UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK DAVIS,	)	
Plaintiff,	)	
	)	Case No. 1:06CV01185 (TG)(GK)(HHK)
v.	)	
	)	Three-Judge Court
FEDERAL ELECTION COMMISSION,	)	
	)	REPLY
Defendant.	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. THE MILLIONAIRES' AMENDMENT SERVES COMPELLING GOVERNMENTAL INTERESTS THAT SATISFY ANY STANDARD OF CONSTITUTIONAL REVIEW

Our opening brief demonstrated that the Millionaires' Amendment serves compelling governmental interests that satisfy strict scrutiny, and accomplishes those purposes without placing any restrictions whatever on the constitutionally protected freedom of a wealthy candidate to spend as much of his personal wealth as he wants to support his own election campaign. Davis's opposition brief fails to contravene either part of this showing. Instead, it relies largely upon irrelevant comparisons and mischaracterizations of the actual impact of the Amendment in the context of the statute as a whole.

A. The Millionaires' Amendment Is An Integral Part Of A Statutory Scheme That Serves The Interest In Avoiding Corruption

Davis's response to our showing (FEC Br. 3-16) that Congress enacted the Millionaires' Amendment to serve several previously recognized compelling governmental interests is essentially to reiterate his claim (e.g., Opp. 1-5) that combating corruption is the only permissible governmental purpose in regulating campaign financing and that the Millionaires' Amendment is unconstitutional because it has no "nexus" to combating corruption. In addition to being contrary to the cases we have already cited (FEC Br. 13) that identify other compelling governmental interests that the Amendment serves, this argument is based upon a mischaracterization of the statute.

The Millionaires' Amendment is not a separate, freestanding statutory scheme. It is an amendment to the complex system of contribution restrictions contained in the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. 431-455. Apart from its disclosure provisions, which we discuss infra, the Millionaires' Amendment's only function is to

relax in certain circumstances some, but not all, of the contribution limits already in the FECA.[1] Indeed, the only substantive effect of the Amendment that Davis challenges is its relaxation of some of the generally applicable contribution limits for his opponent, but not for him.

Thus, the Millionaires' Amendment is nothing other than a mechanism for determining the level of the Act's contribution limits applicable in certain election campaigns. Davis does not, and cannot, deny that those contribution limits serve the compelling governmental interest in avoiding both the reality and the appearance of corruption, as the Supreme Court has repeatedly held from Buckley v. Valeo, 424 U.S. 1, 25-27 (1976) through McConnell v. FEC, 540 U.S 93, 94-95 (2003). Davis does not dispute that setting the levels of those contribution limits is a matter of legislative discretion, so long as they are not set so low that it is impossible to raise sufficient funds to be heard. Buckley, 424 U.S. at 30; Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 397 (2000); Randall v. Sorrell, __ U.S. __, 126 S. Ct. 2479, 2492 (2006).[2] But the anti-corruption purpose is served by whatever limits the legislature finds appropriate. Accordingly, the fundamental premise of Davis's argument – that the provisions of the Millionaires' Amendment that determine the applicable level of the contribution limits have no "nexus" to the governmental interest in avoiding corruption – is simply false.

To be sure, Congress's adjustment of the contribution levels was the result of balancing other compelling purposes with the underlying anti-corruption purpose of all the contribution

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[1] Davis complains that the Commission's use of the word "relax" is "Orwellian" (Davis Opp. 16) "wordplay" (id. at 4). In fact, it was Davis himself who first described the Millionaires' Amendment as "relaxing" the contribution limits (Complaint ¶¶ 5, 7, 14, 20, 22, 44; Davis Br. 18), and he does so again in a different part of his Opposition (p. 28). Senator McCain also used this word to describe the Amendment (FEC Br. 14). So despite Davis's heated rhetoric, there does not appear to be any serious dispute that this is an accurate description of the Amendment's impact.

[2] Davis does not assert that the general contribution limits applicable to him under the Millionaires' Amendment are too low under this standard; indeed, he cannot make such an argument since Buckley upheld contribution limits that were much lower.

limits in the Act. As we have shown (FEC Br. 11-16), Congress carefully considered how to accomplish those other compelling purposes without unduly weakening the anti-corruption purpose of the contribution limits. As a result, the Amendment does not apply unless and until a candidate spends more than $350,000 in personal funds; it relaxes the contribution restrictions only for political parties and individuals, not for corporations, unions, foreign nationals or political committees; and it retains limits even for individuals, albeit at a somewhat higher level. "This amendment deals with very regulated, very much disclosed hard money. It basically builds on the current system. Where there is most accountability in the system today, and where we have had the fewest problems today is with hard money and with individual donors." 147 Cong. Rec. S2536-02, S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). Davis quotes opponents of the Amendment (Opp. 2, 29-30) who argued that its relaxing of contribution limits was contrary to the spirit of the McCain-Feingold bill and would be bad policy. But Senator McCain himself supported the Amendment based on his conclusion that it represented an appropriate balance among important competing congressional purposes. See FEC Br. 14 (quoting Sen. McCain).[3]

