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**SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION  
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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

JOHN MCCOMISH, NANCY MCLAIN, )  
KEVIN GIBBONS, FRANK ANTENORI, )  
TONY BOUIE, AND DOUG SPOSITO, )

Plaintiffs,

v.

JAN BREWER, in her official capacity )  
as Secretary of State of the State of )  
Arizona; and GARY SCARAMAZZO, )  
ROYANN J. PARKER, JEFFREY L. )  
FAIRMAN, DONALD LINDHOLM and )  
LORI S. DANIELS, in their official )  
capacity as members of the )  
ARIZONA CITIZENS CLEAN )  
ELECTIONS COMMISSION, )

Defendants.

) Civil Action No. CV-081550-PHX-ROS

) Hon. Roslyn O. Silver, presiding

) **PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

) Oral Arguments Requested

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1           **Introduction**

2           On August 29, 2008, this Court ruled that the matching funds provisions of  
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4 Arizona’s Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C), create a drag on the  
5 exercise of Plaintiffs’ free speech rights that violates the First Amendment pursuant to  
6 *Davis v. F.E.C.*, 554 U. S. \_\_\_\_, 128 S. Ct. 2759 (2008). The Court further scheduled a  
7 hearing on the issuance of a preliminary injunction to bar enforcement of the Act’s  
8 matching funds provisions for the general election period, which beings on September 3,  
9 2008. Accordingly, this motion seeks a preliminary injunction barring enforcement of  
10 the Arizona’s Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C).

11           **I. Statement of Facts**

12           Plaintiffs are all traditional candidates attempting to run their campaigns with  
13 private contributions. The declarations of Gibbons, Bouie, and Sposito, which were  
14 filed in support of Plaintiffs’ Motion for Temporary Restraining Order, detail how the  
15 Act’s campaign speech subsidies chilled their speech during the primary election cycle.  
16 (Docket No. 13-3 (Gibbons Dec., paras. 10, 11, 13; No. 13-5 (Bouie Dec., paras. 7, 8,  
17 10, 12, 18); No. 13-8 (Sposito Dec., paras. 9, 10, 12, 15, 18.) They also explain how the  
18 Act is not tailored adequately to prevent corruption or the appearance of corruption in  
19 the election process. (Docket No. 13-3 (Gibbons Dec., paras. 21, 22); No. 13-5 (Bouie  
20 Dec., paras. 19, 21-23); No. 13-8 (Sposito Dec., paras. 19-20.) Additionally, an expert  
21 affidavit and policy reports have been furnished establishing that despite 10 years of  
22 operation, the Clean Election Act has yet to achieve its putative goals of enhancing  
23 participatory democracy, competitive elections, civility or more campaign speech.  
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1 (Docket No. 16 (Woodmansee Dec., Exs. D.1, D.2; No. 33-3 (Ex. D, Carpenter Aff., pp.  
2 18-23).) Finally, a sampling of media reports have been furnished evidencing the  
3 reputation the Act’s matching funds provisions have garnered for enabling abuse of the  
4 electoral process and political gamesmanship. (Docket No. 17 (Drantias Dec., Exs. E.1  
5 through E.3); No. 33-3 (Ex. E, pp. 24-26).) This evidence is incorporated herein by  
6 reference, and is further supported by the Supplemental Declaration of Nicholas C.  
7 Drantias, which furnishes Plaintiffs’ last available evidence concerning the status of clean  
8 elections funding during the primary election season. (Drantias Supp. Dec., *inter alia.*)  
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11         The Act’s matching funds provisions function slightly differently during the  
12 general election period than during the primary election period. In the general election,  
13 matching funds are triggered by direct campaign *contributions* rather than direct  
14 *expenditures*. A.R.S. § 16-952(B). Specifically, matching funds to subsidized  
15 candidates will be triggered when the sum of contributions given to a traditional  
16 campaign in the general election period plus unspent contributions given during the  
17 primary election period exceeds the “general election spending limit.” By contrast,  
18 independent expenditures still trigger matching funds during the general election period  
19 in essentially the same way as during the primary election. A.R.S. § 16-952(C). Each  
20 dollar of independent expenditures generates nearly one dollar in matching funds to each  
21 subsidized candidate running in the general election.  
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25         The Declarations of Representative John McComish, Representative Nancy  
26 McLain and the Supplemental Declarations of Doug Sposito, Kevin Gibbons and Tony  
27 Bouie explain how the general election’s contribution-trigger mechanism will chill their  
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1 speech if they are nominated to run in the general election. (McComish Dec., paras. 8-  
2 20; McLain Dec., paras. 7; Gibbons Supp. Dec., paras. 6-8; Sposito Supp. Dec., paras. 6-  
3 11; Bouie Supp. Dec., paras. 6-8.) In essence, they will be stymied and made more  
4 reluctant to personally contribute or loan money to their campaigns than they otherwise  
5 would if the Act did not trigger equal or greater dollar subsidies to their opposing  
6 subsidized candidates. And the overhanging threat of unexpected independent  
7 expenditures triggering equally unexpected matching funds still causes them to hesitate  
8 to contribute or spend money to engage in campaign speech for fear that they might lack  
9 the resources to address any adverse effects of such independent speech and the  
10 subsidized opposing campaign speech thereby generated.

