

1 **INSTITUTE FOR JUSTICE**
Timothy D. Keller (019844)
2 Jennifer M. Perkins (023087)
3 398 S. Mill Avenue, Suite 301
4 Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

5 **INSTITUTE FOR JUSTICE**
William R. Maurer (WSBA 25451)*
6 101 Yesler Way, Suite 603
Seattle, WA 98104
7 P: 206-341-9300/F: 206-341-3911

8 Attorneys for Plaintiffs-Intervenors

9
10 **IN THE UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA

11 JOHN McCOMISH, *et al.*,)
12) Civil Action No.
13)
14 Plaintiffs,) CV08-1550-PHX-ROS
15)
16 v.) **Plaintiffs-Intervenors’ Motion**
17) **for a Preliminary Injunction**
18 JAN BREWER, in her official capacity)
19 as Secretary of State of the State of) (Assigned to the Honorable Roslyn O.
20 Arizona; *et al.*,) Silver)
21)
22 Defendants,)
23)
24)
25)
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20 Pursuant to Fed. R. Civ. P. 65, Plaintiffs-Intervenors Robert Burns (“Burns”),
21 Rick Murphy (“Murphy”), and the Arizona Taxpayers Action Committee (“Arizona
22 Taxpayers”) (and together, the “Intervenor Movants”) hereby move this Court for a
23 preliminary injunction prohibiting Defendants from implementing the “matching funds”
24 provisions of Arizona’s Citizens Clean Elections Act (the “Act”), Ariz. Rev. Stat. § 16-
25

26
27 _____
28 * Application for admission *pro hac vice* pending.

1 952 (B), and (C) (“Equal funding of candidates”) in the upcoming Arizona general
2 election scheduled for November 4, 2008. This relief is necessary to prevent irreparable
3 damage to the Intervenor Movants’ fundamental First Amendment rights caused by
4 Defendants’ continued implementation of the Act’s matching funds provisions, which
5 this Court has already determined “violate[] the First Amendment of the U.S.
6 Constitution.” Order Den. TRO (the “Order”).
7

8
9 Burns and Murphy, privately financed candidates, face the prospect of limiting
10 their speech and abiding by the Act’s expenditure limits or risk being outspent by their
11 government funded opponents in the general election because of the Act’s operation.
12 *See* Attach. A, Decl. of Robert Burns (“Burns Decl.”) ¶¶ 5-7; Attach. B, Decl. of Rick
13 Murphy (“Murphy Decl.”) ¶¶ 5-9. Arizona Taxpayers, an Arizona political committee,
14 similarly faces the prospect of deciding whether, or to what extent, to engage in
15 constitutionally protected advocacy by making independent expenditures in support of
16 privately financed candidates or in opposition to a government funded candidate, when
17 such support or opposition may aid the very candidates Arizona Taxpayers opposes.
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19 Attach. C, Decl. of Dennis Shane Wikfors (“Wikfors Decl.”) ¶¶ 7-9.¹
20

21 This Court should enjoin the enforcement of the Act’s matching funds provisions.
22
23 Intervenor Movants present a compelling case of a strong likelihood of success on the
24 merits. Moreover, because the loss of First Amendment freedoms is per se irreparable
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26 ¹ Arizona Taxpayers will supplement its Declaration with a description of each specific
27 race in which the Act will chill its expression once the primary results have come in on
28 September 2, 2008.

1 injury, and because enforcement of these provisions will irreparably harm Intervenor
2 Movants, they will continue to suffer irreparable harm unless Defendants are enjoined.
3 Finally, the public interest will be served because, absent the issuance of an injunction,
4 such provisions will chill free expression in an area falling within the core of First
5 Amendment protections.
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7 This Motion is based on the argument herein, the attached declarations, and the
8 complaint and other records in this case. A proposed order accompanies this Motion.²
9

10 STATEMENT OF FACTS

11 I. The Parties

12 Burns and Murphy are both privately financed candidates for office in the 2008
13 general election whose First Amendment rights will be harmed by the Act's matching
14 funds provisions absent an injunction. A.R.S. § 16-952 (B) and (C).
15

