

Memorandum

From: Brennan Center for Justice at NYU School of Law, Demos/NVRI

Re: Constitutionality of Full Public Financing Systems for Federal Elections

Date: August 31, 2007

Background

Some of the 2008 presidential candidates have suggested during public debates that a constitutional amendment may be required to implement a voluntary system of public funding for federal elections. The question is therefore whether the core elements of a full public funding system for federal elections, as proposed in the Fair Elections Now Act (“FENA”) now pending in the Senate as [S. 1285](#), are constitutional.

Short Answer

The essential elements of full public financing systems are constitutional. These core components include the provision of public funds to qualified candidates for elective office and trigger provisions that increase the available funds when participating candidates face higher-spending privately financed opponents or significant oppositional independent expenditures,

Analysis

FENA sets up a system of full public financing for congressional elections based on a model adopted in Arizona, Connecticut, Maine, New Mexico, and North Carolina.¹

¹ Arizona, Connecticut and Maine have full public financing system for statewide and legislative candidates. New Mexico and North Carolina have full public financing for appellate judicial candidates. New Mexico has full public financing for candidates for its Public Regulation Commission. North

Under FENA and similar systems, candidates seeking to qualify for receipt of public financing gather a certain number of small “qualifying contributions” and agree to a spending limit. Once the candidate qualifies, he or she is given an appropriate amount of funding for his or her campaign. In order to keep a publicly funded candidate from being grossly outspent by a privately funded opponent, participating candidates are eligible for additional public funds if they face high-spending opposition by a privately financed opponent or independent spenders, or both. All of these core elements of FENA have been upheld as constitutional.

I. Basic Grants to Qualified Candidates Are Constitutional.

Programs that provide public funding to candidates who voluntarily agree to certain campaign finance restrictions, including limitations on expenditures, have been upheld by the Supreme Court and courts in several appellate circuits.² These courts have concluded that public financing furthers, rather than hinders, First Amendment values.

In *Buckley v. Valeo*, the Supreme Court considered and upheld the constitutionality of the presidential public financing system contained in the Federal Election Campaign Act.³ This was the first and only time that the Supreme Court considered the constitutionality of public financing. Since the decision in *Buckley*, however, several district and circuit courts have upheld the constitutionality of a variety

Carolina has full public financing for the offices of State Auditor, Insurance Commissioner, Superintendent of Public Instruction and for certain Council of State races.

² See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). (upholding the presidential public financing system under FECA); *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine’s Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota’s public funding for elections); *Jackson v. Leake*, Civil Action No. 5:06-CV-324-BR, Order (E.D.N.C. Mar. 30, 2007) (dismissing plaintiffs’ complaint against public financing system for appellate judicial elections), *appealed sub nom.*, *Duke v. Leake*, No. 07-1454 (4th Cir. Apr. 26, 2007); *Ass’n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp.2d 1202 (D. Ariz. 2005) (upholding Arizona Clean Election Act), *rev’d in part & aff’d in part* 2007 WL 2044223 (Jul. 18, 2007), *order amended* 2007 WL 2317769 (9th Cir. Aug. 15, 2007).

³ See *Buckley*, 424 U.S. at 92-107.

of state public financing systems around the country. Because FENA shares many of the elements found in the state public financing systems, FENA is likely to be subject to a similar, if not identical, constitutional analysis.

In *Buckley*, the Court explained that a public funding system aims, “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”⁴ The Court further noted that:

the central purpose of the Speech and Press Clauses was to assure a society in which “uninhibited, robust, and wide-open” public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech⁵

In addition, public financing serves the government’s interest in avoiding the reality and appearance of corruption. As *Buckley* recognized: “It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.”⁶ Because they protect both of these compelling state interests, public funding systems are constitutional.

⁴ *Id.* at 92-93.

⁵ *Id.* at 93 n.127 (citations omitted).

⁶ *Id.* at 96; see *Securities Industry & Financial Markets Ass’n v. Garfield*, 469 F. Supp. 2d 25, 38-39 (D. Conn. 2007) (“The [Connecticut public financing] statute seeks to restore public confidence in the integrity of state government and to eliminate corruption and undue influence flowing from campaign contributions given or solicited by certain special interests.”); *Jackson v. Leake*, 476 F.Supp.2d 515, 525 (E.D.N.C. 2006) (“[T]he purpose of the [public financing] Fund itself is to ensure fair judicial elections and protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of such elections.”) (internal quotation omitted).

II. Public Financing Programs May Constitutionally Provide Additional Public Funds to Participating Candidates Facing High-Spending Opponents.

