BRADLEY S. PHILLIPS (*pro hac vice*)
Brad.Phillips@mto.com
GRANT A. DAVIS-DENNY (*pro hac vice*)
Grant.Davis-Denny@mto.com
ELISABETH J. NEUBAUER (*pro hac vice*)
Elisabeth.Neubauer@mto.com
PUNEET K. SANDHU (*pro hac vice*)
Puneet.Sandhu@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MONICA YOUN (*pro hac vice*)
monica.youn@nyu.edu
ANGELA MIGALLY (*pro hac vice*)
angela.migally@nyu.edu
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 992-8158
Facsimile: (212) 995-4550

TIMOTHY M. HOGAN (004567)
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
202 E. McDowell Road, Suite 153
Phoenix, AZ 85004
Telephone: (602) 258-8850

Attorneys for Defendant-Intervenor
CLEAN ELECTIONS INSTITUTE, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOHN MCCOMISH, et al.,

Plaintiffs,

and

DEAN MARTIN, et al.,

Plaintiff-Intervenors,

vs.

KEN BENNETT, et al.,

Defendants,

CASE NO. CV-08-1550-PHX-ROS

(Assigned to the Honorable Roslyn O. Silver)

MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVENOR CLEAN ELECTIONS INSTITUTE, INC.'S MOTION FOR SUMMARY JUDGMENT

and

CLEAN ELECTIONS INSTITUTE, INC.

Defendant-Intervenor.

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I. INTRODUCTION

The crux of Plaintiffs'[1] case is that the Citizens Clean Elections Act (the "Act") chills speech by deterring candidates from spending money on their campaigns. But undisputed evidence establishes that both spending and electoral competition have dramatically *increased* since voters adopted the Act in 1998. Between 1998 and 2006, candidate spending in Arizona campaigns more than quadrupled, while independent expenditures went up over 3300%. Even among high-spending candidates who choose not to accept the Act's public funding, campaign expenditures have risen. Further, more candidates are running for office. Thus, the evidentiary record indisputably establishes that the Act promotes, rather than deters, free speech. *See North Carolina Right to Life Comm. for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (upholding North Carolina's matching funds provision and predicting that the provision would increase speech).

Moreover, Arizona's voters adopted the Act to advance a compelling government interest. Prior to the Act's passage, nearly 10 percent of Arizona's legislature was indicted in a corruption scandal known as AzScam. That scandal occurred despite the existence of the same contribution limits that Plaintiffs now claim were sufficient to deter corruption. The voters correctly concluded that contribution limits alone were insufficient, that a public financing alternative was necessary, and that absent matching funds candidates would not accept public funding.

Because the undisputed evidence establishes that the Act does not abridge, but instead promotes, free speech and that the Act was tailored to serve compelling public interests, Plaintiffs' First Amendment claims should not survive summary judgment.

Plaintiffs' equal-protection claims fare no better. The Act does not discriminate against a group of citizens, but instead offers all candidates a choice on equal terms between a system of public financing and the traditional system of private financing. As the Supreme Court stated in *Buckley v. Valeo*, in rejecting claims brought by non-participants in the presidential public financing system, "[p]lainly, campaigns can be successfully carried out by means other than

[1] Because their claims are essentially the same, Plaintiffs and Plaintiff-Intervenors are referred to collectively in this brief as "Plaintiffs" unless otherwise specifically noted.

public financing; they have been up to this date, and this avenue is still open to all candidates." 424 U.S. 1, 101 (1976). Accordingly, the Supreme Court and the lower federal courts have long held that for the state to offer such a voluntary public financing program works no discrimination against those candidates who are free to opt out. *Id.*; *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996) (citing *Buckley*); *Republican Nat'l Comm. v. F.E.C.*, 487 F. Supp. 280, 283-84 (S.D.N.Y. 1980), *judgment affirmed*, 445 U.S. 955 (1980).

For these reasons, Defendant-Intervenor Clean Elections Institute respectfully requests that the Court grant its motion for summary judgment.

II. FACTUAL BACKGROUND

A. PROPOSITION 200'S CONTRIBUTION LIMITS

Although Plaintiffs contend that the Clean Elections Act should be struck down in favor of a system that has only contribution limits, Arizona voters experimented with that very system for twelve years before adopting the Clean Elections Act. In 1986, voters passed Proposition 200, which established Arizona's first contribution limits for state-level campaigns. Ariz. Rev. Stat. Ann. §16-905 (2009) (historical note). Under the contribution limits, codified at Ariz. Rev. Stat. § 16-905, individual contributors could give up to $200 per election to legislative candidates and up to $500 per election for statewide candidates.

B. AZSCAM: CORRUPTION AND THE PERCEPTION OF CORRUPTION UNDER ARIZONA'S CONTRIBUTION-LIMITS-ONLY REGIME

Five years into Arizona's experiment with a contribution-limit-only scheme, Arizona suffered one of the worst state-level corruption scandals in this nation's history. The scandal, which came to be known as AzScam, resulted from a police sting operation in which an undercover informant posed as a Nevada businessman seeking to open a casino in Arizona. Phoenix police videotaped Arizona legislators accepting bribes and campaign contributions in exchange for agreeing to support gambling legislation. Separate Statement ¶ 4 (*State v. Walker*, 185 Ariz. 228, 231, 235 (Ct. App. 1995)).

AzScam revealed a pervasive pattern of corruption in Arizona government. Nearly 10 percent of Arizona's legislature was indicted. Separate Statement ¶ 5 (Sandhu Decl. Ex. A,

Maricopa County Superior Court Docket, CR1991-000997 (reflecting indictments); *id.* Ex. B, L. Feldman, *Indictment of Lawmakers Another Blow to Arizona*, Los Angeles Times, Feb. 9, 1991, at 1). In total, the sting resulted in the indictment of 23 people, mostly legislators and lobbyists, and the conviction of at least one legislator on corruption-related charges. Separate Statement ¶¶ 6-7 (*State v. Walker*, 185 Ariz. at 231; Sandhu Decl. Ex. A, Maricopa County Superior Court Docket, CR1991-000997 (reflecting indictments)). One long-time lobbyist, who knew the legislators involved in the scandal, testified at deposition that he was "not surprised" when news of the scandal broke because many of the legislators were known to be on "shaky ground." Separate Statement ¶ 11 (Sandhu Decl. Ex. C, Smoldon Dep. 45: 23-25, 46: 1-17).

