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12 Citizens Clean Elections Commission

13 **IN THE UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF ARIZONA**

15 JOHN MCCOMISH, NANCY MCLAIN,  
16 KEVIN GIBBONS, FRANK ANTENORI,  
17 TONY BOUIE, AND DOUG SPOSITO,

18 Plaintiffs,

19 v.

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

28 Defendants.

No. CV08-1550-PHX-ROS

**DEFENDANTS’ OPPOSITION TO  
MOTION FOR TEMPORARY  
RESTRAINING ORDER**

(Assigned to the Honorable  
Roslyn O. Silver)

Defendants Arizona Secretary of State Jan Brewer and the Arizona Citizens Clean  
Election Commission (“Defendants”) ask this Court to deny Plaintiffs’ Motion for

1 Temporary Restraining Order (“Motion”) because it (1) fails to demonstrate a strong  
2 likelihood of success on the merits in light of numerous cases, including Supreme Court  
3 cases, rejecting their legal arguments; (2) fails to demonstrate the possibility of  
4 irreparable harm in light of the timing of the Motion; (3) fails to demonstrate hardships  
5 that would tip the balance in their favor; and (4) fails to address any public interest  
6 advanced by halting the functions of the Citizens Clean Elections Act on the eve of the  
7 primary. For these reasons, Plaintiffs’ request for emergency relief is without merit and  
8 should be denied.

9 **I. BACKGROUND.**

10 In the 1998 general election, Arizona voters approved Proposition 200, an  
11 initiative that created the Citizens Clean Elections Act (the “Act”). Declaration of Todd  
12 F. Lang (“Lang Decl.”) at ¶ 6. The purposes of the Act are recited in the text itself: to  
13 create a system that “will improve the integrity of Arizona State Government by  
14 diminishing the influence of special-interest money, will encourage citizen participation  
15 in the political process, and will promote freedom of speech under the U.S. and Arizona  
16 Constitutions.” A.R.S. § 16-940(A); *see* Declaration of Tanja K. Shipman (“Shipman  
17 Decl.”), 1998 Publicity Pamphlet attached as Ex. 1.

18 The Act is a citizen response to perceived ills in state politics. *See* A.R.S. § 16-  
19 940. As also described in the text, Arizona’s then-existing campaign finance system  
20 allowed elected officials to accept large contributions from private interests in their  
21 electoral districts, hindered communications with voters by qualified candidates,  
22 suppressed the voice and influence of the majority of Arizona citizens in favor of wealthy  
23 special interests, and undermined confidence in the integrity of public officials. *See*  
24 A.R.S. § 16-940(B).

25 Arizona’s system of public funding is voluntary. A candidate that wishes to  
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1 receive public funding (a “participating” candidate) must abide by specific spending  
2 limits. *See* A.R.S. §§ 16-941, -945; Lang Decl. at ¶ 7. These limits vary by office, and  
3 depend on whether the candidate is competing in a primary or general election. *See*  
4 A.R.S. § 16-951. Participating candidates may use limited amounts of personal monies  
5 and accept private “seed” contributions, but only during the exploratory or qualifying  
6 periods. *See* A.R.S. § 16-945; Lang Decl. ¶ 7. Private contributions are prohibited  
7 thereafter. *See* A.R.S. § 16-945.

8 To qualify for public funding, a candidate must raise a specified number of \$5  
9 contributions during the qualifying period. *See* A.R.S. § 16-946; Lang Decl. ¶ 7. The  
10 number of qualifying contributions required depends on the office sought, and ranges  
11 from 200 for legislative candidates, to 4,000 for candidates for governor. *See* A.R.S. §  
12 16-950, as adjusted by rules of the Citizens Clean Elections Commission (the  
13 “Commission”), pursuant to A.R.S. § 16-956(D). Participating candidates must apply for  
14 public funding with the Secretary of State within one week after the qualifying period,  
15 must file a list of persons that made qualifying contributions, and must tender payment to  
16 the Secretary of State the total \$5 contributions received. *See* A.R.S. §§ 16-947, -950(B).

