IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John McComish, et al., Plaintiffs, vs. Jan Brewer, et al., Defendants.	No. CV-08-1550-PHX-ROS **ORDER**

This case involves claims by Plaintiffs that the campaign finance regime adopted by the State of Arizona violates their free speech and equal protection rights. In short, Plaintiffs believe the campaign finance regime violates their rights because the state provides additional funds to publicly-funded candidates in the event non-publicly-funded candidates exceed certain campaign expenditure and fundraising limits. As set forth below, the regime burdens Plaintiffs' First Amendment rights, is not supported by a compelling state interest, is not narrowly tailored, and is not the least restrictive alternative.

The four cross motions for summary judgment were filed in June 2009. The parties filed responses and replies in July 2009. Beginning in late July, and continuing through September 2009, the parties made various filings regarding supplementing the record and submission of supplemental authority. In October the Court directed additional briefing on crucial issues not addressed in the parties' original submissions. The additional briefing was

not complete until mid-November. In December 2009 the parties continued to submit additional filings, and in January 2010 Plaintiffs filed a second motion for preliminary injunction. The Court ordered expedited briefing on that motion as well as supplemental briefing on the appropriate scope of available remedies.

The record in this case is unusually large and complicated. The summary judgment briefing consists of more than one hundred separate docket entries, many of which consist of multiple documents and hundreds of pages. Given the complicated nature of this case, the Court deemed it prudent to review in great detail the parties' submissions before issuing its ruling. This ruling is issued less than two months after the parties submitted the supplemental briefing.[1]

BACKGROUND

1. Passage of Clean Elections Act

The November 1998 election contained the initiative measure known as the Citizens Clean Elections Act ("Act").[2] According to the findings and declarations contained in that initiative, the intent of the Act was "to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech." The proponents of the Act believed the election-financing system in effect at that time suffered from the eight flaws that follow:

> 1. Allowed "elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction";
>
> 2. Gave "incumbents an unhealthy advantage over challengers";

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[1] The District Court hearing the *Davis* matter took approximately ten months to issue its opinion, and it took the Supreme Court just under one year to issue its opinion.

[2] Defendants' briefing recounts various episodes of corruption in Arizona's state government allegedly leading up to passage of the Act. Plaintiffs concede the episodes occurred, but disagree that they were the driving force for passage of the Act. From the record presented in the context of what constitutes admissible evidence, it is impossible to determine the extent to which the various corruption scandals led to passage of the Act.

3. Hindered "communication to voters by many qualified candidates";

4. Suppressed "the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests";

5. Undermined "public confidence in the integrity of public officials";

6. Cost "average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors";

7. Drove "up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding"; and

8. Required "elected officials spend too much of their time raising funds rather than representing the public."[3]

The voter information pamphlet contained various arguments "for" and "against" passage of the Act. According to the arguments in favor of the Act, "it's money that talks in political campaigns and it threatens the principles of our democracy." Also, "[a] thriving system depends upon solid governance and policies that benefit all of Arizonans, not just a few who can afford to 'pay to play.'" And "[p]olls reveal that a lack of confidence in government is a major factor" why individuals choose not to vote. Voting in favor of the Act would "end the money chase, halt corruption, limit campaign spending and reduce special interest influence." Voting in favor of the Act would also "make sure that no lobbyist or special interest can again 'buy' a candidate as they are doing now."

The arguments against the Act in the voter information pamphlet claimed it would levy "a host of new taxes, create[] a new level of bureaucracy, provide[] taxpayer funds for fringe candidates, punish[] candidates who don't want to use taxpayer funds, and limit[] free speech." The opponents believed tax dollars should be saved "for education and the safety of [their] children" instead of wasted on "wacky candidates." The Act passed with approximately 51% of the vote.

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[3] This information is taken from the Ballot Propositions Publicity Pamphlet for the 1998 General Election. Available at http://www.azsos.gov/election/1998/Info/PubPamphlet/Cover.html

2. Operation of Act

The Act, as currently constituted, provides a voluntary system of campaign financing in which all candidates for public office must decide whether to be a "participating candidate" or a "non-participating candidate." Participating candidates must collect a certain number of five-dollar "qualifying contributions." Once a participating candidate collects the minimum number of "qualifying contributions," he or she receives an initial grant for the primary. During the primary campaign, the participating candidate will receive additional funds in the form of "matching funds" if the participating candidate has a non-participating opponent that spends more than the initial grant.[4] The participating candidate will also receive matching contributions if there are "independent expenditures"[5] against the participating candidate or in favor of the non-participating opponent. Participating candidates cannot raise or spend money in addition to the grant.

