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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.

No. CV-081550-PHX-ROS

Hon. Roslyn O. Silver, presiding

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Oral Arguments Requested

Introduction

This Motion presents an emergency and should be heard as presently scheduled for 3:00 p.m. on August 28, 2008 because Plaintiffs are all candidates in an Arizona State primary election that will take place on September 2, 2008 and the last effective trigger dates for matching funds to their opposing subsidized primary election candidates are August 27, 28, 29, September 1 and 2, 2008. *See* http://azcleanelections.gov/ccecweb/ccecays/ccecPDF.asp?docPath=docs/TriggerReporting.pdf (last visited August 26, 2008). Notice of this Motion has been given to Defendants' counsel of record by email, phone voice mail and personal consultation no later than 12:00 p.m. on August 26, 2008.

Stated succinctly, the matching funds provisions of Arizona's Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C), create a discriminatory drag on the exercise of Plaintiffs' free speech rights that swamps the chilling effect of the campaign finance regulations struck down as violative of the First and Fourteenth Amendments in *Davis v. F.E.C.*, 554 U. S. ____, 128 S.Ct. 2759 (2008) and *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). That's why Plaintiffs request this Honorable Court to enter a temporary restraining order enjoining Defendants from enforcing A.R.S. § 16-952 (A), (B) and (C).

I. Statement of Facts

The Arizona Clean Elections Act creates a system of "matching funds" government campaign subsidies for statewide and legislative elected offices within the State of Arizona, for all candidates who choose to "participate" in the government campaign subsidy system, while purporting to give other candidates the option of

running a traditional, privately-supported campaign. *See* A.R.S. § 16-901 et seq. Plaintiffs are all traditional candidates attempting to run their campaigns with private contributions. More specifically, Plaintiffs Gibbons, Bouie and Sposito each have recently triggered matching funds to their opposing "participating" candidates by making direct expenditures to their campaign. (Gibbons Aff., para. 12, Ex. A.1; Bouie Aff., para. 9, Ex. B.1; Sposito Aff., para. 11, Ex. C.1.) Each also has suffered the effects of matching funds triggered by independent expenditures which were deemed to benefit them. (*Id*.) Their declarations detail how the Act's campaign speech subsidies have chilled their speech and threaten to continue to chill their speech. (Gibbons Aff., para. 10, 11, 13; Bouie Aff., para. 7, 8, 10, 12, 18; Sposito Aff., para. 9, 10, 12, 15, 18.)

In essence, Sposito, Gibbons, and Bouie are stymied and made more reluctant to spend money to engage in campaign speech than they would otherwise be if the Act did not trigger equal or greater dollar subsidies to their opposing subsidized candidates. (Gibbons Aff., para. 11, 13, 20; Bouie Aff., para. 10-12, 18; Sposito Aff., para. 10, 12, 15, 18.) And the overhanging threat of unexpected independent expenditures triggering equally unexpected matching funds also causes them to hesitate to raise or spend money to engage in campaign speech for fear that they might otherwise lack the resources to address any adverse effects of such independent speech and the subsidized opposing campaign speech thereby generated. (Gibbons Aff., para. 9, 19; Bouie Aff., para. 7, 18; Sposito Aff., para. 9, 17.)

Sposito, Gibbons, and Bouie affirm that, considering actual direct expenditures and/or opportunity costs, the net campaign speech purchasing power of the campaign

funds they raise is less than that of the amount of matching funds given to their opposing subsidized candidates. (Gibbons Aff., para. 14-18; Bouie Aff., para. 13-16; Sposito Aff., para. 13-16, Ex. C.2.) Moreover, ever since triggering matching funds, Sposito has seen each dollar spent on his campaign bestow generate two dollars in opposition to his campaign because one dollar went to each of his two opposing subsidized candidates. (Sposito Aff., para. 12, Ex. C.1, C.3.)