16 Burns is the current State Senator representing Legislative District 9. Burns
17 Decl. ¶¶ 2-3. He is currently running for re-election to the Arizona State Senate as a
18 privately financed candidate. *Id.* at ¶ 4. In the 2008 general election, Burns' opponent is
19 running with taxpayer funds pursuant to the Act. Burns intends to curtail his speech so
20 as to avoid triggering matching funds to his opponent. *Id.* at ¶ 6.
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25 ²As more fully described in the accompanying Motion to Intervene, Arizona Taxpayers
26 is a plaintiff in *Martin v. Brewer*, No. CV04-0200 PHX EHC, addressing the same
27 statute in a suit against the same defendants, currently pending in Judge Carroll's court.
28 Arizona Taxpayers, like the other *Martin* Plaintiffs, supports consolidating these cases in
one forum. Nonetheless, Arizona Taxpayers is filing this motion so that its interests are
fully represented when this Court considers whether to enjoin the Act's operation.

1 Murphy is a current State Representative in Legislative District 9. Murphy Decl.
2 ¶¶ 2-3. Murphy is currently running for re-election to the Arizona State House as a
3 privately financed candidate. *Id.* at ¶ 4. In the 2008 general election, Murphy will have
4 three government funded opponents in the general election; thus for every dollar he
5 triggers in matching funds, the government will pay out three dollars to his government
6 funded opponents. *Id.* at ¶ 7.

7
8 Arizona Taxpayers is an Independent Expenditures Committee organized
9 pursuant to Ariz. Rev. Stat. § 16-902. Wikfors Decl. ¶ 2. In the 2008 general election, it
10 is likely that Arizona Taxpayers' participation will trigger matching funds in at least one
11 race and thus Arizona Taxpayers must decide whether to engage in the political speech
12 that represents its donors' interests and thereby aid the very candidate whom Arizona
13 Taxpayers opposes. *Id.* It is possible Arizona Taxpayers will remain silent in order to
14 avoid triggering the matching funds; alternatively, if Arizona Taxpayers does speak, that
15 speech will be significantly diluted by the triggering of matching funds. *Id.*

16
17 Defendants are various Arizona state officials charged with implementing the
18 Act, including enforcing its matching funds provisions. First Amended Complaint at 7,
19 *Martin v. Brewer*, CV 04-0200-PHX-EHC (No. 75).

20 **II. The Act**

21
22 Arizona voters narrowly passed the "Citizens Clean Elections Act" by initiative
23 in 1998. <http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf>. It applies
24 to statewide and legislative races. Ariz. Rev. Stat. § 16-950 (D). When a candidate runs
25 a campaign using taxpayer funds, that candidate must consent not to "accept any
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1 additional contributions, including private contributions, in-kind contributions, or any
2 contributions from the candidate personally. The candidate must further agree that all
3 campaign expenditures come from public funds.” Jason B. Frasco, Note, *Full Public*
4 *Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the*
5 *States*, 92 Cornell L. Rev. 733, 755 (2007) (footnote omitted).

7 The challenged portions of the Act are entitled “Equal funding of candidates,”
8 also known as the “matching funds” provisions. A.R.S. § 16-952. These provisions
9 ensure that, under certain circumstances, taxpayer financed candidates are funded based
10 on the actions of privately financed candidates, individual citizens, and independent
11 groups. Under this scheme, if a privately financed candidate in a general election makes
12 expenditures exceeding the taxpayer financed candidate’s general election spending
13 limit (which is the amount of a taxpayer funded candidate’s initial lump sum
14 disbursement), the government immediately pays the taxpayer financed candidate an
15 amount equal to the amount the privately financed candidate spent over that limit, minus
16 6% for the privately financed candidate’s fund raising expenses. A.R.S. § 16-952 (B).