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14         McComish, like Sposito in the primary election, faces a situation where he  
15 anticipates competing with two viable subsidized candidates in the general election.  
16 (McComish Dec., paras. 9-10, 12-14.) In a world without matching funds, McComish  
17 would ordinarily amass contributions, including personal contribution or loans to his  
18 campaign, in the amount of \$25,000 or more. But because of the Act's matching funds  
19 provisions, McComish testifies that he will not make personal contributions or loans in  
20 excess of \$1,000.<sup>1</sup> This is because those provisions guarantee two dollars will be spent  
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23 \_\_\_\_\_  
24 <sup>1</sup> It can be expected that matching funds will be triggered, if they are ever triggered, later  
25 in the election campaign. Therefore, the best evidence of the chilling effect of the Act's  
26 matching funds provisions at this time consists of reasonable predictions of Plaintiffs'  
27 future conduct or inaction. The evidence presented in support of this motion is, thus,  
28 necessarily less concrete than the evidence presented in support of the previous Motion  
for Temporary Restraining Order. Nevertheless, the chilling effect is more imminent  
and likely to be sustained for a greater duration because no subsidized candidate has  
received funds in excess of their spending cap for the general election cycle, and it is all

1 against him for every dollar he raises, contributes or loans above the applicable general  
2 election spending limit. Additionally, McComish joins the earlier declarations of  
3 Sposito, Gibbons and Bouie in affirming that, during the general election period, the net  
4 campaign speech purchasing power of the campaign funds they raise is less than that of  
5 the amount of matching funds given to their opposing subsidized candidates.  
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7 (McComish Dec., paras. 17-18.)  
8

9 Sposito faces a situation where he will compete with at least one subsidized  
10 candidate in the general election. (Sposito Supp. Dec., paras. 9-10.) And in a world  
11 without matching funds, he would likely make personal contribution or loans to his  
12 campaign that would cause his campaign to exceed general election spending limits—as  
13 he did during the primary election. But, as with McComish, Sposito absolutely will not  
14 raise or make contributions to support his campaign speech if doing so will trigger  
15 matching funds to one or more of his opposing candidates. His campaign speech will  
16 thereby be chilled.  
17

18 Presuming that Bouie and Gibbons emerge victorious from their bruising primary  
19 election campaigns against subsidized candidates, both will be similarly chilled during  
20 the general election. (Gibbons Supp. Dec., paras. 6-8; Bouie Supp. Dec., paras. 7-8.) In  
21 the absence of the Act’s matching funds provisions, both testify that they would likely  
22 amass a “war chest” of personal contributions or loans above the general election  
23 spending limit to combat the kind of negative campaigning they encountered during the  
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27 but impossible that any such spending cap will be reached by any subsidized candidate  
28 by the time this motion is heard or decided.