In the general election, a participating candidate receives a second initial grant. Matching funds are awarded if the non-participating candidate's receipts (i.e. contributions), less expenditures made during the primary campaign, exceed the second initial grant. Independent expenditures trigger matching funds in the general campaign the same way they triggered matching funds in the primary campaign. Matching funds cap out at three times the applicable spending limit. Independent expenditures by Political Action Committees[6]

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[4] "Matching funds" are a dollar-for-dollar match minus 6% meant to compensate for the fundraising expenses incurred by traditional candidates. A.R.S. § 16-952(A). The parties use the terms "matching contributions" and "matching funds" interchangeably. This opinion will use matching funds.

[5] "Independent expenditures" are defined as "expenditures by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." A.R.S. § 16-901(14).

[6] Political Action Committees are groups organized "for the purpose of influencing the result of any election." A.R.S. 16-901.

("PACs") made on behalf of a candidate–non-participating or participating–or in opposition to the participating opponent also count towards the spending limit.

Based on this structure, a candidate is faced with the initial choice of whether to participate in public funding. If the candidate decides not to participate in public funding, he or she must determine how much money to spend on the race and how much time to engaged in seeking fundraising. Assuming the candidate has a publicly funded opponent, the candidate's expenditures and fundraising may result in additional funds granted to that opponent. Those additional funds, however, are limited. Once a non-participating candidate has raised or spent more than three times the initial grant, no additional matching funds will be given to the participating opponent. Simply, there are no consequences once a non-participating candidate has raised or spent more than three times the initial grant.

3. Participation in and Consequences of Act

The Act has been in place for the past five elections.[7] Since 2002, candidate participation has varied between 52% and 67%. (Doc. 293 at 3). The parties disagree on whether the Act has had an impact on total campaign spending. It is undisputed that campaign spending has increased since the Act's passage, but it is unclear whether that increase can be traced to the Act. The parties also disagree on whether candidates' spending patterns show the Act has any effect on candidate behavior. Defendants assert the spending patterns of candidates prove the Act has no chilling effect. According to Defendants, if the Act truly is chilling speech, one would expect to find candidates spend just up to but no more than the spending limit. In other words, candidates would attempt to spend the maximum amount they are able to spend without triggering matching funds. Aggregate statistics show candidates do not do so. But this evidence does not dispose of Plaintiffs' claims that their speech was chilled and will be chilled. For example, some of the Plaintiffs triggered matching funds. Those individuals now claim they would have spent more or spent at a

[7] The Act applies to elections for statewide offices.

different time if matching funds were not a possibility.[8] Accordingly, the evidence regarding candidate spending does not definitively establish a chilling effect, or lack thereof.

4. Plaintiffs' Statements Regarding Burden of Act

Plaintiffs and Plaintiff-Intervenors are incumbents, past or future candidates for office, and Political Action Committees ("PACs"). Plaintiffs were asked during discovery to explain how the Act burdens their rights. Plaintiffs' testimony is somewhat scattered and shows only a vague interpretation of the burden of the Act. Evidence regarding each Plaintiff is recounted below.

a. John McComish

Plaintiff John McComish is a member of the Arizona State House of Representatives who plans on running for reelection in 2010. In 2008, Mr. McComish ran as a non-participating candidate. (Doc. 316). In the 2008 election, Mr. McComish had at least three participating opponents. Those opponents received matching funds based on Mr. McComish's expenditures as well as expenditures by third parties. Mr. McComish claims the Act requires him to take steps to minimize the impact of matching funds. Mr. McComish does this "by refraining from making campaign expenditures that [he] would otherwise make . . . or by adopting a tactic of delaying [his] expenditures in such a manner as to minimize the benefit any participating candidate may receive from matching funds." This, according to Mr. McComish, "amounts to self-censorship because [he] will refrain from engaging in communication at times and in manners that [he] would otherwise choose in order to avoid disseminating viewpoints that are hostile to [his] candidacy." (*Id.* at 5).

Mr. McComish also believes matching funds "discriminate against traditional candidates." (Doc. 316 at 5). This "discrimination" allegedly occurs when a non-participating candidate triggers matching funds to his opponents. The Court is unable to conceive of how an award of matching funds "discriminates" against McComish.

[8] Other Plaintiffs did not spend enough to trigger matching funds, and it does not appear that they stopped spending just short of the point where matching funds would be awarded.