Finally, Bouie is running in a primary where an opposing traditional incumbent candidate and a subsidized candidate have joined forces against him as a slate. (Bouie Aff., para. 21-23, Ex. B.2.) Every dollar spent to support his campaign thus gives nearly a dollar to the opposing subsidized candidate, and every dollar spent to support his opposing traditional candidate also supports Bouie's opposing subsidized candidate. Because of the "slate" strategy used by his electoral opponents, Bouie finds himself in a position where, for every dollar he spends to counter a dollar spent by his opposing traditional candidate, the Act's matching funds provisions effectively generate two dollars in opposition to his campaign.

II. Argument

Given the holding of *Davis* and the persuasive precedent of *Day*, Plaintiffs clearly have a substantial likelihood of succeeding on the merits in their challenge against the matching funds provisions of the Arizona Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C). Moreover, the violation of constitutional rights unquestionably constitutes irreparable harm for which there is no adequate legal remedy, the balance of hardships tips decidedly in Plaintiffs' favor, and the public interest is served when courts strike

down blatantly unconstitutional statutes. For all of these reasons, the requested temporary restraining order should issue.

A. A Temporary Restraining Order Should Issue in this Case.

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Gonzales v. State of Arizona*, 435 F.Supp.2d 997, 999 (D. Ariz. 2006); *cf. Stuhlbarg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001) (observing "[b]ecause our analysis is substantially identical for the injunction and the TRO, we do not address the TRO separately"). The standard for a preliminary injunction is satisfied when the movant shows either: 1) a likelihood of success on the merits and the possibility of irreparable harm; or 2) the existence of serious questions going to the merits and the balance tips in the movant's favor. The Ninth Circuit has held that "[t]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). "Additionally, '[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.'" *Id.* Plaintiffs satisfy all applicable standards for issuing a temporary restraining order with prior notice.

1. Plaintiffs Have A Substantial Likelihood Of Succeeding On The Merits.

It is well-established that campaign speech, campaign expenditures and campaign contributions all constitute protected free speech under the First and Fourteenth Amendments. *Davis v. F.E.C.*, 554 U. S. ____, 128 S.Ct. 2759 (2008); *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 548 U.S. 230, 246 (2006); *Buckley v. Valeo*, 424 U.S. 1, 15, 23, 96 S.Ct. 612 (1976). It is equally well-established that government "classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In view of such precedent, Plaintiffs have a substantial likelihood of succeeding on the merits because the matching funds provisions of the Arizona Clean Elections Act unconstitutionally chill free speech by imposing a significant discriminatory burden on supporting a traditional candidate that would not otherwise exist, and also by skewing electoral competition in favor of candidates who participate in the Act's scheme of government-subsidized campaign speech.

a) The Act's Matching Funds Provisions Clearly Chill Free Speech.

In *Davis*, the Court determined that a campaign finance regulation, which creates a "drag" on the exercise of First Amendment rights, "cannot stand unless it is 'justified by a compelling state interest.'" *Davis*, 128 S.Ct. at 2764. The Court further held that the goal of "leveling" electoral opportunities is not a compelling state interest. *Id.* And the Court struck down a campaign finance regulation that created an incentive structure whereby "the vigorous exercise of the right to use personal funds to finance campaign

speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 2772.

Based on these legal principles, *Davis* struck down campaign regulations which were held to impermissibly chill a millionaire-candidate from supporting his own campaign and engaging in campaign speech based on the *mere possibility* that additional campaign contributions and expenditures *might* be made by private supporters to the benefit of competing candidates. By contrast, the Act's matching fund provisions chill both millionaires and ordinary candidates alike from supporting their own campaigns based on the *guarantee* that government subsidies will flow to support the campaigns of competing subsidized candidates.

If the mere *possibility* of triggering privately-funded opposing campaign speech placed an impermissible drag on the exercise of First Amendment rights in *Davis*, then certainly the Arizona Clean Election Act's *guarantee* of *government subsidies* to support opposing campaign speech places an equally impermissible drag on the exercise of First Amendment rights.

