U.S. Supreme Court decision could impact 'rescue money' campaign financing

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COMMENTARY

A little more than a year ago the U.S. Supreme Court handed down its controversial ruling in Citizens United v. Federal Election Commission. Now, in McComish v. Bennett, it is hearing arguments in another important case involving campaign finance.

Citizens United allowed corporations and unions to spend unlimited amounts on campaigns as long as it is done independent of candidates.

McComish v. Bennett challenges Arizona's public financing system. Arizona's "Clean Elections" program gives public dollars to candidates agreeing not to accept private donations.In the spirit of western progressivism, the Arizona law provides added funds to these candidates when outspent by their non-participating opponents.

And that's the rub. The provision allocating "rescue money" to publicly-financed candidates is the subject of the challenge.

The Arizona law is designed to encourage candidates to shun private donations in favor of public financing. It is also designed to level the playing field.

One clue to how the Court might vote comes from Davis v. FEC, a 2008 ruling on a related issue.

Ruling on the "Millionaires' Amendment" to the 2002 Bipartisan Campaign Finance Act (BCRA), the Court found that tripling contribution limits for congressional candidates opposed by self-financed competitors who spent more than $350,000 of their own money was unconstitutional.

Though both cases are similar in that “rescue money” is challenged, the distinction is that the “Millionaires’ Amendment” did not involve public financing.

Two lower court decisions—one in Connecticut and, of course, the Arizona program—injected the issue of public financing into the debate.The second Circuit Court of Appeals found Connecticut Citizens Election Program to be constitutional. It was challenged on the grounds that it discriminated against minor party candidates. And in May 2010, the 9th Circuit Court of Appeals out of San Francisco upheld Arizona’s law. Both decisions overturned earlier decisions rendered by trial judges that deemed both laws unconstitutional.

With the Arizona case looming before the Supreme Court, both sides present compelling arguments.

Bradley Smith, former member of the Federal Election Commission, writes in the Wall Street Journal, “Arizona and a handful of other jurisdictions have gone far beyond what was approved in Buckley by offering candidates ‘rescue’ funds.”

He further argues “this [rescue funds] will discourage political speech . . . . Why make a contribution . . . if doing so triggers a government subsidy to his opponent?”

Conversely, Charles Fried, Solicitor General in the second Reagan administration, states in The New York Times, “contrary to the challengers’ claims, the Arizona law doesn’t prevent privately financed candidates from speaking or spending as much as they like . . . nor does it place any limits on how much anyone may spend in support or opposition to a candidate.”

The decision in McComish promises to be the biggest campaign finance case of the year. And it bears watching, especially in New Jersey.The State’s Gubernatorial Public Financing Program matches private dollars with public dollars. It has been a mainstay of gubernatorial elections since 1977.The program is considered a model for other states and has engendered trust in our gubernatorial elections process.

Importantly, the program does not contain a provision for “rescue money,” a critical distinction. Because of this, New Jersey’s program does not seem vulnerable to any decision that may come out of McComish.

While questioning by judges in Monday’s hearing suggests that parts of Arizona’s law will be struck down, it did not signal that public financing in general will be deemed unconstitutional. The Court most likely will restrict its decision to the

constitutionality of “rescue money.” It will not spell the end of the world for supporters of public financing.

Like the high court did in Citizens United in strongly endorsing disclosure, it may, in McComish, indirectly express support for public financing programs generally, while dismissing rescue money as unconstitutional.

Moreover, by halting the practice of rescue money, which is an inducement for outside groups to spend even more money independently, the Court’s decision may, in the end, not be a bad thing.

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