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

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA 25451)[1]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

Attorneys for Plaintiff-Intervenors

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JOHN MCCOMISH, *et al.*,
Plaintiffs,
and

DEAN MARTIN, a citizen of the State of Arizona; *et al.*,
Plaintiff-Intervenors,

vs.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; *et al.*,
Defendants,
and

CLEAN ELECTIONS INSTITUTE, INC.
Defendant-Intervenor.

Civil Action No. 08-1550-PHX-ROS

PLAINTIFF–INTERVENORS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT BY KEN BENNETT, *et al.*

(Oral Argument Requested)

[1] Admitted *pro hac vice.*

Summary of Argument

Defendants are not entitled to summary judgment. Fed. R. Civ. P. 56(c). Defendants cite the wrong standard of review. Campaign finance laws that burden free speech are subject to strict scrutiny and cases setting a lower standard of review for laws regulating the conduct of elections have no application here. To survive strict scrutiny, the Matching Funds Provision itself must be narrowly tailored to achieve a compelling governmental purpose. The Matching Funds Provision fails that test.

The Matching Funds Provision is not supported by a compelling, or even legitimate, governmental interest. This is true even if Arizona's public financing scheme, as a whole, were justified by a compelling governmental interest, which, as demonstrated in Plaintiff-Intervenors' Memorandum in Support of their Motion for Summary Judgment, it is not. The U.S. Supreme Court has made it clear that each application of a statute that burdens speech must be supported by a compelling interest. Defendants have failed to identify a compelling interest underlying the Matching Funds Provision. Instead, the Matching Funds Provision, like the entire public funding scheme, was created to level the voices of political actors with which the scheme's sponsors disagreed.

Defendants have failed to demonstrate that the Matching Funds Provision is narrowly tailored to actually *achieve* any compelling governmental interest. The only interest the Matching Funds Provision purports to serve is an interest in leveling the relative financial resources between privately financed and publicly funded candidates. The U.S. Supreme Court has rejected any government interest in equalizing candidate resources as sufficient to justify restricting an individual's campaign expenditures.

Disputed Issues of Fact

A. The Act Does Not Limit Corruption Or The Appearance of Corruption

Arizona's public funding scheme was a 1998 ballot initiative that passed by the slimmest of margins. Statement ¶ 27.[2] To this day, almost half of Arizona's electorate does not know what the Act is, how it functions, or why it was passed. Statement ¶ 142. To the extent that voters have some understanding about the Act and voice their support for public funding, they overwhelmingly support the Act's illegitimate purpose of "leveling the playing field," as opposed to any desire to limit corruption or the appearance of corruption. Statement ¶ 26. Moreover, Plaintiff-Intervenors' expert, Dr. David Primo, testified that campaign finance laws do not improve, and in fact harm, citizens' perceptions of government. Statement ¶ 131.

B. Governor Symington's Convictions Were Reversed and Vacated

Defendants' assertion that the Freedom Club's PAC Chairman, former Governor Fife Symington, "was investigated over a conflict of interest" in the early 1990s finds no support in the *Los Angeles Times* article they cite. Plaintiff-Intervenors' Responsive Statement of Facts ("Resp. Statement") ¶ 3. Defendants also failed to note in their Statement of Undisputed Facts that Governor Symington's convictions were reversed and

[2] Unless otherwise indicated, Plaintiff-Intervenors use the same abbreviations and acronyms used in their Memorandum in Support of Plaintiff-Intervenors' Motion for Summary Judgment. Pursuant to LR Civ. 7.1(d) (2), Plaintiff-Intervenors incorporate by reference all documents and papers filed in support of their Motion and in their Response to Defendant-Intervenor's Motion for Summary Judgment.

vacated because his his Sixth Amendment right to an impartial jury was violated. *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999).