20 This “equal funding” goes to *all* taxpayer-financed candidates running against a
21 privately financed candidate. Thus, if a privately financed candidate makes expenditures
22 of \$10,000 and has four primary opponents that receive taxpayer funding, each one of
23 these opponents receives a check for \$9,400 (\$10,000 minus 6%), for a total government
24 subsidy of \$37,600 to counter the privately financed candidate’s expenditure of \$10,000.
25 This provision is particularly harmful to the free speech interests of Murphy, who faces
26 numerous taxpayer funded opponents in the 2008 general election.
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1 **ARGUMENT**

2 A party is entitled to a preliminary injunction upon a showing of either “(1) a
3 combination of probable success on the merits and the possibility of irreparable harm; or
4 (2) that serious questions are raised and the balance of hardships tips in its favor.”
5 *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002) (quotation
6 marks omitted). “[T]hese two formulations represent two points on a sliding scale in
7 which the required degree of irreparable harm increases as the probability of success
8 decreases.” *Id.* (quotation marks omitted). In cases where the public interest is
9 involved, the district court must also examine whether the public interest favors the
10 moving party. *Id.* Intervenor Movants readily satisfy these criteria. Intervenor Movants
11 have a strong case on the merits, face irreparable harm, and the public interest favors
12 their position. Accordingly, this Court should issue the requested injunction.

13 **I. Intervenor Movants Are Likely To Succeed On The Merits**

14 As noted above, this Court has already determined that the Act’s matching funds
15 provisions “violate[] the First Amendment of the U.S. Constitution.” Order at 7. This
16 decision is correct and should continue to guide this Court.

17 **A. The Act Chills Political Expression**

18 **i. Campaign Finance Schemes That Burden the Full
19 Expression of Political Viewpoints Chill Speech**

20 Public campaign finance schemes, like the Act, pay matching funds so that
21 publicly financed candidates can counter speech intended to defeat them. Matching
22 funds provisions thus require privately financed candidates and independent groups to
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1 either agree to limit their expenditures or risk triggering the disbursement of public
2 funds to the candidate they oppose. In this way, matching funds provisions impose a
3 penalty on any privately funded candidate or independent group who robustly exercise
4 their First Amendment rights. Many candidates and groups may choose to speak despite
5 the matching funds, but when they speak they shoulder a special and potentially
6 significant burden. *See Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2772 (2008)
7 (citing *Day v. Holahan*, 34 F.3d 1356, 1359-1360 (8th Cir. 1994)).
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10 In *Day*, the Eighth Circuit struck down the matching funds provision in
11 Minnesota's public campaign finance scheme. The Eighth Circuit examined the effect
12 on independent expenditures when the government pays matching funds to the political
13 candidates whose election the independent expenditure is designed to defeat. *Day*, 34
14 F.3d at 1359. The court found that the threat of triggering payments to government
15 funded candidates caused independent groups to self-censor. *Id.* at 1360. This is
16 because
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18 [t]he knowledge that a candidate who one does not want to be elected will
19 have her spending limits increased and will receive a public subsidy equal
20 to half the amount of the independent expenditure, as a direct result of that
21 independent expenditure, chills the free exercise of that protected speech.

22 *Id.*

23 The First Circuit confronted a similar challenge to Maine's matching funds
24 provision, but declined to adopt *Day*'s sound logic. The First Circuit in *Daggett v.*
25 *Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000),
26 upheld a matching funds provision similar to the provisions challenged in this case.
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1 The First Circuit’s rejection of *Day* is premised on the oft quoted proposition that,
2 under the First Amendment, individuals “have no right to speak free from response.”
3 *Daggett*, 205 F.3d at 464. Intervenor Movants agree that the First Amendment does not
4 protect a right to speak free from response. But objecting to being “directly responsible
5 for adding to” the campaign coffers of a candidate the speaker opposes is a far cry from
6 asserting a right to speak free from response. *Day*, 34 F.3d at 1360.
7