The scandal received local, state, and national media attention. Separate Statement ¶ 9 (Sandhu Decl. Ex. C, Smoldon Dep. 46: 25, 47: 1-4; *id.* Ex. D, Aja Dep. 36: 5-13; *id.* Ex E, Symington Dep. 99: 18-19; *see also id.* Ex. B, F-H (collected news articles)). The press widely reported that videoclips from the sting showed legislators stuffing tens of thousands of dollars into gym bags while making comments such as:

- "I sold way too cheap."
- "My favorite line is, 'What's in it for me?'"
- "There's not an issue in this world I give a [expletive] about."
- "We all have our prices."
- "I like the good life, and I'm trying to position myself so that I can live the good life and have more money."

Separate Statement ¶ 8 (*State v. Walker*, 185 Ariz. 228, 231 (Ct. App. 1995); *Excerpts from indictment tell tale of political deals*, Arizona Daily Star, Feb. 10, 1991; Mary K. Reinhart, *Videotapes show payoffs: Ariz. legislators, lobbyists appear at sting meetings*, Arizona Daily Star, Feb. 8, 1991; L. Feldman, *Indictment of Lawmakers Another Blow to Arizona*, Los Angeles Times, Feb. 9, 1991, at 1; Sally Ann Stewart, *New Tarnish on Arizona's Image, Bribe Case has State 'In Shock,' Lawmakers on Video*, USA Today, Feb. 13, 1991, at 6A (Sandhu Decl. Exs. B, F-H)).

Arizona voters not only saw the video images of corruption but also repeatedly read

reports that the scandal had damaged their fellow citizens' faith in state government. The extensive press coverage of the scandal included multiple articles quoting Arizona legislators lamenting the corrosive effect of the scandal on public trust in government. Separate Statement ¶ 10 (*See* Mary K. Reinhart, *AzScam fallout is far from over, politicians say,* Arizona Daily Star, June 24, 1991 (quoting then-House Speaker Jane Dee Hull as stating, "Everyone in the world has bought the [AzScam sting] transcripts. Members of the public who have not read them yet, they will be able to read them in every [election] brochure."); John Woestendiek, *For Arizona, The Scandals Just Keep On Coming*, Philadelphia Inquirer, Feb. 25, 1991, at A2 ("The public confidence in the Legislature before the scandal was at an all-time low," said one legislator.); ("Because of the scandal, [public confidence is] nonexistent.") (Sandhu Decl. Exs. I-J)). Lobbyists were reported as stating that Arizona was "becoming the laughing stock of the nation." *Id.* And a former State Senate Majority Leader was quoted as saying: "We are still in shock. In terms of confidence it will take years to rebuild." (Seth Mydans, *Civics 101 on Tape in Arizona, Or 'We All Have Our Prices,'* N.Y. Times, Feb. 11, 1991, at A1 (Sandhu Decl. Ex. K)). Public acknowledgment of corruption by legislators further tarnished the public's perception of the integrity of their public officials. (*See* Steve Yozwiak, *Survey Says Opinions Vary on State Ethics: 2nd 'AzScam' is 'probable,'* The Arizona Republic, Oct. 5, 1991, at B1, B4 (quoting legislators as saying that some of their colleagues were "engaged in ethically questionable conduct," such as providing special access to those who contribute to their campaigns) (Sandhu Decl. Ex. L)).

C. THE INVISIBLE LEGISLATURE

The public trust in the integrity of their electoral system was further harmed by troubling reports of improprieties after Azscam. Beginning in 1996, *The Arizona Republic* ran a series of front-page articles about "The Invisible Legislature," a phrase the newspaper used to refer to professional lobbyists in the State's capitol. Separate Statement ¶ 12 (*E.g.*, Jonathan Sidener & Kris Mayes, *The Invisible Legislature: Dollars and Bills: Lobbyists' influence spreads far but often goes unrecorded,* The Arizona Republic, Jan. 21, 1996 A1, A10-A11; Kris Mayes & Michael Murphy, *Lobbyists bearing gifts solidify grip on Capitol,* The Arizona Republic, Dec. 22,

1996 at A1 (detailing lawmakers' reliance on lobbyists for raising funds for campaigns or to retire campaign debt) (Sandhu Decl. Exs. M-N)).

The Arizona Republic painted Arizona's political landscape as an environment in which lobbyists and lawmakers routinely undermined the people's attempt to prevent corruption:

> Reforms passed by voters in 1986 were supposed to prevent the practice known as bundling contributions, but candidates and lobbyists have found a loophole in the law. Bundling occurs when an individual collects a number of checks from individuals and then presents them to one candidate. Lawmakers get around that prohibition by appointing lobbyists to their campaign finance committees, a role that allows them to gather checks from others.

Separate Statement ¶ 12 (Michael Murphy, *Holiday Premium on Fund-Raising*, The Arizona Republic, Dec. 14, 1997, at p. A1 (Sandhu Decl. Ex. O)). In the front-page article, voters read a detailed account about how the Prop. 200 contributions limits were easily circumvented. The article chronicled a fund-raising luncheon for Arizona's Speaker of the House where 45 of the Speaker's 55 fundraising committee members were registered lobbyists. Most of those lobbyists were table sponsors, selling 10 tickets at $200 each for a total of $2,000 in contributions, far more than the applicable $300 contribution limit. *Id.*

Just months before voters adopted the Clean Elections Act, another front-page story in *The Arizona Republic* reported that the State Senate's Republican President had "assigned the state's most powerful lobbyists to raise money for specific candidates" and had "warned . . . lobbyists that they [would] suffer political retribution in the next session of the Legislature if they raise[d] money for Democrats." Separate Statement ¶ 13 (Chris Moeser, "GOP Drafts Lobbyists For Help In Crucial Races; Senate Chief Reputedly Warns Them Not To Raise Funds For Democrats," *The Arizona Republic*, Aug. 20, 1998, at A1 (Sandhu Decl. Ex. P)).

D. THE CITIZENS CLEAN ELECTIONS ACT

On November 3, 1998, twelve years after adopting contribution limits and in response to findings that the then existing "election-financing system…[u]ndermine[d] public confidence in the integrity of public officials," Arizona voters passed the Citizens Clean Elections Act. Ariz. Rev. Stat. § l6-940(B)(5). Louis Hoffman, a citizen drafter of the Act, testified at deposition that AzScam and a more generalized perception of corruption were factors that led to the Act:

> [T]]here was . . . a lot of . . . influence-buying by people giving campaign contributions. There was bundling of contributions . . . . [There was] the general concern about people, in effect, buying elections or buying access to politicians [that] was something that was of great concern . . . in motivating the Clean Elections Act.

