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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS;
MATT SALMON, a citizen of the
State of Arizona; and LORI
DANIELS, a citizen of the State of
Arizona,

Plaintiffs,

V.

JAN BREWER, in her official
capacity as Secretary of State of
the State of Arizona; DAVID
PETERSEN, in his official capacity
as Treasurer of the State of
Arizona; TERRY GODDARD, in his
official capacity as Attorney
General of the State of Arizona;
and LESLIE "GENE" LEMON,
DAVID G. McKAY, KATHLEEN S.
DETRICK, ERMILA JOLLEY, and
MARCIA BUSCHING, in their
official capacity as members of the
ARIZONA CITIZENS CLEAN
ELECTIONS COMMISSION,

Defendants.

No. _____

COMPLAINT
(Declaratory and Injunctive
Relief)

1 intends to run a traditional, privately-funded campaign, and will not participate
2 in the state “Clean Elections” public campaign funding system.
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4 8. Defendant Jan Brewer is the Secretary of State of the State of
5 Arizona, and is sued in her official capacity. As Secretary of State, Brewer is
6 the repository for all campaign finance reports filed pursuant to the Arizona
7 Citizens Clean Elections Act, and is responsible for setting campaign
8 contribution and spending limits. A.R.S. §§ 16-924, 16-941(B), 16-958, and
9 16-959.
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11 9. Defendant David Petersen is the Treasurer of the State of Arizona,
12 and is sued in his official capacity. As Treasurer, Petersen is responsible for
13 administering the Citizens Clean Elections Fund. A.R.S. § 16-949.
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15 10. Defendant Terry Goddard is the Attorney General of the State of
16 Arizona, and is sued in his official capacity. As Attorney General, Goddard is
17 responsible for the enforcement of the state election laws. A.R.S. § 16-924.
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19 11. Defendants Leslie “Gene” Lemon, David G. McKay, Kathleen S.
20 Detrick, Ermila Jolley, and Marcia Busching are members of the Arizona
21 Citizens Clean Elections Commission (“the Commission”), and are sued in their
22 official capacity. The Commission is granted rulemaking and enforcement
23 authority under the Arizona Citizens Clean Elections Act. A.R.S. §16-955 *et*
24 *seq.*
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1 FACTUAL ALLEGATIONS