Significantly, the Court in *Davis* based its reasoning, in part, on *Day*, 34 F. 3d at 1359–60, which struck down the Minnesotan predecessor of the Arizona Clean Elections Act. *Davis*, 128 S.Ct. at 2772. *Day* found that the mere enactment of an independent expenditure matching provision chilled the speech of would-be supporters of a candidate or his message, explaining:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that

> independent expenditure, chills the free exercise of that protected speech. This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.

Day, 34 F.3d at 1360. *Day* is perfectly analogous to this case, and its persuasive force is underscored by the Supreme Court's reliance upon it in *Davis*.

If anything, Clean Elections is even more noxious to free speech than the Minnesota system struck down in *Day*. This is because, unlike in Minnesota's scheme, subsidized candidates under the Clean Elections Act suffer no disadvantage from independent expenditures made to benefit them. This is because Minnesota's scheme would deduct independent expenditures made to benefit subsidized candidates from their available pool of campaign subsidies, whereas Arizona's Clean Elections Act does nothing. Moreover, Arizona's matching funds provisions bestow even more money on subsidized candidates for every dollar spent to the benefit of traditional candidates than did the Minnesota system. Arizona gives subsidized candidates nearly a dollar for every independent expenditure deemed to benefit a traditional candidate, whereas the Minnesota system only furnished a half dollar subsidy for every dollar of independent expenditure made to support a traditional candidate. There is no question that Arizona's matching funds provisions chill campaign speech by independent parties to a greater extent than those at issue in *Day*. And, based on the broad third party standing afforded by the First Amendment, Plaintiffs are certainly entitled to challenge those chilling effects here.

b) The Act's Matching Funds Provisions Also Cause Unconstitutional Discrimination that Burdens Free Speech.

In addition to its chilling effect on campaign speech, contributions and expenditures, the Act's matching funds provisions structure electoral competition to overwhelmingly favor subsidized candidates. This is because even in races where a traditional, privately-supported candidate faces only one subsidized candidate, the matching funds given to subsidized candidates have more campaign speech "purchasing power" because the real costs of raising campaign funds are not deducted from the subsidies they receive. And in races where a traditional, privately-supported candidate faces multiple subsidized candidates, every dollar spent to support the traditional candidate generates multiple dollars to support candidates who are opposed to the traditional candidates. Thus, not only does the guarantee that campaign speech will trigger matching funds to the opposition chill speech more substantially than did the mere possibility of enhanced private contributions in *Davis*, but the dollars received by subsidized candidates actually enable more campaign speech overall by subsidized candidates relative to traditional candidates.

The disproportionate benefit given to subsidized candidates by the Act's matching funds provisions is then further compounded by the way in which independent expenditures trigger matching funds to subsidized candidates. A PAC totally outside of a traditional candidate's control, which spends a dollar on an ineffective advertisement or mailing to benefit that traditional candidate, generates nearly a dollar in matching funds to each subsidized competing candidate. These matching funds can then be spent

at the discretion of the subsidized competing candidate to maximum effect, even though the traditional candidate had nothing to do with the independent expenditure credited against him (and likely could have spent the money to greater effect if she had control over it). This ensures that the Act's matching funds provisions furnish subsidized candidates with the ability to engage in more effective campaign speech whenever an independent expenditure is made, which is deemed to benefit a traditional candidate. (Gibbons Aff., para. 9, 19; Bouie Aff., para. 7, 15-16, 18; Sposito Aff., para. 9, 17.) This discrimination is compounded by the fact that the benefits accruing to subsidized candidates from independent expenditures do not work both ways.

Traditional candidates receive no benefit whatsoever and a subsidized candidate suffers no disadvantage when independent expenditures are made to support a subsidized candidate or to oppose a traditional candidate. The overall effect of such discrimination is more speech and more effective speech to the benefit of a subsidized candidate than a traditional candidate.

c) The Discriminatory Chilling Effect of the Act's Matching Funds Provisions are Not Justified by Any Compelling State Interest.