Separate Statement ¶ 14 (Sandhu Decl. Ex. Q, Hoffman Dep. 19:13-25, 20:1-9). Hoffman explained that in addition to this "goal [of] avoiding the unseemly appearance or actual corruption," the drafters also designed the Act with the goal of "promoting freedom of speech because . . . more candidates would have more opportunity to speak." (*Id.* 127:11-129:15).

The voter-approved Act created a voluntary public financing program whereby participating candidates could receive the benefit of public financing in exchange for abiding by several countervailing burdens including (1) forgoing all potentially corrupting private contributions, (2) adhering to spending limits, (3) and participating in public debates. Ariz. Rev. Stat. § 16-945(A). Interests in "improv[ing] the integrity of Arizona state government…, encourag[ing] citizen participation in the political process, and …promot[ing] freedom of speech under the U.S. and Arizona Constitutions," motivated voters to enact this system. Ariz. Rev. Stat. § l6-940(A).

In order to insulate participating candidates from the corrupting potential of private contributions, Arizona carefully crafted a program offering viable candidates public funding to run competitive campaigns. In order to prevent the waste of public funds on nonviable candidates, the Act offers public grants to those candidates who can demonstrate a modicum of public support by collecting a certain number of five-dollar qualifying contributions. Ariz. Rev. Stat. §§ 16-946, 16-950.

Once qualified, a participating candidate is eligible to receive a total grant amount that enables participating candidates to compete in high-spending races. However, since the actual costs of running a competitive campaign will depend on many factors difficult to anticipate prior to an election, the Act devises a flexible grant distribution system that is adjustable in real time. All participating candidates are initially given a portion of the total grant amount as a base grant. To encourage sufficient participation by counteracting the fear that a participating candidate will be outspent by a traditionally-funded opponent or an independent expenditure committee, the Act

provides additional matching funds that are capped at twice the amount of the initial grant. Ariz. Rev. Stat. §16-952(E). Such a system enables the program to meet its anti-corruption goals by encouraging sufficient participation without flooding the system with unneeded funds.

Capped matching funds are disbursed when: (1) a traditionally-funded opponent's expenditures (or, during the general election, a candidate's receipts, less expenditures made during the primary campaign) exceed the participating candidate's initial disbursement amount; (2) an independent expenditure committee makes an expenditure opposed to the participating candidate; or (3) when an independent expenditure committee makes an expenditure in support of a participating candidate's opponent. *Id.* § 16-952(A), (C)(1)-(2).

This schedule for grant disbursement is an integral part of the package of benefits and burdens that candidates accept when choosing whether to participate in the program and is necessary to incentivize the levels of candidate participation required to make the program successful. In the absence of this pragmatic and reasonable schedule, the state would have to either: (1) grant participating candidates unreasonably high grants at the outset, much of which would be unneeded, wasting state funds and risking public legitimacy, or (2) leave participating candidates to shoulder an inappropriate risk of being drastically outspent by opponents or outside groups and unable to respond to attacks, an option that could dramatically suppress participation. Separate Statement ¶ 34 (Sandhu Decl. Ex. Q, Hoffman Dep. 38:23-43:25).

The Act also contains disclosure provisions in order to assist with the administration of the program. Both participating and traditional candidates are required to file periodic campaign finance reports. In order to implement the public funding program, traditional candidates must also file original and supplemental campaign finance reports when their expenditures exceed 70% of the primary election spending limit or when they receive contributions (less their expenditures through the primary) that exceed 70% of the general election spending limit. Ariz. Rev. Stat. § 16-941(B)(2). In addition, any individual or entity making independent expenditures on behalf of a candidate must report the expenditures once they exceed a certain set limit. *Id.* §§ 16-941(D), 16-958(A).

E. THE ACT HAS RESULTED IN AN INCREASE IN CAMPAIGN SPENDING AND PARTICIPATION IN ARIZONA ELECTIONS

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court's landmark campaign finance decision, the Court noted that public funding "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process." *Id.* at 92-93 (emphasis added).

Over thirty years later, Arizona's experience with public funding confirms this observation. Contrary to Plaintiffs' claims that Arizona's public funding system has placed a drag on political speech, the factual record demonstrates that Arizona has seen a surge in both the number of candidates running for elected office and the amount of money being spent in Arizona elections since the adoption of the Act in 1998.

Both candidate expenditures and independent expenditures have increased sharply from levels seen prior to the enactment of public funding. Defendant-Intervenor's expert, Professor Donald P. Green, Director of the Yale Institution for Social and Policy Studies, analyzed all legislative candidate expenditures in 1998 and 2006. He found that, between 1998 and 2006, spending by legislative candidates rose dramatically. His analysis of campaign finance reports revealed that in 1998 (the election year immediately prior to the enactment of the public financing system) 177 legislative candidates spent a total of $1,333,999 (in 2006 dollars), or an average of $7,537 per candidate. In 2006, the third election cycle under the public financing system, 206 legislative candidates spent a total of $6,487,133, or an average of $31,391. Separate Statement ¶ 37 (Green Decl. Ex. A at 19). Even after accounting for inflation, legislative candidate expenditures in Arizona increased by almost 400% after the enactment of public funding. (*Id.*)

In order to explore Plaintiffs' allegations that nonparticipating candidates restrain their spending to avoid triggering matching funds, Professor Green compared the top 10 spenders in 1998 to the top 10 spenders who were nonparticipating candidates facing a participating major party opponent in 2006. This analysis revealed that spending among the universe of top-spending, non-participating legislative candidates increased. Average inflation-adjusted spending among the top 10 spenders in legislative races in the 1998 general election was $34,622 (in 2006

dollars) as compared to $42,162 for the top 10 nonparticipating spenders facing a participating major party opponent in 2006. In 1998, the top 10 spenders in legislative races spent $51,279. The top 10 nonparticipating spenders facing a participating major party opponent in 2006 spent $61,395. Thus, spending amongst the top 10 spenders increased by at least 20% between 1998 and 2006. Separate Statement ¶ 38 (Green Decl. Ex. A at 14).

Professor Green examined Plaintiffs' "drag" theory in yet another way by examining whether candidate spending "clustered" around the trigger matching threshold. If Plaintiffs' claim that matching funds deter spending above the trigger threshold were correct, privately-funded candidates in 2006 should have continued spending money up to, but not beyond, the matching funds threshold of $17,918. Professor Green's analysis of expenditures in the 2006 elections revealed no such clustering of spending just below the trigger threshold. Instead, he found that, of the 46 nonparticipating candidates who faced a participating opponent in 2006 and who could trigger matching funds by spending more than $17,918, *only one* spent between $15,000 and $26,000. Separate Statement ¶ 40 (Green Decl. Ex. A at 14). Thirty-nine candidates spent less than $15,000 (showing that their expenditures levels were controlled by factors unrelated to matching funds) and 6 candidates spent well above the threshold (showing that they were not deterred by matching funds). (*Id.*) In short, the available data provides no evidence that the Act or its matching funds provisions have suppressed spending.