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3 12. The Arizona Citizens Clean Elections Act (“the Act”), A.R.S. § 16-
4 940 *et. seq.*, was a ballot initiative approved by a slim majority of Arizona
5 electors in the November 3, 1998 general election. On December 10, 1998,
6 Governor Jane Dee Hull issued a proclamation declaring this measure to be law.
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8 13. The Act creates a system of government campaign financing for
9 statewide and legislative elected offices within the State of Arizona, and creates
10 the Arizona Citizens Clean Elections Commission (“the Commission”), a bureau
11 of unelected individuals granted broad enforcement and regulatory powers
12 which extend not only to all candidates who choose to participate in the
13 government campaign financing system, but even to all candidates who do not
14 wish to run a taxpayer-funded campaign. Clean elections candidates obtain a
15 predetermined number of \$5 contributions from constituents in order to qualify
16 for funding. Once qualified, they must follow strict contribution and spending
17 limits, as well as reporting requirements, and participate in primary and general
18 election debates. Nonparticipating candidates choose to fund their campaigns
19 with private donations and, therefore, receive no government funding. They
20 must nonetheless adhere to specified contribution limits and extensive reporting
21 requirements, for the sole purpose of allowing the state to “level the playing
22 field” by the payment of equalization payments (“matching funds”) based on the
23 nonparticipating candidates’ campaign finance reports. These payments to
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1 taxpayer-funded candidates are capped at three times the predetermined
2 spending limit for the office sought: in 2002, for example, participating
3 gubernatorial candidates had a spending limit of \$409,000 in the primary
4 election cycle, and \$615,000 in the general election; legislative candidates had
5 a choice of receiving either \$10,790 or \$16,180 for the primary, and then could
6 only receive the other of those two amounts in the general election. By statute,
7 these spending limits are adjusted for inflation by the Secretary of State.
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10 14. The Act subjects nonparticipating, privately-supported candidates
11 to a series of stringent and punitive measures that have the effect of coercing
12 participation in the public campaign funding scheme. The Act goes far beyond
13 merely promoting the use of public funding and the permissible state interest in
14 “opening up” the political process so that more voices can be heard. In
15 operation, the Act impermissibly tilts the playing field sharply in favor of
16 publicly-funded candidates who are opposed by privately-supported candidates
17 such as Plaintiffs Matt Salmon and Lori Daniels, punishing such privately-
18 supported candidates for having refused government subsidies.
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21 15. A.R.S. § 16-952(C) requires the payment of dollar-for-dollar
22 matching funds to candidates participating in the public funding scheme
23 whenever an independent campaign expenditure is made that either opposes a
24 participating candidate with a nonparticipating opponent or supports a
25 nonparticipating candidate with a participating opponent. By comparison,
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1 independent expenditures made on behalf of participating candidates are not
2 regulated in any way, nor counted against the maximum amount of public funds
3 that can be received by the participating candidate. But when a
4 nonparticipating candidate is the beneficiary of independent expenditures made
5 to counter such an unregulated independent expenditure, that independently and
6 privately-funded speech is immediately neutralized by the state in the form of
7 public matching funds. This provision punishes the nonparticipating candidate
8 for receiving private support, improperly injects the state into the political
9 process by attempting to equalize the relative financial resources of candidates,
10 and harms the independent expender by drowning out its voice, neutralizing its
11 free speech, and placing a chilling effect on the future exercise thereof. In the
12 2002 general election Janet Napolitano, Salmon's government-funded
13 Democratic opponent, was the beneficiary of an independent expenditure of
14 approximately \$1 million from the Democratic Party. Under the law, this
15 expenditure was not counted against the maximum total public disbursement to
16 be received by Napolitano, and was entirely unregulated. But when Salmon's
17 party responded with its own independent expenditure of approximately
18 \$330,000, it directly resulted in that same amount being paid to Napolitano.
19 Thus, by treating independent expenditures differently depending on whether
20 they favor government-funded candidates (in which case they are entirely free
21 of regulation or deleterious effect on the recipient) or privately supported
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1 candidates (in which case they are matched dollar-for-dollar without effect on
2 the publicly-funded candidates' spending limit), privately supported candidates
3 like Matt Salmon would be better off rebuffing potential benefactors.

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5 Unfortunately for privately-supported candidates this is not possible, since
6 independent expenditures are by definition not coordinated or solicited by the
7 candidate who benefits from them. A purely neutral treatment of these
8 unsolicited independent expenditures, whereby no effect is felt by the recipient,
9 would not only promote participation (because that amount would not be
10 counted against the maximum total disbursement for the publicly-funded
11 candidate) but would also avoid punishing privately-supported candidates, who,
12 because they receive unsolicited and uncoordinated support *that they do not*
13 *control*, must suffer the system showering their publicly-funded opponents with
14 more taxpayer money *that such opponents do control*.