Discrimination in a general sense requires that two individuals or groups be treated differently by the government. Mr. McComish and the other Plaintiffs mentioned below have not explained how they have been legally disfavored by the government in comparison to participating candidates.

b. Nancy McLain

Plaintiff Nancy McLain is a member of the Arizona House of Representatives and plans on running for reelection in 2010. During the 2008 primary election, Ms. McLain triggered the award of matching funds to an opponent. (Doc. 317 at 4). Independent expenditures, allegedly aiding Ms. McLain, triggered additional matching funds. During the most recent general election, Ms. McLain had two participating opponents. The presence of these opponents made her "reluctant to fundraise . . . or personally contribute or loan money to [her] campaign." Ms. McLain did not trigger matching funds for the general election. In the future, Ms. McLain plans on minimizing her fundraising and spending, or altering the mode of her fundraising and spending, to lessen the impact of any matching funds. Thus, matching funds allegedly require that Ms. McLain engage in "self-censorship."

Like Mr. McComish, Ms. McLain claims matching funds constitute a "discriminatory legal framework." Again, it is unclear what type of discrimination Ms. McLain believes is at issue.

c. Tony Bouie

Tony Bouie is a non-participating candidate for the Arizona House of Representatives. During the 2008 primary campaign, Mr. Bouie had participating and non-participating opponents. Mr. Bouie and his non-participating opponent both exceeded the spending limit during the primary campaign. Thus, the participating opponent received matching funds. Mr. Bouie claims his "speech was chilled from the moment [he] understood the general idea of matching funds." (Doc. 318). Mr. Bouie ceased "the promotion of [his] campaign and

[held his] campaign speech until [his] expenditures could be timed[9] to minimize the impact of matching funds provisions." The Act caused Mr. Bouie to "self-censor until the last days of the election rather than sending out mailers, making auto calls, and passing out information door-to-door."

d. Dean Martin

Dean Martin is the current Arizona State Treasurer and was elected to the State Senate in 2000, 2002, and 2004. (Doc. 288-2 at 4). In each of his campaigns, Mr. Martin ran as a non-participating candidate. Mr. Martin claims during his most recent campaign he "was forced to limit [his] speech and abide by the Act's expenditure limits or risk being further outspent by [his] government-funded opponent because of the operation of the Act." (Doc. 288-6 at 113). Mr. Martin states "[t]he only way [he] could avoid being massively outspent by [his] opponent was to prevent the triggering of additional matching funds to [his opponent's] campaign." (*Id.* at 114). Thus, Mr. Martin "stopped accepting contributions to [his] campaign." (*Id.*). Mr. Martin triggered a relatively small amount of matching funds in the 2006 State Treasurer race. (Doc. 362-1 at 22).

Despite Mr. Martin's statement that matching funds forced him to limit his speech, and the fact that Mr. Martin triggered matching funds in 2006, Mr. Martin was unable during his deposition to recall whether he had ever triggered matching funds. (Doc. 309-8 at 3). It follows that if matching funds were a serious concern, Mr. Martin would know whether he had triggered such funds. Mr. Martin also testified he has supported legislation to repeal the Act, and his opposition to matching funds is based, at least in part, on the provision that if you accept government funding "you're not allowed . . . to support your own campaign over a certain amount." (*Id.* at 9). Thus, it appears that Mr. Martin's real focus has been on public funding of elections in general, and not matching funds in particular.

[9] Delaying expenditures as much as possible minimizes the impact of matching funds because the participating opponent will not have time to spend the matching funds.

e. Robert Burns

Robert Burns is an Arizona State Senator. Mr. Burns was first elected in 2002, was reelected in 2008, and plans on running in the 2010 election. (Doc. 288-6 at 91). During the 2008 campaign, Mr. Burns, a non-participating candidate, exceeded the matching funds threshold. (Doc. 354 at 7). He claims "the existence of matching funds coerces traditionally funded candidates into changing their message and the timing of getting out their message, even if ultimately the amount of messaging a traditional candidate chooses to engage in does not change."

But Mr. Burns' deposition seems to indicate that matching funds have had little to no impact on his campaign activities. For example, Mr. Burns was unable to state whether he had reduced his campaign communications because of the possibility of triggering matching funds. (Doc. 309-11). In fact, some of his testimony seems to indicate Mr. Burns simply communicated his message to the extent he felt necessary to win. (Doc. 309-11 at 5 "If I had to spend X number of dollars to get out a–a mailer, and I had that amount of money, I would go ahead and do the mailer.").

f. Rick Murphy

Rick Murphy is an Arizona State Representative. Mr. Murphy was elected to the Arizona House in 2004 and was reelected in 2006 and 2008. Mr. Murphy accepted public funds in 2004 but ran as a non-participating candidate in the 2006 and 2008 campaigns. Mr. Murphy now claims he was coerced into accepting public funding for the 2004 campaign, but the record does not provide an explanation of this coercion.[10] During the 2006 campaign, Mr. Murphy claims he "curtailed [his] speech and curtailed [his] fundraising in order to prevent [matching funds]." (Doc. 362-1 at 79).

