UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

Colleen T. Sealander
Assistant General Counsel

Holly J. Baker
Attorney

Claire N. Rajan
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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Plaintiff Jack Davis has brought a facial challenge to the constitutionality of the so-called Millionaires' Amendment, Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155, 116 Stat. 81 (March 27, 2002) ("Section 319"), which added new provisions to the Federal Election Campaign Act ("Act" or "FECA") (codified at 2 U.S.C. 431-455). The Millionaires' Amendment permits an opponent of a candidate for the House of Representatives who contributes more than $350,000 in personal funds to his campaign to accept contributions from individuals in excess of the usual limits, 2 U.S.C. 441a(a), and allows the opponent's political party to make coordinated expenditures in excess of the usual limits, 2 U.S.C. 441a(d), if and when certain specified conditions are met. See generally 2 U.S.C. 441a-1. We demonstrate below that the Millionaires' Amendment is constitutional and consistent with Buckley v. Valeo, 424 U.S. 1 (1976), and that it does not infringe the First or Fifth Amendment rights of a candidate who chooses to finance his campaign with his personal wealth instead of small contributions from citizens.

BACKGROUND

I. PARTIES

A. Federal Election Commission

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), codified at 2 U.S.C. 431-455. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. 437c(b)(1); to make rules and issue advisory opinions, 2 U.S.C. 437d(a)(7) and (8), 437f, 438(a)(8); and to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2). Congress also gave the Commission exclusive jurisdiction to initiate civil actions in the United States district courts to obtain enforcement of the Act. 2 U.S.C. 437c(b)(1); 437d(a)(6); 437d(e).

B. Jack Davis

Jack Davis is an unopposed candidate for the 2006 Democratic nomination for the United States House of Representatives in New York's 26th District. Complaint ¶ 5, Davis Decl. ¶ 3, Davis 2d Decl. at ¶ 1. On March 23, 2006, Davis signed the Statement of Candidacy he filed with the Commission, which stated (after a later amendment) his intent to spend no personal funds in support of his primary campaign and to spend $1,000,000 in personal funds during the general election. FEC Ex. 1, 2. According to financial disclosure reports on file with the Commission, as of August 24, 2006, Davis had spent $939,280 in personal funds on his 2006 primary election campaign even though he is effectively unopposed. FEC Ex. 3. [1]

[1] New York employs a "fusion ballot" system in which a major party candidate may also be on the ballot for a minor party's primary election. Davis is also on the Independence Party primary ballot in the 26th District, running against Robert M. Pusateri. FEC Facts at ¶ 2.

Jack Davis was also a candidate for the same office in the 2004 election cycle, losing to then-incumbent Republican Thomas Reynolds, the same candidate Davis anticipates will again be his major party opponent in the 2006 general election. Complaint ¶ 2; Davis 2d Decl. ¶¶ 2, 5. During the 2004 general election, Davis made contributions and loans to his principal campaign committee, Jack Davis for Congress, totaling $1,257,280, but he never filed any of the required notifications of expenditures from personal funds required by the Millionaires' Amendment. See 2 U.S.C. 441a-1(b)(1)(C) and (D); FEC Ex. 11 at ¶ 5.

II. THE MILLIONAIRES' AMENDMENT

A. The Purposes Of The Millionaires' Amendment

Congress enacted the Millionaires' Amendment in order to address what it perceived as a long-standing inequity created when the Supreme Court invalidated provisions of FECA that placed a limit on the amount of personal wealth a federal candidate could spend on his campaign. Buckley v. Valeo, 424 U.S. 1, 51-54 (1976). The provisions struck down in Buckley limited privately financed Presidential and Vice-Presidential candidates to spending no more than $50,000 of their personal wealth on their campaigns, Senate candidates to $35,000, and most House candidates to $25,000. Id. at 51.[2] In the years since Buckley, increasing numbers of Congressional candidates have chosen to rely largely on their own personal wealth to finance their campaigns, rather than seeking financial support from constituents and other citizens. FEC Facts at ¶¶ 41-42.

However, Mr. Pusateri has not filed any reports with the Commission and unless he raises or spends in excess of $5,000 on his campaign he is not a "candidate" under FECA. 2 U.S.C. 431(2). See FEC Ex. 11 at 2.

[2] The Supreme Court upheld a $50,000 limit on use of personal wealth by presidential candidates who choose to participate in the presidential public financing system.

The Millionaires' Amendment originated on the floor of the Senate during debate on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 116 Stat. 81 (2002). See 147 Cong. Rec. S2433-02, S2434 (daily ed. Mar. 19, 2001).[3] A variation fashioned to apply to elections for the House of Representatives was added during the House debates. 148 Cong. Rec. H369-01, H371-76, H386-92, H402-11, H413-16, H429-432 (daily ed. Feb. 13, 2002).[4] Congress had several reasons for enacting the Millionaires' Amendment. First, it wanted to provide privately financed candidates who are dependent on statutorily limited contributions from citizens an opportunity to compete on a more equal footing when running against opponents with sufficient personal wealth to finance their own campaign.[5] As one of the provision's original sponsors in the Senate explained:

> The Buckley decision has effectively created a substantial disadvantage for opposing candidates who must raise all campaign funds under the current fundraising limitations . . . So you have the situation where the candidate who cannot self-finance has to raise money in a maximum of $1,000 increments but has to then go up against another candidate who can put in maybe an unlimited amount of money – millions and millions of dollars . . .

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[3] The Senate debate on the Millionaires' Amendment is reported at 147 Cong. Rec. S2433-02, S2434-69 (daily ed. Mar. 19, 2001); 147 Cong. Rec. S2536-02, S2536-38, S2546-47 (daily ed. Mar. 20, 2001); 147 Cong. Rec. S2845-02, S2845-52 (daily ed. Mar. 26, 2001); 147 Cong. Rec. S3084-02, S3084-122, S3124-41 (daily ed. Mar. 29, 2001); 147 Cong. Rec. S3183-01, S3283-98 (daily ed. Mar. 30, 2001); 147 Cong. Rec. S3233-06, S3233-61 (daily ed. Ap. 2, 2001), 148 Cong. Rec. S2096, S2142, S2153 (daily ed. Mar. 20, 2002).

[4] "[This] is an amendment that allows House Members to have the same kind of amendment. It would be compatible with the Senate amendment. It works in harmony with it." 148 Cong. Rec. at H430 (Rep. Shays).

