Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Campaign Finance

---

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. ____ (2011)

The Arizona Free Enterprise Club is an organization that makes independent contributions to candidates for statewide offices in Arizona. Members objected to the Arizona Citizens Clean Elections Act, which passed by initiative in 1998. That act provided public funding to candidates who limited expenditures of personal funds and agreed to an overall expenditure cap. The most controversial provision of that act gave publicly financed candidates extra money whenever a privately financed rival's spending was more than the initial amount of public funding. A candidate entitled to ten-thousand dollars in public funding, for example, might be entitled to twenty-thousand dollars if their rival raised substantially more than ten thousand dollars. The Arizona Free Enterprise Club, joined by other candidates for office in Arizona, filed a lawsuit that maintained the matching provision violated the First Amendment, as incorporated by the due process clause of the Fourteenth Amendment. The District Court agreed with this contention, but that decision was reversed by the Court of Appeals for the Ninth Circuit. The Arizona Free Enterprise Club appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote declared the Arizona matching fund provision unconstitutional. Chief Justice Roberts's majority opinion maintained that the matching funds burdened the speech of privately financed candidates and was not justified by a compelling interest. Justice Kagan's dissent insisted that no speech was burdened. Who had the better of this constitutional argument? Chief Justice Roberts and Justice Kagan also disputed whether the matching funds program prevented corruption. Who had the better of that argument? If you were constructing a public financing system after this case, what steps would you take to ensure your system was both attractive to candidates and constitutional?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . .

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley v. Valeo* (1976). As a result, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." "Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. Federal Election Comm'n,* (2010).

. . .

[T]he matching funds provision "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]." Under that provision, "the vigorous exercise of the right to use personal funds to finance campaign speech" leads to "advantages for opponents in the competitive context of electoral politics."

Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. . . .

. . .

. . . [T]he matching funds provision can create a multiplier effect. [In an election where two candidates accept public funding], if the spending cap were exceeded, each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate's publicly financed opponents. In such a situation, the matching funds provision forces privately funded candidates to fight a political hydra of sorts. Each dollar they spend generates two adversarial dollars in response.

[A]ll of this is to some extent out of the privately financed candidate's hands. Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate's election—regardless whether such support was welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds.

The burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. Just as with the candidate the independent group supports, the more money spent on that candidate's behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. And just as with the privately financed candidate, the effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes. Moreover, spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of, dollars directly controlled by the publicly funded candidate or candidates.

In some ways, the burden the Arizona law imposes on independent expenditure groups is worse than the burden it imposes on privately financed candidates. . . . If a candidate contemplating an electoral run in Arizona surveys the campaign landscape and decides that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, he at least has the option of taking public financing. Independent expenditure groups, of course, do not.

. . .

. . . Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. The burden imposed on privately financed candidates and independent expenditure groups reduces their speech; "restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy neighbor" approach to free speech—"restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others"—is "wholly foreign to the First Amendment."

. . . Arizona asserts that no "candidate or independent expenditure group is 'obliged personally to express a message he disagrees with'" or "'required by the government to subsidize a message he disagrees with.'" True enough. But that does not mean that the matching funds provision does not burden speech. The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival. That cash subsidy, conferred in response to political speech, penalizes speech. . . .

. . .

Because the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, "that provision cannot stand unless it is 'justified by a compelling state interest.'"

We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech. . . . "Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to

contribute to the outcome of an election," a dangerous enterprise and one that cannot justify burdening protected speech. . . .

"Leveling the playing field" can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the "unfettered interchange of ideas"—not whatever the State may view as fair.

. . .

Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest. Indeed, we have said that "reliance on personal funds reduces the threat of corruption" and that "discouraging [the] use of personal funds[ ] disserves the anticorruption interest." That is because "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. The matching funds provision counts a candidate's expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

. . .

We have observed in the past that "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." Arizona already has some of the most austere contribution limits in the United States. Contributions to statewide candidates are limited to $840 per contributor per election cycle and contributions to legislative candidates are limited to $410 per contributor per election cycle. Arizona also has stringent fundraising disclosure requirements. In the face of such ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

. . .

"[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs," "includ[ing] discussions of candidates." That agreement "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" True when we said it and true today. Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

. . .

Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people. As we recognized in *Buckley v. Valeo* (1976), our seminal campaign finance case, large private contributions may result in "political quid pro quo[s]," which undermine the integrity of our democracy. And even if these contributions are not converted into corrupt bargains, they still may weaken confidence in our political system because the public perceives "the opportunities for abuse [s]." . . .

[P]ublic financing of elections has emerged as a potentially potent mechanism to preserve elected officials' independence. . . . Candidates who rely on public, rather than private, moneys are "beholden [to] no person and, if elected, should feel no post-election obligation toward any contributor." By supplanting private cash in elections, public financing eliminates the source of political corruption.

. . .

. . . Arizona's matching funds provision does not restrict, but instead subsidizes, speech. The law "impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking." The statute does not tell candidates or their supporters how much money they can spend to convey their message, when they can spend it, or what they can spend it on. Rather, the Arizona law . . . provides funding for political speech, thus "facilitat[ing] communication by candidates with the electorate." By enabling participating

candidates to respond to their opponents' expression, the statute expands public debate, in adherence to "our tradition that more speech, not less, is the governing rule." What the law does—all the law does—is fund more speech.

