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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**

Before the Court is Plaintiffs’ Motion for a Temporary Restraining Order (“TRO”) (Doc. 13). Plaintiffs seek to enjoin enforcement of the matching funds provisions of Arizona’s Clean Elections Act, A.R.S. § 16-952 (A), (B) and (C), asserting that these provisions impermissibly burden their First Amendment rights to freedom of speech.

For the reasons below, Plaintiffs’ requested relief will be denied.

BACKGROUND

The Arizona Clean Elections Act (the “Act” or “Arizona Act”) was approved by Arizona voters in 1998. The Act sets up a voluntary system of campaign financing in which candidates who choose to be “participating candidates” may receive funds from the Citizens Clean Elections Fund (“CCEF”). Participating candidates are limited in the campaign contributions they may receive and personal expenditures they may make. In return, they

1 receive campaign funds from the CCEF in a set amount.¹ See A.R.S. §§ 16-941, -945; see
2 also, Citizen Clean Elections Commission, “Voter Education Guide” (2008) *available at*
3 [http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryC](http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf)
4 [andidateStatementPamphlet.pdf](http://www.ccec.state.az.us/ccecweb/ccecays/ccecPDF.asp?docPath=docs/2008PrimaryCandidateStatementPamphlet.pdf) (hereafter “Voter’s Guide”).

5 When participating candidates have opponents who are non-participating –
6 “traditional candidates” – they can also receive matching funds. Once a traditional candidate
7 exceeds the spending limit for a given race, her participating opponent or opponents will
8 receive dollar-for-dollar matching funds from the CCEF. These funds cap out at three times
9 the applicable spending limit.² Independent expenditures by Political Action Committees
10 (“PACs”) made on behalf of a traditional candidate or in opposition to her participating
11 opponent also count towards the spending limit.

12 Plaintiffs here are non-participating candidates. Plaintiff John McComish is the
13 current Arizona State House of Representatives Majority Whip, currently running for re-
14 election. Plaintiff Nancy McLain is a current member of the Arizona State House of
15 Representatives, currently running for re-election. Plaintiffs Doug Sposito, Frank Antenori,
16 and Tony Bouie are candidates for the Arizona State House of Representatives. Plaintiff
17 Kevin Gibbons is a candidate for the Arizona State Senate. Gibbons, Sposito, and Bouie
18 have recently triggered matching funds to their opposing “participating” candidates by
19 making direct expenditures to their campaign. See Gibbons Aff., ¶ 12, Ex. A.1; Bouie Aff.,
20 ¶ 9, Ex. B.1; Sposito Aff., ¶ 11, Ex. C.1.. Further, all three report that their campaign

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22 ¹ For candidates for the state legislature, primary spending limits are \$12,921 and
23 general election spending limits are \$19,382. Legislative candidates may collect up to
24 \$3,230 in individual early contributions of no more than \$130 during the exploratory and
25 qualifying periods, and may use \$610 of personal monies for their campaigns. For
26 candidates for Corporation Commission, the primary spending limit is \$82,680 and the
27 general election spending limit, \$124,020. Candidates may collect up to \$12,920 in early
28 contributions of no more than \$130 and contribute \$1,230 of their personal monies. See
A.R.S. § 16-951; Voter’s Guide.

² The 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).

1 expenditures have been chilled because of the possibility of triggering further matching funds
2 to their opponents, making them reluctant to spend money they would otherwise have used
3 to fund campaign activities. See Sposito Aff., ¶ 12; Gibbons Aff., ¶ 10-11; Bouie Aff., ¶ 8-
4 10.

5 The Act’s provision can be manipulated in a number of ways. Because PACs may
6 make expenditures on behalf of traditional candidates without their consent or even their
7 knowledge, they may air ineffective - even deliberately ineffective - advertising that then
8 triggers matching funds that participating opponents can use at their discretion. The
9 occurrence of this was alluded to at the hearing for a TRO. Similarly, candidates may use a
10 “slate” strategy against their opponents. Bouie provides an illustrative example arising out
11 of his district where a traditional incumbent, Representative Sam Crump, and a participating
12 challenger, Carl Seel, running in his district (where two seats are available) have emerged as
13 a “slate,” sharing joint advertising. Bouie Aff., ¶ 21-23, Ex. B.2. Thus, money spent by
14 Crump generates matching funds for Seel, effectively aiding both candidates.