[5] The Millionaires' Amendment includes separate and similar (though not identical) provisions for elections to the United States Senate and to the House of Representatives, though the purposes of the two provisions are the same. Section 304 of BCRA, codified at 2 U.S.C. 441a(i), applies to Senate races, and Section 319, codified at 2 U.S.C. 441a-1, sets out the provisions applicable to House races. As a candidate for the House of Representatives, Davis does not have standing to challenge the constitutionality of the somewhat different BCRA provisions that apply only to Senate elections, nor does his opening brief address those provisions. Accordingly, this brief generally addresses only the statutory provisions that apply to campaigns for the House of Representatives.

> [E]veryone in the country is limited to $1,000 they can put into a candidate's campaign – everybody in the country except one person. That one person who has the ability to put money in, in an unlimited fashion, in an unlimited amount, is, of course, the candidate.

147 Cong. Rec. at S2537-38 (daily ed. Mar. 20, 2001) (Sen. DeWine).[6] See also 148 Cong. Rec. at H431 (Feb. 13, 2002) (Rep. Davis) ("This evens the playing field for candidates who are challenging millionaires or who are challenged by millionaires; the individual who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history").

Second, Congress sought to "address[] the public perception that there is something inherently corrupt about a wealthy candidate who can use a substantial amount of his or her own personal resources to win an election . . . ." 147 Cong. Rec. at S2538 (daily ed. Mar. 20, 2001) (Sen. DeWine). It acted to counteract the perception that "someone today who is wealthy enough can buy a seat" in Congress. 147 Cong. Rec. at S2547 (daily ed. Mar. 20, 2001) (Sen. DeWine). See also 148 Cong. Rec. at S2153 (Mar. 20, 2002) (Sen. Domenici) ("The large number of extremely wealthy candidates who spend large amounts of their own money to finance their campaigns reinforces this perception. Many people believe that candidates are attempting to buy their way into office"). See also FEC Facts at ¶¶ 11-14.

Finally, Congress intended the Amendment to reduce the financial disincentive for less wealthy candidates to run for office, and encourage political parties to select candidates on merit rather than personal wealth. Congress concluded that because of the Buckley decision, political

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[6] In 2002, when it adopted BCRA, Congress raised the maximum amount an individual may contribute to a candidate per election from $1,000 to $2,000 and indexed it for inflation. See 2 U.S.C. 441a. For the 2006 elections, the limit is $2,100. 11 C.F.R. 110.1(b); Notice, 70 Fed. Reg. 11658 (Mar. 9, 2005).

parties felt pressure to recruit not the best candidates, but those who could finance their own campaigns:

> [W]hat has happened is there has become a great search every election cycle, where both the Republicans and the Democrats go out and they don't look for people with great ideas. . . . What they look for and what the great search around the country is for is people who have money . . . The reality is that in the last several election cycles, both parties have looked around the country to try to find wealthy candidates who can self-finance their own campaigns.

147 Cong. Rec. at S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). See also id. at S2540 (Sen. McCain) ("as we know both parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate"). FEC Facts at ¶¶ 47-49.

> The only way a pure American democracy can work is if people have faith in the system and if they participate. That includes running for office. It is time to recognize that the realities of today's elections prevent many from participating.

148 Cong. Rec. at H430 (Rep. Capito).

The Millionaires' Amendment was designed to comport with the First Amendment as construed in Buckley by accomplishing those purposes without placing any restriction on the right of candidates to spend as much of their own wealth as they want to promote their candidacies. Rather than limiting a wealthy candidate's speech, the Amendment operates to increase public political debate by providing a candidate opposing a self-funded candidate a limited opportunity to engage in more communication with the electorate. Thus, as one of its sponsors explained, "[t]his amendment attempts to bring about equity and fairness and also, quite

candidly, to increase the opportunity for all candidates to get their ideas to the public." 147 Cong. Rec. at S2537 (daily ed. Mar. 20, 2001) (Sen. DeWine).

B. The Operation Of The Millionaires' Amendment In Campaigns For The House Of Representatives

In a nutshell, once one candidate passes a $350,000 self-financing threshold, the Millionaires' Amendment compares the amount of personal funds a candidate spends on his own campaign, combined with some of the receipts he has received from others, with the amount of personal funds that his opponent has spent on the opponent's campaign, combined with some of the receipts he has received from others.[7] If there is a sufficient discrepancy between the candidates' respective totals under this calculation, the candidate with the smaller amount may be entitled to solicit contributions from individuals in amounts no more than three times the usual contribution limit, 2 U.S.C. 441a(a)(1)(A), to solicit contributions from individuals who have already reached the statutory limit on their total contributions to all candidates during an election cycle, 2 U.S.C. 441a(a)(3)(A), and to coordinate with their political party on additional party expenditures that would otherwise be limited by 2 U.S.C. 441a(d),[8] in an aggregate amount roughly equal to the difference.

To make this financial comparison, the Millionaires' Amendment uses a complicated series of thresholds, calculations and definitions. First, there is a threshold of $350,000 in

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[7] An expenditure from personal funds includes a contribution from the candidate to his campaign made with personal funds, a direct expenditure made by a candidate using personal funds, loans made by a candidate using personal funds, and loans to the candidate's campaign secured by the candidate's personal funds. 2 U.S.C. 441a-1(b)(1)(A).

[8] Political parties are entitled to make unlimited independent expenditures in support of all their candidates, including those who self-finance. Colorado Republican Federal Campaign Committee, 518 U.S. 604, 618 (1996) (plurality opinion). Only expenditures actually coordinated with a candidate are limited by Section 441a(d). See FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 465 (2001).

personal spending by a candidate; the Amendment has no application to any House election campaign in which no candidate spends more than $350,000 in personal funds. If this threshold is passed, the opponent must calculate the "opposition personal funds amount" ("OPFA") to determine whether he is entitled to take advantage of the provision's increased limits under the Amendment. 2 U.S.C. 441a-1(a)(1).

The formula used to calculate the OPFA during the election year counts the expenditures of personal funds by each candidate, adds 50% of the aggregate receipts raised by each candidate during the year prior to the election, and compares the totals. 2 U.S.C. 441a-1(a)(2). Only if the calculation reveals that the opponent has raised and spent less of these funds than the self-financing candidate will he qualify to solicit additional financial support under the provision. The provision applies equally to all candidates, so even a self-financing candidate can qualify to raise extra funds if he is running against a self-financed opponent who has raised and spent even more under the OPFA formula. See FEC Facts at ¶¶ 79-88. The portion of this formula that takes into account a candidate's aggregate receipts during the non-election year – the "gross receipts advantage" provision – was added during the Senate debate for the purpose of reducing the potential benefit to an incumbent who has raised a substantial amount of contributions in the year before the election year. See 147 Cong. Rec. at S3194-95 (daily ed. Mar. 30, 2001). Senator Durbin explained that "we want to get as close to possible to a level playing field but not create incumbent advantage." Id. at S3192 (daily ed. Mar. 30, 2001) (Sen. Durbin).