1 primary election. But because of the Act’s matching funds provisions, both absolutely  
2 will not do so, likely resulting in less campaign speech during the general election than  
3 would otherwise be the case.  
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## 5 **II. Argument**

6 The standard for a preliminary injunction is satisfied when the movant shows  
7 either: (1) a likelihood of success on the merits and the possibility of irreparable harm;  
8 or (2) the existence of serious questions going to the merits and the balance tips in the  
9 movant’s favor. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9<sup>th</sup> Cir.  
10 2002). The Ninth Circuit has held that “[t]hese two formulations represent two points on  
11 a sliding scale in which the required degree of irreparable harm increases as the  
12 probability of success decreases.” *Id.* Plaintiffs satisfy this standard.  
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### 15 **1. The Court Correctly Ruled that the Act’s Matching Funds Provisions** 16 **Violate the First Amendment.**

17 On August 29, 2008, this Court ruled that “Plaintiffs have established the  
18 Matching Funds provision of the Act violates the First Amendment of the U.S.  
19 Constitution.” (Docket No. 30, p. 7.) The Court further ruled that Plaintiffs suffered  
20 “irreparable injury both through the dispensation of funds that will be used to oppose  
21 them and through the mere fact that their speech is being burdened.” (*Id.*) These  
22 rulings were correct when made, they are supported by the manifest weight of the  
23 evidence in the record, and they will remain correct through the general election.  
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25 Accordingly, Plaintiffs incorporate them by reference.  
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1           The rote recitation of appellate or lower court decisions rendered in foreign  
2 circuits before *Davis* came down is no argument against this Court’s ruling. If anything,  
3 the changed focus of the Act’s matching funds provisions during the general election to  
4 equalizing direct *contributions*, rather than direct *expenditures*, makes the application of  
5 *Davis*’ legal principles even more direct and inescapable. *Davis*, after all, struck down a  
6 campaign finance regulation that created a drag on personal campaign contributions  
7 based on the threat of enhanced fundraising *possibilities* for the opposing candidate.  
8 *Davis*, 128 S.Ct. at 2764, 2771-73. The supporting Declarations show how the Act’s  
9 matching funds provisions similarly threaten to create a drag on Plaintiffs’ personal  
10 campaign contributions during the general election based on the *guarantee* of  
11 government subsidies to their opponents. (McComish Dec., paras. 8-20; McLain Dec.,  
12 paras. 7; Gibbons Supp. Dec., paras. 6-8; Sposito Supp. Dec., paras. 6-11; Bouie Supp.  
13 Dec., paras. 6-8.)

14           The common error shared by each case cited by Defendants is the notion that the  
15 protections of the First Amendment are triggered *only* by direct governmental action that  
16 is tantamount to censorship or that is otherwise overwhelmingly coercive and punitive.<sup>2</sup>  
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23 <sup>2</sup> These cases also fail to acknowledge the obvious difference in kind between  
24 constitutional challenges brought by non-participating candidates or PACs to public  
25 subsidy schemes, such as the Arizona Clean Elections Act, and First Amendment  
26 challenges brought by *participants* in a public campaign subsidy system to the limits on  
27 speech that are exacted as a condition of receiving public campaign subsidies. For  
28 example, *Leake*, 524 F.3d at 438 and *Daggett*, 205 F.3d at 466-72, both rely on  
*Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8<sup>th</sup> Cir.1996), as somehow overturning *Day v.*  
*Holahan*, 34 F.3d 1356 (8<sup>th</sup> Cir. 1994), even though *Rosenstiel* involved an inapposite  
challenge brought by *subsidized candidates* to the contribution and expenditure limits

1 See, e.g., *N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427, 438 (4<sup>th</sup> Cir. 2008); *Daggett v.*  
2 *Comm’n on Governmental Ethics & Elections Practices*, 205 F.3d 445, 466-72 (1<sup>st</sup> Cir.  
3 2000); *Gable v. Patton*, 142 F.3d 940, 947-49 (6<sup>th</sup> Cir.1998). Even before *Davis*, this  
4 was a profound error. Especially in the political arena, laws that have a deterrent effect  
5 on free speech ordinarily trigger First Amendment scrutiny. *Buckley v. Valeo*, 424 U.S.  
6 1, 64-65 (1976) (holding the “exacting scrutiny” required by the First Amendment cases  
7 “is necessary even if any deterrent effect on the exercise of First Amendment rights  
8 arises, not through direct governmental action, but indirectly as an unintended but  
9 inevitable result of the government's conduct”). And after *Davis*, it is simply impossible  
10 to make the claim that free speech is not burdened by laws that cause rational candidates  
11 and their supporters to keep silent in the competitive context of electoral politics.<sup>3</sup>

