speech.[1] (Pl. MSJ at 2-5, 10; Pl-Int. MSJ at 1, 3-6.)[2] As described in Defendants' Motion for Summary Judgment ("Defendants' Motion"), matching funds provisions similar to the ones at issue have repeatedly been upheld as constitutional as a matter of law against similar claims. (*See* Defendants' Motion at 5-6.)

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[1] In its Amicus brief, Center for Competitive Politics states that Plaintiffs challenge "the disclosure requirements that enable the provision of such Matching Funds" under A.R.S. §§ 16-941(B)(2) and 16-958. *See* Brief of Amicus Curiae Center for Competitive Politics [Dkt 336] at 1 n.2. Neither Plaintiffs nor Plaintiff-Intervenors, however, raise that basis for summary judgment in their motions.

[2] Herein, "Pl. MSJ" refers to Plaintiffs' Motion for Summary Judgment and "Pl-Int. MSJ" refers to Plaintiff-Intervenors' Motion for Summary Judgment.

First, both sets of Plaintiffs have failed to point to any undisputed material facts which demonstrate that the Act burdens a candidate's or PAC's speech. As demonstrated in Defendants' Objections and Responses to both Plaintiffs' and Plaintiff-Intervenors' Separate Statements of Facts,[3] many if not most of the "facts" asserted by both sets of Plaintiffs in attempting to establish that speech is burdened are disputed by material evidence in the record, are not supported by the evidence cited, are not supported by admissible evidence or are not material or relevant to any issues on summary judgment. (*See* Objs. Pl. SOF at ¶¶ 18, 43, 62, 71, 72-89, 90-104; Objs. Pl-Int. SOF at ¶¶ 33-34, 45-113.) [4]

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[3] Herein, "Objs. Pl. SOF" refers to Defendants' and Defendant-Intervenor's Joint Objections and Responses to Plaintiffs' Separate Statement of Facts which is filed herewith. "Objs. Pl-Int. SOF" refers to Defendants and Defendant-Intervenor's Joint Objections and Responses to Plaintiff-Intervenors' Statement of Material Facts which is filed herewith.

[4] The additional authority that Plaintiffs cite for their assertion that actual harm is not necessary is inapposite. (*See* Pl. MSJ at 14 n.2.) Plaintiffs cite the dissent in *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 318 (1979), for the proposition that "mere 'potential' for 'self-censorship is abhorrent to the First Amendment." The majority in *Babbitt*, however, held that although one need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute," "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Id.* at 298 (alterations in original) (citations omitted). *Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 393 (1988), involved a statute making it a crime to knowingly display sexually explicit material accessible to juveniles and the Court held that plaintiffs had standing because they "have alleged an actual and well-founded fear that the law will be enforced against them." *Id.* Further, as noted by the *Babbitt* Court above, a criminal statute is unique in that a plaintiff is not expected to expose himself to arrest or prosecution to have standing. The statute at issue here is a civil statute that imposes no penalty against Plaintiffs or Plaintiff-Intervenors for raising or spending money. Finally, *Center for Individual Freedom, Inc. v. Ireland*, 2008 WL 1837324, at *5 (S.D.W.Va. 2008), held that a preliminary injunction was warranted because the vague statute regarding West Virginia's corporate expenditure prohibitions made the plaintiff unable to determine whether the ads it intended to disseminate were prohibited or not. Plaintiffs there had "already expended substantial resources to achieve [the ad's] design" and had not disseminated its planned speech because the language of the statute was so vague that it was unclear whether the proposed speech would violate the statute and subject the plaintiffs to criminal penalties. *Id.* at *1, *3. Further, there was evidence in that case that actual speech was withheld as a result of the statute –

To the contrary, the undisputed evidence shows that Plaintiffs and Plaintiff-Intervenors made expenditures and accepted contributions freely during their campaigns and, to the extent they did not expend any money or accept contributions, there were alternate reasons for such behavior – such as party dominance in the district. (*See* Additional Facts Nos. 5-8, 12-15, 19-20, 27, 32-34, 38, 44-45, 51-53, 105-106, 140.)[5]

Plaintiffs allege that the Act creates an asymmetrical drag on their speech in a manner similar to the statute at issue in *Davis*. (Plaintiff's MSJ at 16.) In Defendants' Motion, we explained why *Davis* does not support Plaintiffs' attack against the Act's matching funds provisions.[6] (*See* Defendants' Motion at 6-7.)