C. Plaintiff-Intervenors Do Not Argue They Have A Right To Speak Free From Rebuttal

Defendants' preliminary statement erroneously asserts that Plaintiff-Intervenors argue they have a constitutional right to speak free from rebuttal. Plaintiff-Intervenors do not make, and have never made, any such argument. That argument is antithetical to the First Amendment. What Plaintiff-Intervenors *do* argue is that they have a constitutional right to be free from laws that deter them from, or punish them for, robustly exercising their First Amendment rights. Thus, far from trying to silence their opponents, Plaintiff-Intervenors seek to remove obstacles to their own speech—and to the speech of similarly situated candidates and independent groups. Plaintiff-Intervenors do not oppose rebuttal. They oppose the government tipping the scales in favor of publicly funded candidates by handing out free money. *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (holding that viewpoint-based restrictions on private speech are improper even when public funds are expended to facilitate the private speech). Rather than enhancing political debate, the Matching Funds Provision stifles speech by altering the timing and amount of speech made by candidates and independent groups and limiting contributions.

Argument

Defendants' failure to offer any evidence demonstrating that the Matching Funds Provision itself furthers *any* legitimate governmental interest—much less the compelling governmental interest required by strict scrutiny—mandates this Court deny their motion.

Further, even if this Court were to conclude that the Matching Funds Provision is supported by a compelling governmental interest, the Matching Funds Provision—indeed, the Act itself— is not sufficiently tailored to advance that interest.

A. The Matching Funds Provision Violates the First Amendment

Laws that limit campaign expenditures are subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). The Supreme Court's most recent pronouncement on laws that impose uneven funding burdens on political campaigns made clear that laws like the Matching Funds Provision are subject to strict scrutiny, and that they fail strict scrutiny. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759 (2008). Defendants ignore *Davis* and rely instead on two circuit court decisions that predate *Davis*. Defendants also contend that the standard of review that governs challenges to a state's power to regulate the time, place, and manner of elections applies in this case. The Supreme Court has never held that this lower standard of review applies to laws that limit or restrict campaign finances. Moreover, any analysis of a law that penalizes candidates by giving their opponent a funding advantage must begin with *Davis*. And *Davis* makes clear that strict scrutiny applies to such laws. 554 U.S. at ___, 128 S. Ct. at 2772. The inescapable logic in *Davis* establishes that the Matching Funds Provision does not satisfy strict scrutiny and that it is unconstitutional.

a. Strict Scrutiny Is the Proper Standard of Review

Defendants argue that there is a sliding scale of review when campaign finance laws are challenged. They cite to Supreme Court cases involving challenges to laws that regulate the time, place, and manner in which elections are conducted. *See Timmons v.*

Twin Cities Area New Party, 520 U.S. 351 (1997) (involving a challenge to Minnesota's law prohibiting candidates from appearing on a ballot for multiple political parties); *Burdick v. Takushi*, 504 U.S. 428 (1992) (involving a challenge to Hawaii's prohibition of write-in voting); and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (involving a challenge to Ohio's early filing deadline for independent candidates).[3] When core political speech is at issue, courts are to apply "strict scrutiny without first determining [whether] the State's law severely burdens speech." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 207 (1999) (Thomas J., concurring); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (noting that courts will resort to the severe/lesser burden framework only if a challenged election law regulates "the mechanics of the electoral process," not speech). *Timmons* and its progeny do not control when the challenged law restricts core political activities.

Defendants next argue that if the *Timmons* balancing test does not apply, this Court should examine the Matching Funds Provision as if it only limited contributions. Defs' Mot. & Mem. Supp. Summ. J. 8 (Defs. Mem.). Generally, courts reviewing

[3] The Supreme Court justifies a lower standard of review in cases challenging laws regulating the conduct of elections because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quotation marks and citation omitted); *see also Timmons*, 502 U.S. at 358 ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."). In recognition of the public interest in orderly elections, regulations that impose only slight burdens on speech and associational rights will trigger less rigorous judicial review. In contrast, the Matching Funds Provision affects pure political speech, a concept at the heart of the First Amendment.

contribution limits seek to determine if the limits are "'closely drawn' to serve a 'sufficiently important interest.'" *Buckley*, 424 U.S. at 24-25.[4] One reason the government may justify contribution limits pursuant to a lower standard of review is that such limits leave the contributor with the ability to express herself by associating with the campaign of her choice. *See, e.g., id.* at 22. Contribution limits are also "more clearly justified by a link to political corruption than limits on" expenditures. *FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 440-41 (2001) (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-89(2000)).