Candidates were not the only political actors to experience a surge in political speech after the enactment of public funding. By substituting private money with public funds, public funding programs often free up private money that is then spent on independent expenditures or other political speech. A review of independent expenditures made by independent expenditure organizations, political parties and other political entities demonstrates that the amount of independent expenditures increased dramatically between 1998 and 2006. In 1998 political entities made $29,746.85 in independent expenditures ($36,791.20 in 2006 dollars, adjusted for inflation), and in 2006, independent expenditures totaled $1,262,976.95. Separate Statement ¶ 39 (Migally Decl. ¶ 7). Since the enactment of public funding, Arizona has seen a 3,300% increase in the making of independent expenditures. (*Id.*)

Public funding in Arizona also furthers speech by enabling more candidates to run for office. Absent public funding, candidates lacking personal wealth or access to wealthy contributors are deterred from running for office. Plaintiff-Intervenor Dean Martin testified at deposition about the difficulties challengers face raising private funds:

> Q. And is it harder for challengers to raise money than it is for incumbents?
>
> A. Oh, yes. Much harder.
>
> Q. Okay.
>
> A. Because you've got an existing legislator who can and did threaten other people that he would remember if they supported the challenger in the upcoming legislative session. And so a lot of people said, hey, I like you, but, you know, I can't cross this guy because I think he's going to win.
>
> . . . .
>
> A. [Martin's opponent] made it clear that . . . anybody that supports my opponent is not going to be a friend of mine.

(Sandhu Decl. Ex. R, Martin Dep. 43:4-44:5).

By providing an alternative source of funding, the Act allows more candidates to run for office. Defendant's expert, Professor Kenneth Mayer, a University of Wisconsin political scientist, has documented a 20 percent increase in the number of contested state Senate races and a 300% increase in the number of competitive state Senate races since the Act was adopted.[2] Separate Statement ¶¶ 18-19. Republican political consultant Constantin Querard similarly testified that more candidates were able to run for office and the amount of political dialogue in Arizona has increased because of the availability of public financing. Separate Statement ¶ 35 (Sandhu Decl. Ex. S, Querard Dep. 39:10-15; 40:5-18).

The record contains specific examples of candidates who were able to run for office because of the Act's funding alternative. One such candidate is Rick Murphy, a plaintiff in this action who accepted public funding in 2004 when he first ran for the state legislature. Mr.

[2] *See* Report of Dr. Kenneth Mayer attached to his declaration in support of Defendant's opposition to the preliminary injunction motion ("Mayer Report") at 7 (docket no. 133-3, filed 09/23/2008).

Querard, Murphy's consultant, testified that Murphy could not have successfully run for office in 2004 without public funding. Separate Statement ¶ 36 (Sandhu Decl. Ex. S, Querard Dep. 78:23-79:25). Similarly, Declarant Meg Burton Cahill stated that the availability of public funding allowed her to successfully run for the state legislature against two powerful incumbents. Separate Statement ¶ 32 (Sandhu Decl. Ex. T, Burton Cahill Decl. ¶ 3).

F. MATCHING FUNDS ARE NECESSARY TO ACHIEVE THE ACT'S ANTI-CORRUPTION GOALS

Under the traditional private fundraising model, candidates have the option to tap private donors or their parties' extensive fundraising networks to quickly respond to unanticipated attacks by high-spending opponents or organizations making independent expenditures. Participation in a public funding program requires candidates to surrender this option, and candidates must instead rely on the state to provide sufficient funds as a substitute for the candidate's ability to engage in defensive private fundraising. To induce candidates to give up this option, Arizona—like North Carolina, Connecticut and Maine—had to provide candidates with assurance that they would not be helpless to respond if they were targeted by unanticipated independent expenditures or a high-spending opponent. Separate Statement ¶ 34 (Sandhu Decl. Ex. Q, Hoffman Dep. 38:23-43:25).

State Senator Meg Burton Cahill, a 2008 candidate for Senate District 17, testified that the availability of matching funds was a "critical factor" in her decision to participate in the Clean Elections program. Separate Statement ¶ 33 (Sandhu Decl. Ex. T, Burton Cahill Decl. ¶ 5). According to Senator Cahill, District 17 is one of the most competitive districts in the state making it a prime candidate for the making of independent expenditures. (*Id.* ¶ 6). Without matching funds, Senator Cahill stated that she and other participating candidates would be unable to respond to false or misleading attacks by independent groups, run a competitive campaign, or effectively communicate with the electorate.[3] Separate Statement ¶ 35 (Burton Cahill Decl. ¶ 6).

[3] *See also* Declaration of Tammie Pursely in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction at ¶¶4, 8 (docket no. 134, filed 9/23/2008); Declaration of David Schapira in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction at ¶¶3-8 (docket no. 135, filed 9/23/2008); Declaration of Ed Ableser in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction ¶¶8-14

In short, the state cannot expect candidates to enter the political arena with their hands tied, rendering them helpless targets for unexpected attacks. Without the participation of these candidates, the Act cannot achieve its prophylactic anticorruption goals.

III. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment is of course appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Of particular significance here, a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007) (internal quotations omitted).

B. LEVEL OF SCRUTINY

Because the Act promotes, rather than abridges, free speech, it does not have to survive a heightened level of scrutiny.

But even were this Court to find that Plaintiffs had identified evidence of some modest burden, such a finding would not lead to strict scrutiny. Instead, this Court should apply the "flexible standard" used to review First Amendment or Equal Protection challenges to state election laws. See *Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Under that standard, before deciding on the appropriate level of scrutiny, a court must "weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (internal citations omitted).

(docket no. 136, filed 9/23/2008); Declaration of Pamela Durbin in Support of Defendant's Response in Opposition to Plaintiff and Plaintiff-Intervenor's Motion for Preliminary Injunction ¶¶4-5 (docket no. 137, filed 9/23/2008).