Moreover, the evidence disputes each of Plaintiffs' three factual claims that the Act creates an asymmetrical burden. (*See* Pl. MSJ at 16 n.3.) First, Plaintiffs claim that participating candidates unfairly benefit from matching funds because "the actual cost of raising campaign funds are not deducted" from any matching funds triggered to participating candidates under the Act. (*Id.*) Although the Clean Elections initiative included no deduction for fundraising, the Legislature subsequently decided to address this issue. The Arizona Legislature considered three different figures to use in this fund raising adjustment to matching funds and decided on 6%. (*See* Additional Facts No. 128.) The fact that not every instance of matching funds involved a fundraising cost of 6% does not render the entire provision "asymmetrical." The Legislature reasonably set the figure at 6%, and this is an appropriate legislative judgment. A.R.S. § 16-952.

Although Mr. Bouie may have been less efficient at raising his funds, the record

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unlike the purely hypothetical claims and factually unsupported claims raised here.

[5] Herein, "Additional Facts" refers to the Additional Facts That Establish A Genuine Issue of Material Fact or Otherwise Preclude Judgment In Favor of Plaintiffs contained in Objs. Pl. SOF.

[6] Plaintiff-Intervenors argue that because matching funds are triggered when a candidate contributes money to his own campaign, the Act is analogous to the Millionaire's Amendment. (Pl-Int. MSJ at 9 n.5.) This argument fails because, unlike *Davis*, the Act invokes no unilateral release of expenditure or contribution restrictions on a participating candidate based on the amount of personal money a traditional candidate chooses to spend on her campaign. *See Davis*, 128 S.Ct. at 2766 (under the law at issue, the threshold spending of a candidate's personal funds resulted in trebling of the contribution limits for his opponent).

shows that other candidates in fact incur almost *no* costs for some of their fundraising. (*See* Additional Facts No. 130.) In such cases a 6% deduction for fundraising could result in a benefit to traditional candidates for those non-existent costs and results in no burden on their fundraising. Moreover, Plaintiffs fail to account for any benefit that may be received from participating in fundraising gatherings and meeting constituents face-to-face at various events of that type.[7] Plaintiffs also argue that "opportunity costs" are incurred by traditional candidates in fundraising. (Pl. MSJ at 5.) Mr. Bouie's conclusory declaration as well as the statements attributed to Commissioner Daniels asserted in support of this argument do not demonstrate this "fact." (Objs. Pl. SOF at ¶¶ 108-110.)[8] And, the benefits and burden of private fundraising are factors candidates should assess when determining whether to opt into the public funding program or rely on private fundraising.

Second, Plaintiffs argue that PACs "can run ineffective, unwished for advertising that generates funds for a participating opponent to use at her discretion." (Pl. MSJ at 5 & 16 n.3.) The evidence is disputed on this point, however. (*See* Objs. Pl. SOF at ¶¶ 105-06, 47, 65-67.) Plaintiffs offer for that point merely the conclusory assertion of Rep. McComish that the independent expenditure made in his favor was "unwished for" or "ineffective." Although Rep. McComish may not have "wished for" the independent expenditure, he has established no foundation for his conclusion that the independent expenditure was "ineffective." Indeed, it strains credulity to assert that an uncoordinated campaign ad portraying Rep. McComish as "courageous" and as "seeing what is

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[7] Several participating candidates state that time spent collecting $5 contributions from constituents is very beneficial and valuable to their campaigns. (*See* Additional Facts No. 132.) This supports a similar inference that time spent with voters at fundraisers is equally beneficial to traditional candidates.

[8] The evidence offered by Plaintiffs in the form of testimony by Mr. Bouie and Commissioner Daniels does not establish that a 6% deduction for fundraising from the matching funds award fails reasonably to account for fundraising costs. Commissioner Daniels acknowledged that sometimes a fundraiser may cost more than 6% of the total funds raised, but did not testify that such figure was always (or even often) below the actual fundraising costs of a traditional candidate. Deposition of Lori Daniels [Dkt. 332] at 81-85.

possible…" would be unfavorable to him or otherwise beneficial to his opponent. (*See* Additional Facts Nos. 22-23.) There is no evidence that unwished for advertising disproportionately benefited a participating candidate in any manner analogous to the asymmetry in *Davis*.