17 Candidates who desire to run a privately-funded campaign (“traditional”  
18 candidates) may still do so. *See* Lang Decl. at ¶ 8. The Act limits the size of individual  
19 contributions that traditional candidates for statewide and legislative office can accept.  
20 *See* A.R.S. § 16-941(B). However, there are no limits on the total amount of  
21 contributions these candidates can receive, and no limits on their expenditures. Lang  
22 Decl. ¶ 8.

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24 To make public funding a viable option, participating candidates receive matching  
25 funds when an opposing, traditional candidate exceeds the primary or general election  
26 spending limits. *See* A.R.S. § 16-952(A), (B). Matching funds are also provided when  
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1 independent expenditures are made against the participant, or in favor of a traditional  
2 opponent. *See* A.R.S. § 16-952(C). However, matching funds are capped at three times  
3 the original spending limit. *See* A.R.S. § 16-952(E). Beyond that threshold, a traditional  
4 candidate may outspend a participating opponent. Lang Decl. ¶ 11. Further, matching  
5 funds are not provided on a dollar-for-dollar basis but are reduced by 6% to account for a  
6 traditional candidate’s fund-raising expenses. A.R.S. § 16-952(A).

7 **II. ARGUMENT**

8 Plaintiffs have not met their burden. In order to succeed with their Motion,  
9 Plaintiffs must show “(1) a strong likelihood of success on the merits, (2) the possibility  
10 of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of  
11 hardships favoring the plaintiff, and (4) advancement of the public interest (in certain  
12 cases)” or “either a combination of probable success on the merits and the possibility of  
13 irreparable injury or that serious questions are raised and the balance of hardships tips  
14 sharply in his favor.” *Gonzalez v. Arizona*, 435 F.Supp.2d 997, 999-1000 (D.Ariz.  
15 2006)(denying TRO). Plaintiffs have not established any of these criteria and their  
16 motion should be denied.

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18 **A. PLAINTIFFS FAIL TO SHOW A STRONG LIKELIHOOD OF**  
19 **SUCCESS ON THE MERITS.**

20 The constitutionality of public funding for campaigns is not in question. *Buckley*  
21 *v. Valeo*, 424 U.S. 1 (1976), directly reviewed the constitutionality of the presidential  
22 public funding system and stated that Congress may engage in public funding of  
23 candidates who agreed to decrease reliance on private contributions. Such measures are  
24 an “effort, not to abridge, restrict or censor speech, but rather to use public money to  
25 facilitate and enlarge discussion and participation in the electoral process, goals vital to a  
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1 self-governing people.” *Id.* at 92-93.<sup>1</sup> The Court added that “[i]t cannot be gainsaid that  
2 public financing as a means of eliminating the improper influence of large private  
3 contributions furthers a significant governmental interest.” *Id.* at 96.

4 In the wake of *Buckley*, states have an undisputed interest in encouraging publicly-  
5 funded campaigns. See *Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1<sup>st</sup> Cir. 1993). Indeed,  
6 states need not be neutral on the issue of public funding, *Vote Choice*, 4 F.3d at 39, but  
7 may “rely on incentives for participation, which, by definition, means structuring the  
8 scheme so that participation is usually the rational choice.” *Gable v. Patton*, 142 F.3d  
9 940, 949 (6<sup>th</sup> Cir. 1998).

10 Public funding programs need not be perfect. A law does not burden speech  
11 because the advantages available to participating candidates and the restrictions they  
12 must accept are not in “perfect equipoise.” *Vote Choice*, 4 F.3d at 39. Rather, in viewing  
13 the scheme as a whole, a “rough proportionality” will do. *Id.* Indeed, unless the law is so  
14 “benefit laden” as to create a “large disparity” between benefits and burdens, it is upheld.  
15 *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8<sup>th</sup> Cir. 1996). Plaintiffs present no  
16 evidence demonstrating that Arizona’s funding scheme is “benefit laden” or that a large  
17 disparity exists.