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18 16. A.R.S. § 16-952(B) requires the payment of matching funds to
19 participating candidates based on gross contributions to nonparticipating
20 candidates during the general election cycle. This goes beyond mere promotion
21 of the public funding scheme and punishes privately supported candidates. By
22 failing to account for the significant fundraising costs incurred by traditional,
23 privately supported candidates in the determination of matching funds, the
24 system places the government-funded opponent in the irretrievably superior
25 position of getting all of the benefits of the traditional candidate's fundraising
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1 efforts, while absorbing none of the costs. In effect, this provides government-
2 funded candidates with much greater than a dollar-for-dollar match, and
3 actively discourages private fundraising that is vital to the success of a
4 nonparticipating candidate. The Act's reduction in the amount of permissible
5 contributions makes it more difficult for unsubsidized candidates to raise the
6 amount that subsidized candidates automatically receive.
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9 17. A.R.S. § 16-952(A) is designed to equalize the relative financial
10 resources of candidates, operates in a punitive and hence coercive manner
11 against nonparticipating candidates, operated in such a coercive manner against
12 Matt Salmon in Arizona's 2002 primary election, and will operate to penalize
13 future unsubsidized candidates like Lori Daniels. A.R. S. § 16-952 is entitled
14 "Equal funding of candidates," which on its face declares—and in operation
15 advances—an improper state interest in equalizing the relative financial
16 resources of candidates for public office in Arizona in violation of the First and
17 Fourteenth Amendments to the U.S. Constitution.
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21 18. A.R.S. §§ 16-941(B)(2), 16-941(C), and 16-958, and Commission
22 rules promulgated to implement and enforce these statutes coerce participation
23 in the public financing scheme by punishing nonparticipating candidates through
24 the enforcement of stringent daily campaign financial reporting requirements.
25 Privately-supported candidates must expend great effort, time, and resources
26 to prepare and file a series of 37 special "trigger" reports between July 1 and
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1 Election Day. These reports are required for the sole purpose of facilitating the
2 state's payment of additional taxpayer monies to their government-funded
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4 opponents, and serve no purpose in combating corruption or the appearance
5 thereof. By comparison, government-funded candidates are required to submit
6 only three additional reports over and above the six regularly scheduled reports
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8 that all candidates for public office must file. Thus, this reporting regime seeks
9 not to promote the use of public funding but rather to equalize the relative
10 financial resources of candidates, thereby operating in an impermissibly
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12 coercive fashion by punishing the acceptance of private funding.

13 19. The Commission enjoys sweeping powers which have resulted in
14 aggressive enforcement of these disproportionately burdensome reporting
15 requirements. The public announcement of alleged reporting improprieties—
16 even if ultimately unsubstantiated—have had a profoundly negative impact on
17 the perception of nonparticipating candidates, as occurred with Plaintiff Salmon
18 and others. Because the filing requirements for privately funded candidates are
19 so much more onerous than for candidates taking government subsidies, the
20 Commission's boundless discretionary power, and its overt willingness to use it,
21 creates a strong disincentive to the launching of privately funded campaigns.

22 20. A.R.S. § 16-941(B)(1) seeks to coerce candidates to accept public
23 financing by reducing the maximum individual contribution that can be accepted
24 by a nonparticipating candidate by 20 (twenty) percent. It does nothing to
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1 promote the acceptance of public funding, as it has no effect whatsoever on
2 participating candidates. Rather, these reduced limits do nothing but diminish
3 the available pool of private resources available to a candidate who chooses to
4 exercise his First Amendment right to bring his campaign speech to voters by
5 not participating in the public funding scheme.
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8 21. Plaintiff Matt Salmon was the privately supported Republican
9 candidate for governor of Arizona in the 2002 elections, and suffered injury to
10 his rights under the First and Fourteenth Amendments to the U.S. Constitution
11 by virtue of the Act's aforementioned provisions. Although the election is over,
12 the unconstitutional nature of the Act creates a situation that is capable of
13 repetition, yet evading review.
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16 22. Plaintiff Lori Daniels intends to be a candidate for legislative office
17 in Arizona in the upcoming 2004 or 2006 election cycle, and fears imminent and
18 irreparable injury to her rights under the First and Fourteenth Amendments to
19 the U.S. Constitution by virtue of the Act's aforementioned provisions.
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21 23. Plaintiff Association of American Physicians and Surgeons would
22 have made independent expenditures in Arizona political campaigns in the past,
23 and intends to set up a political action committee in Arizona to make
24 independent expenditures in legislative races in the upcoming 2004 election
25 cycle, but fears that the exercise of its rights under the First and Fourteenth
26 Amendments to the U.S. Constitution will be deprived by virtue of the Act's
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1 opponent, or supports a nonparticipating candidate with a participating
2 opponent. Therefore, this statute amounts to an unconstitutional content-based
3 regulation of political free speech, in that it treats speech differently depending
4 on whether it opposes or favors a publicly-funded candidate.
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6 28. The Association of American Physicians and Surgeons faces
7 imminent injury to its First Amendment rights to free political speech and free
8 association as a direct result of this statutory scheme. The state's payment of
9 matching funds—which, unlike an independent expenditure, is directly
10 controlled by the participating candidate—neutralizes the independent
11 expender's voice when it makes an independent expenditure. The knowledge
12 that making an independent expenditure that opposes a government-funded
13 candidate will directly result in that candidate receiving a dollar-for-dollar
14 matching public subsidy (with no effect on that candidate's spending limit)
15 creates a chilling effect on the Association's free exercise of protected speech,
16 and imposes a climate of self-censorship that is inimical to our American
17 heritage of unfettered political discourse. In so doing, the statute also
18 encroaches upon the ability of like-minded persons to pool their resources in
19 furtherance of common political goals in violation of the physicians' and
20 surgeons' right to freedom of association.
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COUNT II
(FIRST AMENDMENT-CANDIDATE COERCION)