C. The Proportionality Provision

Congress added a provision to the Millionaires' Amendment designed to avoid giving an unfair benefit to the opponent of a self-financing candidate. This "proportionality provision,"

2 U.S.C. 441a-1(a)(3)(ii), caps the amount of increased contributions and increased coordinated party expenditures a candidate may receive at 100% of the amount of the total OPFA disparity between the candidates.

> Proportionality is important because it really helps level the playing field from both directions so the wealthy candidate is not punished or is not inhibited from putting his or her own money into the campaign, which is very important. What this means . . . is that we try to increase free speech; we give that non-wealthy candidate the opportunity to get his or her message out. We do not punish the wealthy candidate. And we take care of that in this well-crafted amendment by saying how much that nonwealthy candidate can raise above . . . the limits . . . So the wealthy candidate, again, is not punished, is not inhibited, is not discouraged from putting in his or her own money.

147 Cong. Rec. at S2538 (daily ed. Mar. 20, 2001) (Sen. DeWine). Thus, if "parity is achieved, the regular contribution limits go back into effect." 148 Cong. Rec. at H430 (Rep. Capito). The Millionaires' Amendment includes other provisions that also serve this purpose. Thus, an opponent's eligibility to accept increased contributions ends if the self-financing candidate withdraws, 2 U.S.C. 441a-1(a)(4)(A), and the eligible candidate must return any contributions raised under increased limits that are unspent at that time. 2 U.S.C. 441a-1(a)(3), 441a-1(a)(4). The statute also ensures that contributions raised under increased limits cannot be carried over to any subsequent election by requiring that unspent funds be returned to donors within 50 days after the election for which they were raised. 2 U.S.C. 441a-1(a)(4).

D. The Millionaires' Amendment's Reporting Requirements

In order to enable a candidate to calculate during the campaign whether and when he is entitled to seek additional financial support from individuals, and to enable political parties to decide whether and when they can make additional coordinated expenditures, the Millionaires' Amendment includes three special reporting provisions for House elections. A candidate must disclose, within 15 days of becoming a candidate, the amount the candidate intends to spend in

personal funds in excess of $350,000. 2 U.S.C. 441a-1(b)(1)(B). Once a candidate actually spends more than $350,000 in personal funds on his campaign, he must file an "initial notification" of that expenditure within 24 hours of exceeding the threshold. 2 U.S.C. 441a-1(b)(1)(C). For each additional aggregate expenditure of $10,000 or more in personal funds, the candidate must file a notification within 24 hours. 2 U.S.C. 441a-1(b)(1)(D). These notifications must be filed with the Commission and provided to each opponent in the same election and the national party of each opponent. 2 U.S.C. 441a-1(b)(1)(F).

An eligible opposing candidate who elects to seek additional financial support under the Millionaires' Amendment is also subject to additional reporting requirements. See 11 C.F.R. 400.30 and 400.31. After receiving the self-financing candidate's initial or subsequent notification of expenditures from personal funds, the opposing candidate must, within 24 hours, notify the Commission and his political party of the OPFA. 11 C.F.R. 400.30(b). If the opposing candidate receives increased individual contributions and increased coordinated party expenditures equal to 100% of the OPFA, the opposing candidate must notify his political party and the Commission of that fact within 24 hours. 11 C.F.R. 400.31(e)(1)(ii). Political parties that make coordinated party expenditures under the Millionaires' Amendment in excess of the normal limits also must notify the Commission, as well as the candidate on whose behalf the party expenditure is made, within 24 hours. See 11 C.F.R. 400.30(c)(2).

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) mandates the

entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322-23.

Since this is a facial challenge to the Millionaires' Amendment, Davis confronts a "heavy burden," National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid. 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). See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984). "Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" Finley, 524 U.S. at 580 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). See also FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990) ("facial challenges to legislation are generally disfavored"). "To prevail, [Davis] must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." Finley, 524 U.S. at 580 (emphasis added).

II. THE MILLIONAIRES' AMENDMENT IS CLOSELY DRAWN TO SERVE COMPELLING GOVERNMENTAL INTERESTS

The Act's system of campaign contribution limits and prohibitions was originally designed to ensure that it applied equally to the campaign financing of all candidates running for the same office. "[T]he Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." Buckley, 424 U.S. at 31. While some candidates would inevitably end up with more campaign funds than others, the Act provided all with the same opportunity to raise campaign funds from supporters.

"Given the limitation on the size of outside contributions, 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." Id. at 56.

However, Buckley's invalidation of the statute's limit on candidates' expenditure of personal funds undermined the evenhandedness of the statute's system of limits on campaign financing. This decision altered the system by creating a class of candidates able to rely upon a source of funding – their own personal wealth – that is not subject to any of the statutory limits under which their opponents' campaign chests must be raised. The Supreme Court itself acknowledged that the "normal relationship" of financial resources to the size and intensity of a candidate's support "may not apply where the candidate devotes a large amount of his personal resources to his campaign." Id. at 56 n. 63.

The legislative history discussed above shows that the Millionaires' Amendment was enacted to ameliorate this distortion in the statutory scheme by relaxing (but not eliminating) some of the statutory limits on financial support for some candidates who are competing with candidates who choose to finance their campaigns with large amounts of their personal wealth. Congress concluded that the advantages in the existing system for wealthy candidates willing to finance their own campaigns had resulted in candidates without personal wealth being discouraged from running for office, political parties increasingly recruiting candidates on the basis of wealth rather than merit, and a public perception that wealthy candidates were able to use their own deep pockets to buy their way into office. See generally FEC Facts at ¶¶ 9-40. See also FEC Facts at ¶¶ 44-49. Congress sought to reduce these effects without interfering with a wealthy candidate's right to spend unlimited amounts of his own money to campaign for office, by enhancing the opportunity of an opposing candidate, in limited circumstances, to solicit

financial support under somewhat higher contribution limits than applicable when all competing candidates build their campaign funds with contributions subject to the statutory limits.

All of the goals Congress identified in adopting the Millionaires' Amendment represent compelling governmental interests well established in the law. The Supreme Court has long recognized that Congress has a compelling interest in preserving "'the integrity of our electoral process, and . . . the responsibility of the individual citizen for the successful functioning of that process.'" FEC v. National Right to Work Committee, 459 U.S. 197, 208 (1982) (quoting United States v. UAW, 352 U.S. 567, 570 (1957)). The Court has also recognized that broadening "public discussion and participation in the electoral process" are "goals vital to a self-governing people." Buckley, 424 U.S. at 92-93. Finally, the "[s]tate's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government" are also "weighty interests . . . in the context of partisan elections." First National Bank of Boston v. Bellotti, 435 U.S. 765, 787 (1978).