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[3] Contrary to Davis (Opp. 27-31), the Commission has relied upon legislative history as evidence of Congress's purposes in enacting the Millionaires' Amendment, not regarding its construction. The Supreme Court has done the same. See, e.g., McConnell, 540 U.S. at 155, 185 n.71. It is the statements of the proponents of the Amendment that explain the reasons Congress enacted it, not the views of opponents of the provision whose arguments failed to convince a majority to accept their position. See D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436, 445 n.40 (D.C. Cir. 1970) ("[t]he statements of proponents are much more likely to portray an accurate representation of Congress' intent than are the views of the opponents"); NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 66 (1964) ("[i]n their zeal to defeat a bill, [opponents] understandably tend to overstate its reach").

Davis's reliance (Opp. 30) on a House committee report as "the most compelling piece of legislative history available" overlooks the fact that this report did not propose the Millionaires' Amendment, which was instead introduced later during debate. See FEC Br. 4. A committee report is persuasive evidence of congressional intent when it "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed

B. The Millionaires' Amendment Also Serves Other Compelling Governmental Interests

Davis barely responds (Opp. 5-6, 8) to our showing (FEC Br. 3-7, 12-13) of multiple interests served by the Amendment that have already been recognized as compelling.[4] The very makeup of the Congress is at stake in federal election campaigns, and public confidence in the integrity of American democracy and government depends upon Congress's ability to maintain public confidence in the fairness and integrity of the system for choosing Congress's membership. While Davis's response does little to counter any of the compelling interests we discussed, Davis does not even question Congress's conclusion, confirmed in Professor Steen's expert report (FEC Ex. 8), that the statute as modified by Buckley had created an incentive for political parties to recruit candidates based on wealth rather than merit and had discouraged those without personal wealth from running for office.[5] Nor does Davis dispute that correcting these

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legislation," Zuber v. Allen, 396 U.S. 168, 186 (1969), which was not the case here. When legislation is proposed during floor debate, it is the sponsors' explanations, upon which we have relied, which are the "authoritative indications of congressional intent," North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982). In any event, Davis misconstrues the language he quotes from the committee report; the disparity it notes is between Senate candidates and House candidates, not between self-funders and their opponents.

[4] The Supreme Court has recognized that, in addition to avoiding the quid pro quo corruption on which Davis focuses, Congress has a compelling interest in combating "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth" that have "no correlation to the public's support" for the spender's political views. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990). While Austin addressed expenditures by corporations, we have shown that Congress sought to address a similar public perception that the campaign process had been "distorted" by the "immense aggregations of wealth" used by wealthy candidates, whose personal funds (unlike contributed funds) have "no correlation to the public's support" for the candidate's views. Id.

[5] Davis objects (Response to FEC's Statement of Material Facts ¶¶ 41 - 55) to Professor Steen's expert report because it was "produced after" the Millionaires' Amendment was adopted, but the Supreme Court has routinely relied upon such post-enactment expert reports in deciding constitutional challenges to the Act. See FEC v. Colorado Republican Federal Campaign Committee ("Colorado II"), 533 U.S. 431, 450, 451, 470 (2001) (relying on expert reports from

incentives serves compelling governmental interests; indeed, there can be no serious doubt that Congress has a compelling interest in trying to ensure that its statutes do not create perverse incentives that discourage the selection of candidates for Congress on the basis of merit and discourage otherwise meritorious candidates without personal wealth from even trying to run against wealthy candidates. Davis has nothing whatever to say about this compelling governmental interest for enacting the Millionaires' Amendment, and the conclusion that a statute is fashioned to serve a compelling governmental interest is alone sufficient to find it facially constitutional under any standard of constitutional review. [6]

C. The Millionaires' Amendment Was Enacted To Reduce The Disparate Impact Of The Act Favoring Self-Financed Candidates

In arguing that the Millionaires' Amendment unfairly burdens his ability to engage in campaign speech using his own wealth, Davis once again relies upon a mischaracterization that ignores the Amendment's context in the statute of which it is a part. As discussed more fully in our opening brief (FEC Br. 11-13), the FECA was originally designed to provide equal opportunities for opposing candidates to accumulate campaign funds by placing limits on all sources of funds, including the candidate's personal wealth. After the invalidation of that limit

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Professors Corrado, Sorauf and Krasno); McConnell v. FEC, 540 U.S. 93, 124, 128, 146, 148, 155, 156, 165, 168, 194 (2003) (relying on expert reports from Professors Mann, Sorauf, Krasno, Magleby and Green).

