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Constitutional Analysis of Proposed Small-Donor Public Financing Program in New Mexico

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On April 5, 2013, Governor Susana Martinez vetoed a proposed amendment to New Mexico's public financing law that would have established a small-donor matching program. Under the legislation, after participating candidates received an initial public finance grant from the state, they would have been eligible to receive a four-to-one match for small-donor contributions of up to $100, up to an established limit. Governor Martinez's veto message cited, among other objections, that "it is entirely unclear that this proposed legislation is constitutional."[1]

As discussed below, Governor Martinez's concerns about the constitutionality of the proposed legislation are unwarranted. Small-donor public financing is undoubtedly constitutional and conforms fully with the First Amendment.[2] Indeed, the U.S. Supreme

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[1] State of New Mexico, Senate Executive Message No. 58 (Apr. 5, 2013).

[2] This document is devoted solely to a discussion of the constitutionality of small donor matching public financing programs. For a more in-depth discussion of other aspects of small donor matching programs, including how small donor matching programs work, see ADAM SKAGGS & FRED WERTHEIMER, EMPOWERING SMALL DONORS IN FEDERAL ELECTIONS (2012), *available at* http://www.brennancenter.org/publication/empowering-small-donors-federal-elections; ANGELA MIGALLY & SUSAN LISS, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2010), *available at* http://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience.

Court has twice ruled that public financing is constitutional[3] and explicitly upheld a small-donor matching funds program in 1976.[4]

Background on New Mexico's Public Financing Law

The New Mexico Voter Action Act (the "Act") gives candidates for appellate judgeships and for the Public Regulation Commission the option of financing their election campaigns with public funds if they agree not to accept funding from other sources.[5] In 2012, the United States District Court for the District of New Mexico struck down one provision of the Act, the so-called "trigger" provision, which provided publicly funded candidates with funds to match spending by their opposition. The court held that this provision impermissibly burdened the protected political speech of participating candidates' opponents, because their spending triggered additional funding for publicly financed candidates. The district court ruled, however, that the remainder of New Mexico's public financing law remained "operable and enforceable."[6]

In 2013, the State Legislature passed Senate Bill 16, which replaced the Act's trigger provision with a small-donor public financing program. On April 5, 2013, Governor Martinez vetoed this bill, questioning its constitutionality.

Small-Donor Public Financing is Constitutional

In *Buckley v. Valeo*, the cornerstone of modern campaign finance law, the U.S. Supreme Court upheld the constitutionality of public financing, including a small-donor public financing program similar to the one proposed for New Mexico.

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[3] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2827 (2011); Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

[4] *See* Buckley, 424 U.S. at 92-93.

[5] N.M. STAT. ANN. §§ 1-19A-1 through 1-19A-17.

[6] Dolan v. Duran, 12-cv-110, slip op. at 17 (D.N.M. July 25, 2012).

In *Buckley*, the Court considered a series of statutes establishing public financing of presidential election campaigns, including a small-donor matching program for primary elections. Finding that public financing "furthers, not abridges, pertinent First Amendment values," the Court upheld this public financing system, explaining that the purpose of public financing is to "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[7] With respect to the small-donor matching program, where candidates in presidential primaries receive a one-to-one match of small-donor contributions of up to $250,[8] the Court noted that "[t]he thrust of the legislation is to reduce financial barriers and to enhance the importance of smaller contributions."[9] Since *Buckley*, lower courts have repeatedly found public financing programs to be constitutional.[10]

In 2011, the U.S. Supreme Court reaffirmed the constitutionality of public financing in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett:* "[G]overnments may engage in public financing of election campaigns and . . . doing so can further significant governmental interests, such as the state interest in preventing corruption."[11] Although the applicable statute did not include a small-donor matching program, nothing in the Court's reasoning draws the constitutionality of small-donor matching – already recognized by the Court in *Buckley* – into question.

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[7] Buckley, 424 U.S. at 92-93.

[8] 26 U.S.C. § 9034(a).

[9] Buckley, 424 U.S. at 107 (footnote omitted).

[10] *See, e.g.*, Ognibene v. Parkes, No. 08 Civ. 1335(LTS)(FM), 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013) (striking down only a triggered supplemental funds provision and upholding all other challenged portions of the New York City small donor public financing program), Green Party of Conn. v. Garfield, 616 F.3d 213 (2d Cir. 2010) (upholding majority of Connecticut's Clean Election Program); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding program); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law).

[11] Bennett, 131 S. Ct. at 2827 (internal citation and quotation marks omitted).

Bennett addressed the constitutionality of a public financing "trigger" mechanism, like the one considered by United States District Court for the District of New Mexico in *Dolan*; indeed, it is *Bennett* that compelled the result in *Dolan*. At issue in both cases was whether it was constitutional for a state to disburse additional public funds to publicly financed candidates based on significant spending by an *opposing* candidate or independent group. The *Bennett* Court ruled that the use of this mechanism imposed an unconstitutional burden on opposition speech because it directly tied public financing amounts to the level of opposition spending: "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."[12]

This reasoning is inapplicable to small-donor public financing, where public funds match small contributions *to* a participating candidate, and the distribution of public funding bears no relation whatsoever to opposition spending. Unlike the trigger at issue in *Bennett*, small-donor public financing does not penalize or otherwise burden opposition speech – how much any other candidates or independent groups spend is unrelated to the amount a publicly financed candidate receives. Thus, as *Bennett* makes clear, because small-donor public financing does not implicate a speaker's "autonomy to choose the content of his own message,"[13] it raises no concerns under the First Amendment.[14] Indeed, the *Bennett* decision

[12] *Id.* at 2818.

[13] *Id.* at 2820 (quoting Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995)).

[14] Likewise, the Supreme Court's landmark *Citizens United* decision in 2010 did not involve or affect the constitutionality of the public financing of elections. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010). *Citizens United* dealt with the constitutionality of a ban of specific political activities by corporations and certain disclosure requirements political spenders are required to undertake. The case did not directly address or incidentally affect any public financing mechanisms.

struck down only the trigger provision in Arizona's public financing law, leaving the rest of the law operable.

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In short, public financing of elections – including small-donor matching – enhances public debate and First Amendment values, and the U.S. Supreme Court has made clear that these programs are wholly consistent with the First Amendment. New Mexico's Senate Bill 16 therefore raises no constitutional questions or concerns.