Plaintiffs also claim that "rational political committees will naturally minimize or alter the mode of their expenditures in campaigns where the candidate they oppose stands to gain Matching Funds." (Pl. MSJ at 15.) The evidence cited by Plaintiffs for this claim, however – statements made by the Victory 2008 political committee outside the context of this litigation – is hearsay and therefore not admissible. (*See* Objs. Pl. SOF at ¶¶ 79-82, 89, 104; Additional Facts No. 142.) Even if that evidence were admissible, it would demonstrate that the Victory 2008 PAC made its independent expenditure despite the fact that the Commission had not yet resolved the issue about whether to permit candidate Stevens to receive matching funds. (*See* Additional Facts No. 142.) Neither do the early declarations of Plaintiff-Intervenor Arizona Taxpayers Action Committee ("ATAC") support the asserted "fact." ATAC admitted that it did not have the funding necessary to make any independent expenditures in the 2008 campaign and because its members were too busy there was no time and were no plans to raise funds necessary to have "any impact." (*See* Additional Facts Nos. 49-53.) Thus, there were reasons other than the possibility of matching funds that caused ATAC to decide not to make independent expenditures.

Finally, Plaintiffs claim that when a traditional candidate faces multiple participating opponents, the matching funds triggered to each of those candidates "disproportionately drowns-out her campaign speech."[9] (Pl. MSJ at 5 & 16 n.3.) The "facts" asserted in support of this theory are disputed or immaterial to their theory. (*See* Objs. Pl. SOF at ¶¶ 44-50, 107.) The evidence shows that no candidate's speech was "drowned out" by matching funds and that in 2006, for example, traditional candidates

[9] Plaintiffs are essentially arguing that the Act is asymmetrical because it does not provide "a level playing field." This flies in the face of both sets of Plaintiffs' complaints that it would be improper for the Act to have such a purpose. (*See* Pl. MSJ at 16; Pl-Int. MSJ at 7, 14.)

still spent more money overall than was received by participating candidates. (*See* Additional Facts Nos. 45-47.) Indeed, only participating candidates have "caps" on the amount of funds they can receive and spend. A.R.S. § 16-952(E). (*See* Additional Facts Nos. 85-87 and 107-111.)

Plaintiffs and Plaintiff-Intervenors next claim that the Act creates asymmetry because it causes Plaintiffs, PACs and their supporters to "disseminate hostile views." (Pl. MSJ at 16; Pl-Int. MSJ at 12.) Plaintiffs' cited cases, however, stand for no such proposition. First, *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 14 (1986), is not analogous to the matching fund provisions at issue here. In *Pacific Gas*, the public utility was ordered by the Public Utilities Commission to place an opponent's political message on its billing envelopes four times a year for two years because the commission viewed the envelope as a public forum paid for by ratepayers. *Id.* at 6. This ensured that the utility's customers would receive the commission's message with each bill. The Court held that Pacific Gas was not required to "'enhance the relative voice' of its opponents" in such a manner. *Id.* at 14; *see also Rumsfield v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 64 (2006) (distinguishing *Pacific Gas* on the basis that "forced inclusion of the other newsletter interfered with the "utility's own message"); *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1194 n.10 (2008) (distinguishing *Pacific Gas* on the basis that it "does not require the parties to reproduce another's speech against their will; nor does it co-opt the parties' own conduits for speech").

Here, the matching funds provision simply provides an opportunity for an opponent to speak. Plaintiffs are compelled neither to speak for their opponents nor serve as a conduit to disseminate their opponents' views. (*See* Additional Facts Nos. 103 and 104.)

Plaintiff-Intervenors' reliance on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), is equally inapposite. (Pl-Int. MSJ at 11.) In *Miami Herald*, the Court held unconstitutional a Florida statute requiring a "right of reply" if a candidate for nomination or election is "assailed regarding his personal character or official record by

any newspaper." 418 U.S. at 244. The Court held that "[t]he Florida statute exacts a penalty on the basis of the content of a newspaper….in terms of the cost of printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." *Id.* at 256. No such penalty is exacted with the matching funds at issue here because the traditional triggering candidate has no involvement in the dissemination of any message that may or may not be created by her participating opponent using those matching funds. (*See* Additional Facts No. 103.) Moreover, there is no requirement in the Act that the traditional candidate must use her personal resources to distribute any hostile message. (*See* Additional Facts No. 104.)

Plaintiff-Intervenors also argue that matching funds "significantly distort[] and alter[] the timing and extent of candidates' speech" and cite the declaration of Dr. David Primo for support. (Pl-Int. MSJ at 13.) Defense expert Dr. Mayer, however, has demonstrated that Dr. Primo's conclusions are invalid. (*See* Additional Facts Nos. 43, 48 and 144.)