Full public financing systems typically allow additional public funds to be released to participating candidates when spending by a non-participating opponent exceeds that limit. These mechanisms, known as “triggers,” ensure that publicly funded candidates are not grossly outspent by privately funded candidates. FENA contains this type of trigger provision.

The Supreme Court has yet to weigh in on a case involving such triggers, but lower courts repeatedly have upheld them. In *Rosenstiel v. Rodriguez*, for example, the Eighth Circuit upheld a trigger provision based on nonparticipating candidate spending against a First Amendment challenge, recognizing that such triggers “avert a powerful disincentive for participation in [the state’s] public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.”⁷ The Sixth Circuit, in *Gable v. Patton*, found them necessary to “assuage the wholly legitimate fears of participating slates that they will be vastly outspent due to their agreement to accept spending limits.”⁸ Embracing that reasoning, the First Circuit in *Daggett v. Comm’n on Governmental Ethics & Election Practices* also upheld Maine’s trigger for matching funds based on nonparticipating candidate spending.⁹

⁷ 101 F.3d 1544, 1552 (8th Cir. 1996) (noting that Minnesota’s public financing program, “promotes, rather than detracts from, cherished First Amendment values”).

⁸ 142 F.3d 940, 947 (6th Cir. 1998) (internal quotation marks omitted). The Sixth Circuit invalidated a trigger activated by the spending of a non-participating candidate, but only as it applied to self-financed candidates. *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004).

⁹ See 205 F.3d at 464 (holding “[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.”); *accord Leake*, 476 F. Supp. 2d at 525-26 (denying a preliminary injunction against the matching funds trigger in North Carolina).

III. Public Financing Programs May Constitutionally Provide Additional Public Funds to Participating Candidates Facing High Independent Spending.

FENA also contains a trigger provision to release additional public funds to those participating candidates who face significant independent spending (either against their candidacies or in support of their privately funded opponents.) Courts considering such triggers in full public funding systems have consistently held that the distribution of matching funds based on independent spending does not inflict a constitutional harm.

Matching funds for independent expenditures have been challenged and upheld in three recent cases: *Daggett*, 205 F.3d at 463-65 (upholding Maine’s trigger), *Leake*, Civil Action No. 5:06-CV-324-BR, Order (E.D.N.C. Mar. 30, 2007) (dismissing challenge to North Carolina’s trigger);¹⁰ and *Brewer*, 363 F. Supp. 2d at 1202-03 (dismissing challenge to Arizona’s trigger).¹¹ Plaintiffs in all three cases complained that their independent speech was chilled by the knowledge that participating candidates would receive matching funds with which to respond.

In *Daggett*, the U.S. Court of Appeals for the First Circuit rejected that complaint, recognizing that it “boils down to a claim of a First Amendment right to outraise and outspend an opponent.”¹² In affirming the constitutionality of additional public funds triggered by independent expenditures in Maine’s Clean Election Act, the Court explained:

¹⁰ See also 476 F .Supp. 2d at 525-26 (denying plaintiffs’ motion for preliminary injunction against challenged matching funds provisions based on independent spending).

¹¹ The Ninth Circuit later ruled that the Association’s claims challenging the independent expenditure trigger were moot. *Ass’n of Am. Physicians & Surgeons v. Brewer*, 2007 WL 2044223 (Jul. 18, 2007), order amended 2007 WL 2317769 (9th Cir. Aug. 15, 2007).

¹² *Daggett*, 205 F.3d at 464 (“comfortably . . . conclud[ing] that the provision of matching funds based on independent expenditures does not create a burden on speakers’ First Amendment rights”).

Appellants [challenging the independent spending triggers] misconstrue the meaning of the First Amendment’s protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The 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.¹³

This reasoning by the First Circuit echoed a similar analysis by the district court in *Daggett*. With respect to those attacking matching funds, the district court said:

Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment . . . on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. . . . This “marketplace of ideas” metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.¹⁴

Finally, FENA’s triggers cap the amount of public funding that a participating candidate may receive to respond to well-funded opposition. As the *Daggett* court explained with respect to the Maine system:

[The public financing program] does not provide an unlimited release of the expenditure ceiling—it allocates matching funds for the participating