[10] According to one of Mr. Murphy's campaign consultants, Mr. Murphy was not coerced into accepted public funding. In fact, the consultant believes Mr. Murphy "would not have been elected [in 2004] if Clean Elections did not exist." The consultant reached this opinion because Mr. Murphy was not an incumbent and did not having the contacts necessary to independently raise funds. (Doc. 309-9 at 8).

g. Arizona Free Enterprise Club's Freedom Club PAC

The Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") "is a Candidate Support or Opposition Committee." (Doc. 288-2 at 6). The Act allegedly harms the Freedom Club PAC because matching funds are triggered when it speaks out in favor of certain candidates. (Doc. 288-2 at 21). But the Freedom Club PAC does not make independent expenditures. (Doc. 362-1 at 83). The Freedom Club PAC contributes to Arizonans for a Sound Economy, another PAC, and it is this entity which actually expends funds. The Freedom Club PAC's treasurer stated matching funds have never prevented it from spending money, but matching funds allegedly have altered the timing of certain expenditures. (Doc. 362-1 at 85).

h. Arizona Taxpayers Action Committee

The Arizona Taxpayers Action Committee ("ATAC") is an Independent Expenditures Committee that was organized in 2006. It claims it "did not speak in opposition to a publicly funded candidate in the District 1 Senate primary race to avoid triggering matching funds to that candidate." (Doc. 288-2 at 7). Defendants counter that the evidence shows no such abstention occurred. Instead, the decision not to spend money was based on the fact ATAC had no money to spend. (Doc. 354 at 9). Based on the unreliable and conflicting evidence, the Court cannot determine which side is presenting the more accurate picture.

ANALYSIS

I. Procedural History

The Court previously denied Plaintiffs' applications for a temporary restraining order and a preliminary injunction. (Doc. 30, 185). In the ruling denying the preliminary injunction, the Court found that the Clean Elections Act "imposes a substantial burden on the First Amendment right to use personal funds for campaign speech."[11] (Doc. 185 at 10). The Court also found Defendants had not established a compelling state interest justifying that

[11] The prior rulings did not address the precise nature of the burden allegedly imposed upon Plaintiffs. As explored below, identifying the burden is more difficult than that alluded to by the prior rulings.

burden. (Doc. 185 at 14). The preliminary injunction was denied, however, because of the "extraordinary balance of the harms required in the context of an ongoing election." (Doc. 185 at 18). The parties have now completed discovery and have filed motions for summary judgment.

II. Standard For Summary Judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

III. Proper Standard of Review

The first disagreement between the parties is the proper standard of review. According to the Ninth Circuit, if the Act "places a severe burden on fully protected speech and associational freedoms," the court must apply strict scrutiny. *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). But if the Act "places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the First Amendment, [courts] apply a lower level of constitutional scrutiny." *Id.* Thus, the proper standard of review depends upon two inquiries. First, what type of speech is at issue? And second, is that speech being burdened?

A. Type of Speech

Based on longstanding Supreme Court precedent, there is an important distinction between contributions and expenditures. Contributions are not considered "to be fully protected political speech." *Lincoln Club of Orange County*, 292 F.3d at 938. Instead, "contributions are merely speech by proxy," and do not merit full protection. *Id.* Expenditures, however, are recognized as fully protected speech. Candidates have a "First Amendment right to engage in unfettered political speech," such as the expenditure of their

personal funds. *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2771 (2008). Thus, if the Act is seen as burdening contributions, it will be subject to a lower level of scrutiny; if the Act is seen as burdening expenditures, it will be subject to a higher level of scrutiny; and if the Act is seen as a burden on both expenditures and contributions, the higher level of scrutiny is appropriate. *Lincoln Club of Orange County*, 292 F.3d at 938 (applying strict scrutiny to provision regulating both contributions and expenditures).

Defendants argue the Act "is fundamentally a restriction on contributions." (Doc. 382 at 6). This is an oversimplification. For a primary campaign, matching contributions are explicitly tied to a candidate's "expenditures." While those expenditures might consist of a candidate spending contributions from third parties, it is possible for a candidate to trigger matching funds during the primary based on his or her expenditure of personal funds. For the general campaign, matching funds are dependent on "contributions," but the expenditure of personal funds is also defined as a "contribution." Accordingly, the Act has the ability, if not always the effect, of regulating expenditures in both the primary and general campaigns. The Act's burden must be evaluated in terms of potentially affecting "fully protected speech." *Lincoln Club of Orange County*, 292 F.3d at 938.