Expenditure limits, on the other hand, effectively preclude campaigns from speaking as much and as often as they would like. *See, e.g., Buckley* 424 U.S. at 22. Unlike election regulations or contribution limits, limiting expenditures "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Expenditure limits curb more expressive and associational activity than do limits on contributions. *Nixon*, 528 U.S. at 386-88; *Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 615 (1996); *Buckley*, 424 U.S. at 19-23. Expenditure limits therefore receive strict scrutiny. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2772 ("Because § 319(a) imposes a

[4] However, contribution limits on independent groups like the Freedom Club and Arizona Taxpayers will oftentimes be subject to strict scrutiny. *See, e.g., Comm. on Jobs Candidate Advocacy Fund v. Herrera*, No. 07-03199, 2007 U.S. Dist. LEXIS 73736, at *8-*10 (N.D. Cal. Sept. 20, 2007) (holding that "[l]imits on contributions to independent expenditure committees are subject to strict scrutiny"); *OakPAC v. City of Oakland*, No. 06-6366, 2006 U.S. Dist. LEXIS 96900, at *3 (N.D. Cal. Oct. 19, 2006) (holding that because the law "limit[ed] the source of funds available for political committees to conduct independent expenditures," contribution limits were subject to strict scrutiny).

substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is justified by a compelling state interest.") (quotation marks and citation omitted); *see also FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (striking down a limit on independent expenditures because no compelling government interest existed to justify the restriction).

Laws that do not impose a direct ceiling on expenditures, but rather incentivize silence by punishing a speaker's decision to spend money, are also subject to strict scrutiny. *Davis*, 554 U.S. at ___, 128 S.Ct. at 2771 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."). The Matching Funds Provision may not directly limit campaign expenditures, but it does penalize Plaintiff-Intervenors for spending money on campaign speech. Plaintiff-Intervenors are forced to alter their entire campaign strategy by changing the timing and amount of their speech in order to avoid triggering matching funds to their political opponents. *See, e.g.*, Statement ¶ 33. Like the expenditure limits struck down in *Buckley*, the Matching Funds Provision "restrict[s] the quantity of campaign speech by individuals, groups, and candidates." 424 U.S. at 39. The Matching Funds Provision limits contributions and expenditures. The inescapable standard of review is therefore strict scrutiny.

i. The Matching Funds Provision Burdens Plaintiff-Intervenors' Speech Because It Limits Both Contributions And Expenditures

The Matching Funds Provision both suppresses contributions and reduces and alters the timing of campaign expenditures. Plaintiff-Intervenors have introduced evidence of how the Matching Funds Provision acts to suppress and limit their expenditures and contributions in their declarations, their depositions, the documents they disclosed, their responses to Defendants' and Defendant-Intervenor's discovery requests, their separate Statement of Facts in Support of their Motion for Summary Judgment, and in their Memorandum in Support of their Motion for Summary Judgment, each of which Plaintiff-Intervenors incorporate herein by this reference. Defendants' assertion that the Matching Funds Provision does not burden core political speech completely ignores the evidence and testimony.

Plaintiff-Intervenors limit their fundraising activities as a result of the Matching Funds Provision to prevent the triggering of matching funds to their political opponents. Statement ¶¶ 33-34, 52-53, 55, 63-64, 79-80, 90. This means they solicit fewer contributions, hold fewer fundraisers, and/or refrain from early fundraising. *Id.* The Matching Funds Provision also burdens their speech by limiting and altering the timing of their expenditures. Statement ¶¶ 31, 33-35, 38, 56, 63, 68, 75, 80, 88, 97, 109, 112, 114. Plaintiff-Intervenors' expert witness, Dr. David Primo, testified that the changes in fundraising and campaign spending caused by the Matching Funds Provision are harmful to free expression. Statement ¶ 33. He based his conclusion on his statistical analysis of Arizona campaign spending data. *Id.*

b. The Defendants Have Not Identified A Compelling Governmental Interest To Justify The Matching Funds Provision

Under strict scrutiny, a law restricting campaign expenditures will be upheld only if the government can prove it has a compelling interest and that the restriction is narrowly tailored to achieve that interest. *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, ___, 127 S. Ct. 2652, 2664 (2007). Rather than identifying a compelling interest that supports the Matching Funds Provision itself, the Defendants focus on the "important" governmental interests that support Arizona's public funding scheme *as a whole*. *See, e.g.*, Defs. Mem. 9.