. . .

No one can claim that Arizona's law discriminates against particular ideas, and so violates the First Amendment's sole limitation on speech subsidies. The State throws open the doors of its public financing program to all candidates who meet minimal eligibility requirements and agree not to raise private funds. Republicans and Democrats, conservatives and liberals may participate; so too, the law applies equally to independent expenditure groups across the political spectrum. Arizona disburses funds based not on a candidate's (or supporter's) ideas, but on the candidate's decision to sign up for public funding. So under our precedent, Arizona's subsidy statute should easily survive First Amendment scrutiny.

. . .

Indeed, what petitioners demand is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program. Petitioners are able to convey their ideas without public financing—and they would prefer the field to themselves, so that they can speak free from response. To attain that goal, they ask this Court to prevent Arizona from funding electoral speech—even though that assistance is offered to every state candidate, on the same (entirely unobjectionable) basis. And this Court gladly obliges.

If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct. That Amendment protects no person's, nor any candidate's, "right to be free from vigorous debate. Indeed, the Amendment exists so that this debate can occur—robust, forceful, and contested. It is the theory of the Free Speech Clause that "falsehood and fallacies" are exposed through "discussion," "education," and "more speech." And this is no place more true than in elections, where voters' ability to choose the best representatives depends on debate—on charge and countercharge, call and response. So to invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.

. . .

. . . We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another. (And that is so even when the subsidy is not open to all, as it is here.) Yet in this case, the majority says that the prospect of more speech—responsive speech, competitive speech, the kind of speech that drives public debate—counts as a constitutional injury. That concept, for all the reasons previously given, is "wholly foreign to the First Amendment."

Any system of public financing, including the lump-sum model upheld in *Buckley*, imposes a similar burden on privately funded candidates. Suppose Arizona were to do what all parties agree it could under *Buckley*—provide a single upfront payment (say, $150,000) to a participating candidate, rather than an initial payment (of $50,000) plus 94% of whatever his privately funded opponent spent, up to a ceiling (the same $150,000). That system would "diminis[h] the effectiveness" of a privately funded candidate's speech at least as much, and in the same way: It would give his opponent, who presumably would not be able to raise that sum on his own, more money to spend. And so too, a lump-sum system may deter speech. A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways—for example, by eschewing dubious, easy-to-answer charges—because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system more burdensome than Arizona's (assuming the lump is big enough). Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of $150,000, or that he receive only $50,000, with the possibility—a possibility that you mostly get to control—of collecting another $100,000 somewhere down the road? Me too. That's the first reason the burden on speech cannot command a different result in this case than in Buckley.

Under the First Amendment, the similarity between *Davis* and this case matters far less than the differences. Here is the similarity: In both cases, one candidate's campaign expenditure triggered . . . something. Now here are the differences: In *Davis*, the candidate's expenditure triggered a discriminatory speech restriction, which Congress could not otherwise have imposed consistent with the First Amendment; by contrast, in this case, the candidate's expenditure triggers a non-discriminatory speech subsidy, which all parties agree Arizona could have provided in the first instance.

. . .

Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest. . . . Public financing of elections serves this interest. [P]ublic financing "reduce[s] the deleterious influence of large contributions on our political process. When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election. And voters, seeing the dependence of candidates on large contributors (or on bundlers of smaller contributions), may lose faith that their representatives will serve the public's interest.

. . .

And that interest justifies the matching funds provision at issue because it is a critical facet of Arizona's public financing program. The provision is no more than a disbursement mechanism; but it is also the thing that makes the whole Clean Elections Act work. [P]ublic financing has an Achilles heel—the difficulty of setting the subsidy at the right amount. Too small, and the grant will not attract candidates to the program; and with no participating candidates, the program can hardly decrease corruption. Too large, and the system becomes unsustainable, or at the least an unnecessary drain on public resources. But finding the sweet-spot is near impossible because of variation, across districts and over time, in the political system. Enter the matching funds provision, which takes an ordinary lump-sum amount, divides it into thirds, and disburses the last two of these (to the extent necessary) via a self-calibrating mechanism. . . . If public financing furthers a compelling interest—and according to this Court, it does—then so too does the disbursement formula that Arizona uses to make public financing effective. The one conclusion follows directly from the other.

. . .

This case arose because Arizonans wanted their government to work on behalf of all the State's people. On the heels of a political scandal involving the near-routine purchase of legislators' votes, Arizonans passed a law designed to sever political candidates' dependence on large contributors. They wished, as many of their fellow Americans wish, to stop corrupt dealing—to ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office. The legislation that Arizona's voters enacted was the product of deep thought and care. It put into effect a public financing system that attracted large numbers of candidates at a sustainable cost to the State's taxpayers. The system discriminated against no ideas and prevented no speech. Indeed, by increasing electoral competition and enabling a wide range of candidates to express their views, the system "further[ed] . . . First Amendment values." Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many. The people of Arizona might have expected a decent respect for those objectives.

. . .