Even if Arizona's public financing program created a burden upon the First Amendment rights of nonparticipants—and we submit that it does not—in the campaign finance context, the Court has indicated that not every burden on the exercise of First Amendment rights automatically requires that the regulation at issue be subject to strict scrutiny. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-888 (2000) (quoting *Buckley*, 424 U.S. at 25) (contribution limits need only be "'closely drawn' to match a 'sufficiently important government interest.'").

Indeed, in the Supreme Court's seminal decision on public financing, the Court applied a standard of review less than strict scrutiny. In *Buckley*, the Court upheld a public financing system against First Amendment and Equal Protection challenges because the program was "further[ed]" by "significant" and "important" interests. *Buckley*, 424 U.S. at 86. Such language makes clear that the "compelling" state interests and "narrow tailoring" that are the hallmarks of strict scrutiny were not applied by the *Buckley* court in assessing the public financing provisions at issue.

Here, Plaintiffs have failed to demonstrate any burden on their First Amendment rights. However, if this Court determines that Plaintiffs have shown such a burden, it is only a modest infringement and must be reviewed under a lesser standard than strict scrutiny.

C. PLAINTIFFS' FIRST AMENDMENT CLAIMS DO NOT WITHSTAND SUMMARY JUDGMENT.

1. THE ACT FURTHERS, RATHER THAN ABRIDGES, FIRST AMENDMENT RIGHTS.

a. UNDISPUTED EVIDENCE ESTABLISHES THAT CAMPAIGN SPENDING AND SPEECH HAVE RISEN DRAMATICALLY SINCE THE ACT WAS ADOPTED.

Plaintiffs have failed to adduce evidence sufficient to create a genuine issue of material fact on their claim that the Act abridges free speech. To the contrary, as discussed above, the undisputed campaign-finance data establishes that since voters adopted the Act in 1998, overall candidate spending in Arizona has more than quadrupled, that more candidates are running for office, and that independent expenditures have increased by more than 3300%. Even among top-spending, non-participating candidates, average spending has increased significantly since the Act

was adopted. And there is no evidence that spending by privately-financed candidates with participating opponents clusters just under the matching funds threshold.

Lacking support in the data for their claim that matching funds chill speech, Plaintiffs rely on their own declarations. No genuine issue of fact exists, however, "where the only evidence presented is 'uncorroborated and self-serving' testimony." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

Plaintiffs have adduced no data that backs up their self-serving declarations. To the contrary, Professor Green's finding that spending by non-participating candidates does not cluster around the trigger threshold establishes that matching funds do not have the effect that Plaintiffs claim.

Moreover, Plaintiffs' own actions and deposition testimony undermine the claims made in their declarations. State Senate President Robert Burns' spending was not chilled by the matching-funds provision; he triggered matching funds in the 2002, 2004, and 2006 election cycles. Burns even acknowledged at deposition that he paid no attention to his opponents' receipt or expenditure of matching funds. Separate Statement ¶¶ 23-24 (Sandhu Decl. Ex. U, Burns Dep. 40:11-41:10, 50:25-51:6; *id.* Exs. V-X (Citizens Clean Election Commission Disbursement Data for 2002- 2006)). Moreover, Burns, an individual who ran for state legislative office both before and after the enactment of the Act, conceded that he could not show that his communications with voters had decreased since the Act's passage. Separate Statement ¶ 25 (Sandhu Decl. Ex. U, Burns Dep. at 100:15-103:9). Other plaintiffs could not recall whether they had triggered matching funds in the past. Separate Statement ¶ 27 (Sandhu Decl. Ex. R, Martin Dep. 28:1-4).

b. AS A MATTER OF LAW, MATCHING FUND PROVISIONS THAT ARE PART OF A PUBLIC FUNDING SCHEME DO NOT BURDEN SPEECH

Plaintiffs base their First Amendment claims not on hard evidence, but on a misreading of campaign finance doctrine. The consensus of the federal circuit courts who have ruled on the constitutionality of trigger matching provisions as part of a public funding system is that trigger matching funds do not, in themselves, burden the First Amendment rights of nonparticipating candidates and independent organizations, and are justified by compelling state interests. *See*

Leake, 524 F.3d at 437-38; *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). Contrary to Plaintiffs' contention, the Supreme Court's recent decision in *Davis* is not controlling in the public funding context and therefore does not alter the circuit courts' long-standing authority.

The most on-point authorities are the decisions of the First and Fourth Circuits upholding matching funds provisions like those in Arizona. *Leake*, 524 F.3d at 437 (4th Cir. 2008); *Daggett*, 205 F.3d at 464. In *Daggett*, the First Circuit considered the matching funds provision of Maine's Clean Elections Act. It concluded that Maine's "public funding system in no way limits the quantity of speech one 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." *Daggett*, 205 F.3d at 464.

Similarly, in *Leake*, the Fourth Circuit affirmed the constitutionality of the matching funds provision in North Carolina's Judicial Campaign Reform Act. 524 F.3d at 437. The *Leake* court explained that "[P]laintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Id*. Indeed, it found that "North Carolina's provision of matching funds is likely to result in more, not less, speech." *Id*. at 438.

Both *Daggett* and *Leake* found unpersuasive the Eighth Circuit's decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the only circuit court opinion to strike down a matching funds provision. As the First and Fourth Circuits both noted, the Eighth Circuit itself had declined to follow *Day's* reasoning in a subsequent case, *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). *See Daggett*, 205 F.3d at 464 n.25 (noting that the "continuing vitality of *Day* is open to question"); *Leake*, 524 F.3d at 438 ("the *Day* decision appears to be an anomaly even within the Eighth Circuit, as demonstrated by that court's later decision in *Rosenstiel*").

Plaintiffs ask this Court to ignore this authority and hold that the Supreme Court's 2008 decision in *Davis v. Federal Election Commission*, 128 S.Ct. 2759, 2773 (2008), a case that took place outside of the public funding context, somehow *sub silentio* overruled this consensus of circuit authority in a separate area of law. The Supreme Court does not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If it meant to

overturn such consensus it would have done so explicitly.

Nor does the reasoning of *Davis* call into question the constitutionality of Arizona's speech-maximizing approach to financing elections. *Davis* did not concern public financing or matching funds, but rather the "Millionaire's Amendment" of the Bipartisan Campaign Reform Act (BCRA). The Millionaire's Amendment raised the contribution limits of a candidate three-fold when that candidate's self-financing opponent indicated an intent to spend more than $350,000 of his personal funds. *Davis*, 128 S. Ct. at 2773.