Public funding schemes that simply provide financial support to candidates may be constitutionally permissible. *See, e.g., Buckley*, 424 U.S. at 90-91. However, that does not mean that all systems that contain public funding are constitutionally valid, *see Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) ("There is a point at which [public funding] incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive."), or that a particular provision of an otherwise valid public financing scheme cannot be struck down as unconstitutional. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (striking down the matching funds provision of Minnesota's public funding scheme).[5]

[5] Defendants rely on *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) and *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008). But both cases were decided before the decision in *Davis*, which establishes that *Daggett* and *Leake* are no longer good law. The Supreme Court's denial of certiorari in *Leake* is not an expression of approval of the decision. *United States v. Carver*, 260 U.S. 482, 490 (1923).

What is at issue in this case is not Arizona's public funding scheme as a whole, but a discrete portion of the Act: the Matching Funds Provision and its related reporting requirements. It is not enough for Defendants to demonstrate that the Act as a whole furthers a compelling government interest. The Defendants must establish that the Matching Funds Provision itself is justified by a compelling government interest and that the provision is narrowly tailored to achieve that interest. *WRTL II*, 551 U.S. at ___, 127 S. Ct. at 2671 ("A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech.") (emphasis omitted).

i. Encouraging Participation Is Not A Compelling Interest

The only interest Defendants do identify the Matching Funds Provision as serving is to entice candidates to participate in Arizona's public funding scheme. Of course, what entices one candidate to participate in the system serves to penalize the privately funded candidate who declines to participate in the system. Even if the Matching Funds Provision does entice candidates to participate, that cannot justify imposing burdens on political speech. *Cf. Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency."). To date, the only legitimate and compelling interests identified for restricting campaign finances are preventing corruption or appearance of corruption. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2773 (citing *Nixon*, 528 U.S. at 428 (Thomas, J., dissenting)). Even if the Act as a

---

Moreover, *Daggett* involved a facial challenge. 205 F.3d at 472. Plaintiff-Intervenors' challenge is facial and as-applied. *Daggett* concludes with a call for "vigilant monitoring"and presciently notes that "[e]xperience . . . will be our best teacher." *Id.* Arizona's experience has taught that matching funds severely restrict free speech rights.

whole is justified by these interests, it does not follow that a provision of the Act that burdens speech but that does not itself advance the state's anti-corruption interests can withstand strict scrutiny.[6] "[S]uch a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *WRTL II*, 551 U.S. at ___, 127 S. Ct. at 2672 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech.") and *Buckley*, 424 U.S. at 44 (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"); *see also NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

ii. The Matching Funds Provision Is Not Narrowly-Tailored To Encourage Candidates Participation

"Narrow tailoring requires that the regulation actually advance the government's interests." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073-74 (9th Cir. 2006). In *Ariz. Right to Life PAC v. Bayless*, the Ninth Circuit emphasized that "[i]t is not enough simply to invoke the general desire to avoid corruption or its appearance

---

[6] Defendants deny that leveling the playing field is the compelling governmental interest supporting Arizona's public financing scheme as a whole. Defs. Mem. 9, n.9. Defendants are silent as to whether they believe leveling the playing field justifies the Matching Funds Provision. The record demonstrates conclusively that the Act's framers and proponents were motivated primarily by a desire to level the playing field. Statement ¶¶ 15, 20-21, 26. The Supreme Court has repeatedly rejected the government's interest in equalizing financial resources to justify the infringement of First Amendment rights. *See, e.g., Davis*, 554 U.S. at ___, 128 S. Ct. at 2771 (quoting *Buckley* at 54).

without explaining how [the statute] furthers that goal." 320 F.3d 1002, 1013 n.13 (9th Cir. 2003) (quotation marks and citation omitted). Even if encouraging participation was a compelling interest, the Matching Funds Provision is not narrowly tailored to achieve that interest. Recent events in Arizona, as well as data from other public funding schemes, demonstrate that it is possible to encourage participation without burdening free speech.