8 The First Circuit, like Defendants here, failed to account for the true cost to
9 candidates and independent groups of triggering matching funds when they speak out
10 against a government funded candidate: namely, there is a chilling effect on the exercise
11 of constitutionally protected speech when the direct result of that speech is to provide
12 one’s opponent with a large cash subsidy. *See* Burns Decl. ¶ 5 (“These provisions force
13 me to censor myself in order to avoid triggering matching funds to my government
14 funded opponent.”); Murphy Decl. ¶ 9 (“I may be forced by the operation of the Act to
15 stop accepting contributions to my campaign to make sure that I do not exceed the Act’s
16 expenditure limitations for this race, despite the fact that I would like to continue to
17 collect contributions in order to communicate with the voters of [] my district.”);
18 Wikfors Decl. ¶ 9 (“The knowledge that a candidate Arizona Taxpayers does not want to
19 be elected will receive a government subsidy, as a direct result of Arizona Taxpayers
20 speech, will prevent Arizona Taxpayers from the full and unrestricted exercise of its
21 speech in such races.”). Even courts that have upheld such provisions have recognized
22 that matching funds are designed to, and do, interfere with the full expression of First
23 Amendment rights. *See Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998) (“Speech
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1 will be stifled to some degree by the fear that the [government funded] candidate will
2 clearly ‘outspend’ the [privately financed] candidate once the cap is lifted.’”) (quoting
3 the district court’s opinion).
4

5 Quite simply, under the Act, the harder privately financed candidates, like Burns
6 or Murphy, work at fundraising, the more their government funded opponents benefit.
7 Matching funds give government funded candidates a free ride on their privately
8 financed opponents’ expressive coattails. The result is that privately funded candidates
9 face two choices, both bad: accept expenditure limits by running for office with
10 government funds or suffer the punitive provisions of the public campaign finance
11 scheme. The end result is a chilling of speech and a related diminution of information
12 conveyed to the voters of this State.³
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15 **ii. The Act Has Chilled Political Expression by Privately**
16 **Financed Candidates**

17 The chilling effect of matching funds provisions recognized in the abstract by the
18 Eighth Circuit has been borne out in reality. As discussed in the attached declaration of
19 Dick Carpenter, the Act’s effect in practice has been to significantly decrease spending
20 on political campaigns by privately financed candidates, while providing funds for
21 government financed candidates to significantly outspend any privately financed
22 opponents. The end result of this disparity suggests that the Act’s ultimate result is to
23 chill political expression by any privately financed candidate with a corresponding
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27 [§] Arizona’s increased reporting requirements tie up privately financed candidates’ time
28 and resources without making the political process more transparent. The only purpose

1 expansion of political influence by their government funded opponents. *See* Attach. D,
2 Decl. of Dick Carpenter.

3 **B. The Act’s Justification Is Not Compelling or Even Legitimate**

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5 A government restriction on speech may survive constitutional scrutiny if it is
6 narrowly tailored to serve a compelling government interest. *Fed. Election Comm’n v.*
7 *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007). The governmental goal
8 underlying matching fund provisions is to equalize the relative financial resources of
9 publicly and privately funded candidates. *See* Ariz. Rev. Stat. § 16-952. Public
10 campaign finance schemes intend to level the playing field so that privately financed
11 candidates do not outspend their government funded opponents. But leveling the
12 resources of competing speakers is not a compelling government interest—in fact, it is
13 not even a legitimate one. As the Supreme Court recently recognized in *Davis*, it is a
14 concept “‘wholly foreign to the First Amendment.’” *Davis*, 128 S. Ct. at 2773 (quoting
15 *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).
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19 While *Davis* did not deal with a public campaign finance system, but rather with
20 the so-called “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act of
21 2002, nonetheless, it has significant implications for public campaign finance systems.
22 In particular, the Court found that:

23
24 The argument that a candidate’s speech may be restricted in order to
25 “level electoral opportunities” has ominous implications because it would
26 permit Congress to arrogate the voters’ authority to evaluate the strengths
27 of candidates competing for office ... Leveling electoral opportunities

28 of the reporting requirements is to facilitate equalization payments to government
subsidized candidates. #

1 means making and implementing judgments about which strengths should
2 be permitted to contribute to the outcome of an election. The Constitution,
3 however, confers upon voters, not Congress, the power to choose the
4 Members of the House of Representatives, Art. I, § 2, and it is a dangerous
5 business for Congress to use the election laws to influence the voters’
6 choices.