¹³ *Id.* (internal quotations and citations omitted); *see also Leake*, 476 F. Supp. 2d at 525-26 (finding *Daggett*’s reasoning regarding matching funds persuasive); *Brewer*, 363 F. Supp. 2d at 1201-03 (granting motion to dismiss challenge to Arizona’s public financing program and expressly adopting *Daggett*’s reasoning in holding that trigger mechanisms and matching funds provisions are constitutionally permissible). There is only one case, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), holding to the contrary (in a case not involving full public funding). The *Day* court held that the plaintiffs’ First Amendment rights were unjustifiably burdened when their independent expenditures triggered the operation of provisions allowing participating candidates in Minnesota to respond. But the Eighth Circuit undercut its own reasoning in *Day* only two years later in *Rosensteil v. Rodriguez*, when it upheld a trigger based on spending by nonparticipating candidates. 101 F.3d at 1551. The *Rosensteil* court commented: “The [trigger provision] is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit.” *Id.* The same point could be made about the provision challenged in *Day*, except that the participating candidate’s fear of being outspent is prompted by privately financed independent groups with no expenditure limits. For this reason, *Daggett* recognized that the continuing vitality of *Day* is open to question.

¹⁴ *Daggett*, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff’d*, 205 F.3d 445.

candidate of only two times the initial disbursement. Thus, a non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after that limit is reached. Further, the non-participating candidate holds the key as to how much and at what time the participant receives matching funds.¹⁵

The cap on public money means that candidates accept real risks in choosing to participate in the program. The benefits of doing so, therefore, are not so overwhelming that candidates will be unconstitutionally coerced into participating in the program.

IV. The Recent Decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.* Does Not Affect the Constitutionality of Public Funding.

The Supreme Court's recent decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"), does not affect the constitutionality of FENA's independent expenditure trigger provisions. *WRTL* held only that BCRA's ban on electioneering communications funded by corporate and union general treasury funds was unconstitutional as applied to advertisements aired by a non-profit ideological advocacy corporation, because the ads did not contain the "functional equivalent" of express campaign advocacy. 127 S. Ct. at 2667. Chief Justice Roberts' controlling opinion focused on the concern that BCRA's spending ban was an unconstitutional restriction on protected speech. *Id.* at 2674.

Although some public funding programs, including the one proposed in FENA, provide public funds to match expenditures for electioneering communications, such provisions do not implicate the same constitutional concerns that led to the outcome in *WRTL*. Matching funds provisions do not impose any ban on expenditures for

¹⁵ *Daggett*, 205 F.3d at 468; see also *Rosenstiel*, 101 F.3d at 1551 & n.6 (holding that law lifting the expenditure limits when nonparticipating spending reached a trigger amount also benefited nonparticipating candidates because it gave them control over possibility and timing of an increase in funds).

electioneering communications; rather, they allow participating candidates who are targeted by the expenditures, or whose opponents are supported by the expenditures, to engage in additional political debate. Thus, to the extent that Chief Justice Roberts' opinion focused on concerns about censorship resulting from a spending ban, that rationale simply does not apply to requirements aimed only at disclosure and reporting for the purpose of providing matching funds to participating candidates.

The importance of the distinction between *disclosure* of electioneering communications and a *ban* on corporate and union funding of such communications is reflected in the votes of Justices Kennedy and Scalia in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), concerning BCRA's disclosure requirements for electioneering communications. Both Justices were part of the majority in *WRTL*, and would have struck down BCRA's ban on corporate and union-funded electioneering communications as facially unconstitutional in *McConnell* as well. Nevertheless, both agreed in *McConnell* that BCRA's core requirements for disclosure of electioneering communications were constitutionally permissible. 540 U.S. at 321 (opinion of Kennedy, J., joined by Rehnquist, C.J. and Scalia, J.).¹⁶ Justice Kennedy's opinion indicated that he agreed with the *McConnell* majority's conclusion, *see* 540 U.S. at 196, that the governmental interest in informing voters about the sources of spending constituted a compelling interest justifying the core disclosure requirements, even though he rejected an anti-corruption justification for the requirements. Indeed, the vote upholding the basic

¹⁶ The sole disclosure provision that Justices Kennedy and Scalia would have struck down in *McConnell* was the provision in Section 201 of BCRA requiring disclosure of executory contracts for electioneering communications, *see* 2 U.S.C.A. § 434(f)(5), which they regarded as excessively burdensome. *Id.* at 321-322.

disclosure requirements for electioneering communications was 8-1 in *McConnell*, with Justice Thomas the sole dissenter on that issue.

Public funding laws, including FENA, impose no ban on spending for electioneering communications. Instead, they rely on disclosure of electioneering communications to facilitate the provision of matching funds. The decision in *WRTL* therefore does nothing to alter the conclusion that matching independent expenditures is constitutional.

Conclusion

The core provisions of FENA have been challenged repeatedly and have been upheld as constitutional because public financing enhances candidates' ability to engage in political debate and thus expands First Amendment rights. No constitutional amendment would be necessary to implement FENA or any comparable presidential public funding system.