B. Level of Burden

According to Plaintiffs, matching funds place a "drag on campaign speech." (Doc. 297 at 15). That drag is present because "Matching Funds cause the vigorous exercise of First Amendment rights by Plaintiffs, political action committees and their supporters to produce fundraising advantages for their opposing government-subsidized candidates." (*Id.*) In other words, Plaintiffs allege they will refrain from raising funds or spending their personal monies to prevent participating candidates from receiving matching funds. This, according to Plaintiffs, is a severe burden on their free speech rights. Plaintiffs' argument relies in large part on the Supreme Court's recent decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008). While *Davis* is instructive, it does not answer the precise question now before the Court.

In *Davis*, the Supreme Court addressed the so-called "Millionaire's Amendment" contained in the federal Bipartisan Campaign Reform Act of 2002. According to that amendment, when a candidate's expenditure of personal funds exceeded $350,000, the candidate's opponent became eligible to accept contributions from individuals at treble the normal limit. The opponent also became eligible to accept unlimited "coordinated party expenditures," *i.e.* expenditures by national or state political party committees. The Supreme Court concluded the amendment "requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." The discriminatory fundraising limitations constituted the "special and potentially significant burden" of conferring a "fundraising advantage[] for opponents in the competitive context of electoral politics." *Id.* at 2772.

In some respects the burden Plaintiffs allegedly suffer in this case is analogous to the burden in *Davis*. Plaintiffs submit evidence that they have felt "chilled" and that but for the matching provisions they would have spent or will spend more money on campaigns. Thus, it appears that in Plaintiffs' view, the "burden" is that an exercise of their First Amendment right to spend as much as they wish will result in Arizona conferring an additional benefit on publicly-financed candidates. Those candidates presumably will spend the matching funds, *i.e.* generate more speech. In other words, the "burden" created by the Act is that Plaintiffs' speech will lead directly to more speech. Given that the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources," it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited "burden" on Plaintiffs. *Buckley v. Valeo*, 424 U.S. 1, 49.

Another strange aspect of the alleged burden is that public financing of elections is permitted by the Constitution. If the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*. Presumably the Act would also be permissible if the incremental awards were linked to some occurrence other than a non-publicly financed candidate's speech. Thus, Plaintiffs are left to argue their First Amendment rights are violated not by the fact of public

financing, or the level of that financing, but by the fact that Arizona provides incremental grants linked to their activities. If a single lump sum award[12] would not burden Plaintiffs' free speech rights in any cognizable way, finding a burden solely because of the incremental nature of the awards seems difficult to establish.[13]

Despite the unsettling nature of Plaintiffs' claims, *Davis* requires this Court find Plaintiffs have established a cognizable burden. Plaintiffs face a choice very similar to that faced in *Davis*: either "abide by a limit on personal expenditures" or face potentially serious negative consequences. In *Davis*, the negative consequence was having one's opponent subject to higher contribution limits. Here, the negative consequence is having one's opponent receive additional funds. "Arguably the benefit conferred by [matching funds] is more constitutionally objectionable than increasing an opponent's individual contribution limits. In the latter scenario, the opponent must still go out and raise the additional contributions . . . [Matching funds], by contrast, ensure[] that there will be additional money to counteract the excess expenditures by the non-participating candidate . . . ." *Green Party of Connecticut v. Garfield*, 2009 WL 2730525, at *67 (D. Conn. 2009). Accordingly, if the statute in *Davis* constituted a burden, matching funds must also constitute a burden.[14]

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[12] Based on the practical realities, this entire case only makes sense under the assumption that single lump-sum awards are not fiscally possible. No rational candidate would prefer a system wherein his opponents receive the maximum award in a single lump sum instead of incremental awards.

[13] Using the amounts available for a general election for a legislative candidate as an example, the spending limit is $19,382. Once a non-participating candidate spends more than that amount, the participating opponent receives dollar-for-dollar matching funds, up to a maximum of approximately $54,000. Arizona could award an initial grant of $54,000 to each legislative candidate who opted for public financing, and this award would constitute no constitutionally prohibited "burden" on Plaintiffs' rights. Thus, Plaintiffs' argument is that an award under the current regime of $25,000 (the initial grant plus some matching funds) violates their rights, but an award of twice that amount (not based on matching funds) would not.