The Court found this provision to be "unprecedented" because it applied "asymmetrical" and "discriminatory" contribution limits to otherwise similarly-situated candidates, both of whom were competing to raise private funds. *Id.* at 2770-73. It ruled that the Millionaire's Amendment burdened First Amendment rights because the discriminatory contribution limits created an advantage under the law for one candidate over his similarly-situated opponent. *Id.* at 2772. The Court also held that the provision was not justified by any interest in reducing corruption or its appearance, since it regulated only a candidate's own expenditures (which created no risk of corruption) and *increased* the fundraising limits for his opponent (creating a greater risk of the appearance of corruption). *Id.* at 2773.

Contrary to Plaintiffs' claims, *Davis* did not hold that all triggered benefits to a candidate create an unconstitutional burden on her opponent. Pls. Sec. Am. Comp. ¶¶ 34, 51. The plaintiff in *Davis* had suggested that the Millionaire's Amendment was unconstitutional because "making expenditures . . . has the effect of enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of Davis' own speech." *Id.* at 2770.

Although ultimately ruling in Davis's favor, the Supreme Court did not adopt this line of reasoning. To the contrary, the Court held that had the plaintiff's personal expenditures triggered a rise in "the contribution limits for all candidates, Davis' argument would plainly fail." *Id.* The Court reiterated this point: "if §319(a)'s elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits."

So it was the provision's "asymmetrical contribution scheme" which produced

"discriminatory" contribution limits for similarly-situated, privately-financed opponents—not the trigger mechanism *per se*—that was the basis of the Court's finding of an unconstitutional burden. *Id.* at 2772 and n.7 ("[T]he vigorous exercise of the right to use personal funds to finance speech produces fundraising advantages for opponents in the competitive context of electoral politics"). As the Court emphasized, "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id*. at 2771.

Unlike the Millionaire's Amendment at issue in *Davis*¸ the Clean Elections Act does not treat similarly-situated candidates differently. Under the Act, all candidates are free to choose the financing system (traditional or public) that maximizes their speech. By choosing public funding, a candidate may gain access to matching funds; but in exchange she must endure the burdens of qualifying, agree to spending limits, attend mandatory debates, and reject most private contributions, burdens that do not befall the privately-financed candidate. By contrast, under the Millionaire's Amendment, those candidates who were subjected to lower contribution limits gained no regulatory advantages, and those with higher limits were subjected to no additional burdens. Matching funds thus are not like the asymmetrical contribution limits that the Millionaire's Amendment applied to privately-financed candidates. They are an essential component of the public-financing alternative, an alternative that all candidates are free to pursue or decline.

In fact, the Supreme Court has long recognized the constitutionality of a system that provides candidates with the option of choosing between the countervailing benefits and costs of public and private financing:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Buckley, 424 U.S. at 57 n. 65. The Court adhered to this view in *Davis*, stating that "Congress . . . may condition acceptance of public funds on an agreement . . . to abide by specific expenditure

limitations even though we found an independent limit to be unconstitutional." 128 S. Ct. at 2772 (internal quotations omitted).

Thus, unlike in *Davis*, the choice confronting candidates in Arizona is constitutionally acceptable. Knowing the benefits and burdens of the private and public financing options, each candidate may choose the option that maximizes his or her speech. So long as the differences between the relative benefits and burdens of participation and nonparticipation are not so extreme that they coerce participation (a point discussed below), there is no burden on the First Amendment rights of nonparticipants. *See Daggett*, 205 F.3d at 470. The Act's speech-maximizing options further, rather than abridge, First Amendment rights.

In short, after *Davis* was decided in June 2008, *Leake* and *Daggett* remain sound authority for the constitutionality of matching funds. *See North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008).

c. PARTICIPATION IN THE ACT'S PUBLIC FUNDING OPTION IS VOLUNTARY.

There is likewise no merit to Plaintiff-Intervenors' claim that the Act abridges First Amendment rights by coercing participation in the Act's public funding option. *See* Complaint in Intervention at ¶¶ 51, 57-64.

The First Circuit considered and rejected an identical challenge to Maine's Clean Elections Act in *Daggett*. 205 F.3d at 470. The *Daggett* court recognized that:

> A state need not be completely neutral on the matter of public financing of elections and that a public funding scheme need not achieve an exact balance between benefits and detriments. In fact, a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice.

Id. (internal quotations and citations omitted). Only where the incentives to participate "stray beyond the pale" and "create disparities so profound that they become impermissibly coercive" do First Amendment concerns arise. *Id*. (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38-39 (1st Cir. 1993)).

Applying this standard, the *Daggett* court held that the Maine Clean Elections Act did not coerce candidate participation. While noting the benefits of participation, the First Circuit also

cited the significant "detriments" and challenges faced by participating candidates including the need to obtain $5 qualifying contributions, the limited amount of the initial grant, the uncertainty of matching funds, the limit on matching funds, and the inability to raise or spend any funds apart from those received from the Commission—in short, the exact same issues that participating candidates in Arizona face. *Id*. at 471. As a matter of law, Plaintiff-Intervenors' coercion claim fails.

Nor have Plaintiff-Intervenors adduced sufficient evidence to mount an as-applied challenge to the Act. The undisputed record establishes that candidates, including Plaintiff-Intervenors, can and do choose to run privately-financed campaigns in Arizona. While participation rates have steadily climbed as awareness of the public financing option has increased, one in three candidates still opted for private financing in the 2008 primary and general elections. Separate Statement ¶ 43 (Sandhu Decl. Ex. Y, Citizens Clean Elections Commission 2008 Annual Report at 8). There is, in short, no evidence that candidates are coerced to participate.

Only one Plaintiff-Intervenor claims that he "may be" coerced to participate in the 2010 elections, and that party's self-serving speculation is not sufficient to create a genuine issue of material fact. *See* Complaint in Intervention ¶ 8. History disproves Plaintiff-Intervenor Martin's speculative assertion: he has declined the option of running as a participating candidate in each of his four prior campaigns and won each of his races. Separate Statement ¶ 26 (Sandhu Decl. Exs. Z-CC, Campaign Finance Reports 2002-2006). Furthermore, Martin testified that he did not think that the elimination of matching funds would make any difference in his decision whether to accept public funding in 2010. Separate Statement ¶ 29 (Sandhu Decl. Ex. R, Martin Dep. at 86:11-87:12). Because matching funds will not affect Martin's choice between the public and private funding options, the matching funds provisions cannot coerce him to become a participating candidate.

In short, there is no genuine issue of material fact regarding Plaintiff-Intervenor Martin's coercion claim. The undisputed evidence establishes that candidates remain free to choose private over public fundraising.