[6] Contrary to Davis's assertions (Opp. 5), there is nothing "paternalistic" about Congress's interest in maintaining public confidence in the fairness and integrity of the electoral process. We have shown that the public perception that immense personal wealth can sometimes determine who is nominated and elected to office (see FEC Facts ¶¶ 12-13, 18, 21-23, 34, 38, 40) is not an illusion; a party's recruitment of candidates on the basis of wealth rather than merit, for example, has nothing to do with voters being "taken in by an inferior candidate in a contested election based solely on that candidate's wealth" (Davis Opp. 5). The Millionaires' Amendment is designed to provide candidates opposing self-financers an opportunity to accumulate funds to get their message to voters; it is not intended to encourage voters to cast their votes for or against any candidate.

in Buckley, however, there was a class of candidates who did not need to rely upon statutorily limited sources of campaign contributions because of their extreme personal wealth, which they were found to have a constitutional right to spend on their campaigns without limit.

Thus, prior to enactment of the Millionaires' Amendment, there was a substantial disparity in the effect of the statute's contribution limits on wealthy candidates who could finance their own campaigns with personal wealth unlimited by the statute, and the effect on candidates whose campaigns were entirely dependent upon contributions restricted by the statute. While the contribution restrictions on their face applied equally to both classes of candidates, the wealthy candidates relying on their own personal wealth did not need such contributions to finance their campaigns.[7] Davis's portrayal of the Millionaires' Amendment as creating an unfair disparity ignores the fact that the Amendment was designed to ameliorate a disparity in campaign finance regulation that was already built into the statute.

Accordingly, the question before the Court is not whether there can be a disparity in the statute's treatment of opposing candidates, as Davis would argue, for disparity is inherent in the constitutional right of wealthy candidates to use unlimited amounts of their own money. Instead, the question is whether Congress can adjust the statute to reduce, if not eliminate, the existing disparity otherwise favoring wealthy candidates willing to use their personal wealth to finance their campaigns. While it is understandable that Davis prefers the previous disparity that benefited wealthy self-financers like himself, he has cited no authority whatever indicating that reducing this benefit is beyond Congress's authority.

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[7] "'E]quality can be denied when government fails to classify, with the result that its rules or programs do not distinguish between persons who . . . should be regarded as differently situated. So it was with the majestic equality of French law, which Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris.'" Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1103 n.2 (S.D. Cal. 1999) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988)).

As we have shown, the Act still does not entirely eliminate the advantage that self-financing candidates have over candidates without personal wealth because even under the Millionaires' Amendment they alone have a ready source of campaign funds that is not limited at all by the statute. The Supreme Court has repeatedly confirmed that "Congress is fully entitled to consider . . . real-world differences . . . when crafting a system of campaign finance regulation." McConnell, 540 U.S. at 188. Davis's claim that his acknowledged constitutional right, undiminished by the Millionaires' Amendment, to spend an unlimited amount of his personal wealth on his campaign somehow precludes Congress from adjusting his opponent's contribution limits to reduce this real-world disparity in their opportunities to communicate with the electorate has no support in the Buckley decision, or in any other case he cites.

D. The Millionaires' Amendment Provides Ample Opportunity For A Self-Financing Candidate To Build A Competitive Campaign Treasury

Davis again asks the Court to ignore the effect of the statute as a whole when he argues (Opp. 17) that the Court should compare the amount of a self-financer's personal expenditures with the amount of an opponent's funds representing contributions from supporters under the statutory limits. Under the actual operation of the statute, all candidates are equally entitled to raise as much money as they can in contributions from supporters, subject to the general contribution restrictions in the statute. This may result in one candidate accumulating much more money than the other, but that result is not unfair because in these circumstances "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." Buckley, 424 U.S. at 56.

Contrary to Davis's argument (Opp. 2, 6-7, 16), Congress has not sought in the Millionaires' Amendment to level the playing field in the sense of trying to ensure that both

candidates have equal financial resources, but only in the sense of providing all candidates with a fair opportunity to accumulate a competitive campaign treasury. The effect of the Millionaires' Amendment is only to provide a candidate opposing a self-financing candidate additional sources that he can solicit for campaign funds, which in almost all circumstances cannot total more than the amount of personal wealth the self-financer diverts to his own campaign treasury. As with the general contribution limits themselves, the opposing candidate could end up with more or less funds overall to spend than the self-financer; the Amendment provides an opposing candidate only an opportunity to solicit funds from individuals in excess of the normal contribution limits (and/or coordinated expenditures from his party) to match the personal wealth actually used by the self-financer, which is not subject to contribution limits at all.