Davis argues (Memorandum of Points and Authorities in Support of Plaintiff Jack Davis's Motion for Summary Judgment ("Br.") at 14-15, 18, 27) that any relaxation of the contribution limits contravenes the Supreme Court's holdings in Buckley and its progeny that Congress is entitled to restrict contributions and coordinated expenditures in an effort to reduce corruption and the appearance of corruption. This argument turns those cases on their heads. The Supreme Court held that avoiding the actuality and appearance of corruption is a compelling interest that permits Congress to limit contributions, not that requires Congress to do so. See, e.g., Randall v. Sorrell, 126 S.Ct. 2479, 2492 (June 26, 2006) (plurality opinion) ("[T]hat rationale does not simply mean 'the lower the limit, the better'"). In fact, the Court has explicitly stated that determining the appropriate level of contribution limits is a matter of legislative

discretion that is not of constitutional moment unless the limit is so low as to make it impossible to accumulate sufficient funds to be heard. Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 397 (2000); Buckley, 424 U.S. at 30. Accordingly, while constitutional questions may arise if contribution limits are too strict, the Court has never recognized any constitutional restriction on a legislature's relaxing such a limit, as the Millionaires' Amendment does.

In the Millionaires' Amendment Congress did not abandon limits on contributions to candidates opposing self-financed candidates; it retained restrictions to avoid the appearance of corruption but relaxed them in order to serve the competing interests identified above.

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. [The Millionaires' Amendment] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits – despite their fundamental importance in fighting actual and apparent corruption – should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections.

148 Cong. Rec. at S2142 (daily ed. Mar. 20, 2002) (Sen. McCain). Such accommodation of competing interests is the norm rather than the exception in legislation and "[c]ourts . . . must respect and give effect to these sorts of compromises." Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 94 (2002) (citation omitted).

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). See also Buckley, 424 U.S. at 84 n.112 (exception from reporting requirements available only to incumbents "represents a reasonable accommodation between the legitimate and necessary efforts of legislators to communicate with their constituents and activities designed to win

elections by legislators in their other role as politicians"); id. at 36 ("provisions [excepting some volunteers' expenses from contribution limits] are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates").

The solution Congress devised in the Millionaires' Amendment was carefully crafted to target the problems it identified without unduly benefiting or burdening either self-financing candidates or their opponents. The provision applies only to the biggest self-financers, not every candidate who spends personal funds on his own campaign – self-financing candidates who spend $350,000 or less on their campaigns do not trigger application of the provision. As we have described supra at pp. 8-9, the proportionality provision of the Millionaires' Amendment, 2 U.S.C. 441a-1(a)(3)(ii), caps the amount of increased contributions and coordinated party expenditures that an opponent may accept, and thus in most circumstances prevents an opponent from raising more in additional funds under the provision than the self-financing candidate's expenditures of personal funds on his own campaign. In addition, under the Millionaires' Amendment the opponents of self-financing candidates remain subject to substantial statutory fundraising restrictions that help reduce the possibility of corruption or its appearance. Thus, the Amendment makes no change in the contribution restrictions on corporations, labor unions, foreign nationals, or political committees, and it only raises, but does not eliminate, the limits on contributions by individuals. Even the Amendment's waiver of the limit on coordinated party expenditures made pursuant to 2 U.S.C. 441a(d) is effectively capped by the overall limit imposed by the proportionality provision. See p. 7 n.8, supra. Moreover, in the 2004 elections, no political party engaged in additional coordinated spending under this provision in any

campaign, and none has done so to date in 2006. FEC Facts at ¶ 53.[9] Thus, the Millionaires' Amendment is closely drawn to address the compelling governmental interests Congress identified.

III. THE MILLIONAIRES' AMENDMENT DOES NOT RESTRICT SPEECH

A. The Millionaires' Amendment Places No Restrictions On A Candidate's Right To Spend His Own Money On Campaign Speech

Although the Millionaires' Amendment is narrowly tailored to serve compelling governmental interests that would satisfy strict scrutiny, in fact the Amendment accomplishes its goals without infringing a self-financing candidate's freedom to spend unlimited amounts of his own money to advocate his election to office. Like the public financing provisions upheld in Buckley, the Millionaires' Amendment does not "abridge, restrict, or censor speech," but rather is designed to "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." Buckley, 424 U.S. at 92-93 (footnote omitted). The statute places no restriction whatsoever on the amount of personal funds a candidate may use to support his own campaign, nor does it reduce the amount a self-financing candidate is entitled to raise from others if he chooses to self-finance. Instead it relaxes the limits on two types of contributions – individual donations and coordinated party expenditures – that can be made to opposing candidates who finance their campaign through contributions subject to the statutory

[9] Davis speculates (Br. at 14-15) that without specific limits on coordinated party expenditures, unscrupulous contributors may illegally "earmark" contributions made to the parties for coordinated spending in favor of their favorite candidate. But "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussions of such violations will be insufficient to police the contribution provisions." Buckley, 424 U.S. at 56.

limits. As Senator DeWine explained:

> [T]his amendment will enhance free speech . . . [T]he end result will be not that the candidate who is the millionaire will have a smaller megaphone – that millionaire who is putting in his or her own money will have the same megaphone they had before this amendment – but what it means is that the candidate who is facing that multimillionaire will also have the opportunity to have a bigger megaphone, to grow that megaphone. [I]t will put more money into the political system [and] the effect of that money will be to enhance the first amendment. It will be to enhance people's ability to communicate and get a message across without in any way hurting someone else's ability – namely the millionaire – to get their message across.

147 Cong. Rec. at S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine).

In drafting the Amendment Congress followed, rather than violated, the Supreme Court's teaching in Buckley. In that case the Court found unconstitutional provisions that placed a ceiling on the amount that a candidate, or any other person, could spend of his own money to advocate the election or defeat of candidates. The Court explained that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," so that the "First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." 424 U.S. at 48-49 (emphases added). The Court concluded that "the First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." Id. at 54 (emphasis added). Thus, the Buckley Court invalidated legislative ceilings on the expenditure of one's own money to advocate an election result, but it did not hold that the First Amendment forecloses Congress from seeking to enhance some people's opportunity for speech, so long as it does so without placing a limit on anyone's speech. For example, the Court contrasted its holding on expenditure limits from its earlier decision

upholding the FCC's "fairness doctrine" because "the presumed effect of the fairness doctrine is one of 'enhancing the volume and quality of coverage' of public issues." 424 U.S. at 49-50 n.55 (citation omitted). The Court also noted that "[l]egislation to enhance…First Amendment values" such as by "providing financial assistance to the exercise of free speech" is "the rule, not the exception." Id. at 93 n.127. The Court even found limits on overall campaign spending and upon spending from a candidate's personal funds to be constitutional, when they are applicable only to candidates who voluntarily choose to accept public financing to subsidize their campaign speech. 424 U.S. at 57 n.65, 85-109.

