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# LEVY: Confusing the cost of free speech

*Message obscured by money in Florida*

By Robert A. Levy

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Florida Attorney General Bill McCollum claims he favors free speech. Apparently, he means scot-free.

Mr. McCollum invoked the Florida Election Campaign Financing Act (FECFA) so that his run for governor would funded by the taxpayers. But on July 30, the U.S. Court of Appeals for the 11th Circuit sided with Rick Scott, his opponent in the upcoming Republican primary - reversing a lower court decision and issuing a preliminary injunctio barring Mr. McCollum from collecting any money under the so-called excess-subsidy provision of FECFA. Now th case goes back to District Court for a final ruling, with a strong hint from the appellate judges that Mr. Scott proved his point.

Under FECFA, gubernatorial candidates can choose to receive matching public dollars based on the contributions they raise. Mr. McCollum opted in; Mr. Scott did not. In return, Mr. McCollum agreed to spend no more than $24.9 million on his campaign and to limit his use of personal and party funds.

Mr. Scott didn't challenge the matching funds, but he did challenge another provision - the excess subsidy. It would have awarded a dollar of taxpayer money to Mr. McCollum for each dollar in excess of $24.9 million that Mr. Scott spent. That was key to Mr. McCollum's financially strapped campaign; Mr. Scott was very close to triggering the subsidy after spending millions of his own money.

Essentially, the excess subsidy forced Mr. Scott either to curtail his own speech or subsidize Mr. McCollum's speec Mr. Scott chose the former - pulling TV ads, minimizing campaign travel and spending less on absentee-ballot and early-voter programs. Now, with the injunction in place, he can resume full-scale campaigning.

In the past, courts have upheld campaign-finance restrictions that curb corruption or the appearance of corruption. But when a candidate spends his own money to get elected, there's no risk he will corrupt himself. That's why Distri Judge Robert L. Hinkle had to find a different justification when he denied Mr. Scott's request to block the excess-subsidy provision. Judge Hinkle conjured up a rationale that had not been argued by any of the parties and was not supported by the legislative history:

When FECFA was enacted, Florida reduced individual-contribution limits from $3,000 to $500. According to Judge Hinkle, that gave self-funders like Mr. Scott a big advantage. They could "hamstring" an opponent by spending unlimited amounts of their own money. To counteract that edge, the state created the excess subsidy, which would encourage candidates to participate in the public-financing scheme. That, in turn, would help curb corruption.

In other words, Florida had to mitigate the potentially corrupting effect of the state's own handiwork. To ensure that Mr. McCollum imposed on the taxpayers, the Florida Legislature decided to punish Mr. Scott. Is that clear? Never mind that punishing a self-funder increases the potential for corruption by encouraging wealthy candidates to solicit expenditures by other fat cats.

The Court of Appeals rejected Judge Hinkle's analysis. Writing for a unanimous three-judge panel, Judge William H

Pryor Jr. concluded that the excess subsidy was designed not to curb corruption, but to level the playing field - a goa that is anathema to the First Amendment. Instead, the state could have simply eliminated the $24.9 million spending limit. That would have given all candidates equal access to public money. Less affluent candidates probably would sign on; wealthier candidates might not participate - just like the excess-subsidy provision, but without trampling on First Amendment rights.

Of course, Mr. Scott still would have used his personal resources to outspend Mr. McCollum. But dollar differences aren't the whole story. Incumbents have a significant head start. Mr. Scott entered late, had little name recognition and was up against a prohibitive favorite who already held high state office. In Davis v. Federal Election Commissi (2008), the Supreme Court put it this way: "Different candidates have different strengths. Some are wealthy. ... Som are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome. ... It is a dangerous business ... to use the election laws to influence the voters' choices."

In November, Florida voters will have a chance to stop the leakage from depleted state coffers by repealing the enti public-financing scheme. Similar schemes are up for grabs in other states. Thomas Jefferson offered pertinent advic "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

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