18 As Defendants illustrate below, Plaintiffs have no strong likelihood of success on  
19 the merits. Indeed, courts have already rejected similar claims under schemes whose  
20 incentives for public funding go well beyond the provisions of the Act.  
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24 <sup>1</sup> The Court said: “Congress was legislating for the ‘general welfare’ to reduce the  
25 deleterious influence of large contributions on our political process, to facilitate  
26 communication by candidates with the electorate, and to free candidates from the rigors  
27 of fundraising.” *Id.* at 91.  
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1           **1.       The Act’s Matching Fund Provisions Do Not Burden Free Speech.**

2           Plaintiffs claim that the Act “creates a ‘drag’ on the exercise of First Amendment  
3 rights” “based on the guarantee that government subsidies will flow to support the  
4 campaigns of competing subsidized candidates.” Motion at 6-7. Plaintiffs confuse their  
5 right to speak, which is not restrained here, with the right to be the only voice in the  
6 debate.

7           Nothing in the Act quells Plaintiffs’ speech. Plaintiffs are free to communicate as  
8 much as they want and with whatever message that they want. Indeed, if there is any  
9 limitation on speech, it falls on participating candidates, who are barred from spending on  
10 political advocacy once the expenditure cap is reached.

11           In *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 205 F.3d  
12 445, 463-69 (1<sup>st</sup> Cir. 2000), for example, the court turned away claims that providing  
13 matching funds to participating candidates based on expenditures by their opponents, or  
14 the special interests that support them, burdened political speech.

15           Appellants misconstrue the meaning of the First Amendment’s protection of  
16 their speech. They have no right to speak free from response – the purpose  
17 of the First Amendment is to “secure the widest possible dissemination of  
18 information from diverse and antagonistic sources.” *Buckley*, 424 U.S. at  
19 49. The public funding system in no way limits the quantity of speech one  
20 can engage in or the amount of money one can spend engaging in political  
speech, nor does it threaten censure or penalty for such expenditures.

21           *Id.* at 464 (citation omitted).

22           Plaintiffs’ rely on *Davis v. Federal Election Comm’n*, 554 U.S. \_\_\_, 128 S.Ct. 2759  
23 (2008), to support their statement that “the mere possibility of triggering privately-funded  
24 opposing campaign speech place[s] an impermissible drag on the exercise of First  
25 Amendment rights.” Motion at 7. There is nothing in *Davis* that supports Plaintiffs’  
26 statement. Indeed, the Court’s decision in *Davis* had nothing to do with the public  
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1 matching funds issues raised here and it analyzed only the constitutionality of the so-  
2 called Millionaires' Amendment, which relaxed generally applicable limits on campaign  
3 contributions under certain conditions for only one candidate. *Davis*, 128 S.Ct. at 2770.

4 Under that Amendment, "when a candidate spends more than \$350,000 in  
5 personal funds and creates what the statute apparently regards as a financial imbalance,  
6 that candidate's opponent may qualify to receive both larger individual contributions than  
7 would otherwise be allowed and unlimited coordinated party expenditures." *Id.* The  
8 Court had no issue with elevated contribution limits on principle and stated that it would  
9 not find any basis for challenge had the contribution limits been "applied across the  
10 board." *Id.* at 2771. Here, contribution limits *are* applied across the board. Lang Decl.  
11 at ¶8. The constitutional concern in *Davis* was the imposition of restrictions on only one  
12 party. "We have never upheld the constitutionality of a law that imposes different  
13 contribution limits for candidates who are competing against each other and we agree  
14 with *Davis* that this scheme impermissibly burdens his First Amendment right to spend  
15 his own money for campaign speech." *Id.* In holding that provision unconstitutional, the  
16 Court found it was an "unprecedented" and "asymmetrical" burden on speech. *Id.* at  
17 2772, 2773.

18  
19 The Act here imposes no asymmetrical burden on a traditional candidate's ability  
20 to contribute or expend his or her own money. It creates a voluntary system under which  
21 candidates may either (1) raise private funds for their campaigns and send as much  
22 money as they can raise or (2) forego private contributions and abide by strict spending  
23 limits to accept public financing. Under the Act, a participating candidate can receive no  
24 contributions after the qualifying period, and receives matching funds (minus 6%  
25 attributed to fundraising expenses) until the limit of three times the original disbursement  
26 is reached. Lang Decl. at ¶¶ 7-11. Once that occurs, the Act does not lift any  
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1 contribution limitations imposed on the participating candidate; rather, the traditional  
2 candidate is free to outspend the participating opponent with abandon and no matching  
3 funds are triggered. *Id.* at ¶ 11. “All contribution limits remain the same for all  
4 candidates regardless of how much money they raise or spend.” *Id.* at ¶ 8. Further,  
5 independent expenditures that trigger matching funds for participating candidates count  
6 towards their overall funding limits and, as a result, a participating candidate could “max  
7 out” without any additional spending by the traditional candidate and be left without any  
8 funds once his opponent begins spending. *Id.* at ¶ 12.