Plaintiff-Intervenors argue that the matching fund provisions are "discriminatory" because they "provide[] funds only to publicly financed candidates and only on the basis of the speech of the opponents of such candidates."[10] (Pl-Int. MSJ at 8, 12.) The record lacks evidence of any discriminatory effect. Further, Defendants' Motion explains that the Act is not discriminatory because of its identification of candidates as having either chosen to participate in the public funding system or forego the system and any resulting distribution of funds based on that chose is also not discriminatory. (*See* Defendants'

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[10] The cases cited in support of Plaintiff-Intervenors' argument that a strict scrutiny level of review is warranted because the Act is content-based are inapposite. (*See* Pl-Int. MSJ at 8.) In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992), the Court struck down a city ordinance that prohibited expressions that constitute "fighting words" on the basis that it was too broad and prohibited otherwise permitted speech solely on the bases of the subjects the speech addresses. The Act does not prohibit any speech and in fact encourages and permits more speech to be expressed. *See* A.R.S. § 16-940. *Video Software Dealers Assoc. v. Schwarzenegger*, 556 F.3d 950, 953, 965 (9th Cir. 2009), prohibited a statute which imposed restrictions and a labeling requirement on the sale or rental of "violent video games" to minors. Here, as described above, there are no restrictions in the Act on the type or amount of speech any candidate may express.

Motion at 15-16.)

Because the Act does not infringe on the ability of traditional candidates to personally fund their campaigns or to collect as many contributions or make as many expenditures as they desire to broadcast their political message, the Act does not burden speech as a matter of law and Plaintiffs' and Plaintiff-Intervenors' motions should be denied.

B. <u>An Intermediate Standard Of Review Should Be Applied.</u>

Without any substantive analysis of the relevant law, Plaintiffs and Plaintiff-Intervenors ask this Court to apply strict scrutiny to Arizona's matching funds provisions. (*See* Pl. MSJ at 16; Pl-Int. MSJ at 6-7.) As described in Defendants' Motion at 8-9, however, an analysis of the Supreme Court's jurisprudence regarding similar issues reveals that this Court should uphold a restriction against a First Amendment challenge regarding the claims at issue here if the restriction is "closely drawn" to serve a "sufficiently important interest."

Both Plaintiffs and Plaintiff-Intervenors primarily rely on *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2664 (2007) ("*WRTL*"), for their proposed strict scrutiny standard. (Pl. MSJ at 16; Pl-Int. MSJ at 6.) *WRTL*, however, analyzed Bipartisan Campaign Reform Act ("BCRA") §203 which made it "a crime for any labor union or incorporated entity . . . to use its general treasury funds to pay for any "electioneering communication." 127 S.Ct. at 2660. The statute thus directly prohibited an entity's *expenditure*, a type of restriction which the Supreme Court has repeatedly identified as subject to strict scrutiny. By contrast, contribution limits are subject to a lesser level of scrutiny. (*See* Defendants' Motion at 8.) No matter how they characterize it, Plaintiffs and Plaintiff-Intervenors challenge no prohibition or limitation on expenditures here. Moreover, under the Act, even when expenditures do result in a trigger of matching funds, they do so only in the primary period. *See* A.R.S. § 16-952(A). During the general election only contributions received -- not expenditures -- trigger matching funds. *See* A.R.S. § 16-952. In any event, however, the matching funds provisions do not impose any limits whatsoever on any traditional candidate's contributions *or*

expenditures.

Reliance on the standard applied by the *Davis* Court is also inappropriate because the relaxed contribution limits at issue there were triggered upon a candidate's *expenditure* of personal funds over a certain limit.[11] 128 S.Ct. at 2772-73. Instead, the relevant case law indicates that this Court should uphold the Act if it is "closely drawn" to serve a "sufficiently important interest." (*See* Defendants' Motion at 11-12.)

C. <u>The Evidence Shows That Matching Funds Serve Important – Even Compelling - State Interests.</u>

As explained in Defendants' Motion at 8-11, the Clean Elections Act, including the matching funds provisions, serves the State's compelling interest in the integrity of its elections. *See* A.R.S. § 16-940. A central purpose of this citizens' initiative was to "improve the integrity of Arizona state government by diminishing the influence of special-interest money." *Id.* Providing a public funding option that limits the reliance on private contributions furthers the State's compelling interest in preventing corruption and the appearance of corruption. Corruption in the electoral system includes "the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. Legislation can "constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)). The appearance that "large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Id.* at 390.