2. THE ACT IS NARROWLY TAILORED TO SERVE MULTIPLE COMPELLING GOVERNMENT INTERESTS.

Even if Plaintiffs could show that the Act abridged their speech, which they cannot, their First Amendment claims fail if the Act is narrowly tailored to serve a compelling government interest. The Act is essential to promoting two interests that both voters and the Courts have found compelling: promoting campaign speech and combating the reality or appearance of corruption.

a. BY EXPANDING SPEECH, THE ACT FURTHERS A COMPELLING GOVERNMENT INTEREST.

The overwhelming evidence that the Act has expanded, rather than abridged, free speech both defeats Plaintiffs' claim that their own speech has been chilled and establishes that the Act furthers compelling government interests.

Arizona's compelling interest in promoting First Amendment values through the adoption of an effective public financing system is well established. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court's landmark campaign finance decision, the Court upheld the Presidential public financing system. *Id*. at 57 n.65. It emphasized that public financing "furthers, not abridges, pertinent First Amendment values" by "facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process, *goals vital to a self-governing people*." *Id*. at 92-93 (emphasis added).

While the *Buckley* Court did not explicitly use the term "compelling" to describe the government's interest in promoting First Amendment values through public financing, its reference to that interest as a "goal[] vital to a self-governing people" left little room for doubt that the interest is in fact compelling. Indeed, lower courts have since recognized that states have "a *compelling interest* in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates." *Wilkinson v. Jones*, 876 F.Supp. 916, 928 (W.D. Ky. 1995) (emphasis added).

b. THE ACT COMBATS CORRUPTION.

The undisputed evidence also establishes that Arizona voters adopted the Clean Elections Act as an appropriately-tailored remedy to serve their compelling interest in deterring corruption.

(1) **ARIZONA VOTERS HAD A COMPELLING INTEREST IN COMBATING CORRUPTION.**

It is well established that "[r]educing corruption and the appearance of corruption *are* compelling government interests." Findings of Fact and Conclusions of Law at 11 (docket no.185, filed 10/17/2008); *see also Buckley*, 424 U.S. at 25-27 (noting that *quid pro quo* corruption undermines "the integrity of our system of representative democracy" and the appearance of corruption must be avoided "if confidence in the system of representative Government is not be eroded to a disastrous extent"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted."). As the Supreme Court has explained:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 390 (2000) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

In the years leading up to the adoption of the Clean Elections Act, Arizona voters had good reason to suspect "malfeasance and corruption" among their elected officials. The extensive media coverage of AzScam revealed in vivid and undeniable detail that the threat of corruption from contributions was real and pervasive.[4] Arizona voters responded by adopting the Act in which they expressly stated that "our current election-financing system . . . [u]ndermines public confidence in the integrity of public officials." Ariz. Rev. Stat. § l6-940(B)(5). In short, the evidence that Arizona voters perceived a threat of corruption and adopted the Act to address that

[4] It is no answer to Arizonans' first-hand experience with corruption that academic studies have been unable to draw a conclusive link between campaign contributions and official acts. As the Supreme Court has recognized, the studies are conflicting and in any event there is an "absence of any reason to think that public perception has been influenced by the studies." *Nixon*, 528 U.S. at 394-95. Particularly in light of the videotaped footage and broad media coverage from AzScam, the public was well aware that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id*.

threat is overwhelming. The Supreme Court has upheld campaign finance restrictions based on far less direct evidence of corruption. *See Nixon*, 528 U.S. at 393 (relying on a state legislator's affidavit that there was a potential for corruption and newspaper reports of large contributions from business interests).

Arizona's leading newspaper also published reports that legislators and lobbyists were circumventing the contribution limits voters implemented twelve years earlier by having lobbyists "bundle" contributions from clients and colleagues. In light of Arizona's public awareness of the bundling issue, "the evidence support[ed] the long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals and nonparty groups." *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 456 n.18 (2001) (upholding limits on coordinated party expenditures because such expenditures posed a threat of circumvention of contribution limits).

In short, Arizona voters plainly had a compelling interest of the highest magnitude in adopting measures designed to combat the corruption revealed in AzScam.

(2) THE ACT IS AN APPROPRIATELY-TAILORED SOLUTION TO ARIZONA'S HISTORY OF CORRUPTION AND CIRCUMVENTION OF CONTRIBUTION LIMITS.

The Act represents a well-tailored remedy to the corrupt practices observed in Arizona during the 1990s. As far back as *Buckley*, the Supreme Court recognized that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." 424 U.S. at 96. The First Circuit in *Daggett* similarly noted that a candidate who accepts public funding benefits from "the assurance that contributors will not have an opportunity to seek special access" and from "the avoidance of any appearance of corruption." 205 F.3d at 471; *see also Leake*, 524 F.3d at 440-41 (noting that "the state's public financing system . . . is designed to promote the state's anti-corruption goals"). Similarly, Republican political consultant Querard testified that participating candidates have the "freedom in essence to vote [their] conscience" without "ever hav[ing] to worry about will I be targeted or will the people that help me get elected . . . feel betrayed." (Sandhu Decl. Ex. S, Querard Dep. at

61: 7-22.).

Matching funds in particular are essential to a viable public financing alternative in Arizona. As the First Circuit explained in upholding Maine's clean elections system, "without the matching funds . . . candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000).

Indeed, numerous participating candidates have submitted declarations confirming that matching funds played a key role in their decision to accept public funding.[5] Likewise, Professor Mayer has examined various public financing systems and found that matching funds are key to encouraging candidate participation.[6] Mr. Querard similarly testified that, absent matching funds, participation rates would decline. (Sandhu Decl. Ex. S, Querard Dep. at 32:2-24).[7]

Arizona voters justifiably concluded that contribution limits alone were not sufficient to combat corruption. The $200 limits on individual contributions to state legislative candidates were in place five years *before* AzScam occurred. The *Arizona Republic's* "The Invisible Legislature" series also fostered a public perception that lobbyists and elected officials were regularly circumventing the contribution limits through the practice of bundling. Having given contribution limits twelve years to succeed, Arizona voters understandably concluded that more was needed.[8] In short, the Clean Elections Act was the rational next step in Arizona's effort to alleviate the pernicious effects of private contributions.

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[5] *See* Sandhu Decl. Ex. T, Burton Cahill Decl. ¶ 5 submitted in support of Defendant-Intervenors' Opposition To Motion for Preliminary Injunction (docket no. 121, filed 9/23/2008); *see also* the declarations filed by participating candidates Tammie Pursely, David Schapira, Ed Ableser, and Pamela Durbin in support of Defendants' Response in Opposition To Motion for Preliminary Injunction (*supra*, footnote 3).