Davis's comparisons (most notably in the LaTourette example (Opp. 25-27), discussed infra, p. 10 n. 8) between a self-financer's personal expenditures and his opponent's entire campaign fund is, therefore, inapt. The opponent's campaign treasury is made up of statutorily limited contributions, and the statute permits the self-financer an equal opportunity to raise such contributions. Accordingly, the relevant comparison is between the self-financer's opportunity under the statute to use both contributions under the general limits and personal wealth to finance his campaign, and the opponent's opportunity to use both contributions under the general limits and contributions under the increased limits of the Millionaires' Amendment (if anyone makes such contributions) to finance his campaign. Because in most circumstances the total amount of contributions that the opponent of a self-financed candidate can accept under the increased limits will not exceed the amount of the self-financed candidate's personal expenditures, the statute as a whole gives the self-financer an opportunity to accumulate campaign funds that is at least equal to that of his opponent.

Davis's own decision not to seek substantial amounts of contributions does not alter this conclusion. Davis is entitled to solicit contributions under the statutory limits to the same extent as his opponent and he can use those contributions in addition to his personal wealth to finance his campaign. His decision to forgo such contributions, whatever his motive for doing so, does not make the statute unconstitutional. Any resulting inequality in funds "stems not from the operation of [the Millionaires' Amendment], but from [his] own personal 'wish' not to solicit or accept large contributions, i.e., [his] personal choice." McConnell, 540 U.S. at 228. Such a claim of competitive injury is not "'fairly traceable' to [the statute]." Id.

This fuller picture of the Act's entire effect on the fundraising opportunities of competing candidates also demonstrates why Davis's criticism of the details of the calculations involved in the application of the Millionaires' Amendment are actually irrelevant to this facial constitutional challenge. Most of those criticisms focus on the statute's treatment of funds raised before the election year, a provision that we have shown (FEC Br. 30-31) was adopted to limit the benefit of the Millionaires' Amendment for incumbents who have an advantage in raising funds before the campaign year begins. We have shown (FEC Br. 32) that incumbents have only been involved in a small minority of the campaigns subject to the Millionaires' Amendment, and even in those few campaigns very little additional money has actually been raised under the Amendment by the incumbent.

Accordingly, even if it is assumed that the Millionaires' Amendment could one day be found unconstitutional in its application to a campaign in which an incumbent is shown to have actually obtained the sort of unfair advantage Davis hypothesizes, such a possibility cannot support the facial challenge to the statute before this Court. "The fact that [the statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render

[it] wholly invalid." Rust v. Sullivan, 500 U.S. 173, 183 (1991) (citation omitted). Davis's explicit abandonment of any reliance upon a disparity of treatment between incumbents and self-financing challengers (Opp. 33) further confirms that the calculation provisions that Davis previously argued would unfairly benefit incumbents against self-financed challengers are irrelevant to his facial challenge to the Millionaires' Amendment.[8]

II. THE MILLIONAIRES' AMENDMENT DOES NOT LIMIT A CANDIDATE'S FREEDOM TO SPEND UNLIMITED AMOUNTS OF HIS PERSONAL FUNDS ON HIS CAMPAIGN

We have demonstrated that the Millionaires' Amendment imposes no restriction on a self-financing candidate's right to use an unlimited amount of his own funds for campaign speech. The Amendment also does not penalize Davis because it makes no change in the amounts he may raise under contribution limits that have been in effect for nearly 30 years. Rather than imposing any restriction on Davis, the Millionaires' Amendment only provides to his opponent the opportunity to raise funds from individuals and political parties, subject to relaxed limits, and thus it seeks to increase speech and encourage public participation in the political process, rather than restrict Davis's speech. This approach does not run afoul of Buckley's

[8] Unable to find a campaign in which an incumbent has actually used the Millionaires' Amendment to the extent he alleges is possible, Davis dwells at length (Opp. 25-27) on the 2004 LaTourette campaign, in which he argues that LaTourette could have raised enough additional money under the Millionaires' Amendment to overwhelm his opponent's personal spending, even though he did not actually do so. Even if LaTourette had raised the full amount he was allowed, LaTourette's opponent also could have raised contributions under the statutory limits to augment her own personal campaign fund, but either chose not to do so or lacked sufficient supporters willing to contribute. This example also raises at least the theoretical possibility that the Millionaires' Amendment is self-limiting in practice, because incumbents with particularly large campaign treasuries will not feel the need to seek additional funds that can only be spent on a campaign in which they are already well enough financed. In either case, Davis's exclusive reliance upon this hypothetical example, in the face of record evidence that no incumbent has actually obtained the overwhelming fundraising advantage Davis postulates, provides no support for his facial challenge to the statute. See Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 461 (11th Cir. 1996) ("As for the League's hypothesized, fact-specific worst case scenarios, we also decline to accept the facial challenge based on these perceived problems").

rationale, for that decision held only that leveling the playing field is an insufficient basis for placing limits on a candidate's use of his own funds for speech; Buckley did not suggest that Congress could not legitimately serve this purpose by encouraging more speech by candidates lacking personal wealth.[9]