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15 As shown by the accompanying and referenced Declarations, the matching funds  
16 provisions’ chilling effect continues into the general election. There still is no  
17 compelling state interest to justify deterring Plaintiffs, other traditional candidates and  
18 their supporters from exercising their First Amendment rights. For these reasons,  
19 Plaintiffs clearly have a substantial likelihood of succeeding on the merits in their  
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22 they *agreed-to* when they opted into the public subsidy system, whereas *Day* involved  
23 an outsider’s challenge to a matching fund system much like Arizona’s.

24 <sup>3</sup> The curious claim that the Clean Election Act’s incentive structure somehow increases  
25 the aggregate amount of campaign speech is belied by the findings of Dr. Richard  
26 Carpenter in his declaration, which are incorporated herein by reference. (Docket No.  
27 33-3, Ex. D., pp. 18-23.) Moreover, the Goldwater Institute’s previously-filed policy  
28 reports, also incorporated herein by reference, show no appreciable increase in  
participatory democracy, civility or electoral competition. (Docket Nos. 16-2, 16-3  
(Woodmansee Dec., Exs. D.1 (pp. 10-13, 16, 20), and D.2).) All available evidence thus  
establishes that the Act’s matching funds provisions have not achieved any goal set out  
by its advocates, despite being in operation for nearly 10 years.

1 challenge against the matching funds provisions of the Arizona Clean Elections Act,  
2 A.R.S. § 16-952 (A), (B) and (C). And this time, the equities and the public interest  
3 favor Plaintiffs’ relief.  
4

5 **2. The Equities and Public Interest Favor Preliminarily Enjoining the Act’s**  
6 **Unconstitutional Matching Funds Provisions.**

7 “Neither the Government nor the public generally can claim an interest in the  
8 enforcement of an unconstitutional law.” *American Civil Liberties Union v. Ashcroft*,  
9 322 F.3d 240, 2551 n.11 (3<sup>rd</sup> Cir. 2003). Moreover, the public interest ordinarily favors  
10 preliminarily enjoining the enforcement of a law that violates the First Amendment.  
11 *Sammartano*, 303 F.3d at 974 (collecting cases). In fact, the Ninth Circuit has  
12 recognized only limited exceptions to this general rule, such as where nuclear safety is  
13 involved, provided that the government adduces evidence showing specifically how  
14 other legitimate interests would be harmed by enjoining the unconstitutional law.  
15 *Sammartano*, 303 F.3d at 974 (citing *Hale v. Dep’t of Energy*, 806 F.2d 910, 918 (9<sup>th</sup> Cir.  
16 1986)). Accordingly, in this case, Defendants must show harm to legitimate public  
17 interests—apart from the *illegitimate* interest in receiving matching funds triggered by  
18 Plaintiffs’ campaign speech—to overcome the strong public interest in favor of  
19 preliminarily enjoining laws that violate the First Amendment. *Id.*  
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23 At this time, Defendants have adduced no evidence showing what *legitimate*  
24 public interests would be harmed from enjoining enforcement of the Act’s matching  
25 funds provisions. Plaintiffs hypothesize, however, that Defendants will make the claim  
26 that subsidized candidates will be unable to compete effectively with traditional  
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1 candidates in the general election if the Act's matching funds provisions were enjoined.  
2 At the outset, Plaintiffs question whether there can be a legally cognizable legitimate  
3 public interest in competitive elections, when they are made competitive only through  
4 First Amendment violations. But even assuming such an interest could be legitimate,  
5 the claim that a preliminary injunction would competitively disadvantage subsidized  
6 candidates relative to traditional candidates is not obviously true in the aggregate.<sup>4</sup> And  
7  
8 any specific claim that subsidized candidates would be placed at a competitive  
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10 disadvantage relative to traditional candidates by a preliminary injunction should invite  
11 close scrutiny of the historical record to see whether matching funds had been previously  
12 triggered in the relevant districts and, if not, whether circumstances have changed.