9 Plaintiffs also argue that “the Act’s matching funds provisions structure electoral  
10 competition to overwhelmingly favor subsidized candidates.” Motion at 9. First,  
11 Plaintiffs claim that the matching funds given to participating candidates have more  
12 “purchasing power” because the “real costs of raising campaign funds are not deducted  
13 from the subsidies they receive.” *Id.* Plaintiffs provide no facts to support this claim.  
14 Further, A.R.S. § 16-952 accounts for the costs of fund-raising by requiring that the  
15 Commission deduct 6% from the total reported by the traditional candidate prior to  
16 issuing matching funds.<sup>2</sup> Also, a law does not burden speech because the advantages  
17 available to participating candidates and the restrictions they must accept are not in  
18 “perfect equipoise.” *Vote Choice*, 4 F.3d at 39. Finally, matching funds are sometimes  
19 less than the reported cost of the expenditure because A.R.S. § 16-952(C) requires that  
20 expenditures subject to matching funds “be allocated among candidates for different  
21 offices based on the relative size and length and relative prominence of the reference to  
22 candidates for different offices.” Lang Decl. at ¶ 14. “As a result, participating  
23 candidates in those instances receive matching funds that are not sufficient to respond in  
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26 <sup>2</sup> This was the result of a recent legislative modification passed in 2007 and contained in  
27 HB2690.  
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1 kind to the communication that triggered the matching funds.” *Id.* This circumstance has  
2 occurred in the 2008 election cycle as well. *Id.*

3 The First Amendment issue in this context is whether the benefits of participating,  
4 or the burdens of not participating, are so great that a candidate is effectively coerced into  
5 participating in the system. *See Daggett*, 205 F.3d at 467. In 2006, 40% of the  
6 candidates in Arizona chose not to accept public funds. Lang. Decl. at ¶ 13. In 2008,  
7 36% of the candidates chose not to accept public funds. *Id.* In light of this data, there is  
8 no serious argument that the Act coerced participation.

9 Matching funds have been repeatedly found to be constitutional. Most recently, in  
10 *North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437-39 (4<sup>th</sup> Cir. 2008), the  
11 Fourth Circuit held that North Carolina’s similar scheme of optional public funding for  
12 candidates seeking election to the state’s supreme court and court of appeals did not chill  
13 free speech. That court rejected appellants’ identical argument that their speech was  
14 chilled because they “choose to spend less money (and thus engage in less political  
15 speech) in order to prevent candidates they oppose from receiving public funds. *Id.* at  
16 437. Like Plaintiffs here, “[t]he plaintiffs remain free to raise and spend as much money,  
17 and engage in as much political speech, as they desire.” *Id.* at 437. The distribution of  
18 matching funds, “‘furthers, not abridges, pertinent First Amendment values’ by ensuring  
19 that the participating candidate will have an opportunity to engage in responsive speech.”  
20 *Id.* (quoting *Buckley*, 424 U.S. at 92-93.) Plaintiffs’ arguments here should similarly be  
21 rejected. *See also Gable*, 142 F.3d at 949 (finding Kentucky’s public funding trigger  
22 provision constitutional); *Daggett*, 205 F.3d at 464 (finding Maine’s clean election statute  
23 constitutional).  
24

25 Matching funds are an important component of the Act and are necessary for its  
26 ability to fulfill its anti-corruption purposes. They serve two purposes: 1) they make the  
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1 choice of public financing a rational option and (2) as a practical matter, they preserve the  
2 public's funds so that funding is provided only for necessary campaign expenditures  
3 made in response to an opponent's actions. Without matching funds, a candidate's  
4 decision to run a publicly-funded campaign in Arizona would seldom be the "rational  
5 choice." A participating candidate would receive only a modest public disbursement,  
6 after which she could be grossly outspent by an opponent unconstrained by limits on  
7 expenditures. The Act does not turn a blind eye to independent expenditures, based on  
8 the same legitimate concern.

