IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK DAVIS
Davis for Congress
P.O. Box 2006
Akron, NY 14001

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, D.C. 20463,

Defendant.

Civil No. 06-

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Jack Davis, a Democratic candidate for New York's 26th District seat in the United States House of Representatives in the 2006 election, brings this action for declaratory and injunctive relief, alleging as follows:

INTRODUCTION

1. This is an action challenging certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.* The challenged provisions of the BCRA/FECA, which together are commonly known as the Millionaires' Amendment, infringe on Mr. Davis's constitutional rights to fund his campaign primarily with his own money by depriving him of the protections guaranteed by the First and Fifth Amendments to the United States Constitution. Plaintiff seeks a declaration that these provisions are invalid and

unenforceable, as well as an injunction barring the Defendant Federal Election Commission ("FEC") from enforcing these unconstitutional provisions against him.

2. In 2002, Congress enacted, *inter alia,* Section 307(a) of the BCRA which greatly increased the amount of money that the law permits individual donors to contribute to candidates in federal campaigns. The provision amended the FECA to raise the limits on individual contributions to candidates from $1,000 to $2,000 per election, and from $2,000 to $4,000 per election cycle. Section 307(d) of the BCRA indexes these contribution caps for inflation and currently sets the limits at $2,100 per election and $4,200 per election cycle.

3. In enacting these limits, however, Congress carved out a significant and patently unconstitutional exception to the prophylactic rules. The Millionaires' Amendment (or "Amendment") provisions of the new law punish individuals who wish to self-finance their campaigns and metes out this punishment in a particularly irrational, even perverse, manner. *See* BCRA § 319, 2 U.S.C. § 441a-1. Instead of limiting the corrupting influence of campaign contributions, the Act serves to protect the well-financed incumbents who wrote the statute and allows them almost unlimited access to money donated by committees and individual donors.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, because it arises under the First and Fifth Amendments to the United States Constitution, as well as under 28 U.S.C. § 2201, because it concerns a declaratory judgment. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and Section 403 of the BCRA which provides that any constitutional challenge to the Amendment shall be filed in the United States District Court for the District of Columbia and shall be heard by a three-judge court convened pursuant to 28 U.S.C. § 2284.

PARTIES

5. On March 30, 2006, Plaintiff Jack Davis declared his candidacy for the Democratic Party's nomination for New York's 26th District seat in the United States House of Representatives. In 2004, Mr. Davis was the Democratic candidate for the same seat and lost to Republican Thomas Reynolds in the general election. The primary election will be held on Tuesday, September 12, 2006. If Mr. Davis wins the Democratic nomination, he will face the Republican nominee in the general election for the seat on November 7, 2006. Mr. Davis intends to spend over $350,000 of his own funds to finance his own campaign. *See* Declaration of Jack Davis, attached hereto as Exhibit 1 and incorporated herein by this reference. Accordingly, Mr. Davis will have to comply with the requirements of the Millionaires' Amendment's notice requirements and his opponent will likely benefit from the Amendment's relaxation of contribution limits *See generally* 2 U.S.C. § 441a-1.

6. Defendant Federal Election Commission is a commission established by 2 U.S.C. § 437(c), which enforces the provisions of the BCRA/FECA including Section 319 and generally regulates the campaigns of candidates for federal office. As such, the FEC is charged with administering the campaign finance system in federal elections.

LEGAL AND FACTUAL ALLEGATIONS

Supreme Court Jurisprudence Recognizes that – Contrary to Individual and Committee Contributions – Self-Financing is Not Corruptive of the Electoral Process

7. The Supreme Court has held that, contrary to individual and committee campaign donations, self-financing does not have a corrupting influence on elections. *See Buckley v. Valeo,* 424 U.S. 1, 52 (1976). Yet, the Millionaires' Amendment provisions inject a torrent of campaign contributions into the system by relaxing individual limits and abolishing committee limits.

8. The provisions at issue in this Complaint offend the two pillars of campaign finance law articulated by the Supreme Court. First, that any "restraint on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression." *Buckley v. Valeo,* 424 U.S. 1, 52 (1976) (holding unconstitutional the FECA's limitation on expenditures by candidates from personal resources). Second, that the primary interest served by any generally applicable contribution limits imposed by campaign finance law is the "prevention of actual and apparent corruption of the political process." *Buckley,* 424 U.S. at 52.