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14 But even if Defendants parade before this Court subsidized candidates who will  
15 be placed at an unfair competitive disadvantage in the general election by virtue of a  
16 preliminary injunction, enjoining matching funds on the first day of the general election  
17 remains completely consistent with preserving the *status quo* because no funds can be  
18 triggered until the first trigger reporting date of September 9, 2008. And this Court has  
19 broad discretion to fashion an appropriate equitable remedy to minimize any injustice  
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24 <sup>4</sup> Even apart from the matching funds provisions of the Act, all subsidized candidates  
25 will still receive clean elections funding in the amount of the general election spending  
26 limit. This will give subsidized candidates an immediate head-start over the fundraising  
27 of any traditional candidate. Subsidized candidates will also benefit from independent  
28 expenditures supporting their campaign or opposing other candidates. Accordingly, the  
Court should consider whether, in the aggregate, such benefits alone give subsidized  
candidates a competitive advantage over traditional candidates which is not diminished  
substantially by enjoining matching funds.

1 that may result from preserving the *status quo*. *Stuhlbarg Intern. Sales Co., Inc. v. John*  
2 *D. Brush and Co., Inc.*, 240 F.3d 832, 841 n. 8 (9<sup>th</sup> Cir. 2001).

3  
4 In light of the Court’s broad equitable power, the question confronting the Court  
5 is not an “all or nothing” proposition. There are better options than Defendants’  
6 proposal to allow the unbridled enforcement of a plainly unconstitutional law. The  
7 elections cases previously cited by Defendants are inapposite because they dealt with  
8 proposed injunctive remedies that were sought on the eve of elections, which would  
9 have unavoidably disrupted the election or integral aspects of the election. The timing  
10 of this motion allows the Court much more flexibility. Plaintiffs, for example, would  
11 have no objection to a court order allowing currently participating candidates to opt-out  
12 of the clean elections system within a reasonable period of time after the issuance of a  
13 preliminary injunction. And certainly this Court has the creativity to craft an appropriate  
14 injunctive remedy that vindicates the First Amendment while minimizing injury to any  
15 legitimate public interest that might be at stake.  
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19 **3. The Court Should Exercise its Discretion and Only Require a Nominal**  
20 **Bond.**

21 Although Fed. R. Civ. P. 65(c) requires that an applicant for a preliminary  
22 injunction give security, this Court has discretion to reduce the amount of a bond to a  
23 nominal sum, or even to waive the requirement under *Barahona-Gomez v. Reno*, 167  
24 F.3d 1228, 1237 (9<sup>th</sup> Cir. 1999). In the unlikely event that Defendants are ultimately  
25 found to have been wrongfully enjoined here, any cost would be minimal or nonexistent  
26 to the State. In fact, the State will have saved money. Moreover, Plaintiffs are of  
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1 relatively little means and are represented by a nonprofit, public-interest legal  
2 foundation. For these reasons, the preliminary injunction should be granted with a  
3 nominal bond amount or the injunction bond should be waived altogether.  
4

5 **Conclusion**

6 This Court was correct to rule that the matching funds provisions of the Arizona  
7 Clean Elections Act cause the vigorous exercise of free speech rights by Plaintiffs and  
8 their supporters to produce fundraising advantages for their opposing government-  
9 subsidized candidates, and that this legal framework cannot withstand the holding of  
10 *Davis*. Moreover, on the first day of the general election cycle, there is no legitimate  
11 public interest that justifies the continued chilling of free political speech when an  
12 equitable remedy to preserve the *status quo* can be fashioned to prevent both irreparable  
13 harm and injustice. For these reasons, vindicating the core protections of the First  
14 Amendment justifies entry of a preliminary injunction barring enforcement of A.R.S. §  
15 16-952 (A), (B) and (C).  
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19 **RESPECTFULLY SUBMITTED** this 2<sup>nd</sup> Day of September, 2008

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