Plaintiffs and Plaintiff-Intervenors both argue that the *only* purpose of matching funds is to equalize resources. (Pl. MSJ at 17; Pl-Int. MSJ at 14.) The record shows, however, that avoiding corruption and the appearance of corruption was indeed an important purpose of the Act. (*See* Additional Facts Nos. 61, 62 and 131; Defendants' SOF at ¶¶ 1-17.)[12] Voters unquestionably intended an anti-corruption purpose because

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[11] The *Davis* Court also noted that contribution limits are to be scrutinized under an intermediate standard. *Davis*, 128 S.Ct. at 2770.

[12] Herein, "Defendants' SOF" refers to the Defendants' and Defendant-Intervenor's Joint Statement of Facts in Support of Summary Judgment [Dkt. 285].

they included it in the language of the Act. *See* A.R.S. § 16-940 ("[t]he people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government….").

"Our primary objective in construing statutes adopted by initiative is to give effect to the intent of the electorate." *State v. Gomez*, 127 P.3d 873, 875 (Ariz. 2006). The intent of the electorate in establishing Arizona's public funding system can be found in the publicity pamphlet. *See id.* at 877 (referring to publicity pamphlet in interpreting electorate's intent); *Cal. Prolife Council Political Action Comm. v. Scully*, 989 F.Supp. 1282, 1296 n.33 (E.D.Cal. 1998) (referring to ballot measure arguments in determining the intent of a proposition). The 1998 publicity pamphlet containing arguments for and against Proposition 200 reflects the Act's anti-corruption purpose. (*See* Additional Facts No. 131; Defendants' SOF at ¶ 15 .) For example, one supporter commented on Arizona's "reputation of a state rife with corruption and abuse of money in politics." (Defendants' SOF at ¶ 15.)

Contrary to Plaintiffs' assertions, the proponents of the Clean Elections Act stated that a purpose of the Act was to avoid corruption or the appearance of corruption. (*See* Additional Facts No. 61.) This is reflected in the fact that the proposition to enact the Clean Elections Act was motivated by and circulated in the wake of actual scandals or publicly perceived scandals in Arizona based on the public reports of bribery and other scandals which largely involved the transfer of private money to politicians in return for political favors.[13] (*See* Additional Facts No. 62.) Moreover, states are authorized to adopt prophylactic measures to prevent fraud and corruption.[14]

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[13] The New Times article cited by Plaintiffs is inadmissible for purposes of establishing the truth of the statements made therein and therefore does not support Plaintiffs' assertions about the intent of the electorate in voting for the Act. (*See* Obj. Pl. SOF at ¶ 180.)

[14] The Supreme Court has repeatedly affirmed states' interests in preserving the integrity of elections. *E.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) ("'A State indisputably has a compelling interest in preserving the integrity of its election process.'") (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008) (recognizing the state interest of promoting public confidence in the integrity of the electoral process).

Plaintiffs' interpretation of the word "influence" notwithstanding, the use of the terms "integrity" and "influence" in the Act itself indicate the electorate's desire to avoid corruption or the appearance of corruption. (*See* Pl. MSJ at 18.) That anti-corruption purpose was most recently recognized and reaffirmed by the Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2263-64 (2009). There, the Court held that a state supreme court justice should have recused himself because of the effect that contributions and independent expenditures during his campaign had in creating an appearance of undue *influence* on his ability to perform his judicial duties. *Id.* ("We conclude that there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

Indeed, the "special interest influence" sought to be reduced by the Act is commonly associated with corruption in politics. *See, e.g.*, *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096-97 (9th Cir. 2003) (finding that aggregate contribution limits on PACs as a means by which to reduce special interest influence on a candidate's campaign were justified by the state's interest in reducing corruption or the appearance of corruption); *Jacobus v. Alaska*, 338 F.3d 1095, 1112-13 (9th Cir. 2003) (finding that soft money contributions to political parties that are funneled to a candidate's campaign have a potential for corrupting influence because they are a "magnet for special interest groups," and that limitations on such contributions are justified by the state's interest in preventing corruption or the appearance of corruption).