[6] Mayer Report at 8.

[7] Plaintiffs' attack on the matching funds provision reflects their ideological position that the public financing system as a whole should be repealed. Martin Dep. at 32:20-24 (Q. Have you supported legislation to effectively get rid of the Clean Elections Act? A. To limit, neuter or repeal in various shapes . . . ."); *id.* at 36:4-7 ("Q. . . . if the matching funds component of the Clean Elections Act was eliminated, would you still be opposed to the Clean Elections Act? A. Yes.") (Sandhu Decl. Ex. R).

[8] Plaintiffs' position that contribution limits are a less restrictive alternative to public financing is misleading since Plaintiffs believe Arizona's contribution limits are also unconstitutional. (Sandhu Decl. Ex. R, Martin Dep. 32:25-33:9.)

Plaintiffs ask this Court to overturn the voter-approved Act because candidates allegedly used public money in a way not contemplated by the voters in two out of the 429 races in which there was a participating candidate between 2000 and 2008. Separate Statement ¶ 46 (Migally Decl. ¶ 9). The Supreme Court has never held that a campaign finance restriction that is used properly 99.5% of the time is unconstitutional merely because it was not 100% effective. Even if the Court found this .5% occurrence to be of concern, the Court has consistently upheld regulations that were capable of circumvention. For example, the well-recognized potential for the circumvention of contribution limits never served as a justification for their invalidation. *See Colorado Republican*, 533 U.S. at 456. To the contrary, the Court has responded to evidence of circumvention by giving Congress the flexibility to craft campaign finance laws that respond to the ever-changing strategies of moneyed interests:

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. *We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.* What problems will arise, and how Congress will respond, are concerns for another day.

McConnell v. Federal Election Commission, 540 U.S. 93, 223-224 (2003) (emphasis added; internal citations omitted).

Plaintiffs of course do not seek to amend the Act to address the minor problems that arose during the 2008 election; nor do they suggest that the Court should give the people, the legislature, or the administrative process the opportunity to address the issue. Instead, they ask this Court to overturn the voter-approved Act. In so doing, Plaintiffs greatly overstate the threat of corruption from gaming and dramatically understate the threat of corruption from shifting publicly-funded candidates back into the world of private financing. If the Clean Elections Act is to be judged in part based on the acts of candidates in two races, then its benefits must also be assessed based upon what has *not* recurred in Arizona since its enactment: a scandal on the scale of AzScam and a crisis of confidence in state government.

D. PLAINTIFFS' EQUAL PROTECTION CLAIMS ALSO FAIL AS A MATTER OF LAW.

Where a law distinguishes between classes of individuals, the Constitution's equal protection requirement is satisfied so long as the classification rationally furthers a legitimate state interest. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Because the Act does not discriminate against a suspect class and, as explained in detail above, is indisputably rationally related to a legitimate state interest, Plaintiffs' Fourteenth Amendment equal protection claims fail as a matter of law.

Plaintiffs wrongly contend that the Act violates the equal protection clause because it applies different rules to candidates and their supporters regarding campaign contributions and reporting requirements depending on whether the candidates *choose* to accept public campaign financing. However, when two groups are not similarly situated, the equal protection clause does not prevent the government from treating them differently. As the First Circuit explained in rejecting a virtually-identical legal challenge in *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993):

> First, the statute does not impose unequal treatment but gives candidates an authentic choice. Second, the statute treats candidates differently on the basis of their actions rather than their beliefs—actions which, as we have seen, possess differing implications for the integrity and effectiveness of the electoral process. The equal protection clause does not interdict such classifications.

Id. at 40 n. 17; *see also Buckley*, 424 U.S. at 95 (upholding against equal protection attack a system which actually excluded minority party candidates); *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971) (rejecting equal protection challenge to election law and observing that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike").

Such is the case here: when one candidate chooses to accept public financing, he or she is no longer similarly situated to a candidate who chooses not to participate in Arizona's clean elections system, and no constitutional concerns are raised by treating the candidates differently. To hold otherwise would fly in the face of the Supreme Court's unequivocal directive that the government may impose differing restrictions on candidates depending on whether they choose to

accept public funding. *See Buckley*, 424 U.S. at 57 n. 65 (The legislature "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.").

Moreover, even if participating and non-participating candidates could be considered similarly situated, the Act's differing treatment of such individuals is justified by the rational and indeed compelling governmental interests in increasing communication between candidates and their electorates, freeing candidates from the pressures of fundraising, and combating corruption in the political process. *See Vote Choice*, 4 F.3d at 39.

To the extent Plaintiffs characterize their flawed First Amendment claims as an equal protection violation, the claims fail for the reasons detailed above. The Act promotes rather than abridges First Amendment expression. And even if Plaintiffs could adduce evidence of abridgment, multiple compelling government interests support the Act. In short, Plaintiffs' equal protection claims fail as a matter of law.

IV. CONCLUSION

Because there are no genuine issues of fact, and because Plaintiffs' First Amendment and equal protection claims fail as a matter of law, this Court must grant summary judgment for Defendants and Defendant-Intervenor.

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MUNGER, TOLLES & OLSON LLP
BRADLEY S. PHILLIPS
GRANT A. DAVIS-DENNY
ELISABETH J. NEUBAUER
PUNEET SANDHU

THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
MONICA YOUN
ANGELA MIGALLY

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
TIMOTHY MICHAEL HOGAN

By: /s/ Grant A. Davis-Denny
GRANT A. DAVIS-DENNY

Attorneys for Defendant-Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2009, I caused the foregoing documents to be electronically transmitted 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 East Coronado Road
Phoenix, AZ 85004
cbolick@goldwaterinstitute.org
ndranias@goldwaterinstitute.org

Attorneys for Plaintiffs

William R. Maurer
Institute for Justice
101 Yesler Way, Suite 603
Seattle, WA 98104
Wmaurer@ij.org

Attorneys for Plaintiffs-Intervenors

Timothy D. Keller
Institute for Justice
1398 South Mill Avenue
Suite 301
Tempe, AZ 85281
TKeller@ij.org

Attorneys for Plaintiffs-Intervenors

Mary O'Grady
Solicitor General
Tanja K. Shipman
Assistant Attorney General
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007
Mary.ogrady@azag.gov
Tanja.shipman@azag.gov

Attorneys for Defendants

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

Attorneys for Defendant-Intervenor

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

Attorneys for Defendant-Intervenor

/s/ Puneet Sandhu
PUNEET K. SANDHU