9. Indeed, the Supreme Court reaffirmed *Buckley* as recently as Monday of this week. *See Randall v. Sorrell*, 2006 Lexis 5161, 548 U.S. __, No. 04-1528, slip op. (June 26, 2006). In rejecting exceptionally restrictive contribution limits imposed by the state of Vermont, the Court not only declined to limit *Buckley's* First Amendment holdings, *Randall* at *22-35, 6-8, but also based its decision in part on the fact that the limits would significantly disadvantage challengers' ability to run competitive campaigns against incumbents, *Randall* at *80-97, 19-22.

10. In enacting the Millionaires' Amendment, Congress violated *Buckley's* core holdings. The Amendment neither prevents corruption nor levels the playing field. Instead, it dramatically tilts the field to benefit incumbents and their big-money patrons. The statute and regulations consistently and thoroughly operate to protect incumbents from self-financed candidates by turning Supreme Court jurisprudence on its head; in the upside-down realm of the Millionaires' Amendment, self-financed funds corrupt while virtually limitless individual and committee donations pose no danger to the electoral process and, thus, are promoted.

The Millionaires' Amendment Serves to Punish Self-Financed Candidates and Reward Those Who Rely on Campaign Contributions, Particularly Incumbents.

11. The Amendment works its harm on Plaintiff in two ways, one patent and one that is concealed in the thicket of regulations promulgated by the FEC.

12. On its face, the Amendment is harmful enough to Mr. Davis. The statute generally permits incumbents (and other candidates) facing self-financed candidates who have exceeded a $350,000 threshold to: 1) raise **three times** more money than normal from individual donors, 2) receive **unlimited donations** from party committees (where the normal limit is $10,000 per election); and 3) receive contributions from donors who have **exceeded their normal limits** of $37,500 per election. *See* 2 U.S.C. § 441a-1(a)(1)[1]; *see generally* 11 C.F.R. §§ 400.1-400.54.

13. The harm buried in the calculations that the Amendment applies to determine a candidate's eligibility for the relaxed limits is even more insidious. While the statute and regulations make a feint towards offering measures to insure that candidates with ample funds (either from donations or self-financing) do not benefit from the Millionaires' Amendment relaxed limits, these measures are so toothless and readily manipulated as to be wholly meaningless. *See* 11 C.F.R. §§ 400.10.

14. As directed by the Statute, the regulations compel self-financed candidates to predict at the very start of their campaign if they will exceed a threshold of $350,000. When they have exceeded that threshold, they must account to both the FEC and their opponent for all of their additional expenditures in **real time**. *See* 2 U.S.C. § 441a-1(b) (mandating 24-hour reporting period); *see also* 11 C.F.R. §§ 400.20-400.25. Their opponents may then rely on these

[1] BCRA Section 304(a), adding Section 315 of the FECA, 2 U.S.C. § 441a, makes similar changes for Senate races. While Plaintiff's Complaint focuses on the unconstitutional effects of

figures to perform a calculation to determine if they qualify for the relaxed contribution limits. *See* 11 C.F.R. § 400.10.

15. Conversely, the candidate relying upon campaign donations need only calculate the amount of their receipts on December 31 of the **year preceding the election**. *See* 2 U.S.C. § 441a-1(a)(2)(B)(ii); *see also* 2 C.F.R. § 400.10; FEC Form 3Z-1 (Consolidated Report of Gross Receipts for Authorized Committees). Even if the candidate receives millions of dollars in additional funding from individuals or committees after that date, for purposes of the Millionaires' Amendment, **the December 31 total remains fixed** from January 1 through Election Day. *See id.*

16. As such, while the BCRA requires the self-financed candidate to provide both his opponent and the FEC with a "real time" depiction of the amount of funds he has provided, it allows the candidate relying on campaign contributions to take a "snapshot" on December 31 of the year before the election. For purposes of calculating eligibility for the relaxed contribution limits, that candidate may then rely on that snapshot, however inaccurate it may be, for the duration of the campaign, a period of over eight months. Accordingly, a candidate could manipulate his receipts to gain eligibility for the financial bonanza available under the Millionaires' Amendment's relaxed limits without compromising his ability to raise and spend additional campaign funds under the normal method.

17. The Amendment is particularly generous to incumbents, who can often tap into huge campaign war chests accumulated from previous elections and usually run unopposed in their party primaries. By essentially "stashing" money in their primary campaign funds, incumbents can create the illusion of poverty for purposes of the Amendment, qualify for the

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Section 319 on his House of Representatives contest, these claims would apply with equal force to Section 304(a) and its effect on Senate races.

relaxed limits, and collect vast additional sums of donations. *See, e.g.,* FEC Form 3Z-1 (providing accounting requirements for Millionaires' Amendment calculations).