7 *Id.* at 2773-74.

8 Given that public financing efforts, including the Act, have been presented
9 repeatedly and clearly as a means to “level the playing field” in elections, it is clear that
10 this justification cannot provide sufficient support for a system that so heavily burdens
11 First Amendment rights. As *Davis* made clear, the entire purpose behind the Act is
12 simply not a legitimate government interest and cannot support *any* law that results in a
13 reduction in free speech rights.

14 **C. The Act’s Justification Is Undermined By Its Capacity for**
15 **Abuse**

16 As this Court recognized in the Order denying the *McComish* Plaintiffs’ motion
17 for a temporary restraining order, “the Act opens up new avenues for possible
18 corruption.” Order at 7. Indeed, the very day this Court issued that Order, the *Arizona*
19 *Daily Star* reported that candidates for the Arizona Corporation Commission have begun
20 to run in privately funded/government funded “slates” in order to “kick[] up Clean
21 Elections disbursements, as they pool their money for costly campaign expenses such as
22 TV ads.” Attach. E, Shelley Shelton, *Non-participant is boon for rivals in Clean*
23 *Elections*, *Az. Daily Star*, Aug. 29, 2008. One candidate not receiving public funds
24 described this approach as “‘politics as usual. That’s how politicians play the game.
25 And it’s how well-connected people move into these statewide positions with a vested
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1 interest.” *Id.* Thus, as this Court recognized in its Order regarding such a “slate”
2 strategy, “[t]he possibility of such gamesmanship mitigates against any decrease in
3 corruption or in the appearance of corruption.” Order at 7.
4

5 **II. Absent An Injunction, Intervenor Movants Will Be Irreparably**
6 **Harmed**

7 Intervenor Movants have demonstrated a strong likelihood of success on the
8 merits because the Act violates their speech rights and is unsupported by a legitimate
9 government interest. Because of the strength of the merits in this case, Intervenor
10 Movants need only show a “possibility of irreparable harm” under the Ninth Circuit’s
11 standards. *Sammartano*, 303 F.3d at 965 (quotation marks omitted). Indeed, Plaintiffs
12 have shown much more than a possibility of irreparable harm because the “loss of First
13 Amendment freedoms, for even minimal periods of time, unquestionably constitutes
14 irreparable injury.” *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir.
15 1998). (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
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18 Moreover, “a party seeking preliminary injunctive relief in a First Amendment
19 context can establish irreparable injury sufficient to merit the grant of relief by
20 demonstrating the existence of a colorable First Amendment claim.” *Sammartano*, 303
21 F.3d at 973 (quotation marks omitted). In the Ninth Circuit, “when the harm claimed is
22 a serious infringement on core expressive freedoms, a plaintiff is entitled to an
23 injunction even on a lesser showing of meritoriousness.” *Id.* at 974. Because Intervenor
24 Movants “have not only stated a colorable First Amendment claim, but one that is likely
25 to prevail[,] they have thus established the potential for irreparable injury” entitling them
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1 to a preliminary injunction. *Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1225
2 (9th Cir. 2003).

3
4 **III. The Balance of Harms and the Public Interest Weigh In Favor of**
5 **Granting An Injunction**

6 In determining whether to grant a preliminary injunction where the public interest
7 is involved, a court must consider whether the balance of public interests weighs in favor
8 of granting or denying injunctive relief. *Westlands Water Dist. v. Natural Res. Def.*
9 *Council*, 43 F.3d 457, 459 (9th Cir. 1994). The public interest weighs heavily in favor
10 of enjoining the continued enforcement of the Act's matching funds provisions. Unlike
11 the *McComish* Plaintiffs' desired temporary restraining order, which sought to alter the
12 funding mechanism for an election a few days away, the general election in Arizona is
13 more than two months away from the date of this Motion. This is clearly enough time
14 for government funded candidates to obtain traditional funding, especially in light of the
15 fact that such candidates were on notice that such provisions were on shaky
16 constitutional grounds after the U.S. Supreme Court's decision in *Davis*, and certainly
17 after this Court's Order holding that the Act violated First Amendment rights.