9 Absent such safeguards, "the State could reasonably believe that far fewer  
10 candidates would enroll in its campaign financing program." *Rosenstiel*, 101 F.3d at  
11 1554. And, while these provisions advance, rather than burden, speech, the matching  
12 funds are sufficiently tailored – indeed, vital – to serving the compelling interests of the  
13 public funding program. *See Rosenstiel*, 101 F.3d at 1553; *Vote Choice*, 4 F.3d at 39.

14 *Day v. Holahan*, 34 F.3d 1356 (8<sup>th</sup> Cir. 1994), relied upon by Plaintiffs, is  
15 inapposite. Both the First and Fourth Circuits have expressly rejected *Day*, which  
16 equated responsive speech with impairment of the initial speaker. *See Daggett*, 205 F.3d  
17 at 464 ("we cannot adopt the logic of *Day*"); *Leake*, 524 F.3d at 437 ("we reject as  
18 unpersuasive the Eighth Circuit's decision in *Day*"). *Day* also is inapposite on its facts.  
19 There, the state sought to justify the independent expenditure match as an incentive to  
20 participation. Given that participation already soared near 100%, the court concluded  
21 that no interest, no matter how compelling, could be served. *Day*, 34 F.3d. at 1361.<sup>3</sup>

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23 After *Day*, the Eight Circuit seemed to contradict its own precedent by holding  
24 that a candidate's expenditure which triggered the release of his opponent's spending

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26 <sup>3</sup> Further, while the court in *Day* decided that strict scrutiny should apply, it never  
27 completed the analysis, and therefore does not help Plaintiffs here. *See* 34 F.3d at 1361.  
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1 limit did not burden First Amendment rights. *See Rosenstiel*, 101 F.3d at 1552. Thus,  
2 the logic of *Day* and *Rosenstiel* are inconsistent, leaving *Day* “open to question.”  
3 *Daggett*, 205 F.3d at 465 n.25. In fact, when the provision is a legitimate part of the  
4 public funding scheme, *Rosenstiel* suggests that there is no burden. *See* 101 F.3d at 1555.  
5 As in *Rosenstiel*, the Act’s matching funds provisions are an essential component of the  
6 Act, without which the state would be unable to “avert a powerful disincentive for  
7 participation in its public financing scheme.” *Id.* at 1555.

8 As a result, Plaintiffs have demonstrated no burden on their free speech.  
9 However, even indulging Plaintiffs that more speech is antithetical to First Amendment  
10 values, the narrowly drawn provisions in this case serve the state’s compelling interests.

## 11 **2. The Matching Fund Provisions Serve a Compelling State Interest.**

12 Public funding systems serve compelling state interests, including to reduce  
13 corruption or the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). The  
14 Court in *Davis*, cited *Buckley* on this point and reaffirmed the constitutionality of public  
15 financing. *Davis*, 128 S.Ct. at 2771-72. *See Daggett*, 205 F.3d at 459 (finding  
16 sufficiently compelling the government’s interest in abolishing the appearance of  
17 corruption in the political process).

18 Taking *Buckley’s* cue, courts have supported efforts by Congress and the states to  
19 enact meaningful campaign finance reform. In *McConnell v. Fed. Election Comm’n*,  
20 540 U.S. 93, 115 (2003), the Supreme Court upheld provisions of the Bipartisan  
21 Campaign Reform Act of 2002 (“BCRA”) designed “to purge national politics of what  
22 [is] conceived to be the pernicious influence of ‘big money’ campaign contributions.” In  
23 passing on the constitutionality of BCRA, the Court reaffirmed government’s interest in  
24 addressing corruption. *See id.* at 143 (“Our cases have made clear that the prevention of  
25 corruption or its appearance constitutes a sufficiently important interest to justify political  
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1 contribution limits.”). The Court also affirmed the deference to be afforded legislatures  
2 in implementing reform. *See id.* at 117 (“Congress’ ‘careful legislative adjustment of the  
3 federal election laws, in a cautious advance, step by step, to account for the particular  
4 legal and economic attributes of corporations and labor organizations warrants  
5 considerable deference.’”) (quoting *Fed. Election Comm’n v. Nat’l Right to Work  
6 Comm’n*, 459 U.S. 197, 209 (1982) (internal quotation omitted)).