15 ANALYSIS

16 I. Standard

17 The standard for issuing a Temporary Restraining Order (“TRO”) is the same as that
18 for issuing a preliminary injunction. Gonzalez v. State, 435 F. Supp. 2d 997, 999 (D. Ariz.
19 2006). In the Ninth Circuit, there are two sets of criteria for a court to use when evaluating
20 a request for a TRO. First, a plaintiff must show:

- 21 (1) a strong likelihood of success on the merits,
- 22 (2) the possibility of irreparable injury to plaintiff if preliminary relief
is not granted,
- 23 (3) a balance of hardships favoring the plaintiff, and
- (4) advancement of the public interest (in certain cases).

24 Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) (quoting Johnson v. Cal.
25 State Bd. Of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternately, a plaintiff may
26 “demonstrate[] ‘either a combination of probable success on the merits and the possibility of
27 irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply
28 in his favor’” Id. These two tests represent a continuum; “[t]hus, the greater the relative

1 hardship to [Plaintiffs] the less probability of success must be shown.” Earth Island, 351 F.3d
2 at 1298.

3 **II. Application**

4 a. Likelihood of Success on the Merits.

5 The history of campaign finance jurisprudence is extensive and convoluted. In
6 Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court rejected a cap on expenditures by
7 candidates of their personal funds. The Court explained that a “candidate . . . has a First
8 Amendment right to engage in the discussion of public issues and vigorously and tirelessly
9 to advocate his own election,” and that a cap on personal expenditures by a candidate
10 constitutes “a substantial,” “clea[r],” and “direc[t] restraint on that right.” Id. at 52. Thus,
11 while states may place certain reasonable limits on campaign *contributions*, personal
12 expenditures may not be restrained. Id. at 21-22, 51.

13 Less clear, however, has been the fate of statutes like Arizona’s which, rather than
14 placing a direct cap on personal expenditures, instead create a system that incentivizes – or,
15 perhaps, coerces – candidates to opt into a public financing program that includes limits on
16 contributions *and* personal expenditures. Several circuits have considered this variation to
17 the statute in *Buckley*. The First, Fourth and Sixth Circuits have ruled such schemes
18 constitutional. In N.C. Right to Life, Inc. v. Leake, 524 F.3d 427 (4th Cir. 2008), the court
19 held an act similar to Arizona’s was constitutional. “The plaintiffs remain free to raise and
20 spend as much money, and engage in as much political speech, as they desire,” wrote the
21 court. “They will not be jailed, fined, or censured if they exceed the trigger amounts.”
22 Similarly, the First Circuit, in Daggett v. Comm’n on Governmental Ethics & Election
23 Practices, 205 F.3d 445 (1st Cir. 2000), held that Maine’s matching fund provision was
24 constitutional, writing that “[t]he public funding system in no way limits the quantity of
25 speech one can engage in or the amount of money one can spend engaging in political speech,
26 nor does it threaten censure or penalty for such expenditures.” Id. at 464; see also Gable v.
27 Patton, 142 F.3d 940 (6th Cir. 1998) (holding that a Kentucky campaign finance law which
28

1 lifted expenditure limits for participating candidates when non-participating candidates
2 exceeded those limits was constitutional).

3 Of the circuits that have considered the question, only the Eighth Circuit has found
4 matching fund provisions like those in the Arizona Act to be unconstitutional. In Day v.
5 Holahan, 34 F.3d 1356 (8th Cir. 1994), a Minnesota law provided that candidates would
6 receive one half the amount of independent expenditures made by opposing candidates. The
7 court emphasized the “‘self-censorship’ that has occurred even before the state implements
8 the statute’s mandates,” “no less a burden on speech that is susceptible to constitutional
9 challenge than is direct government censorship.” Id. at 1360. The court also found that the
10 speech restriction could not be considered content neutral; “[i]ndependent expenditures of any
11 other nature, supporting the expression of any sentiment other than advocating the defeat of
12 one candidate or the election of another, do not trigger the statute’s . . . provisions.” Id. at
13 1361. There was, however, one substantial difference between the statute at issue in Day and
14 the Arizona Act. In Minnesota, the participation rate among candidates was approaching
15 100% (in Arizona, it is closer to 60%), leading the court to declare that “no interest, no matter
16 how compelling, could be served” by the restrictions on the remaining candidates. Id.