Davis's response to the Commission's showing that his First Amendment right to spend his own money is not restricted by the language of the Millionaires' Amendment rests entirely upon a misreading of the First Circuit's decision in Vote Choice v. DiStefano, 4 F.3d 26 (1st Cir. 1993). Davis claims that the Millionaires' Amendment punishes him for spending his own money on his campaign because "'any benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office.'" Opp. 3-4 (quoting Vote Choice, 4 F.3d at 38). But the Vote Choice court said this only in explaining why the allegation of punitive effect was a meaningless tautology, finding that it "proves too much" in the context of a "head-to-head election [which] has a single victor." Id. Instead, in reviewing a campaign finance law that imposed a $2,000 contribution limit on qualifying publicly funded candidates, and a $1,000 limit on non-qualifying candidates, the court looked to whether there was anything "penal" about the $1,000 contribution limit and whether there was any legislative history or other evidence to suggest that the provision had a punitive purpose. Finding none, the court rejected the plaintiff's First Amendment claim, concluding "[w]here, as here, a non-

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[9] Davis claims (Opp. 11-12) that if Congress is justified in raising the contribution limits for the opponents of self-financing candidates, "it could decide that the independent expenditures of registered Libertarians exerted too much influence over elections and that these superior expenditures 'drowned out' opposing views," and Congress could "then selectively 'relax' limits on a candidate of virtually any other stripe to 'level the playing field.'" Such a statute would plainly represent impermissible viewpoint discrimination which, we have already explained, the Millionaires' Amendment does not. See FEC Br. 21 n.12.

complying candidate suffers no more than 'a countervailing denial,' the statute does not go too far." Id. at 39 (quoting Buckley, 424 U.S. at 95).[10]

In this case, Davis does not dispute that the contribution limits that apply to his own fundraising – the $2,100 individual limit in 2 U.S.C. 441a(a)(1), the party coordinated expenditure limits in 2 U.S.C. 441a(d), and the overall individual limit in 2 U.S.C. 441a(a)(3) – are constitutional. Davis also has not identified any legislative history that could support a claim that Congress intended to penalize self-financing candidates when it adopted the Millionaires' Amendment, nor has he submitted any empirical evidence suggesting that the Amendment has had any practical effect on the campaigns of self-financing candidates that could be viewed as a penalty for engaging in such speech. Thus, if Vote Choice is as dispositive as Davis asserts, it actually supports the Commission's position that the Millionaires' Amendment imposes no cognizable penalty on his exercise of First Amendment rights.[11]

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[10] Davis's reliance (Opp. 6 n.3, 12) upon Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) is equally misplaced. There the Supreme Court held unconstitutional a right-of-access statute that forced a newspaper to publish responding views with which it disagreed. The Court found that the statute compelled speech from the newspaper against its will and penalized the newspaper by imposing additional costs and directions on how to use its space. The Court explained that a newspaper faced with these burdens "might well conclude that the safe course is to avoid controversy," and so "political and electoral coverage would be blunted or reduced." Id. at 257 (footnote omitted). The Millionaires' Amendment, by contrast, does not require the self-financing candidate "to [say] that which [he] would not otherwise [say]," see id. at 256, make him bear any extra costs, or intrude in any way into his control over what and how much he says on his own behalf. Id.

[11] Davis also appears to argue (Opp. 15) that the Millionaires' Amendment constitutes a penalty because it is like the statute at issue in Kennedy v. Gardner, 1998 U.S. Dist. Lexis 23575 (D.N.H. 1998), in which candidates who did not agree to expenditure limitations were compelled to disclose that fact on petitions they had to file in order to appear on the ballot. Id. at *1. In that case, however, the district court's conclusion was based on the restriction imposed by the statute on the non-participating candidate's petitioning to qualify for the ballot, which the court concluded was "coercive." Id. at *12. In contrast, the Millionaires' Amendment places no restriction on Davis's right to raise contributions – it permits Davis to accept contributions from others in the same amounts as he would have been permitted had he not chosen to spend more than $350,000 of his personal funds in support of his campaign.

Instead of explaining how the Millionaires' Amendment operates to suppress any of his own speech, Davis seeks only to distinguish the cases the Commission has cited (see n.12, infra) in which other federal courts have determined that similar statutes impose no First Amendment burden. Davis argues that these cases involved a "quid pro quo" in return for restricting a candidate's First Amendment rights, while the Millionaires' Amendment provides no "quo" for self-financing candidates. In fact, these cases involved statutes providing higher contribution limits for those candidates who agreed to accept expenditure limits; none of them involved any quid pro quo for the opponents of the candidates receiving the higher limits, who would be the analogs to the self-financing candidates in this case. Thus, Davis's claim (Opp. 15) that the Millionaires' Amendment "extracts only a 'quid'" from him, with no corresponding "quo" does not distinguish the cases cited by the Commission. In all these cases, the claim that Davis makes here – that his First Amendment rights are burdened because his opponent receives a benefit or incentive from the statute – was squarely rejected by the courts.[12]