29. Plaintiffs incorporate and reallege each and every allegation contained in Paragraphs 25-28 of this Complaint as if set forth fully herein.

30. Under the First Amendment to the U.S. Constitution and *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny, a state public campaign financing scheme violates the right to free political speech where it goes beyond mere promotion of the voluntary use of public funding, and improperly injects the state into the political process by attempting to equalize the relative financial resources of candidates—thereby coercing involuntary participation in public campaign financing by punishing those candidates like Plaintiff Matt Salmon, who in 2002 chose not to participate in taxpayer subsidies and instead ran a traditional, privately-supported political campaign.

31. A.R.S. § 16-952(C) requires the payment of dollar-for-dollar matching funds to candidates participating in the public funding scheme whenever an independent campaign expenditure is made that either opposes a participating candidate with a nonparticipating opponent or supports a nonparticipating candidate with a participating opponent.

32. A.R.S. § 16-952(B) requires the state to pay matching funds to government-funded candidates based on the gross amount of contributions received by their privately supported opponents after the primary election

1 period, without regard for fundraising or other expenses incurred by the
2 privately-supported candidate.
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4 33. A.R.S. § 16-952(A) expressly provides for the “equal funding of
5 candidates” in primary elections, which on its face declares an improper state
6 interest in equalizing the relative financial resources of candidates for public
7 office in Arizona. This bureaucratic intermeddling in the political process is in
8 violation of the First Amendment to the U.S. Constitution.
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10 34. A.R.S. §§ 16-941(B)(2), 16-941(C), and 16-958, and Commission
11 rules promulgated to implement and enforce these statutes coerce participation
12 in the public financing scheme by punishing nonparticipating candidates through
13 the enforcement of stringent daily campaign financial reporting requirements.
14 Privately-supported candidates must expend great effort, time, and resources
15 to prepare and file a series of 37 special “trigger” reports between July 1 and
16 Election Day. These reports are required for the sole purpose of facilitating the
17 state’s payment of additional taxpayer monies to their publicly-funded
18 opponents, and serve no purpose in combating corruption or the appearance
19 thereof. By comparison, government-funded candidates are required to submit
20 only three additional reports over and above the six regularly-scheduled
21 reports that all candidates for public office must file. Thus, this reporting
22 regime seeks not to promote the use of public funding but rather to equalize the
23 relative financial resources of candidates, thereby operating in an impermissibly
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1 coercive fashion by punishing the acceptance of private funding. This is
2 especially so in light of the Commission's aggressive and highly publicized
3 enforcement of reporting infractions against nonparticipating candidates during
4 the election cycle.