The Millionaires' Amendment leaves wealthy candidates entirely free to decide whether to rely on statutorily limited contributions from others to finance their campaigns or instead to use enough of their personal wealth to trigger their opponent's opportunity to seek additional financial support. In either event, the wealthy candidate remains entirely free to spend an unlimited amount of his personal fortune to communicate with the electorate. "Since the candidate remains free to choose between funding alternatives, he or she will opt for [limiting personal expenditures] only if, in the candidate's view, it will enhance the candidate's powers of communication and association." Republican National Comm. v. FEC, 487 F. Supp 280, 285 (S.D.N.Y.) (three-judge district court), aff'd, 445 U.S. 955 (1980). "[A]s long as the candidate remains free to engage in unlimited private funding and spending . . . the law does not violate the First Amendment rights of the candidate or supporters." Id. at 284. Whether to self-finance, how much to self-finance, and when to self-finance are all decisions the statute leaves within the

exclusive control of the self-financing candidate. The choice belongs to him, not to the statute, and without some governmental abridgement the First Amendment is not violated.[10]

Other federal courts have concluded that statutes permitting increased contributions to certain qualifying candidates do not unconstitutionally restrict the speech of their opponents. See Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) ("we have difficulty believing that a statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes any burden on first amendment rights"); Daggett v. Committee on Gov't Ethics and Election Practices, 205 F.3d 445, 464 (1st Cir. 2000) (plaintiffs "have no right to speak free from response"); Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998) ("a statutorily created benefit does not per se result in an unconstitutional burden"(internal quotes omitted)); Kennedy v. Gardner, 1999 WL 814273 *6 (D.N.H. 1999) (where a statute relaxed to $5,000 the contribution limit for candidates agreeing to limit expenditures, "[t]he only 'burden' imposed upon candidates who elect not to limit campaign expenditures is the $1,000 cap on individual contributions. That cap is plainly constitutional."). The First Circuit's decision in Daggett is illustrative. Daggett involved a constitutional challenge to a Maine statute that granted additional matching funds to candidates who participated in the state-financed funding program when non-candidates made independent expenditures either against them or in favor of their opponent. The court found decisive that the matching funds provision "in no way limits the quantity of speech one can engage in or the

[10] Davis mistakenly relies (Br. at 18, 26) on the public forum doctrine, which "defines situations in which the government cannot close government-owned property to parties who desire to use that property as a forum for exercising their First Amendment rights." Tele-Communications of Key West v. United States, 757 F.2d 1330, 1337 (D.C. Cir. 1985). See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 n.9 (1983) (distinguishing, inter alia, Carey v. Brown, 447 U.S. 455 (1980), as "cases invalidating restricted access to public forums"). The Millionaires' Amendment does not involve restrictions on access to public property, so the public forum doctrine is wholly inapplicable.

amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." 205 F.3d at 464. "These facts," the court stated, "allow us comfortably to conclude that the provision of matching funds [to one candidate] based on independent expenditures does not create a burden on [independent] speakers' First Amendment rights." Id. [11]

B. The Millionaires' Amendment Does Not Chill Speech

Unable to show any statutory restriction on his own spending, Davis argues that the Millionaires' Amendment will have a "chilling" effect on the speech of self-financing candidates (Br. at 24). Davis himself is plainly not chilled, since he has already spent about a million dollars on his primary campaign and has stated an intent to spend another million dollars on his general election campaign. See pp. 2-3, supra. Moreover, Davis has offered no evidence that the Millionaires' Amendment has reduced the quantity of speech engaged in by self-financing House candidates or caused anyone who otherwise might have self-financed their own campaign to forgo that option. Dozens of candidates running for the House of Representatives have financed their campaigns with sufficient personal funds to exceed the $350,000 threshold since the Millionaires' Amendment went into effect, FEC Facts at ¶¶ 57, 58, and Davis has offered no evidence indicating that this is not comparable to the number who did so before the Amendment was enacted. To paraphrase the Supreme Court, "[p]lainly, campaigns can be successfully carried out by [self-financing]; they have been up to this date, and this avenue is still open to all candidates." Buckley, 424 U.S. at 101.

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[11] Davis relies (Br. at 20) on decisions invalidating provisions that placed discriminatory tax burdens on particular speakers. Unlike the Millionaires' Amendment, these provisions directly penalized certain speakers by extracting additional money from them in the form of taxes. Accordingly, these decisions are not contrary to Daggett.

Even if Davis could show that more candidates were choosing to forgo self-financing after enactment of the Millionaires' Amendment, however, this would not make the Amendment unconstitutional. As discussed above, such a choice remains entirely with the candidate, and any candidate's decision to forgo self-financing would presumably be based upon his own political calculation of which course would maximize his chances of winning election. See Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) ("candidates will presumably select the option that they feel is most advantageous to their candidacy"). So long as the candidate remains free to make that decision, without limit or coercion by the government, the statute is not unconstitutional. If this were not so, the denial of public funding to candidates who decline to limit their personal spending to $50,000 would constitute an unconstitutional "chill" on such personal spending, a result the Supreme Court rejected in Buckley, 424 U.S. at 57 n.65. The cases cited on pp. 19-20, supra, also concluded that a statute designed only to assist one candidate to compete more fairly with an opponent in communicating with voters does not unconstitutionally coerce the opponent's choice of funding options.[12]

Ignoring all the cases discussed supra at pp. 19-20, Davis cites (Br. at 22-23) a single case, Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), for his claim that encouraging the speech of an opponent of a self-financing candidate unconstitutionally chills the speech of the self-financer. The statute at issue in Day provided that whenever an independent expenditure was made in opposition to a candidate participating in Minnesota's public financing program, the candidate whose defeat was advocated (or whose opponent's election was advocated) was

[12] Contrary to Davis's argument (Br. at 20, 23-24), the Millionaires' Amendment is triggered solely by the financial formulae we have discussed, and does not depend in any way on the viewpoint the self-financing candidate may express on any issue. While Davis apparently is trying to make a campaign issue out of his reliance upon his own funds instead of contributions, the statute applies in the same way to a self-financing candidate who chooses to avoid making an issue of his personal wealth.