18. Because it is so easy to "game" the Millionaires' Amendment's figures, only the most accounting-challenged candidate ever need worry about calculating eligibility under the provision's formulae. Even so, further evidence of the statute's insidiousness is found in the formulae's disparate and illogical treatment of the competing sources of funds for purposes of determining eligibility for the relaxed limits. *See* 11 C.F.R. § 400.10 (providing formulae for computing "Opposition personal funds amount" used to determine eligibility for relaxed contribution limits under the Millionaires' Amendment).

19. One particularly troubling aspect of the complex formulae is that while self-financed funds are computed at **actual levels**, money received from campaign contributions is discounted by **fifty percent**. *See id.* § 400.10(a)(3)(i). Congress can offer no explanation for why it elected to count the protected self-financed funds at actual levels while halving the effect of the corrupting contributions.

20. The FEC has provided a "Millionaires' Amendment Hypothetical" to assist a candidate in making these calculations. *See* 68 Fed. Reg. 3970, 3987-3994 (Jan. 27, 2003). In short, a candidate is eligible for the relaxed limits when he has raised (counting fifty cents on the dollar) and personally contributed $350,000 less than his opponent has raised (again, discounted by half) and personally contributed, so long as his opponent has personally contributed more than $350,000 of his own funds. 11 C.F.R. § 400.10.

21. Once this $350,000 threshold has been reached, the regulations allow the candidate to tap into the torrent of money from individual and committee donors. Not only are the individual limits tripled, 2 U.S.C. § 441a-1(a)(A), but the $10,000 limit on State or national

committee contributions is abolished. 2 U.S.C. § 441a-1(a)(C). Finally, the individual donors need not count such contributions against their normal personal limits. 2 U.S.C. § 441a-1(a)(B).

22. Once qualified, a candidate can use these relaxed limits to raise up to 100% of the total amount personally contributed by his self-financed opponent. 11 C.F.R. § 400.31(e)(ii); *see also* 441a-1(3)(A)(ii). Again, because of the irregular accounting method mandated by the Amendment, the candidate can simultaneously continue to raise funds normally without compromising his eligibility for the Millionaires' Amendment monetary bonanza.

23. Because Section 319 infringes upon the Plaintiff's "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly . . . advocate his own election," it cannot pass constitutional muster. The provision also infringes upon Plaintiff's Fifth Amendment right to equal protection under the election laws as a candidate for federal office.

COUNT I
(First Amendment)

24. The First Amendment to the United States Constitution guarantees protection of a person's freedom of association and freedom of speech. Included within these protections is the right to participate freely in political activities, including federal elections.

25. In restricting these freedoms through generally-applicable contribution limits, Congress must tread carefully and offer a clear and compelling justification for its actions. In turn, the judiciary must closely scrutinize any such congressional actions. The Supreme Court has accepted, under certain conditions, congressionally-imposed limits on the amount of money that a person may contribute to a candidate or campaign organization because such speech is more symbolic than actual.

26. However, the Court has held that limiting the amount that a candidate may personally spend on her own race imposes a substantial restraint on her ability to engage in protected First Amendment expression. As the Court noted in *Buckley*: "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 424 U.S. at 52.

27. The Court has rejected all claims that the primary governmental interest served by the BCRA/FECA – namely, "the prevention of actual and apparent corruption of the political process" – justifies limitations on the expenditure of personal funds. *Buckley* at 53.

28. To the contrary, the Court has noted that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the [FECA's] contribution limits are directed." *Id.*

29. The Supreme Court has also held that "[political] parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 481-2 (2001) (holding that a party's coordinated expenditures may be restricted to minimize circumvention of contribution limits).

30. Yet, Congress – apparently unchastened by the Supreme Court's ruling on this issue in *Buckley* and its progeny– has once again sought to limit such constitutionally-protected campaign activity and, paradoxically, foster the exact type of contributions it sought to restrain via the contribution limits set forth in the BCRA.

31. In Section 319 of the BCRA, Congress, by increasing the limits on contributions for the opponents of a self-financed candidate, exempting that contribution from an individual's

aggregate limit, and abolishing the limits on coordinated expenditures by the opponent's political party, has violated the Supreme Court's holding in *Buckley* that any limitation on personal expenditures is unconstitutional.

32. Given that the Supreme Court has rejected the argument that self-financing can ever serve as a source of political corruption for either challengers or incumbents, the only reasonable justification for enactment of Section 319 lies in Congress's desire to equalize the relative financial resources of candidates competing for office.

33. The Court, however, has found this equalizing rationale insufficient to justify any campaign contribution limits that infringe upon fundamental First Amendment rights. *See Buckley,* 424 U.S. at 54.

34. Even this unconstitutional rationale is merely a façade for Congress's actual goal: the protection of incumbents running for re-election. In other words, the members' desire to protect their own seats.