Plaintiffs and Plaintiff-Intervenors seek to isolate the matching funds provisions in

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Moreover, states are not required to "wait and see" if corruption in the electoral process occurs, but may take prophylactic action to ensure the integrity of elections. *E.g.*, *Crawford*, 128 S. Ct. at 1618-19 (upholding a state measure intended to prevent voter fraud even though the record contained "no evidence of any such fraud actually occurring in Indiana at any time in its history"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) (stating that "[w]e have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access").

an attempt to detach that component from the Act's undisputed anti-corruption purpose. (*See* Pl. MSJ at 16, 18-19; Pl-Int. MSJ at 14.) Defendants' Motion explained that the matching funds provisions are an important component of the Act and are reasonably calculated to achieve the Act's anti-corruption purposes. (*See* Defendants' Motion at 11-12.) Even with matching funds, a participating candidate can always be outspent by the traditional candidate because the Act caps the amount of matching funds that a participating candidate can receive. For example, in Representative Jim Weiers' 2006 and 2008 general election races for District 10, he ran as a traditional candidate and his participating candidate opponents received the maximum allowable funds under the Act yet Rep. Weiers far out-raised and outspent those opponents in both elections. (*See* Additional Facts Nos. 105 and 106.)

Plaintiffs' and Plaintiff-Intervenors' reliance on *WRTL* as support for isolating the matching funds provisions is misplaced. (*See* Pl. MSJ at 16, 18; Pl-Int. MSJ at 6.) *WRTL* does not state that each component of a statute must be analyzed individually. Instead *WRTL* states that "[a] court applying strict scrutiny must ensure that a compelling interest supports each *application* of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy." 127 S.Ct. at 2671 (emphasis added).

In other words, the Court held that a prior finding that express advocacy may be constitutionally regulated by a statute's terms does not negate the need to analyze in a later challenge whether issue advocacy may be regulated.[15] *Id.* It does not mean that courts must analyze in a piecemeal fashion a specific provision of a statute without regard to its role in a statutory scheme. *E.g.*, *McConnell*, 540 U.S. at 170-71 (upholding provision of the BCRA that required state and local parties to spend federal funds on certain employee salaries in connection with federal elections because, in absence of such provision, such parties might circumvent the Act's other restrictions, which served a

[15] *McConnell* upheld the facial constitutionality of BCRA's regulation of "the functional equivalent of express advocacy," *see McConnell*, 540 U.S. at 204-06, and the *WRTL* Court was addressing an "as applied" challenge to the same statute. *WRTL*, 127 S.Ct. at 2659.

compelling interest). Statutes should be analyzed in context. *Cf. Doe v. Rumsfield*, 435 F.3d 980, 987 (9th Cir. 2006) ("When interpreting a statute, a court is guided not by a single sentence or member of a sentence, but [should look] to the provisions of the whole law, and to its object and policy.") (citations omitted) (alternations in original). Neither Plaintiffs nor Plaintiff-Intervenors present any evidence refuting the fact that matching funds are essential to the effective implementation of a viable public funding system. (*See* Defendants' SOF at ¶¶ 33, 34, 44, 45; *see also* Additional Facts Nos. 121 and 122.) Instead, Plaintiffs merely attempt to isolate the tool of matching funds under the same standard of analysis as the entire system of public funding – which the Supreme Court has already unquestionably found constitutional. *See Buckley*, 424 U.S. at 108 (finding statute providing for public funding of presidential campaigns constitutional).

The matching funds provision is an integral part of the Act and, accordingly, that provision indeed achieves the State's compelling interest of eliminating the actuality and appearance of corruption in elections.

D. <u>The Evidence Shows That The Act Is Closely Drawn To Serve Arizona's Important Interest In Avoiding Corruption And The Appearance Of Corruption.</u>

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

In arguing that the Act is not effective or narrowly drawn in addressing the State's interest in avoiding corruption or the appearance of corruption, Plaintiffs assert that in 1992 and 1993, the electorate adopted terms limits and the legislature "dramatically lowered contribution limits" which eliminated corruption or the appearance of corruption in Arizona politics.[16] (Pl. MSJ at 21.) The evidence shows, however, that the "sweeping

[16] As described earlier, the application of this standard of analysis is not supported by the relevant campaign finance jurisprudence. Further, Plaintiffs' argument that the Act must

legislative reforms" adopted by the Legislature in 1993 actually codified *increases* in contribution limits. (*See* Additional Facts No. 59.)