17 For all that these cases have long muddied the matching funds landscape, a recent
18 Supreme Court decision sheds light upon the issue. In Davis v. Fed. Election Comm’n., 128
19 S. Ct. 2759 (2008), the Court quoted from Day extensively and affirmatively, while ignoring
20 the conflicting opinions entirely. See id. at 2772. Ultimately, the Court found that provisions
21 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) – the so-called Millionaire’s
22 Amendment – violated the Constitution’s First Amendment free speech protections. 2 U.S.C.
23 §441a-1(a); id. at 2774. The Millionaire’s Amendment was triggered when a non-
24 participating candidate’s personal expenditures caused her total campaign expenditures to
25 exceed \$350,000. At that point, an opposing participating candidate was allowed to receive
26 individual contributions at three times the normal limit (the limit for non-participating
27 candidates remained the same), and could accept coordinated party expenditures without limit.
28 Id. at 2766. The Court found that the asymmetry of this arrangement “impermissibly

1 burden[ed] [the plaintiff's] First Amendment right to spend his own money for campaign
2 speech.” Id. at 2771. Thus, although under the BCRA candidates can choose to spend their
3 own money as desired, they “must shoulder a special and potentially significant burden if they
4 make that choice.” Davis, 128 S.Ct. at 2771.

5 Because the BCRA “impose[d] a substantial burden on the exercise of the First
6 Amendment right to use personal funds for campaign speech, the provision [could] not stand
7 unless it [was] ‘justified by a compelling state interest.’” Id. at 2772. The Court found that
8 the government’s stated interest of “level[ing] electoral opportunities for candidates of
9 different personal wealth” was not a compelling state interest. Id. at 2773. “[P]reventing
10 corruption or the appearance of corruption” *are* legitimate. Id. However, it did not find that
11 the BCRA was justified by such an interest; “reliance on personal funds *reduces* the threat of
12 corruption, and therefore [the challenged provision], by discouraging use of personal funds,
13 disserves the anticorruption interest.” Id. (emphasis in original).

14 The law at issue in Davis differs from the Arizona Act in that the latter does not
15 inequitably raise the contributions limit, instead providing matching funds from the CCEF.
16 The Defendants point to this in their brief, quoting the Supreme Court’s statement that “we
17 have never upheld the constitutionality of a law that imposes different contribution limits for
18 candidates who are competing against each other” Id. Thus, Defendants argue, “[t]he
19 Act here imposes no asymmetrical burden on a traditional candidate’s ability to contribute or
20 expend his or her own money.”

21 However, the Davis court focuses not merely on the fact that the contributions limit
22 differs for participating and non-participating candidates, but also forcefully on the fact that
23 “the vigorous exercise of the right to use personal funds to finance campaign speech produces
24 fundraising advantages for opponents in the competitive context of electoral politics.” Id. at
25 2772. Likewise, the Supreme Court has held (in a passage quoted approvingly in Davis) that,
26 while one does not “have the right to be free from vigorous debate, one “*does* have the right
27 to be free from government restrictions that abridge its own rights in order to ‘enhance the
28 relative voice’ of its opponents.” Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n., 475 U.S.

1 1, 14 (1986) (emphasis in original). The “statutorily imposed choice” provided by the BCRA
2 was not sufficient to save its constitutionality. Davis, 128 S. Ct. at 2772. Though the Arizona
3 Act’s mechanism for funding differs, the effect, which forces a candidate to choose to “abide
4 by a limit on personal expenditures” or else endure a burden placed on that right, is
5 substantially the same. Id.

6 It is in the presence of a compelling state interest that the Arizona Act has the potential
7 to most sharply distinguish itself from the BCRA. The Arizona Act perhaps better serves the
8 interest of discouraging corruption; it provides matching funds for – and thus discourages –
9 private contribution. However, as Plaintiffs point out, the Act opens up new avenues for
10 possible corruption. Because matching funds will be provided to participating candidates for
11 expenditures that PACs make on behalf of traditional candidates, PACs can run ineffective,
12 unwished for advertising that generates funds for the participating candidate to use at her
13 discretion. The Act also allows the unofficial “slate” strategy seen in Bouie’s race, which
14 allows traditional candidates to trigger matching funds that will be used partially in their own
15 support. The possibility of such gamesmanship mitigates against any decrease in corruption
16 or in the appearance of corruption. The Arizona Act cannot be found to serve this interest any
17 more narrowly than did the BCRA.