Toward the end of the legislative session, state lawmakers nearly passed a bill to increase the base level funding for publicly funded candidates. *See* H.B. 2603, 49th Leg. 1st Reg. Sess. (2009). Testimony in this case demonstrates that increasing the base level funding while doing away with matching funds will at least maintain, and may even increase, participation under the Act. Resp. Statement ¶ 70-71. Other public funding systems maintain high participation rates without matching funds. Minnesota's public funding system garners near universal participation and does not provide matching funds. Statement ¶ 151. Minnesota's public funding scheme did include a matching funds provision, but it was struck down as unconstitutional in *Day v. Holahan*, 34 F.3d 1356. Yet Minnesota still maintains participation levels higher than Arizona's participation rate. Resp. Statement ¶ 68.

c. The Matching Funds Provision Is Not Narrowly-Tailored To Actually Achieve A Compelling Governmental Interest

Narrow tailoring focuses on whether a law that burdens speech actually achieves a compelling governmental interest. *Bayless*, 320 F.3d at 1007 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling

state interest."); *see also San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 830 (9th Cir. 1987) (holding that to establish "that the statutes advance a compelling interest, the State must show that the statutes actually accomplish something . . ."). The Matching Funds Provision must be narrowly tailored to actually reduce corruption or the appearance of corruption. Defendants do not argue that the Provision is either designed or narrowly tailored to achieve these interests.

To the extent that the government does have a compelling governmental interest in combating the influence of political contributions, that interest is lessened by the real interest of the Matching Funds Provision: leveling the playing field. Pursuant to *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007), Defendants' evidence of a compelling governmental interest may be overcome by the Plaintiff-Intervenors' evidence. Defendants have offered no evidence that fighting corruption or the appearance of corruption was the actual interest supporting the Matching Funds Provision. Instead, Defendants offer vague circumstantial evidence that the Act itself may have been motivated in part by a desire to curb corruption or the appearance thereof.[7] Plaintiff-Intervenors have introduced ample evidence that the motivation

[7] Nor is it clear that the Defendants' evidence relating to corruption or the appearance of corruption satisfies the standards necessary to carry their burden that the Act is supported by a compelling governmental interest. *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1102 (9th Cir. 2003) (Teilborg, Dist. J., dissenting) (arguing that public opinion alone is not sufficient to establish the existence of perceived corruption). Governor Mecham's resignation and the AZSCAM scandal are so distant in time from the Act's passage that it is questionable whether those events have any relevance or influence on Arizona's political landscape today. Moreover, Defendants' allegations of corruption

behind the Matching Funds Provision was to level the playing field. But even though "measures designed to eliminate the prospect and appearance of corruption … may reflect a compelling governmental interest [that] does not mean that a particular form of regulation is required." *DePaul v. Commonwealth*, 969 A.2d 536, 551 (Pa. 2009). In this case, at the time the Act was adopted, Arizona already had a law that directly and materially advanced the state's interest in preventing elected officials from being bribed. A.R.S. § 13-2602(C) ("Bribery of a public servant or party officer is a class 4 felony."). This is a much more direct and less restrictive means to eliminate the form of corruption present in the AzScam scandal. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (quotation marks and citation omitted).

B. The Reporting Requirements That Implement The Matching Funds Provision Violate The First Amendment

Plaintiff-Intervenors challenge the constitutionality of the reporting requirements that implement the Matching Fund Provision. A.R.S. § 16-958. Disclosure requirements must survive exacting constitutional scrutiny, which requires a substantial relationship between a legitimate government interest and the information required to be disclosed. Here, the only interest furthered by the reporting requirements is the government's interest in leveling the playing field. Indeed, when a privately financed candidate does

---

regarding Governor Symington are in no way related to campaign finance issues and relate to private matters that occurred prior to his election in 1990.

not face a publicly funded challenger, the reporting requirements do not even apply. They apply only in races between privately and a publicly funded candidates.