[14] The pre-*Davis* precedents from other circuits no longer appear valid. In analyzing North Carolina's matching funds regime, the Fourth Circuit found matching funds impose

Determining that matching funds constitute a cognizable burden does not end the inquiry. The weight of that burden must also be assessed. Unfortunately, *Davis* provided no guidance on how the statute at issue constituted a "substantial burden" on the plaintiffs' rights. After explaining its holding that discriminatory fundraising limitations constituted a burden, the *Davis* court jumped to the conclusion that the burden was "substantial."[15] This *ipse dixit* was announced "without the slightest veneer of reasoning to shield the obvious fiat by which it [is] reached." *Francis v. Henderson*, 425 U.S. 536, 552 (1976) (Brennan, J. dissenting). But the lack of reasoning does not free this Court to ignore the conclusion. If lifting a candidate's opponent's fundraising limitations constitutes a "substantial burden," awarding funds to a candidate's opponent must constitute a "substantial burden" as well. Accordingly, Arizona's matching funds constitute a substantial burden and are permissible only if they are supported by a compelling government interest and are narrowly tailored to achieve that interest.

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no burden whatsoever. That court ruled that even with matching funds, candidates "remain[ed] free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined or censured if they exceed the trigger amounts." *N. Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008). The distribution of matching funds "furthers, not abridges, pertinent First Amendment values by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Id.* Of course, the same rationale could apply to the statute at issue in *Davis*, but the Supreme Court decided otherwise. The First Circuit also concluded matching funds pose no burden. *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). In so holding, that court found plaintiffs had "misconstrue[d] the meaning of the First Amendment protection of their speech. They have no right to speak free from response . . . [t]he 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." *Id.* Again, this holding cannot be reconciled with *Davis*. If the mere *potential* for your opponent to raise additional funds is a substantial burden, the granting of additional funds to your opponent must also be a burden.

[15] This was directly contrary to the lower court's factual finding that the Millionaires' Amendment was having no chilling effect. *Davis v. FEC*, 501 F. Supp. 2d 22, 31 (D.D.C. 2007).

IV. The Burden Fails Strict Scrutiny

Having found the Act constitutes a substantial burden, Defendants must show the Act is "narrowly tailored to serve a compelling state interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). "Further, 'if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.'" *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). The Act does not meet any of these requirements.

A. The Act is Not Supported by a Compelling Interest

Davis states the *only* legitimate and compelling interest is the elimination of corruption or the perception of corruption. Based on earlier cases, the contours of this anticorruption concern are far from clear.[16] But the most recent Supreme Court cases seem to recognize corruption only in the sense of "politicians [being] too compliant with the wishes of large contributors." *Nixon*, 528 U.S. at 389, 390. In other words, the only legitimate anticorruption interest is in preventing the reality or appearance of *quid pro quo* arrangements between politicians and contributors. This type of anticorruption interest supports some aspects of the Act, but it does not support the Act's application to self-financed candidates.

Under the Act, if a candidate wishes to expend his or her own money, that expenditure will trigger the "burden" of matching funds. Defendants have not identified any anticorruption interest served by burdening self-financed candidates' speech in this manner. In fact, the Supreme Court has recognized that "reliance on personal funds *reduces* the threat

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[16] The Supreme Court has repeatedly *upheld* statutes "designed to protect against the undue influence of aggregations of wealth on the political process." 128 S. Ct. at 2781 (J. Stevens dissent). There is at least an open question whether a state's anticorruption interest includes countering "the corrosive and distorting effects of immense aggregations of wealth" on the political process. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

of corruption" and "discouraging use of personal funds disserves the anticorruption interest." *Davis*, 128 S. Ct. at 2773. Thus, there is no compelling interest served by the Act.

B. The Act is Not Narrowly Tailored

The conclusion that the Act is not serving a valid anticorruption interest also leads to the conclusion that the Act is not narrowly tailored. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 785 (1988). The Act allegedly seeks to target and eliminate the "evil" of the appearance or reality of corruption. But the Act places a burden on a candidate's expenditure of personal funds even though there is no apparent and constitutionally recognized anticorruption interest served by such a restriction. Thus, the Act "significantly restrict[s] a substantial quantity of speech that does not create" the appearance of corruption.[17] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989). The Act is not narrowly tailored.

C. The Act is Not the Least Restrictive Alternative

Finally, the Act is not the least restrictive alternative. At the very least, the Act could have been structured such that it does not place a burden on a candidate's expenditure of personal funds. For example, the Act could tie matching funds solely to contributions made by third parties to a candidate. Such a structure would achieve the anticorruption goal recognized by the Supreme Court without burdening a candidate's decision to expend personal funds.