18 Accordingly, Plaintiffs have established that the Matching Funds provision of the Act
19 violates the First Amendment of the U.S. Constitution.

20 b. Irreparable Injury

21 Plaintiffs can be said to suffer irreparable injury both through the dispensation of funds
22 that will be used to oppose them and through the mere fact that their speech is being burdened.
23 The Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal
24 periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347,
25 373 (1976).

26 c. Balance of Harms and the Public Interest

27 The balance of harms at issue is not a simple one. On the one hand, Plaintiffs suffer
28 a burden on their First Amendment rights and have proffered some evidence that the

1 candidates opposing them benefit directly from that opposition. On the other hand, the State
2 Defendants have a clear interest in running a smooth and orderly election which, in this case,
3 includes a significant number of candidates who have been operating under the assumption
4 that matching funds would be distributed and planning their campaign strategies accordingly.
5 Those disadvantaged candidates are not currently parties to this litigation, but disrupting their
6 expectations of funding shortly before an election surely interferes with the State's interest
7 in holding a fair, contested election. Furthermore, courts have traditionally treated injunctions
8 in election cases differently than in other contexts, as “[i]n this case, hardship falls not only
9 upon the putative defendant” but on all citizens of the state. Southwest Voter Registration
10 Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003). Certainly the fair nature of this
11 election has been tainted by the constitutional violations with which it is entwined. However,
12 as Defendants point out, “[c]hanging the rule now would irreparably harm the candidates who
13 in good faith chose to accept public funding by participating in Arizona's Clean Elections
14 program.” Defendants provide affidavits from at least two candidates who state that they are
15 relying on matching funds to run an effective campaign. Kelty Aff., ¶ 3-4; Valdez Aff., ¶ 4.

16 And the length of time Plaintiffs waited to file their TRO also weighs in the balance
17 against the Plaintiffs on the public interest determination. Candidates began qualifying for
18 clean elections funding after January 1, 2008, candidates were required to file nomination
19 papers by June 4, 2008, and Davis was decided on June 27, 2008. While it appears Plaintiffs'
20 counsel acted quickly upon learning of the case, the fact remains that Plaintiffs filed their
21 complaint on August 21, 2008 and their Motion for Temporary Restraining Order was filed
22 five days later on August 26, 2008. An Oregon district court decision noted the “eleventh-
23 hour” nature of a challenge in denying a TRO in an election case as bearing against the public
24 interest. Grudzinski v. Bradbury, 2007 WL 2733826, at *3 (D. Or. Sept. 12, 2007). Further
25 the case law discussed previously addressing matching funds were not resolved in the context
26 of a TRO or preliminary injunction..

27 The tardiness of the challenge has inhibited a thorough determination of the harms on
28 each side. In order to accurately assess the balance of the harms, Plaintiffs need to present

1 further evidence of harm done to them through expenditures of matching funds *at this late*
2 *stage of the election.* Defendants, similarly, need adequate time to develop and present
3 evidence as to the disruptive effect enjoining matching funds will have at this stage of the
4 election.

5 **CONCLUSION**

6 Plaintiffs have shown success on the merits. However, given the special nature of an
7 election and the seriousness of enjoining a critical facet of it at this stage in time, Plaintiffs
8 have not shown that the balance of harms tilts in their favor.


9 Accordingly,

10 **IT IS ORDERED** Plaintiffs' Motion for a Temporary Restraining Order shall be
11 **DENIED.**

12 **IT IS FURTHER ORDERED** a hearing will be held on September 3, 2008, 1:30 p.m.
13 to determine whether a preliminary injunction should be granted or, should the parties decide
14 that discovery is necessary, the preliminary injunction hearing will be continued and a status
15 hearing will be held in its place.

16 DATED this 29th day of August, 2008.

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Roslyn O. Silver
United States District Judge