permitted to spend additional money and was provided with an additional public subsidy with which to do so. The court emphasized in Day that it was the combination of "increas[ing] the maximum amount she may spend and giv[ing] her the wherewithal to increase that spending" that led to its conclusion that the statute was "directly responsible for adding to her campaign coffers" and impermissibly discouraged the speech of the independent spender. Id. at 1360 (emphasis in original). The Millionaires' Amendment, in contrast, does not provide a self-financing candidate's opponent with any money at all – it simply permits an opponent, under limited circumstances, to seek additional funds from two specific types of contributor – if he chooses to exert the effort to do so and if he has any such large contributions to be solicited. A candidate choosing to solicit additional contributions is not guaranteed by the statute that anyone will agree to give additional funds. Moreover, unlike the statute in Day, the Millionaires' Amendment can be triggered only by the spending of a candidate, not by the actions of independent spenders beyond either candidate's control. In a subsequent case, the Eighth Circuit found no unconstitutional burden on a candidate's First Amendment rights where the candidate's own expenditures above a threshold amount triggered the elimination of limits on his publicly financed opponent's spending. Rosenstiel, 101 F.3d at 1551-52. Thus, like the First and Sixth Circuit decisions discussed above, the Eighth Circuit's case law relied upon by Davis does not support his claim of unconstitutional "chill" from the Millionaires' Amendment.

Finally, Davis alleges that he is "harmed by having to anticipate how [his] opponent will take advantage of the regulations to raise funds in ways that would normally be barred under the nation's campaign finance laws," Davis 2d Decl. at ¶ 9, and that "the statute requires [a self-financing candidate] to undergo the expense of soliciting more contributions than her opponent" (Br. at 25). It is hard to imagine why a self-financing candidate would need to "solicit[] more

contributions that his opponent," whose entire campaign chest is built with limited contributions, and trying to anticipate an opponent's actions is the sort of tactical planning all candidates must make during a campaign to effectively compete with their opponents. After all, regardless of the level of the contribution limits, no candidate ever knows in advance the total his opponent will actually be able to raise.

What Davis's argument actually boils down to, then, is a claim not of a constitutional right to preserve his own right to speak, which is unaffected by the statute, but of a constitutional right to outspend his opponent. But Buckley invalidated limits on a candidate's expenditure of personal funds only to preserve "the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." Buckley, 424 U.S. at 54. The Court did not suggest such a candidate has a constitutional right to maintain whatever political advantages his personal wealth may give him over his opponent.

> The general premise of the First Amendment as interpreted by the Supreme Court, on the other hand, is that it preserves and fosters a marketplace of ideas. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).… In that view of the world, more speech is better.… This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett v. Webster, 74 F.Supp.2d 53, 58 (D.Me. 1999) (footnote omitted), aff'd sub nom., Daggett v. Committee on Gov't Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2002).

IV. THE REPORTING PROVISIONS OF THE MILLIONAIRES' AMENDMENT DO NOT VIOLATE THE FIRST AMENDMENT

A. The Reporting Provisions Are Essential to the Operation of the Millionaires' Amendment

As described supra at pp. 9-10, the Millionaires' Amendment imposes three additional reporting provisions for self-financed candidates over and above the generally applicable reporting requirements of FECA: a simple declaration of intent to spend more than $350,000 in

personal funds that must be filed within fifteen days of becoming a candidate,[13] an initial notification that the candidate has exceeded $350,000 in personal funds that must be filed within 24 hours of exceeding that threshold; and additional notifications for aggregate expenditures of $10,000 or more in personal funds that must be filed within 24 hours of making the expenditure.[14]

Political campaigns move rapidly, and a candidate may become eligible to seek additional funds relatively late in the campaign. See FEC Facts at ¶ 43. Without a mechanism to enable such a candidate to calculate his eligibility quickly, the Millionaires' Amendment would have no effect on an election campaign. Neither the opponent of the self-financing candidate nor the Commission nor the opponent's political party have any other way to obtain timely notice (1) that the Millionaires' Amendment has been triggered, or (2) of the amount the opponent is entitled to seek, or the party is entitled to spend, under the Amendment. Any delay would reduce the opportunity to raise, or prepare to raise, contributions in increased amounts in time to use

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[13] Davis complains (Br. at 8) that "[n]either the statute nor regulations provide guidance to candidates for how, at the very outset of their candidacy, they should divine their intent to exceed the threshold." A candidate's then-current intent to spend his own money, if he has one, would necessarily be known to the candidate, and a declaration of intent is simply that, not a binding commitment to spend any amount at all, let alone the amount anticipated. Since Davis filed his declaration of intent well before he filed this lawsuit it is doubtful that he even has standing to seek review of that requirement, and it is apparent that he was able to discern his own intent when he filed that form. However, if Davis were truly confused about how to divine his own intent, he could have sought an "advisory opinion[] for clarification, 2 U.S.C. 437f(a)(1), and thereby remove[d] any doubt there may be as to the meaning of the law." McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (internal quotation and citation omitted).

[14] Davis asserts (Br. at 8) that a personal expenditure of $10,000 is "marginal," but this is the same threshold amount used in BCRA's electioneering message reporting provisions that were upheld by the Supreme Court in McConnell, 540 U.S. 194, and it is well above the $100 independent expenditure reporting provision upheld in Buckley, 424 U.S. at 76. Reporting thresholds are matters of legislative discretion. Buckley, 424 U.S. at 83 (upholding $100 reporting threshold for contributions).

such funds before the election. Cf. McConnell, 540 U.S. at 200 ("Given the relatively short timeframes in which electioneering communications are made [within the last 30-60 days before the election], the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant"). "To avoid this type of gamesmanship," requiring prompt notification of the self-financed candidate's spending "is a legitimate approach for the legislation to take" to implement the statutory design. Daggett, 74 F.Supp.2d at 59.

B. The Reporting Requirements Do Not Burden Speech

The Millionaires' Amendment requires only the disclosure of amounts of money spent by the candidate himself. It does not require disclosure of the names of supporters or even of the manner in which the money is spent to support the candidate's campaign. Davis does not describe any way in which this limited disclosure burdens his First Amendment rights. Compare Buckley, 424 U.S. at 68 ("public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute" and "may even expose contributors to harassment or retaliation"). In McConnell, the Supreme Court considered the constitutionality of provisions in BCRA that mandate "advance" disclosure of expenditures of $10,000 or more made for a particular type of communication called electioneering communications. The Court concluded that those advance disclosure requirements do not violate the First Amendment because they "'d[o] not prevent anyone from speaking.'" McConnell, 540 U.S. at 201 (quoting the district court's opinion). Since the disclosure reports required by the Millionaires' Amendment similarly do not "prevent anyone from speaking" there is no basis for concluding that they burden Davis's constitutional rights at all.