It is not any supposed "bargain" in the Millionaires' Amendment that is "illusory," as Davis claims (Opp. 16); what is illusory is the burden on his First Amendment rights. Other than

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[12] See Daggett v. Commission on Gov't Ethics and Election Practices, 205 F.3d 445, 464-65 (1st Cir. 2000) (upholding statute that provided public matching funds to qualifying candidate when independent expenditures were made against him or on behalf of his non-qualifying opponent); Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998) (where the statute provided 2-1 public matching funds for candidates who agreed to limit campaign expenditures, upholding a provision that waived the expenditure limit when a non-participating opponent raised funds in excess of that amount); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1551 (8th Cir. 1996) (where the statute provided public financing to candidates who, inter alia, agreed to limit overall expenditures, upholding a "waiver" provision that raised the agreed-to expenditure limitation when a privately financed opponent spent in excess of the limit); Vote Choice, 4 F.3d at 39 (upholding statute that permitted candidates who agreed to accept public funding and limit their expenditures to accept $2,000 contributions, while limiting non-participating opponents to accepting $1,000 contributions); Kennedy v. Gardner, 1999 WL 814273, *8 (upholding statute that permitted candidates who agreed to limit overall expenditures to accept $5,000 contributions and limited non-participating opponents to accepting $1,000 contributions).

the reporting obligations contained in the Millionaires' Amendment, the only provision of law that applies to Davis himself that is relevant to this case is 2 U.S.C. 441a(f), which requires him to abide by the generally applicable contribution limits. While it is true that Davis's opponent is permitted to accept some contributions under more relaxed limits, Davis does not really want an equivalent opportunity to raise contributions under higher limits since he has made a campaign issue out of his lack of interest in receiving any contributions. See Jill Terreri, Reynolds' campaign chest swells as Davis spends his own money, NIAGARA GAZETTE, http://www.niagara-gazette.com/siteSearch/apstorysection/local_story_198205331.html. Instead, what he wants is to reduce the amount of contributions that his opponent is permitted to accept in order to reduce his opponent's ability to speak and to retain for himself the campaign advantage of his personal wealth. Thus, it is Davis who is seeking to restrict campaign speech and Congress that has sought to expand it.

The public financing cases we have cited held that even statutes that directly provided public funds to qualifying candidates did not unconstitutionally restrict the speech of a non-qualifying opponent (FEC Br. 19-20). The Millionaires' Amendment does not, however, go that far in assisting the self-financing candidate's opponent. The Amendment does not give any public funds or other direct support to any candidate, as the public financing statutes at issue in those cases did. At most, the Millionaires' Amendment permits a candidate opposing a self-financer the opportunity to solicit additional contributions in increased amounts and to accept party coordinated expenditures in an increased amount. See 2 U.S.C. 441a-1(a)(3). The opposing candidate can obtain no increased contributions under the Amendment unless he can convince contributors to give that much more to his campaign, and he can receive no increased coordinated expenditures unless his party has the money to spend and is willing to spend it on his

campaign. The data obtained since the Millionaires' Amendment went into effect indicates that party committees have so far been unwilling or unable to make any increased coordinated expenditures in such campaigns (FEC Facts ¶ 53), and that no candidate has come close to actually being able to raise the amount he is eligible to under the provision. Id. at ¶¶ 63-65, 68-69, 73, 76, 81, 83, 85, 87-88. Thus, the mere opportunity to raise additional funds under the Millionaires' Amendment is even less like a penalty on a self-financed opponent than the automatic grant of public funds to one candidate under the public financing statutes.[13]

Davis argues that the Millionaires' Amendment is constitutionally infirm because the relaxing of the contribution limits for an opposing candidate is triggered by the self-financing candidate's "decision to exercise his fundamental First Amendment right to expend funds on his own behalf" (Opp. 4). The whole purpose of the Millionaires' Amendment, however, is to ameliorate what Congress found to be the statute's unfair effect on a candidate trying to compete with another candidate who actually uses large amounts of personal funds to finance his campaign. Thus, keying the relaxing of the opponent's contribution limits to the self-financing candidate's actual expenditure of personal funds is the best way to ensure that the Millionaires'

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[13] In arguing for strict scrutiny review of his Equal Protection claim (Opp. 33-34), Davis misleadingly connects quotations from separate sections of Buckley. In his first quotation (Opp. 33, quoting Buckley, 424 U.S. at 15) (citation omitted), the "constitutional guarantee" that the Court said was particularly applicable "'to the conduct of campaigns for political office'" was the First Amendment, not the Equal Protection guarantee of the Fifth Amendment. The section of Buckley that actually addressed the claim that the contribution limits unconstitutionally discriminated between incumbents and challengers and between major and minor parties, 424 U.S. at 30-33, contains no reference to strict or exacting scrutiny. Instead, the Court repeatedly emphasized the challengers' failure to support their facial challenge with evidence that one class of candidates would invariably be disadvantaged by the contribution limits. See, e.g., 424 U.S. at 32 ("[t]here is no such evidence to support the claim that the contribution limitations . . . discriminate against major-party challengers"); id. at 34 ("the record is devoid of support for the claim that the [contribution limits] will have a serious effect on . . . minor-party and independent candidacies"). Davis has similarly failed to present any evidence of actual disadvantage to the ability of self-financing candidates to campaign for office, relying instead entirely upon the kind of speculation and theoretical arguments that the Buckley decision rejected.