The Act, in its current form, is not supported by a compelling interest, is not narrowly tailored, and is not the least restrictive alternative. The Act is unconstitutional under the First Amendment.

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[17] At oral argument on the motions for summary judgment, Defendants stressed that "[t]he point of matching funds is not to deter self-financing," it is "to incentivize participation in the public financing system thereby reducing the risk of corruption." But this argument does not answer the narrowly tailored issue in that matching funds present a burden on speech.

V. Equal Protection Claims

Plaintiffs claim the Act violates their right to equal protection based on participating and non-participating candidates being treated "differently with respect to direct expenditures, independent expenditures or contributions made on their behalf." (Doc. 1 at 18). Because the Act violates the First Amendment, the Court need not resolve this issue.

VI. Severability

Plaintiffs' stated goal is a declaration that the matching funds portion of the Act violates their right to free speech. (Doc. 260 at 25-26). Matching funds, however, is just one aspect of the Act. The parties apparently believe the matching funds provision can be severed from the Act. There is disagreement, however, on whether portions of the matching funds provision can be severed.

The Court raised the issue of severance prior to the arguments on the summary judgment rulings. The parties were then instructed to brief the issue. In their briefing, Plaintiffs argue severance is not feasible. Defendants counter that severing the link between personal expenditures and matching funds is a relatively straightforward step capable of quick implementation. While Arizona utilizes a very lenient severance standard, the severance now proposed by Defendants is not possible.

"Severability is . . . a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Pursuant to Arizona law regarding an act enacted by an initiative, "in deciding whether to sever the invalid portion of a measure adopted by popular vote and uphold the remaining, valid portion," a court must "first consider whether the valid portion, considered separately, can operate independently and is enforceable and workable. If it is, [the court must] uphold it unless doing so would produce a result so irrational and absurd as to compel the conclusion that an informed electorate would not have adopted one portion without the other." *Randolph v. Groscost*, 989 P.2d 751, 755 (Ariz. 1999). The presence of an express

severability clause requires "all doubts . . . be resolved in favor of severability."[18] *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 713 (Ariz. 2000).

During the general election, the Act awards matching funds based on contributions by individuals to a candidate, a candidate's expenditure of personal funds, and expenditures by a person or political committee advocating the election or defeat of a specific candidate and made without the cooperation of the candidate. A.R.S. § 16-952. As decided above, the application of matching funds to personal expenditures is unconstitutional because Defendants have no valid interest in burdening these expenditures. Defendants may, however, have a valid interest in burdening independent expenditures and contributions by individuals to candidates. Thus, Defendants argue the Court should prohibit matching funds based on personal expenditures but permit matching funds based on contributions and independent expenditures.

Severance requires the portion remaining be "enforceable and workable." *Randolph*, 989 P.2d at 755. Inherent in this test is the requirement that severance can occur only when the remaining portion is workable *without further action* by the State. For example, in *Myers*, the Arizona Supreme Court was presented with the issue of whether it could sever a portion of the Act regarding the appointment of members of the citizens clean election commission. *Myers*, 1 P.3d at 712. As originally drafted, the Act required the commission on appellate court appointments nominate the candidates for the commission. The Arizona Supreme Court found the Act expanded the duties of the commission on appellate court appointments in a manner "inconsistent with the Arizona Constitution." *Id.* Therefore, the court invalidated that portion of the Act, essentially excising it. Next, the court concluded that severing all references to the commission on appellate appointments did not materially impact the operation of the Act. Upon severance, the Act remained fully operational. That

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[18] The Act contains a very broad severability clause that states, in relevant part, "[i]f a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application." A.R.S. § 16-960.

is, the Act was workable without *any* statutory or regulatory changes. The situation here is different.

Were this Court to sever certain portions of the matching funds provision, Defendants concede various regulatory changes would be required. Without these changes, the Act would not be enforceable and workable. Defendants expended considerable effort in supplemental briefing, including attaching a proposed revised regulation, to persuade the Court that severance is uncomplicated. But these efforts did not meet the mark. As illustrated by Plaintiffs, severance would raise a variety of issues that would require administrative intervention to resolve. For example, the regulations governing matching funds would need to be revised to accommodate issues regarding loans obtained by candidates and in-kind contributions by candidates. Defendants agree that such revisions would have to be drafted, presented for public comment, and then submitted to the Department of Justice for approval. The Act, after a limited severance, is not workable absent further action. Thus, the matching funds provision cannot be selectively severed as Defendants propose.