Additionally, the arguments contained in the 1992 publicity pamphlet regarding the proposition to adopt term limits do not address any desire to avoid corruption or the appearance of corruption in the area of campaign finance which are addressed by the Act. (*See* Additional Facts No. 60.) As such, although the Legislature adopted many changes to Arizona's election laws in 1993 and the electorate adopted term limits in 1992, Plaintiffs offer no evidence that any of the concerns addressed by the Act were alleviated in whole or in part by those prior changes. Instead, the voter approval of the Act indicates that the citizens of Arizona were not satisfied with the "reforms" provided in the former legislation and desired the reforms contained in the Act. (*See* Declaration of Tanja K. Shipman in Support of Defendants' Opposition To Plaintiffs' Motion For Temporary Restraining Order [Dkt. 24] at Ex. 1 at 88 ("[I]n each new election, the politicians have extended the boundaries of ethical campaigning, skirting the edges of the campaign finance laws at every opportunity.")).

Indeed, given the public scandal involving Governor Symington which occurred after those changes, it can be inferred that the electorate believed that more reforms were

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be the "least restrictive means of regulation" to remedy corruption and the appearance of corruption in a campaign finance case of this nature is unsupported by the cases cited. *See Video Software*, 556 F.3d at 964-65 (applying standard to content-based law imposing restrictions and labeling requirements on video games); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) (applying standard to ordinance prohibiting door-to-door solicitation of contributions by certain charitable organizations); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (applying standard to statute requiring enhanced signature requirements for new political parties); *Lubin v. Parish*, 415 U.S. 709, 716 (1974) (does not apply "least restrictive means" standard to analysis of statute requiring indigents to pay fee for placement on ballot); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) (does not apply "least restrictive means" standard to analysis of statute prohibiting voting in a primary under certain circumstances); *Williams v. Rhodes*, 393 U.S. 23, 31-33 (1968) (does not apply "least restrictive means" standard to analysis of statute restricting new political party access to the ballot); *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997) (applying standard to analysis of statute seeking to protect minors from harmful material on the Internet); *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (does not apply "least restrictive means" standard to analysis of statute prohibiting publication of rape victim's identity).

necessary to alleviate corruption. (*See* Defendants' SOF at ¶ 3.) Plaintiffs also argue that "because no problem of actual or apparent corruption currently exists in Arizona's highly regulated private campaign finance system," the Act is unnecessary. (Pl. MSJ at 19.) If anything, however, in light of the undisputed evidence of Arizona's history of actual and apparent corruption regarding its campaign finance system, the lack of any corruption today supports the inference that the Act is indeed achieving its purposes. (*See* Defendants' SOF at ¶¶ 1-17.)

Because they cannot meaningfully challenge the evidence that matching funds indeed serve the Act's anti-corruption purpose by reducing special interest money in elections, Plaintiffs argue that aspects of Clean Elections or matching funds potentially can result in inequities or an appearance of impropriety. As explained below, however, none of those assertions defeats a finding that the matching funds provisions are closely drawn to serve the State's anti-corruption interests.

Plaintiffs argue that matching funds "incentivize the bundling of qualifying contributions for participating candidates and the teaming of traditional candidates and subsidized candidates." (Pl. MSJ at 22.) Plaintiffs offer no evidence, however, either that $5 qualifying contributions are "bundled" by special interest groups seeking to obtain influence on the candidate or that the "bundling" of these *de minimus* contributions would in any way influence a participating candidate's behavior while in office. (*See* Additional Facts Nos. 74, 95, 132 and 139; Objs. Pl. SOF at ¶¶ 123-53.) Moreover, several participating candidates stated that it was important to collect those contributions personally and that it was a means by which to shake the hands of and have face-to-face conversations with the people they seek to represent. (*See* Additional Facts No. 132.)

Plaintiffs assertion that some candidates participate in a "teaming strategy" similarly is both irrelevant to an analysis of whether the matching funds is closely drawn to achieve the anti-corruption purposes of the Act and disputed as a factual matter. (*See* Objs. Pl. SOF at ¶¶ 123-33.) Although participating and traditional candidates may jointly campaign, a participating candidate may not spend any public funding on the traditional candidate's campaign. (*See* Additional Facts Nos. 9, 112, 123-125.) The two

candidates must therefore proportionately divide and pay for each of their campaign expenditures separately. (*See* Additional Facts No. 9.)