7 The Act was created with the purpose of reducing corruption and the appearance  
8 of corruption. *See* A.R.S. § 16-940(A). As a voter initiative, arguments supporting the  
9 Act are contained in the Secretary of State’s publicity pamphlet and reflect the intended  
10 purpose of the law:

- 11 • “Arizona has earned the reputation of a state rife with corruption and abuse of  
12 money in politics. Our elected officials are going to jail and this cycle of abuse  
13 seems endless. It’s time to change that. It’s time to restore confidence in our  
14 political system. It’s time to pass the Citizens Clean Election Act.” Shipman  
15 Decl., Ex. 1 at 88.
- 16 • “We have watched in horror as, in each new election, the politicians have  
17 extended the boundaries of ethical campaigning, skirting the edges of the  
18 campaign finance laws at every opportunity. . . . It’s time for us to take charge and  
19 mandate the desperately needed corrections!” *Id.*
- 20 • “You can end the money chase, halt corruption, limit campaign spending and  
21 reduce special interest influence by supporting ‘Clean Elections.’” *Id.* at 87.
- 22 • “The shocking fact is that non voters outnumber voters. Polls reveal that a lack of  
23 confidence in government is a major factor. Voters believe that their elected  
24 representatives enact policies that favor special interests – not theirs.” *Id.* at 86.

25 The Act is a citizen response to perceived ills in state politics. As also described  
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1 in the text, Arizona’s then-existing campaign finance system allowed elected officials to  
2 accept large contributions from private interests over which they had jurisdiction,  
3 hindered communication to voters by qualified candidates, suppressed the voice and  
4 influence of the majority of Arizona citizens in favor of wealthy special interests, and  
5 undermined confidence in the integrity of public officials. *See* A.R.S. § 16-940(B).

6 For the foregoing reasons, Plaintiffs have failed to demonstrate any likelihood of  
7 success on the merits and their claims fail as a matter of law. Plaintiffs’ Motion should  
8 be denied. *See Gonzalez*, 435 F.Supp.2d at 1000 (“if Plaintiffs’ claims fail as a matter of  
9 law, no likelihood of success exists and the temporary restraining order cannot be  
10 issued”)(citation omitted).

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12 **B. THE BALANCE OF HARMS AND THE PUBLIC INTEREST**  
13 **FAVOR DENYING THE TRO.**

14 The balance of harms and the public interest favor preserving the status quo while  
15 this lawsuit is pending so that the candidates can complete this election under the present  
16 campaign finance system. Changing the rules now would irreparably harm the  
17 candidates who in good faith chose to accept public funding by participating in Arizona’s  
18 Clean Elections program. Declaration of Kara Kelty at ¶¶ 3-6; Declaration of Jackie  
19 Thrasher at ¶¶ 2-9; Declaration of John Valdez at ¶¶ 3-6. It would also undermine  
20 Arizona’s campaign finance system and its elections by eliminating a key component of  
21 Arizona’s public funding program.

22 There is no justification for Plaintiffs’ eleventh hour effort to cut funding for their  
23 opponents, and there is certainly no emergency that justifies a TRO. The Clean Elections  
24 Act is nothing new. It has been in place for ten years. Arizona voters approved the Act  
25 in 1998, and the 2008 election is the fifth in which the public funding alternative has been  
26 available to statewide and legislative candidates in Arizona. The legal issues they raise  
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1 are also not new. The issue of the constitutionality of matching funds has been raised in  
2 another lawsuit pending in federal district court (*Martin v. Brewer*, CV 2004-0002). And,  
3 although Plaintiffs think that the United States Supreme Court decision in *Davis* supports  
4 their legal theory, that case does not justify their delay in filing this lawsuit. The Court  
5 issued that decision June 27, 2008, almost two months before Plaintiffs filed this action.  
6 *See Grudzinski v. Bradbury*, Civ. No. 07-6195-AA, 2007 WL 2733826, at \*3 (D. Or.  
7 Sept. 12, 2007)(denying a request for a TRO and a preliminary injunction with regard to  
8 a ballot measure where the plaintiff waited six weeks after the legislature placed the  
9 initiative on the ballot).

