

SUPREME COURT’S INJUNCTION OF TRIGGER FUNDS PROVISIONS OF ARIZONA’S PUBLIC FINANCING SYSTEM DOES NOT CAST DOUBT ON CONSTITUTIONALITY OF PUBLIC FINANCING SYSTEMS, INCLUDING THE FAIR ELECTIONS NOW ACT, H.R. 1826

On June 8, 2010, in *McComish v. Bennett*, the Supreme Court enjoined¹ the so-called “trigger funds provisions” of Arizona’s public financing system. Such funds provide publicly funded candidates with additional grants when their opponents or third parties spend more than a threshold “trigger” amount against them. The Supreme Court’s decision enjoined these additional “trigger funds”, but the rest of Arizona’s public financing system is unaffected by the order and is not at issue in the case. Although we believe the Supreme Court’s order was unwarranted interference with an ongoing election, the Supreme Court’s order – and the *McComish* case in general – have no bearing on the constitutionality of the Fair Elections Now Act or other voluntary public financing systems, such as the presidential public financing system, that lack such “trigger funds.” Fair Elections does not contain the “trigger funds” provisions at issue in *McComish*; in fact, Fair Elections was designed to avoid the challenges to trigger funds provisions at issue in *McComish* and other pending cases. Indeed, public financing systems such as Fair Elections have been declared constitutional in a series of Supreme Court decisions going back to the Court’s 1976 decision in *Buckley v. Valeo*, and reaffirmed by the Roberts Court as recently as 2008. Thus, regardless of whether the Supreme Court eventually upholds or strikes down Arizona’s trigger funds provisions, Fair Elections remains on sound constitutional footing.

Unlike Fair Elections and the presidential public financing system, Arizona’s system uses trigger fund provisions as part of its grant distribution scheme. Under Arizona’s system, qualified candidates are eligible to receive an initial grant with the opportunity to receive additional triggered funds—additional grants that are distributed only if a high spending, privately-financed opponent or a third party attack ad campaign spend past a certain threshold.

The *McComish* plaintiffs allege that this mechanism for additional monies—the trigger funds provisions—violate the First Amendment by chilling privately-financed candidates and third parties from spending past the trigger threshold. They base this argument on the Court’s 2008 decision in *Davis v. FEC*.² In *Davis*, the Court struck down the “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act, a law that raised a candidate’s contribution limits when the candidate’s opponent spent her personal funds over a threshold amount. Thus, under the “Millionaire’s Amendment,” one candidate could potentially be subject to contribution limits

¹ The Supreme Court’s order was not a decision on the merits. The order enjoined the system pending either a denial of a petition for a writ of certiorari or a final decision on the merits.

² *Davis v. FEC*, 128 S.Ct. 2759 (2008).

that were three times lower than the limits governing her opponent in the same privately-funded, congressional race. The *Davis* Court held that this asymmetrical system “chilled” the speech of the self-financed candidate.³ The *McComish* plaintiffs claimed that the grant of additional “trigger” funds to publicly financed candidates created an analogous “chill” on the spending of privately funded opponents and third parties.

Regardless of whether Plaintiffs’ analogy is correct, neither *McComish* nor *Davis* have any bearing on Fair Elections because Fair Elections employs an entirely different grant distribution scheme that does not contain trigger fund provisions. Under Fair Elections, the scheme provides qualified congressional candidates an initial lump-sum grant, plus additional funds in the form of a multiple match, four-to-one, of small donor contributions collected throughout the election. Unlike Arizona’s system, additional funds under Fair Elections are generated by further fundraising from small donors; they are not triggered by the spending of other candidates or third parties. Thus, the chill on speech alleged in *McComish* and *Davis*, does not, indeed cannot, exist under Fair Elections. By design, Fair Elections’ method of providing additional money avoids any of the constitutional issues raised in *Davis* or *McComish*.

³ Prior to *Davis v. FEC*, the First and Fourth Circuits upheld the constitutionality of trigger fund provisions. See *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (affirming denial of preliminary injunction against North Carolina’s trigger fund provisions); *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine’s trigger fund provisions). Since *Davis*, Plaintiffs in Connecticut and Wisconsin are currently challenging the constitutionality of trigger fund provisions in Connecticut and Wisconsin. See *Green Party v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. Aug. 27, 2009), *argued* (2d Cir. Jan. 13, 2010); *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D. Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wi. 2009).