Moreover, virtually all of the information required to be disclosed by the Millionaires' Amendment would have to be disclosed later in any event under other provisions that long predate the Millionaires' Amendment. A candidate's name, the office sought, the date and amount of each expenditure of personal funds and the total amount of personal funds spent to date in a particular election cycle all must be publicly disclosed either in a candidate's Statement of Candidacy, 2 U.S.C. 432(e)(1); 11 C.F.R. 101.1, or on the periodic reports each candidate's committee must file, 2 U.S.C. 434(b); 11 C.F.R. 104.3. Thus, the essence of the new reporting requirements is timing, not substance, and that is not a significant burden on a candidate's First Amendment rights. See McConnell, 540 U.S. at 196-201.

The deadlines for these notifications are also not significantly more onerous than those contained in the disclosure requirements that all federal candidates must satisfy under other provisions, many of which were upheld in Buckley and McConnell. The fifteen-day deadline for a self-financed candidate to file a notice of intent to spend personal funds, for example, is the same deadline Congress set for candidates to designate a campaign committee. 2 U.S.C. 432(e)(1). Similarly, the 24-hour deadline for the initial notification and all subsequent notifications that a candidate has spent personal funds in excess of $350,000 and $10,000 respectively, mirror the timing required for reporting information concerning electioneering communications under 2 U.S.C. 434(f)(1), see McConnell, 540 U.S. at 194-95 and all candidates must report contributions of $1,000 or more received between two and twenty days prior to an election within 48-hours of receipt, even if the contribution is from the candidate. 2 U.S.C. 434(a)(6).[15] Thus, since the Supreme Court has already upheld the constitutionality of other

[15] The 24-hour report required by the Millionaires' Amendment is in lieu of this 48-hour notice required of all candidates. See FEC Ex. 4.

reporting provisions that require far more disclosure than the notifications mandated under the Millionaires' Amendment, and that must be filed within similar timeframes, the Millionaires' Amendment's disclosure requirements cannot be found impermissible under the First Amendment.[16]

V. THE MILLIONAIRES' AMENDMENT DOES NOT VIOLATE A SELF-FINANCING CANDIDATE'S FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION

"Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley, 424 U.S. at 93. Strict scrutiny applies when a restriction substantially burdens a suspect class or a fundamental right, see Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985), and intermediate scrutiny applies when a quasi-suspect class, such as gender, is at issue, see Craig v. Boren, 429 U.S. 190, 191-192 (1976). We have already shown, supra at pp. 16-23, that the Millionaires' Amendment does not actually burden a self-financing candidate's freedom of speech and "[w]ealth is not a suspect category in Equal

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[16] Davis makes several erroneous factual claims about the details of the reporting provisions contained in the Millionaires' Amendment. He claims (Br. at 8) that an opponent of a self-financed candidate is not obligated to declare his intent to spend personal funds, but the statute actually provides that "a candidate for the office of Representative . . . shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed $350,000." 2 U.S.C. 441a-1(b)(1)(B). The Commission has interpreted this to require a candidate who intends to spend no funds in excess of the threshold to file a report stating that. See FEC Ex. 5. Davis must be aware of this requirement since he filed a report declaring his intent to spend nothing in excess of the threshold for the 2006 primary election. FEC Facts ¶ 4; FEC Ex.2.

Davis also incorrectly asserts (Br. at 22) that while a self-financed candidate "must satisfy [] onerous disclosure requirements," an opponent of such a candidate "faces no comparable burden." As we have explained, the opponent of a self-financed candidate must file a similar notice of intent, and he must also calculate and file notices concerning the OPFA, the amount he has qualified to raise (or his party is entitled to spend) in extra funds, each time the self-financed candidate discloses that he has spent additional funds. See p. 10, supra. In addition, an opponent must file a notice if he raises sufficient extra funds to reach the proportionality cap, and has special reporting obligations should he have to refund excess contributions. 11 C.F.R. 400.31(e)(1)(ii); FEC Ex. 6.

Protection jurisprudence." NAACP v. Jones, 131 F.3d 1317, 1321 (9th Cir. 1997). See also San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages").[17] Thus, the applicable standard of review for Davis's equal protection claims is whether the Millionaires' Amendment is rationally related to a legitimate purpose. See, e.g., Heller v. Doe, 509 U.S. 312, 320 (1993); Clement v. Fashing, 457 U.S. 957, 963 (1982).[18]

A. Self-Financed Candidates Are Not Similarly Situated to Privately Financed Candidates

At the threshold of his Equal Protection claim, Davis must show that the provision treats similarly situated candidates differently. California Medical Assoc. v. FEC, 453 U.S. 182, 200 (1981) (plurality opinion). However, Davis is not situated similarly to his opponent because he has chosen to finance his campaign largely with personal wealth that is not subject to the Act's contribution limits, while his opponent is financing his campaign with private contributions subject to the statutory limits. Because, as we have explained, the statutory contribution limits

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[17] The Millionaires' Amendment does not actually discriminate on the basis of wealth. It applies only to candidates who choose to pour substantial amounts of personal funds into their election campaigns, and has no application to wealthy candidates who choose instead to finance their campaigns by soliciting campaign contributions.

[18] Davis relies on an equal protection standard that was rejected by the Buckley Court in reviewing the public financing provisions' differential impact on different classes of candidates and political parties. Buckley does not, as Davis claims, "further instruct[]" that a "'restriction can be sustained only if it furthers a vital governmental interest that is achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity.'" Br. at 26 (quoting Buckley, 424 U.S. at 95). Buckley instead explained that this standard applied only to "direct burdens . . . on the candidate's ability to run for office [and] on the voter's ability to voice preferences regarding representative government and contemporary issues," such as ballot-access restrictions. 424 U.S. at 95. "In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'." Id.

Davis also cites (Br. at 26) Carey v. Brown, 447 U.S. 455 (1980), to support his claim that this Court should apply some sort of heightened scrutiny to his Fifth Amendment claim, but we have already shown, p. 19, n.10, supra, that Carey is a "public forum" case that has no application to the Millionaires' Amendment.

have entirely different effects on these different methods of campaign financing, Davis and his opponent are not similarly situated with respect to the Millionaires' Amendment's provisions relaxing the impact of the contribution limits on candidates running against self-financing opponents.

B. Treating Self-Financed Candidates Differently Under the Millionaires' Amendment Is Justified

Even if Davis could satisfy the threshold test for an equal protection claim, the Millionaires' Amendment is rationally related to a legitimate government purpose. As we have already described supra at pp. 3-7, the purposes of the Millionaires' Amendment are to encourage those who must rely on small contributions from others to run for office, to encourage political parties to select candidates based on their merits rather than their wealth, to promote greater public debate in election campaigns, and to counter the public perception that federal office is available to the highest bidder. As we have shown, these are more than legitimate governmental purposes – they are compelling governmental interests that would satisfy strict scrutiny.