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21 In that regard, it is well established that allowing enforcement of unconstitutional
22 laws does not advance the public interest. "Curtailing constitutionally protected speech
23 will not advance the public interest, and neither the Government nor the public generally
24 can claim an interest in the enforcement of an unconstitutional law." *Am. Civil Liberties*
25 *Union v. Reno*, 217 F.3d 162, 180-81 (3rd Cir. 2000), *vacated on other grounds*,
26 *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002) (quotation marks omitted).
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1 This is even more apparent when confronted with a law that chills political speech about
2 the very people the voters of the state of Arizona will elect to govern them.

3
4 **CONCLUSION**

5 For the reasons set forth above, as supported by the materials filed concurrently
6 with this Motion, Intervenor Movants respectfully request that this Court enter a
7 preliminary injunction pursuant to Fed. R. Civ. P. 65 preventing Defendants and any
8 officer, employee, or agent of the Defendants, from enforcing the Act's matching funds
9 provisions pending this Court's final judgment in this action.
10

11 **RESPECTFULLY SUBMITTED** this 1st day of September, 2008.

12
13 **INSTITUTE FOR JUSTICE**

14
15 s/Timothy D. Keller

16 Timothy D. Keller (019844)
17 Jennifer M. Perkins (023087)
18 398 S. Mill Avenue, Suite 301
19 Tempe, AZ 85281
20 P: 480-557-8300/F: 480-557-8305

21 **INSTITUTE FOR JUSTICE**

22 William R. Maurer (WSBA #25451)⁴
23 101 Yesler Way, Suite 603
24 Seattle, WA 98104
25 P: 206-341-9300/F: 206-341-8311

26
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⁴ *Pro hac vice* application pending.

1 Certificate of Service

2
3 I hereby certify that on September 1, 2008, I electronically transmitted the
4 attached document to the Clerk's Office using the CM/ECF System for filing and
5 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

6 Clint Bolick
7 Nick Dranias
8 Scharf-Norton Center for
9 Constitutional Litigation
10 Goldwater Institute
11 500 E. Coronado Rd.
12 Phoenix, AZ, 85004
13 cbolick@goldwaterinstitute.org

14 Attorney for the Plaintiffs

15 Terry Goddard
16 Attorney General
17 Mary O'Grady
18 Solicitor General
19 Tanja K. Shipman
20 Assistant Attorney General
21 125 W. Washington St.
22 Phoenix, AZ 85007-1298
23 mary.ograde@azag.gov
24 tanja.shipman@azag.gov

25 Attorneys for the Defendant

26 Timothy M. Hogan
27 Joy-Herr-Cardillo
28 Arizona Center for Law in the Public Interest
202 E. McDowell Rd. Suite 153
Phoenix, AZ 85004
thogan@aclpi.org
jherrcardillo@aclpi.org

Deborah Goldberg
James Joseph Sample
Monica Youngna Youn
5th Floor

1 Brennan Center of Justice at NYU School of Law
2 161 Avenue of the Americas
3 New York, NY 10013
4 deborah.goldberg@nyu.edu
5 james.sample@nyu.edu
6 monica.youn@nyu.edu

7 Bradley S. Phillips
8 Grant A. Davis-Denny
9 Elisabeth J. Neubauer
10 Trevor D. Dryer
11 Munger, Tolles & Olson LLP
12 355 S. Grand Avenue
13 Thirty-Fifth Floor
14 Los Angeles, CA 90071-1560
15 Brad.Phillips@mto.com
16 Grant.Davis-Denny@mto.com
17 Elisabeth.Neubauer@mto.com
18 Trevor.Dryer@mto.com

19 Attorney for the Defendant-Intervenors

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21
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23
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25
26
27
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s/Timothy D. Keller