Moreover, the Commission staff has drafted a rule that will be presented to the Commission for their consideration and possible preliminary approval at the July 30, 2009 meeting that seeks to eliminate any perceived financial advantages in establishing a "team" of participating and traditional candidates in races involving two or more seats. (*See* Additional Facts Nos. 123-125.) The fact that there exist possible "loopholes" in a statute, however, does not render it unconstitutional and it is the function of the legislature or (as the case may be) the electorate to make revisions to the law to address any such issues. Out of 61 races in the 2008 election, Plaintiffs assert that one race involved two "teams" of participating/traditional candidates. And as to those two teams, Plaintiffs offer no evidence that such teams were formed to trigger matching funds. (Objs. Pl. SOF at ¶¶ 123-137.)

Indeed, in two instances where traditional candidates purportedly teamed with participating candidates in their run for the statewide office of Corporation Commissioner, both of the traditional candidates lost their elections. (*See* Additional Facts No. 133; Objs. Pl. SOF at ¶¶ 132-134.) As a result, the so-called "team strategy" imparted no benefit to the traditional candidates in those races.

Plaintiffs also argue that matching funds "generate new incentives to engage in deceptive campaign strategies, such as 'reverse targeting.'" (Pl. MSJ at 22.) Plaintiffs fail to identify or, more importantly, offer evidence of any instance in which so-called "reverse targeting" resulted in an award of matching funds to a participating candidate who also was the beneficiary of the independent expenditure that triggered the matching funds.[17] (*See* Additional Facts Nos. 22-23, 29-30 and 69-70; Obj. Pl. SOF at ¶¶ 154-163.) Plaintiffs' theorizing about a potential "reverse-targeting" independent expenditure provides no basis for concluding that the matching funds are not closely drawn to serve

[17] Plaintiffs point to one press release by a gay rights group (*which did not trigger matching funds*) and signs posted in 2008 by a disgruntled individual named Jim Torgeson who had threatened to make sure that several of the candidates named in his signs did not get elected. (Objs. Pl. SOF at ¶¶ 57, 157-58, 160-63.)

the State's anti-corruption interests by reducing special interest money in elections.

Plaintiffs next allege that there has been a regulatory scandal "embroiling participating candidates during every election cycle since the Act became effective" which they argue undermines the Act's anti-corruption purposes. (Pl. MSJ at 22.) Plaintiffs point to inadmissible evidence to support this assertion but, even if it was admissible the fact that there have been enforcement proceedings in every election cycle demonstrates that the Commission strictly enforces the Act to ensure that its anti-corruption purpose is realized. (*See* Objs. Pl. SOF at ¶¶ 164-65.) This does not undermine the legitimate purpose of the Act at all and, instead, only supports that purpose.[18] (*See* Pl. MSJ at 20.)

Finally, the proposed revisions in H.B. 2603 do not demonstrate that a less restrictive alternative to matching funds is available. (*See* Pl. MSJ at 23-24.) The purpose of supporting the legislator's proposals contained in HB2603 was to provide a temporary means by which to sustain Arizona's public funding system in the wake of a possible ruling that matching funds are unconstitutional. (*See* Additional Facts No. 118.) Indeed, the Commission does not consider providing lump sum financing a feasible alternative to matching funds at all and the Commission only supported language making this "lump sum" approach a temporary measure that would only be implemented if the court ruled them unconstitutional and be immediately repealed should any such decision be reversed on appeal. (*See* Additional Facts Nos. 118-120.) The Commission has a duty to ensure that the purposes of the Act are carried out – one of which is to preserve the public fisc. (*See* Additional Facts No. 121.) To continue to implement the "lump sum" approach to public funding, however, would not be viable because of the high cost involved in making those large payments to all candidates who choose to participate in the public funding system. (*See* Additional Facts No. 122.)

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[18] Neither is there any evidence that the elected officials who receive funding from the Commission are influenced in one way or another by any lobbying done on behalf of the Commission. Indeed, despite any lobbying efforts by the Commission supporting its passage, the Legislature rejected the proposed legislation in H.B. 2603, which was sought to amend on a temporary basis the matching funds provisions of the Act. (*See* Additional Facts Nos. 117-122 and 142.)

III. Conclusion.

For these reasons and the reasons identified in Defenant-Intervenors' Response to Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment and the Joint Objections and Responses to Plaintiffs' and Plaintiff-Intervenors' Separate Statements of Material Facts on Summary Judgment, Defendants request that this Court deny Plaintiffs' and Plaintiff-Intervenors' Motions for Summary Judgment.

RESPECTFULLY SUBMITTED this 17th day of July, 2009.

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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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COPY also served the following business day, the 20th day of July, 2009, by U.S. Mail with Notice of Electronic Filing, on:

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