6 35. A.R.S. § 16-941(B)(1) seeks to coerce candidates to accept public
7 financing by reducing the maximum individual contribution that can be accepted
8 by a nonparticipating candidate by 20 (twenty) percent. It does nothing to
9 promote the acceptance of public funding, as it has no effect whatsoever on
10 participating candidates. Rather, these reduced limits do nothing but diminish
11 the available pool of private resources available to a candidate who chooses to
12 exercise his First Amendment right to bring his campaign speech to voters by
13 not participating in the public funding scheme.

17 36. The foregoing provisions, individually and cumulatively, are
18 designed to equalize the relative financial resources of candidates, operate in a
19 punitive and coercive manner against nonparticipating candidates, operated in
20 such a coercive manner against Matt Salmon in Arizona's 2002 primary and
21 general elections, and will operate to penalize future unsubsidized candidates
22 like Lori Daniels. The Act creates an involuntary public campaign financing
23 system that stacks the deck against nonparticipating candidates by equalizing
24 the financial resources of candidates—or in some instances (*e.g.*, § 16-952(B)'s
25 gross contribution matching after the primary) sharply skewing the balance in
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1 favor of publicly-funded candidates. The Act coerces rather than promotes
2 participation, actively and directly punishing nonparticipating candidates for
3 having exercised their right under the First Amendment to engage in political
4 speech by running a traditional, privately-supported campaign.
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8 COUNT III
9 (EQUAL PROTECTION-INDEPENDENT EXPENDITURES)

10 37. Plaintiffs incorporate and reallege each and every allegation
11 contained in Paragraphs 29-36 of this Complaint as if set forth fully herein.
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13 38. Under the Fourteenth Amendment to the U.S. Constitution, Plaintiff
14 Association of American Physicians and Surgeons and its members have the
15 right to enjoy the equal protection of laws.
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17 39. A.R.S. § 16-952 (C) sets up three classifications of independent
18 expenditures: (1) those statements brought forward to the voting populace
19 *against* a participating candidate or in favor of the *nonparticipating opponent* of
20 a participating candidate; (2) those statements that *favor* a participating
21 candidate; and (3) those statements that *oppose a nonparticipating candidate*.
22 These three different types of speech are treated much differently under the
23 Act. The first type of speech, independent expenditures *against* a participating
24 candidate or in favor of the *nonparticipating opponent* of a participating
25 candidate, are treated as expenditures of the opponent during the primary
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1 election, and contributions to the opponent during the general election. (This is
2 because, under § 16-952(B), contributions are matched without regard for
3 expenditures made during the general election.) In either the primary or
4 general election period, then, expenditures made *against a participating*
5 *candidate or in favor of a nonparticipating opponent* are matched by the state,
6 dollar-for-dollar. This state action neutralizes the speech of the independent
7 spender who disfavors the publicly-funded candidate, and has a chilling effect
8 on the future exercise thereof. The second type of speech, statements that
9 *favor a participating candidate*, will only be matched or neutralized when that
10 candidate has a participating opponent. But the third type of speech, brought
11 forward by independent exponents who *oppose a nonparticipating candidate*, is
12 not regulated, matched, neutralized, or limited in any way. In fact, independent
13 expenditures opposing a nonparticipating candidate serve to funnel additional
14 taxpayer monies to the intended publicly-funded beneficiary. In the event that
15 supporters of the nonparticipating candidate exercise their First Amendment
16 rights by responding to the attack—which as an independent expenditure is, by
17 definition, not coordinated or controlled by the nonparticipating candidate—this
18 nonetheless triggers dollar-for-dollar matching funds to the participating
19 opponent, who, unlike his nonparticipating counterpart, is then free to control
20 how that money is spent. This threatened harm has a chilling effect on
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1 independent expenders who favor nonparticipating, privately-supported
2 candidates with participating, publicly-funded opponents.
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4 40. The right of independent expenders like the Association of
5 American Physicians and Surgeons to speak during political campaigns is a
6 fundamental right under the First Amendment to the U.S. Constitution. Any
7 regulation such as A.R.S. § 16-952(C) that singles out the Association's political
8 speech for disparate treatment must withstand strict scrutiny.
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12 COUNT IV
13 (EQUAL PROTECTION-CANDIDATES)