The Act's discriminatory and speech-chilling matching funds provisions are not justified by any compelling state interest. First of all, under *Davis*, the Clean Election Act's actual purpose of equalizing the financial resources of candidates is not a compelling state interest that can justify its coercive speech chilling and discriminatory effects. Nor is there any other compelling state interest that can justify the Act's matching funds provisions.

The attached Goldwater Institute Policy Reports detail how the Clean Elections Act tends to benefit incumbents, has not appreciably promoted competitive elections, and has not promoted significantly more candidate diversity. (Woodmansea Aff., Ex. D.1, D.2.) This precludes any assertion that the Act advances any interest in enhanced participatory democracy. Furthermore, the discriminatory incentives and impact of the Act's matching funds provisions preclude any contention that the Act neutrally advances any state interest in increasing campaign speech. The fact that the Act can actually favor those very few traditional candidates who generate direct contributions and expenditures three or more times the applicable spending limits belies the argument that the Act is aimed at preventing corruption or the appearance of corruption that purportedly results from the influence of direct campaign support. (Gibbons Aff., para. 21, 22; Bouie Aff., para. 19; Sposito Aff., para. 19-20.) Indeed, as shown by the attached sampling of recent newspaper reports and editorials, the Act has no reputation of legitimizing the statewide political process or preventing the appearance of corruption. (Dranias Aff., Ex. E.1, E.2, E.3.) Moreover, the Act's matching funds provisions have the reputation of being easily gamed by special interests and causing grossly disproportionate campaign expenditures against traditional candidates who are faced by multiple subsidized candidates. (Gibbons Aff., para. 23; Bouie Aff., para. 20-22; Sposito Aff., para. 21.)

In sum, the Act creates an unconstitutional "drag" on the exercise of First and Fourteenth Amendment rights without advancing any compelling state interest. For these reasons, under *Davis* and *Day*, Plaintiffs have a likelihood of success on the merits

of their claim that the Act's matching funds provisions violate the First and Fourteenth Amendments.

2. The Plaintiffs Are Suffering Irreparable Harm For Which There Is No Adequate Remedy At Law.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Under Ninth Circuit law, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano*, 303 F.3d at 973. Such precedent directly supports the contention that Act's matching funds provisions have caused and threaten to continue to cause Plaintiffs to suffer irreparable harm for which there is no adequate remedy at law.

3. The Balance Of Harms and The Public Interest Weigh Heavily In The Plaintiffs' Favor.

Free political expression in the context of competitive electoral processes is one of the core concerns of the First Amendment. And, not surprisingly, the Ninth Circuit has held that "[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammaranto*, 303 F.3d at 974. Since no speech in America is more highly treasured than free political speech, the need to prevent further loss of Plaintiffs' fundamental freedoms trumps the State's interest in subsidizing political campaigns to squelch such speech.

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B. The Court Should Exercise its Discretion and Only Require a Nominal Bond.

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

Conclusion

As did the campaign finance regulations struck down in *Davis* and *Day*, the matching funds provisions of the Arizona Clean Elections Act cause the vigorous exercise of free speech rights by Plaintiffs and their supporters to produce fundraising advantages for their opposing government-subsidized candidates. But the chilling effect of the Act's matching funds provisions does not even end with guaranteed opposing government campaign subsidies. The Act creates a discriminatory framework that overwhelmingly structures electoral competition to favor subsidized candidates over traditional candidates by ensuring that, in nearly all cases, more campaign speech and more effective campaign speech will be made to the benefit of subsidized candidates

than to the benefit of traditional candidates. With this discriminatory framework in view, there is simply no way that the matching funds provisions of the Act can withstand application of the legal principles enforced in *Davis* and *Day*. No compelling state interest is advanced by the Arizona Clean Elections Act because its matching funds provisions make a mess out of electoral politics.

RESPECTFULLY SUBMITTED this 26th Day of August, 2008

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