Amendment is narrowly tailored to serve its precise purpose, without permitting the self-financer's opponent to engage in increased fundraising in advance of, or in excess of, the actual personal spending Congress wanted to offset. Davis cannot reasonably argue that the statute's narrow tailoring to serve Congress's compelling interests makes it unconstitutional. He posits no way in which Congress could have accomplished this purpose in a more narrowly tailored manner than using a candidate's actual personal expenditures as a trigger. In these circumstances, Davis's argument is reduced to the assertion that Congress cannot legislate at all to alleviate the disparate impact of its statutory contribution limits no matter how compelling that interest may be, an extreme position that is unsupported by any of the cases he cites.

III. THE DISCLOSURE REQUIREMENTS IN THE MILLIONAIRES' AMENDMENT ARE NOT UNCONSTITUTIONAL

As explained in our opening brief, the disclosure provisions of the Millionaires' Amendment do not require the disclosure of any information that could be thought to imperil either the freedom to associate or to speak, which was the case in Buckley. Indeed, since all of the information at issue would have to be disclosed eventually under other provisions of the Act, the primary impact of the Millionaires' Amendment is in its timing rather than in the disclosure of otherwise confidential information. FEC Br. 26.

Davis does not seriously dispute this. He makes the vague assertion (Opp. 18-19) that the timing of the initial declaration of intent to spend in excess of the $350,000 threshold under the Millionaires Amendment creates some sort of "tactical" disadvantage by "allow[ing] a contribution-based opponent to use this information to plan her own fund-raising and

expenditures accordingly."[14] But he never explains why the complementary disclosure by other candidates in their required declarations of intent to spend less than $350,000 in personal funds does not provide an equivalent basis for an opponent to plan his campaign financing.[15] Moreover, because of "the First Amendment interest in free and open discussion of campaign issues," the Supreme Court in McConnell was willing to assume only "for argument's sake" that the Constitution includes any "form of protection against premature disclosure of campaign strategy," 540 U.S. at 242-43. Davis offers no support whatever for his assumption that the timing of such disclosures raises any genuine constitutional question.

More fundamentally, Davis offers no evidence that self-financing candidates prefer to keep their plans to finance their own campaigns secret. For example, he has not disputed our showing (FEC Br. 12) that advance disclosure by candidates of an intent to self-finance often plays a large role in political party recruiting efforts and in discouraging other candidates from running, as Congress found and Professor Steen's expert report confirms. Davis himself publicly proclaimed his intent to spend large amounts of personal funds to finance his own campaign

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[14] Our opening brief (FEC Br. 24 n. 13) questioned Davis's standing to challenge the requirement of an initial declaration of intent because he had filed his own declaration of intent well before initiating this lawsuit. Although it is Davis's burden to clearly demonstrate his standing to litigate each of his constitutional claims, Davis has not even addressed this point. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n. 4 (1992), FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1990).

[15] Davis complains (Opp. 19) that a non-self-financing candidate is not "required to state the total amounts of all funds [from others] that she plans to raise and spend on her campaign," but the self-financing candidate is also not required to disclose such a prediction, even though self-financing candidates can, and often do, raise substantial amounts of contributions to augment their personal funds.

even before he filed his declaration of intent with the Commission.[16] Thus, Davis has provided no factual basis for claiming a tactical disadvantage from the premature disclosure of information that he or other self-financing candidates would normally keep secret.[17]

Beyond these groundless claims about the initial declaration of intent, Davis's claims of unconstitutional burden from the disclosure provisions amount to nothing more than the mere annoyance of filling out the forms, having nothing to do with any constitutional sensitivity of the information to be disclosed. He cites no authority for questioning the constitutionality of a disclosure provision because of the mere burden of submitting forms. But even if placing on one candidate a substantially greater burden of filing forms might be thought to raise constitutional questions, we have already demonstrated (FEC Br. 27 n.16) that the opponent of a self-financed candidate has an equivalent number of disclosure forms to file. Davis asserts (Opp. 16-23) that the forms required of him are more "intrusive" (id. 22 n.14), but he never explains why that might be so. Indeed, we demonstrated in our opening brief (FEC Br. 25-27) that these disclosure provisions require less information from Davis than other disclosure requirements in the Act that were upheld in McConnell and Buckley, and on a schedule that is not more onerous.

