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Free Speech Worth Paying For

By CHARLES FRIED and CLIFF SLOAN

ON Monday, the Supreme Court will consider its first campaign-finance challenge since Citizens United v. Federal Election Commission, the 2010 ruling that permits corporations and unions to spend as much as they wish to promote or defeat political candidates. Based on Citizens United, it might appear that the court would be inclined to wipe away all regulation of campaign finance. But that view would be mistaken.

The court will hear a pair of challenges to an Arizona law that provides public financing for candidates who agree to forgo private contributions, including their own. Under the law, adopted in 1998 as a citizen initiative in the wake of election scandals, Arizona allocates additional money to publicly financed candidates when their privately financed opponents spend more than a specified amount.

These challenges are being brought by political action committees and candidates for state office who say that the law violates their free speech rights. But it is the defenders of public financing schemes like Arizona's who have the First Amendment at their back. And they have Citizens United, with its broad protection for speech in the public square, on their side. (We submitted an amicus brief supporting the Arizona law on behalf of a bipartisan group of former elected officials.)

The First Amendment forbids any law "abridging the freedom of speech." While fearing the corrupting effects of unrestrained campaign spending, the people of Arizona abridged no speech, forbade nothing, restricted nothing. Instead, they followed the principle, set forth by Justices Louis Brandeis and Oliver Wendell Holmes Jr. in the 1927 case Whitney v. California, that the remedy for speech that is threatening or inconvenient is "more speech."

Contrary to the challengers' claims, the Arizona law doesn't prevent privately financed candidates from speaking or spending as much as they like, or from raising as much as they like, or from raising as much money as they need. Nor does it place any limits on how much anyone may spend in support or opposition to a candidate. The law simply ensures that, when a candidate relying on private money speaks, the publicly financed candidate has the money to answer.

The notion that more speech inhibits or corrupts public debate contradicts the very premises of the Citizens United decision that government has no business limiting the source, content or quality of the speech deployed in debate. Indeed, decades of free speech opinions proclaim that the government has no business shutting down speech no matter what it says or who is saying it; it will not prohibit hate speech, for example, or speech glorifying the sexual subjugation of women. Our First Amendment law trusts the people to choose what they will listen to and whom they will believe.

That noble, deep tradition has stood up against every claim that certain speech will confuse or mislead or drown out the more virtuous speech of others. The Arizona challengers in the two cases — McComish v. Bennett and Arizona Free Enterprise Club v. Bennett — believe their speech will be swamped by publicly financed candidates. That "drowning out" argument may be accepted in other countries, but our First Amendment denies that more speech silences the speech it challenges: it only answers it.

Of course, because publicly financed campaigns involve the government's footing the bill for answering speech, that speech is portrayed as being in a different category. That too is an argument that runs against our free speech law. Over and over — whether it is financing artistic creativity, or campaigns against smoking or for premarital abstinence — the Supreme Court has insisted that government may add its voice to the private debate without being thought to inhibit or drown out the message of private speakers. And the Arizona law does not even pick the message, but merely adds to the voice of any qualifying candidate.

The broadest attacks on the Arizona statute, outlined in amicus briefs before the Supreme Court, would make any provision of public financing unconstitutional. But public financing — provided by 16 states and numerous local governments, including New York City — remains an important option for governments interested in providing candidates with an alternative to dependence on private contributions.

To suggest that this facilitation of speech by the government itself violates the First Amendment is perverse, and deeply antithetical to the nation's First Amendment tradition. To prevail in this case, the challengers would have to countermand the very principles of the wide open, free and uninhibited nature of our campaign finance regime which in other contexts they celebrate. The principles of Citizens United should lead the Supreme Court to uphold Arizona's campaign finance law.

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