14 41. Plaintiffs incorporate and reallege each and every allegation
15 contained in Paragraphs 37-40 of this Complaint as if set forth fully herein.
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17 42. Under the Fourteenth Amendment to the U.S. Constitution,
18 Plaintiffs Matt Salmon and Lori Daniels have the right to enjoy the equal
19 protection of laws.
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21 43. A.R.S. § 16-952 *et seq.* creates two classifications of candidates
22 for public office in Arizona: those who participate in the Clean Elections system
23 by accepting public financing; and those who do not participate in the system,
24 choosing instead to run a privately-funded campaign. These provisions then
25 treat candidates differently with respect to independent expenditures or
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1 contributions made on their behalf, based solely on their status as a
2 “participating” or “nonparticipating” candidate.
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4 44. A.R.S. § 16-941 *et seq.*, § 16-958, and any and all Commission
5 rules promulgated in furtherance thereof, create two classifications of
6 candidates for public office in Arizona: those who participate in the Clean
7 Elections system by accepting public financing; and those who do not
8 participate in the system, choosing instead to run a privately-funded campaign.
9 These provisions then treat these candidates differently with respect to
10 contribution limits and campaign finance reporting requirements, based solely
11 on their status as a “participating” or “nonparticipating” candidate.
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14 45. The right of privately-funded candidates for public office like Matt
15 Salmon and Lori Daniels to speak during political campaigns without having
16 involuntary limitations placed on their expenditures, without being coerced into
17 participating in public campaign financing, and without fear of being punished or
18 penalized for having chosen to run as a privately-funded candidate is a
19 fundamental right under the First Amendment to the U.S. Constitution. Any
20 regulation such as A.R.S. § 16-952 *et seq.*, § 16-941 *et seq.*, § 16-958, or any
21 administrative rules promulgated in furtherance thereof that singles out
22 nonparticipating candidates for disparate treatment must withstand strict
23 scrutiny.
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1 REQUEST FOR RELIEF

2 Plaintiffs pray for judgment and ask this Court for the following:

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4 A. A declaration that §§ 16-941(B)(1) and (2), § 16-941(C), § 16-
5 952(A), (B) and (C), and § 16-958 of the Arizona Citizens Clean Elections Act,
6 and any Commission rules promulgated in furtherance thereof, violate the First
7 Amendment to the United States Constitution;

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9 B. A declaration that §§ 16-941(B)(1) and (2), § 16-941(C), § 16-
10 952(A), (B) and (C), and § 16-958 of the Arizona Citizens Clean Elections Act,
11 and any Commission rules promulgated in furtherance thereof, violate the equal
12 protection clause of the Fourteenth Amendment to the United States
13 Constitution;

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15 C. A declaration that the Act as a whole is void and of no effect
16 because the remaining provisions cannot sensibly remain legally operational
17 absent the unconstitutional provisions.

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19 D. An Order that preliminarily and permanently enjoins Defendants
20 from further implementing and performing their duties in administering and
21 enforcing the above-referenced provisions;

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23 E. An award for Plaintiffs' reasonable attorneys' fees and costs
24 pursuant to 42 U.S.C. § 1988; and

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26 F. Such further relief as this Court deems equitable, just and proper.

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28 RESPECTFULLY SUBMITTED this ____ day of January, 2004.

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**INSTITUTE FOR JUSTICE
ARIZONA CHAPTER**

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