The reports themselves contain very little information and are useless to the public. The reports do not include any identifying information about contributors or recipients of expenditures. Defs. Mem. 14. The reports require disclosure only of the candidate's name, the date, and the total amount of contributions or expenditures. *Id.* The reporting requirements have nothing to do with providing the electorate information, deterring actual corruption or the appearance thereof, or gathering information that is necessary to implement other aspects of the Act. They serve only to implement the Matching Funds Provision. The challenged reports are designed only to implement the unconstitutional system of matching funds. Therefore, the burdens imposed by the reporting requirements "cannot be justified, and it follows that they too are unconstitutional." *Davis*, 554 U.S. at ___, 128 S. Ct. at 2775.

C. The Matching Funds Provision Violates Equal Protection Because It Treats Political Speech Differently Based On The Content Of The Speech

The Matching Funds Provision discriminates against candidates and independent groups based on the content of their speech. "[U]nder the Equal Protection Clause . . . [a] regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (quotation marks and citation omitted). Defendants must prove the differential treatment is narrowly tailored to serve a substantial governmental interest in order to survive an equal

protection challenge. *See Police Dept. v. Mosley*, 408 U.S. 92, 99 (1972). Defendants cannot do so.

The Matching Funds Provision differentiates between candidates and independent groups based on the content of their message. It creates two candidate classifications: those who participate in the public funding scheme and those who run privately funded campaigns. It then treats candidates differently based on their classification. The Provision treats independent groups different based on the content of their speech. Speech opposing a publicly funded candidate or supporting a privately funded candidate opposed by a publicly funded candidate are matched—essentially neutralizing the speech that triggered the matching funds. Speech that favors a publicly funded candidate is only matched when that candidate has a publicly funded opponent. But the third category, speech opposing a privately funded candidate, is not matched or limited in any way. The Matching Funds Provision singles out privately funded candidates for disparate treatment without clear reason. There is nothing on the face of the Provision that indicates any legitimate interest in regulating speech based on the nature of the person to whom that speech is directed. Even if Defendants could demonstrate a substantial interest, there is nothing in the record that justifies regulating speech based on content.

Conclusion

The government's interest in equalizing the amount of money available to publicly funded candidates in races against privately funded candidates does not justify a system that incentivizes silence. Defendants' Motion for Summary Judgment must be denied.

Respectfully submitted this 17th day of July, 2009.

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER
s/Timothy D. Keller
Timothy D. Keller
Jennifer M. Perkins
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
P: 480-557-8300/F: 480-557-8305

INSTITUTE FOR JUSTICE
William R. Maurer (WSBA #25451)[8]
101 Yesler Way, Suite 603
Seattle, WA 98104
P: 206-341-9300/F: 206-341-9311

[8] *Admitted pro hac vice.*

Certificate of Service

I hereby certify that on **July 17, 2009,** I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Clint Bolick
Nicholas C. Dranias
Scharf-Norton Center for
Constitutional Litigation
Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ, 85004
cbolick@goldwaterinstitute.org
ndranias@goldwaterinstitute.org

Attorneys for the Plaintiffs

Mary O'Grady
Solicitor General
Tanja K. Shipman
Assistant Attorney General
125 W. Washington St.
Phoenix, AZ 85007-1298
mary.ogrady@azag.gov
tanja.shipman@azag.gov

Attorneys for the Defendant

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

s/Kasey Higgins

Bradley S. Phillips
Grant A. Davis-Denny
Elisabeth J. Neubauer
Trevor D. Dryer
Puneet Kaur Sandhu
Munger, Tolles & Olson LLP
355 S. Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Brad.Phillips@mto.com
Grant.Davis-Denny@mto.com
Elisabeth.Neubauer@mto.com
Trevor.Dryer@mto.com
Puneet.sandhu@mto.com

James Sample
Monica Youn
Angela Migally
5th Floor
Brennan Center for Justice
161 Avenue of the Americas
New York, NY 10013
James.sample@nyu.edu
Monica.youn@nyu.edu
Angela.migally@nyu.edu

Attorneys for the Defendant-Intervenors