VII. Stay Pending Appeal

Federal Rule of Civil Procedure 62(c) provides that "[w]hile an appeal is pending from . . . [a] final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's right." A court must consider four factors when evaluating a request for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). "There is substantial overlap between these and the factors governing

preliminary injunctions," but the tests are different in that the test for a stay appears slightly easier to meet.[19] *Id.*

When deciding whether to grant a stay, "[t]he first two factors . . . are the most critical." *Id.* The first factor–likelihood of success–requires the prospect of success be more than "negligible." *Id.* Although the Supreme Court in *Nken* did not offer elaborate analysis of the first factor, the Court did make plain what the factor was not: it is not enough that the chance of success on the merits be "negligible" or that there is a "mere possibility of relief." *Id.* Here, it is possible the Ninth Circuit will agree with the majority of the other circuits to hear this type of challenge and find no First Amendment violation. This Court believes the *Davis* decision casts grave doubt on the earlier decisions, but there is more than a "mere possibility" the Ninth Circuit will disagree. Similarly, the Ninth Circuit might take a different view regarding permissible severance options. Thus, the Court believes there is a sufficient question regarding the likelihood of success to grant a short stay to allow the Ninth Circuit to bring its considered judgment on the issues.

The second factor–possibility of irreparable injury–requires there be more than a mere possibility of injury. *Id.* Defendants will suffer irreparable injury in the absence of a stay. Invalidating matching funds changes the entire election landscape. Once the injunction takes effect, candidates will have to change their election and fundraising strategies. In particular, candidates may begin to collect contributions they would otherwise be prohibited from collecting. Even if the appellate court were to later reinstate matching funds, those candidates would be ineligible to receive the funds. Accordingly, the first two factors weigh in favor of a stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Id.* at 1762. Given the Court's finding

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[19] Delaying the effective date of the Court's order clearly qualifies as a "stay" in that it will "suspend judicial alteration of the status quo." *Nken*, 129 S.Ct. at 1758 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986)).

that the matching funds provision violates the First Amendment, the continued existence of matching funds undoubtedly harms Plaintiffs. But that harm will not be felt in the immediate future. Candidates who wish to raise funds or spend personal monies without the consequence of triggering matching funds may do so while this stay is in effect because no matching funds would be awarded at this time. The third factor weighs in favor of a stay.

Finally, the public interest weighs in favor of allowing the Act to remain in place for a short time while appellate review is sought. Given the substantial impact a change to Arizona's election law will have, the public has an interest in permitting a brief window for appellate review prior to implementation of that change.

Based on the above factors, a stay of the injunction is appropriate. Granting a stay is in no way meant to derogate the decision that the Act is unconstitutional and that the unconstitutional components of the Act cannot be severed. The discussion of the factors for granting a stay assumes only a brief stay. A stay of any substantial length, such as until the end of the 2010 elections, would not be appropriate. A stay of that length would reverse the factors such that the harm to the Plaintiffs would outweigh other considerations.

The injunction against matching funds will be stayed for ten days to allow Defendants to seek additional relief, such as a stay, from the Ninth Circuit. This ten-day stay is contingent on the Defendants filing a notice of appeal within five days of this Order. If Defendants do not file a notice of appeal within five days, the injunction shall take effect immediately.

Accordingly,

IT IS ORDERED the Motions for Summary Judgment (Doc. 287, 288) are **GRANTED**. Arizona Revised Statutes section 16-952 may not be applied.

IT IS FURTHER ORDERED the Motions for Summary Judgment (Doc. 285, 293) are **DENIED**.

IT IS FURTHER ORDERED the Motion for Leave to File Separate Response (Doc. 373) is **DENIED**.

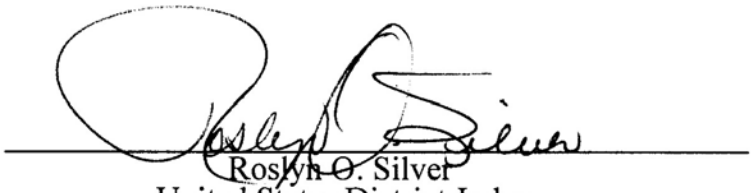
IT IS FURTHER ORDERED the Motions to File Supplemental Authority (Doc. 393, 399) are **GRANTED**.

IT IS FURTHER ORDERED the Motion for Status Hearing (Doc. 404) is **DENIED**.

IT IS FURTHER ORDERED the Motion for Preliminary Injunction (Doc. 416) and Motion for Hearing (Doc. 418) are **DENIED**.

IT IS FURTHER ORDERED the Clerk shall enter judgment in favor of Plaintiffs.

DATED this 20th day of January, 2010.



Roslyn O. Silver
United States District Judge