The Constitution does not require opposing candidates to be subject to identical regulations without regard to their sources of campaign funding. That is why the Buckley Court upheld public financing for major party candidates that was unavailable to minor party candidates, 424 U.S. at 93-97, upheld public financing in presidential primaries that "limit[ed] subsidization to those candidates with a substantial chance of being nominated," id. at 106, and upheld expenditure limits on publicly financed candidates that did not apply to their privately financed opponents, id. at 108-9. We have already explained that the Supreme Court has recognized that because of contribution limits, the financial resources available to a candidate's campaign "will normally vary with the size and intensity of the candidate's support," 424 U.S. at

56, but that this "normal relationship" may not apply when a candidate devotes a large amount of personal wealth to his campaign. Id. at 56 n.63. "[T]he Constitution does not require things that are different in fact or opinion to be treated in law as though they were the same. The initial discretion to determine what is different and what is the same resides in the legislatures," Plyler v. Doe, 457 U.S. 202, 216 (1982) (citation and internal quotations omitted), and "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Buckley, 424 U.S. at 97-98.

C. The Millionaires' Amendment Does Not Favor Incumbents Over Challengers

Davis provides no evidence to support his assertion that the Millionaires' Amendment was structured by Congress to provide an advantage to incumbents in qualifying for increased contributions. To the contrary, Congress adopted an amendment to the provision for the very purpose of reducing any benefit the Millionaires' Amendment gives incumbents and other candidates who may be able to raise sizeable amounts in private contributions in the year prior to the election. The "gross receipts advantage" provision of the Millionaires' Amendment takes into account that incumbents may be in a better position to accumulate large "war chests" during the year before the election year, when potential challengers may not yet have begun to organize a campaign. See p. 8, supra.

Davis complains about the details of the formulae for calculating the "gross receipts advantage" because it counts only 50% of a candidate's gross receipts (Br. at 12) and it looks at receipts only as late as December 31 of the year before the election (Br. at 3, 9-10).[19] However,

[19] Davis also asserts (Br. at 10) that an FEC Form could enable incumbents to "stash" funds in their primary campaign accounts and "create the illusion of poverty" for the general election. But incumbents facing a contested primary may well need to spend their funds to win nomination, in which case their financial status entering the general election will be no "illusion." In any event, since Davis attributes this "loophole" to a Commission form and admits

because the calculation uses gross receipts during the non-election year, rather than net receipts, it includes all the money that a campaign has already spent before the beginning of the election year on such continuous expenses such as fundraising and administrative costs, not just the candidate's remaining cash on hand when the election year begins. Congress apparently found 50% to be a fair rough approximation of the amount likely to be left in a candidate's account at the start of the election year, after such expenses are paid, and that it is appropriate to calculate the "gross receipts advantage" at the end of the year before the election because the purpose of that provision is to ensure that incumbents do not unfairly benefit from the "war chest" they may have built up in advance. See supra at 8. While Congress could have accounted for any other perceived advantages incumbents might have, "a statute is not invalid under the Constitution because it might have gone farther than it did," Buckley, 424 U.S. at 105 (citations and internal quotations omitted).[20]

Just as the Buckley Court stated about a similar argument against FECA's original contribution limits, "[t]here is no []evidence to support the claim that the [Millionaires'

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that it is "not detailed in the statute" (Br. at 10), this Court has no jurisdiction to hear any challenge to its validity. The extraordinary forum of a three-judge district court is only available under BCRA's judicial review provision for constitutional challenges to the statute itself, not to a Commission regulation or form. McConnell v. FEC, 540 U.S. 93, 223 (2003) ("issues concerning the regulations are not appropriately raised in this facial challenge to BCRA, but must be pursued in a separate proceeding").

[20] Davis's focus on ways in which he thinks the provisions of the Amendment can be manipulated by a privately financed incumbent (Br. at 10-11, 15) ignores that the self-financed candidate is actually in full control of the flow of his own money, which is what determines his opponent's ability to benefit from the statute. For example, a self-financed candidate could allow his committee to incur debt up until the last few weeks of the election cycle and then pour in hundreds of thousands of dollars of personal funds to pay those bills. By the time his opponent would be able to calculate whether he is entitled to solicit increased contributions there would be little time to raise additional money that could be used during the campaign. In fact, a self-financed candidate could incur campaign debts and repay the debts with personal funds after the election, which would completely foreclose his opponent's opportunity to seek increased contributions under the Amendment.

Amendment] in [itself] discriminate[s] against major-party challengers to incumbents." 424 U.S. at 32. In the four years since the Millionaires' Amendment was adopted, 110 House and Senate candidates have become eligible to accept increased contributions, but only six have been incumbents. FEC Facts at ¶ 76. Of the six incumbents who qualified, two are 2006 candidates who have not reported raising any additional funds so far in the campaign, and two were 2004 candidates who did not report raising any extra funds under the Amendment. Id. at ¶¶ 63, 64. The fifth incumbent raised less than 2% of what the Amendment would have permitted, and the sixth raised only 16% of the additional amount he was entitled to seek. Id. at ¶¶ 69, 73. On the other hand, two incumbents spent enough of their own personal funds to exceed the threshold under the Millionaires' Amendment that would permit any opposing candidates to raise increased contributions to offset any OPFA discrepancy. See FEC Facts at ¶¶ 59, 60. Thus, there is no evidence to support the claim that incumbents as a class have benefited more than others from the Millionaires' Amendment.

In any event, Davis's complaints about the details of the percentages, dates and calculations included in the Millionaires' Amendment are not of constitutional stature. As the Supreme Court stated in Buckley in response to claims that the then-$1,000 contribution limit was too low: "[I]f [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." 424 U.S. at 30. See also id. at 103-04 ("the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would sufficiently [serve the competing statutory interests]. We cannot say that Congress' choice falls without the permissible range" (internal citation omitted)). If the

Millionaires' Amendment needs fine tuning to make it function better in serving the compelling interests identified by Congress, that is a matter for legislative, rather than judicial, action. Since none of Davis's complaints about the mathematical details of the Millionaires' Amendment amounts to a "difference in kind," he has offered no evidence that it has consistently favored incumbents in operation, and the provision is narrowly tailored to serve compelling governmental interests, any suggestion for improving its financial formulae should be directed to Congress.

CONCLUSION

For the foregoing reasons, this Court should grant the Commission's motion for summary judgment, deny plaintiff's motion for summary judgment, and dismiss the case.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
Colleen T. Sealander
Assistant General Counsel

_____/s/_____
Holly J. Baker
Attorney

_____/s/_____
Claire N. Rajan
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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