35. Therefore, the increased contribution limits for opponents of self-financing candidates and the waiver of coordinated party expenditures set forth in Section 319 address and satisfy no legitimate purpose under the campaign finance laws. Instead, the provision merely serves to discourage and deter individuals from self-financing and, ultimately, punishes such candidates for expending substantial amounts of their own funds.

36. Accordingly, by increasing the otherwise applicable contribution limits for donor-financed candidates and exempting such donations from individual donor's aggregate limits, Section 319 violates Plaintiff's First Amendment rights to free speech and free association.

37. Moreover, by lifting altogether the limits on coordinated expenditures by the opponent's political party, and thereby allowing that party to spend more money on behalf of

the donor-financed candidate, Section 319 violates Plaintiff's First Amendment rights to free speech and association.

38. Finally, by requiring that a candidate makes advance disclosure of his intent to self-finance and provide additional notice of expenditures, Section 319 imposes an unconstitutional condition on the exercise of First Amendment rights of free speech and association.

COUNT II
(Equal Protection)

39. Plaintiff incorporates herein by reference paragraphs 1 through 38 above.

40. The equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution requires that the federal government treat similarly situated persons and entities alike.

41. The Fifth Amendment equal protection principle requires that any restrictions on access to the electoral process survive exacting scrutiny. *Buckley,* 424 U.S. at 94. "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." *Buckley*, 424 U.S. at 95 (citations and quotations omitted).

42. The Supreme Court has also repeatedly rejected Congressional attempts to justify campaign finance limitations that simply seek to "level the playing field" for all candidates. *See Buckley,* 424 U.S. at 48-49 (no asserted interest exists in "equalizing the relative ability of individuals and groups to influence the outcome of elections").

43. In Section 319, Congress has chosen to hamper the opportunities for self-financed candidates, such as Plaintiff, by increasing the limits on contributions for the donor-

financed candidate and abolishing the limits on coordinated expenditures by the opponent's political party. In so doing, the provision punishes Plaintiff for seeking to avoid the corrupting influence of campaign donations by largely self-financing his own campaign. Perversely, Section 319 actually increases the appearance and actuality of corruption by injecting more money from campaign donations into the electoral process.

44. Finally, Congress has failed to identify any other "vital" governmental interest that is furthered by relaxation of these limits. In fact, during congressional debate one Senator opposed to this provision stated: "[I]t seems to me this is what I would call incumbency protection." 147 Cong. Rec. S2542 (daily ed. March 20, 2001) (statement of Sen. Dodd). Certainly, "incumbency protection" has never been recognized as a vital governmental interest.

PRAYER FOR RELIEF

WHEREFORE, relying on the foregoing allegations, Plaintiff prays for the following relief:

A. an order and declaratory judgment declaring Section 319 of the BCRA, codified in 2 U.S.C. § 441a-1, unconstitutional;

B. a preliminary and permanent order and injunction enjoining Defendant from enforcing Section 319 of the BCRA;

C. costs and attorneys' fees pursuant to any applicable statute or authority; and

D. any other relief as this Court in its discretion deems just and appropriate.

Respectfully Submitted,

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(202) 662-9700

Attorneys for Mr. Jack Davis
Dated: June 28, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2006, a true and correct copy of the *Plaintiff's Complaint For Declaratory and Injunctive Relief, the Declaration Of Plaintiff Jack Davis, Plaintiff's Motion To Expedite and Memorandum Of Points and Authorities In Support Thereof, (Proposed) Order Granting Plaintiff's Motion To Expedite, Application For Three-Judge Court And Memorandum Of Points And Authorities In Support Thereof* have been served via hand delivery, upon the following individuals:

FEDERAL ELECTION COMMISSION:

Lawrence Norton, Esq.
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Zachary Mahshie, Esq.
Assistant General Counsel
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UNITED STATES ATTORNEY'S OFFICE:

Kenneth Wainstein, Esq.
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UNITED STATES OF AMERICA
Alberto Gonzales, Esq.
Attorney General for the United States of America
U.S. Department of Justice
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Washington, DC 20530-0001

In compliance with BCRA § 403(a)(2), Plaintiff also served copies of the complaint via hand delivery on the Secretary of the U.S. Senate and the Clerk of the U.S House of Representatives.

UNITED STATES SENATE
The Honorable Emily Reynolds
Secretary of the Senate
United States Senate
Washington, DC 20515

UNITED STATES HOUSE OF REPRESENTATIVES
The Honorable Karen L. Haas
Clerk of the United States House of Representatives
U.S. Capitol, Room H154
Washington, DC 2005-6601

Stanley M. Brand