10 In this year's election, all 90 legislative seats are on the ballot, as well as three out  
11 of the five seats on the Arizona Corporation Commission. These candidates had to file  
12 their nomination papers by June 4, 2008—more than two months ago. Lang Decl. at ¶  
13 23. They have already made decisions about whether to participate in Clean Elections or  
14 rely on private contributions to finance their campaigns. Candidates began qualifying for  
15 clean elections funding after January 1, 2008. *Id.* at ¶¶ 9 & 19. Sixty-four percent of the  
16 176 candidates running for statewide and legislative offices in the 2008 election have  
17 chosen to participate in Clean Elections and qualified for funding. *Id.* at ¶ 13. Plaintiffs  
18 submitted their TRO application only one week before the September 2, 2008 primary  
19 election, well after early voting began July 31, 2008. *Id.* at ¶ 13. Early voting for the  
20 general election will begin October 2, 2008, and the general election is November 4,  
21 2008. *Id.* at ¶ 22. It is simply too late to change the campaign finance system this  
22 election cycle.  
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24 The requested TRO presents a serious threat to the public interest, and the  
25 certainty and magnitude of its harmful effects on Arizona's electoral system would  
26 dramatically outweigh the illusory injury asserted by Plaintiffs. As the Ninth Circuit  
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1 made clear, “election cases are different from ordinary injunction cases” because the  
2 “hardship [of an injunction] falls not only upon the putative defendant, . . . but on all the  
3 citizens of [the state].” *Southwest Voter Registration Education Project v. Shelley*, 344  
4 F.3d 914, 918 (9<sup>th</sup> Cir. 2003). The hardship that would befall Arizona’s citizens if a TRO  
5 upended its campaign finance system just two months before an election is plain.  
6 Participating candidates who had agreed to spending limits with the assurance that  
7 matching funds would be available would suddenly be placed at a substantial  
8 disadvantage vis-à-vis their traditional opponents. And rather than fostering speech, as  
9 Plaintiffs’ assert, the TRO would actually reduce the amount of information flowing to  
10 the electorate. After all, the only effect of the TRO would be to prevent participating  
11 candidates from receiving matching funds.

12         Neither the balance of harms nor the public interest is served by altering the  
13 campaign finance system in the middle of an election cycle. “Interference with  
14 impending elections is extraordinary, and interference with an election after voting has  
15 begun is unprecedented.” *Southwest Voter Registration*, 344 F.3d at 918. Voting for the  
16 primary is underway, and it is unfair to the candidates and to the voters to alter the  
17 campaign finance system now, undermining the public funding program Arizona voters  
18 approved almost 10 years ago. Plaintiffs’ application for a TRO should be denied.  
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**III. CONCLUSION.**

For each of the above reasons, Defendants respectfully request that Plaintiffs' Motion be denied.

RESPECTFULLY SUBMITTED this 28th day of August, 2008.

TERRY GODDARD  
Attorney General

/s/ Tanja K. Shipman  
Mary R. O'Grady  
Solicitor General  
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Secretary of State and Arizona Citizens Clean  
Election Commission

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 28th day of August, 2008, I electronically  
3 transmitted the attached document to the Clerk's Office using the ECF System for  
4 filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:  
5

6  
7 Clint Bolick  
8 Scharf-Norton Center for  
9 Constitutional Litigation  
10 Goldwater Institute  
11 500 East Coronado Road  
12 Phoenix, Arizona 85004  
13 [cbolick@goldwaterinstitute.org](mailto:cbolick@goldwaterinstitute.org)  
14 *Attorney for Plaintiffs*

15 **COPY** also served the following business day, the 28th day of August, 2008, by  
16 U.S. Mail with Notice of Electronic Filing, on:

17 The Honorable Roslyn O. Silver  
18 United States District Court  
19 Sandra Day O'Connor U.S. Courthouse, Suite 624  
20 401 West Washington Street, SPC 59  
21 Phoenix, AZ 85003-2158

22 /s/ Laurie Stallman

23 #279854  
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26  
27  
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