Question 1 Part A (1)

The Supreme Court has held that candidate debates are a special class of programming because they are "by design a forum for political speech by candidates" and they are "of exceptional significance in the electoral process."[1] For this reason, public forum principles can be applied to candidate debates.

The debate in Vermont is a designated public forum because as the Court held in *Forbes "*to create a forum of this type, the government must intend to make the property "generally available to a class of speakers."[2] The format of the VCB debate allows unfretted access to the candidates by members of the audience, while also allowing general access to a class of speakers, which in this case are the candidates for election to the US Senate seat. Candidate Osetek is a member of this class of speakers. Consequently, his exclusion by the government from the designated public forum is subject to strict scrutiny.[3]

As such the VCB's decision to exclude Osetek will fail to withstand a review by the courts. Osetek was excluded because he was, according to the VCB Administrator, a "dirty hippy". Clearly, VCB prevented Osetek from participating in the debate because of his views as a member of the Green Party, which diverges on a wide range of issues from both Democrats and Republicans. The court's ruling in *Forbes* has been understood to prohibit limits on participation in debates "based on subjective assessment of the seriousness of the viewpoint being expressed."[4] Accordingly, VCB's action towards Osetek fails to serve a compelling state interest narrowly drawn to achieve that interest. Furthermore, it only serves to prevent a legitimate

[1] AETC v. Forbes 523 U.S. 666 (1998) pg 439 of Textbook
[2] AETC v. Forbes 523 U.S. 666 (1998) pg 440 of Textbook
[3] AETC v. Forbes 523 U.S. 666 (1998) pg 440 of Textbook
[4] The Law of Democracy Page 446

candidate from expressing his views to a public gathering, at a public institution, at a publicly funded debate.

While VCB may claim that Osetek was excluded because of a lack of public interest in his candidacy, which was a successful approach for AETC in *Forbes*, that argument does not apply in this case. Osetek is currently in a statistical dead heat with both the Democratic and Republican candidate. Moreover, VCB may argue that the debate, in fact, is a non-public forum, where in order to exclude candidates it only needs to show that their action "was a reasonable, viewpoint neutral exercise of journalistic discretion."[5] Yet, even if the court rules that the debate was in fact a non-public forum, VCB's actions will still fail to stand as a "viewpoint neutral exercise." By their own admission, Osetek was excluded because of his status as a "dirty hippy" with views different from those of Republicans and Democrats.

PART A (2)

The 1st Amendment protects the rights of people and organizations to associate freely with whomever they choose. Candidate Osetek, the Green Party, and the Democratic Party have agreed to associate. This decision was based on each of the actors' determination that by listing Osetek as a Green Party / Democratic Party candidate on the ballot, all would benefit in the election. The Supreme Court has held that "the Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the constitution."[6] By denying the parties' request to include both the Green Party and Democratic Party name after Osetek, Vermont's Secretary of State has violated the associational rights of those involved. "Party's… under the First Amendment," have the right

[5] AETC v. Forbes 523 U.S. 666 (1998) pg 441 of Textbook
[6] Tashjian v. Republican Party of Connecticut 479 U.S. 208 (1986) Textbook Pg 404

"to organize with like-minded citizens in support of common political goals."[7] Clearly the two parties feel that they share at least some common political goals; this is reflected in their desire to appear together on the ballot after Osetek's name. For this reason, the constitution protects their right to associate.

Vermont's Secretary of State may respond by arguing that the USSC in *Timmons* held that prohibiting "fusion" candidacies of the sort here is constitutional because "the ban does not involve regulation of political parties' internal affairs and core associational activities."[8] The court held that since the burden on the party's associational rights is not severe, the state only needs to show that the interests behind the regulation are "sufficiently weighty to justify the limitation."[9] Party labels provide voters with an indication of the views of the candidate, thus a candidate with two parties listed could confuse the electorate. States have an important "interest in fostering informed and educated expressions of the popular will in a general election."[10] Thus, The Secretary of State will argue that Osetek's fusion candidacy will impair the voters' ability to make an educated decision. Finally, the court held that preventing fusion candidacies protects the 2-party system, an important state interest.[11]

PART B

The Good Government Coalition's proposed public financing scheme appears to be unconstitutional. When a public financing scheme becomes so beneficial that candidates would be foolish to not participate, the candidates 1st Amendment rights are violated. While the courts have upheld public financing schemes in the past, the benefits of participation in Good

[7] Tashjian v. Republican Party of Connecticut 479 U.S. 208 (1986) Textbook Pg 405
[8] Timmons v. Twin Cities Area New Party 520 U.S. 351 (1997) Textbook 428
[9] Timmons v. Twin Cities Area New Party 520 U.S. 351 (1997) Textbook 429
[10] Tashjian v. Republican Party of Connecticut 479 U.S. 208 (1986) Textbook Pg 406
[11] Timmons v. Twin Cities Area New Party 520 U.S. 351 (1997) Textbook 430

Government's proposed scheme far outweigh those considered previously by the courts. Although both participants and non-participants will see their contributions from PAC's and 527's limited, the matching funds and lack of an expenditure ceiling makes the proposed scheme unconstitutionally coercive.

As referenced in *Daggett* the 1st Circuit has held "that the… benchmark of whether candidates 1st Amendment rights are burdened by a public financing system is whether the system allows candidates to make a voluntary choice about whether to pursue public funding"[12] While the courts have realized that for any candidate to choose public financing there must be some benefits for making such a decision, the courts have held that when a system becomes beneficial to the point that candidates are coerced to join, that system infringes on their 1st Amendment rights.

In *Daggett* the 1st Circuit upheld Maine's public financing scheme that gave candidates matching funds up to two times the initial disbursement of public funds.[13] The Court points to a 6th circuit decision, which upheld a Kentucky statute that gave candidates a two-for one match on private contributions raised- more beneficial then the scheme examined in *Daggett*.[14] Nevertheless, Good Government proposes a scheme that would provide participating candidates with matching funds of 4 times each private donation. Additionally, the scheme sets no expenditure ceiling for those in the system. This scheme is more beneficial for participating candidates then the systems examined in both *Daggett* and *Gabble.*

Seeing that they system automatically gives participating candidates half of the total raised by the previous election's winning candidate and that it provides 4 times the amount of

[12] Vote Choice, Inc. v. Distefano, 4 F. 3d 26, 38 (1st Cir. 1993)
[13] Daggett v. Commission on Governmental Ethics and Election Practices 205 F. 3d 445 (1st Cir. 2000) Pg 530 Textbook
[14] Gable v. Patton 142 F 3d 940 (6th Cir. 1998) Pg 531 Textbook

private donations received without an expenditure limit, candidates lack a rational "voluntary" choice for joining the system. Candidates would not rationally choose to forgo public funding because they would have to raise at least 4 times the amount of private dollars to match the spending power of those participating candidates. For this reason, the proposed system "strays beyond the pale, creating disparities so profound that they become impermissibly coercive"[15]

Remember that the court in *Buckley v. Valeo* held that "money is speech" thus applying strict scrutiny review to any scheme that would limit the use of money by candidates to express their views.[16] The contribution limits for PACs and 527s appear to be constitutional because they are narrowly tailored to serve the compelling state interest of preventing both the appearance and instances of actual corruption. However, since the scheme would place a coercive burden on the speech rights of candidates, overall it will fail a strict scrutiny review.

Word Count: 1249

[15] Vote Choice, Inc. v. Distefano, 4 F. 3d 26, 38 (1st Cir. 1993)
[16] Buckley v. Valeo Textbook Pg 460