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[16] The record indicates that Davis's stated intent to self-finance convinced one potential primary opponent in 2004 to forgo running against him (FEC Ex. 8 at 14 (FEC Facts ¶ 48)), and the website for Davis's 2006 campaign features a press release from March 2006 stating his intention to finance his own campaign. See http://www.jackdavis.org/new/press/2006.asp (visited on Oct. 3, 2006).

[17] Little need be said about Davis's lengthy reiteration (Opp. 17-22) of his claim that the notice of intent is difficult to comply with and places him in peril of criminal sanctions. The statute plainly does not require him to predict accurately how much of his personal wealth he will actually end up spending on his campaign; it only requires him to state his current "intent." Intent is subjective and does not involve predicting or anticipating circumstances that could lead him to change that intent in the future. Accordingly, the civil and criminal penalties in the statute are not in any way applicable to a candidate who honestly states his current intent, regardless of whether he later has a change in plans. Moreover, Davis does not respond to our showing (FEC Br. 24 n.13) that any uncertainty about the statute's requirements can be cleared up by asking for an advisory opinion from the Commission.

Even if Davis had been able to demonstrate that the information required to be disclosed by the Millionaires' Amendment is of the type that raises constitutional concerns, the disclosure requirements are supported by sufficient governmental interests to survive constitutional scrutiny. We have already demonstrated above and in our opening brief (FEC Br. 23-25) that the substantive provisions of the Millionaires' Amendment serve compelling governmental interests and that the disclosure provisions are essential for those substantive provisions to work. Accordingly, the disclosure provisions serve the same compelling interests as does the remainder of the statutory scheme of which they are a central component.

Davis does not deny that the disclosure provisions are essential to the proper operation of the Millionaires' Amendment, but argues (Opp. 21) that ensuring the proper operation of other statutory provisions is an insufficient interest to justify requiring disclosure. However, the Supreme Court held in Buckley, 424 U.S. at 68, that Congress had a compelling governmental interest in requiring disclosure of constitutionally sensitive information as "an essential means of gathering the data necessary to detect violations of the contribution limitations." Similarly, in Colorado II, 533 U.S. at 465 (2001), the Court found that limits on coordinated party expenditures were constitutional because they helped prevent circumvention of the Act's provisions limiting direct contributions to candidates. Like the disclosure provision upheld in Buckley and the coordinated party expenditure provisions upheld in Colorado II, the disclosure provisions in the Millionaires' Amendment serve the compelling governmental interest in implementing the substantive provisions of the Amendment, including not only the timing of the

relaxation of contribution limits, but also determining the cap on the amount that can be raised under the relaxed contribution limits by an opponent of a self-financing candidate.[18]

Davis tries (Opp. 21) to distinguish the decision in McConnell upholding the disclosure requirements for electioneering communications because the appellants in that case "made no assertion of one-sided application or divergent burdens based on a candidate's viewpoint." However, the relevant question is not whether Davis is making these claims, but whether there is any substance to them. We have already shown above and in our opening brief that the disclosure provisions of the Millionaires' Amendment are not "one-sided" because a comparable amount of disclosure is required of the self-financing candidate's opponent. We have also shown (FEC Br. 21 n. 12) that the statute draws no distinctions based on "a candidate's viewpoint"; it is only the amount of personal expenditures that makes a difference under the Amendment, regardless of the "viewpoint" of the candidate making those expenditures. Davis does not even respond to this showing, but simply ignores it and hopes the Court will do so as well.

In sum, Davis has failed to provide any factual or legal basis for concluding that the disclosure provisions of the Millionaires' Amendment require disclosure of any confidential,

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[18] While it appears that Congress would not have enacted these disclosure provisions but for their central role in the operation of the Millionaires' Amendment, those provisions also serve the recognized "governmental interest of 'shed[ding] the light of publicity' on campaign financing." McConnell, 540 U.S. at 231 (quoting Buckley, 424 U.S. at 81). See also id. at 237 (upholding a record-keeping requirement because it "will help make the public aware of how much money candidates may be prepared to spend on broadcast messages"). The initial declaration of intent, for example, makes the public (as well as other candidates and the Commission) aware at an early point that this campaign is likely (or is not likely) to be a Millionaires' Amendment campaign. The public can take this into account in evaluating the candidates during the subsequent campaign, while the Commission and opposing candidates and political parties can plan for their roles in implementing the Amendment's provisions in those campaigns likely to be affected, while paying less attention to those provisions in campaigns that are not likely to be affected.

constitutionally protected information, and in any event those provisions serve compelling governmental interests that satisfy any level of constitutional scrutiny.

CONCLUSION

For the foregoing reasons and those contained in our opening brief, this Court should grant the Commission's motion for summary judgment, deny plaintiff's motion for summary judgment, and dismiss the case.

Respectfully submitted,

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