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Public Financing After *Davis*:
Denial of Appeal in *Duke v. Leake* Should Put to Rest Concerns Regarding the Constitutionality of Trigger Provisions
December 24, 2008

There had been much speculation in the months following the Supreme Court's decision in *Davis v. FEC*,[1] striking down the federal law "Millionaire's Amendment," about whether and how the decision would impact lawsuits challenging the constitutionality of public financing program trigger provisions. For example, the reauthorization of a public financing pilot program in New Jersey, which was originally enacted in 2005 and reauthorized in 2007, was abandoned by State Assembly Speaker Joseph Roberts in September of this year over concern's that the law's trigger provisions are unconstitutional.[2] Such concerns were then fueled by an Arizona federal district court decision suggesting that public financing program triggers are likely unconstitutional under the Supreme Court's *Davis* decision.[3] Speaker Roberts, for example, explicitly cited the Arizona decision as the reason he gave New Jersey's public financing program a "time out."[4]

The concerns regarding the constitutionality of public financing program trigger provisions, however, should be put to rest by the Supreme Court's decision in November to leave standing a recent federal appellate court decision explicitly upholding as constitutional a public financing program trigger provision. In *Duke v. Leake*, the U.S. Court of Appeals for the Fourth Circuit ruled that "North Carolina's provision of matching funds under [its trigger provision] does not violate the First Amendment because the Act does not coerce candidates into opting into the public financing system."[5] Because the appellate court had rendered its decision in *Duke* prior to the Supreme Court's decision in *Davis*, the plaintiffs/appellants appealed the decision to the Supreme Court—arguing that the Supreme Court's *Davis* decision made clear that the Fourth Circuit had erred in upholding the North Carolina trigger provision. The Supreme Court, however, denied the appeal (*i.e.*, denied the petition for certiorari) and left standing the Fourth Circuit decision in *Duke*. The Supreme Court's denial of the appeal in *Duke* is

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[1] 128 S. Ct. 2759 (2008).
[2] Robert Schwaneberg, *'Clean Elections' Effort Gets Sidelined*, STAR-LEDGER, Sept. 3, 2008.
[3] *See McComish v. Brewer*, No. 2:08-cv-1550, Order Denying Motion for Temporary Restraining Order (Aug. 29, 2008); *see also McComish v. Brewer*, No. 2:08-cv-1550, Findings of Fact and Conclusions of Law Re Denial of Motion for Preliminary Injunction, 2008 WL 4629337 (Oct. 17, 2008).
[4] Robert Schwaneberg, *'Clean Elections' Effort Gets Sidelined*, STAR-LEDGER, Sept. 3, 2008.
[5] *Duke v. Leake*, 424 F.3d 427, 438 (4th Cir. 2008).

strong evidence that a majority of the Supreme Court believes the Fourth Circuit correctly upheld as constitutional the North Carolina trigger provision notwithstanding the Supreme Court's June decision in *Davis*.

This memo analyzes the Supreme Court's decision in *Davis* and the Fourth Circuit's decision in *Duke*, in an effort to highlight the important differences between the statutes examined in the two cases—differences that should lead courts to follow the rationale of the Fourth Circuit's *Duke* decision to conclude that public financing program trigger provisions are *not* unconstitutional.

I. *Davis v. FEC* and the Millionaire's Amendment

A brief review of what was actually litigated in *Davis* is in order, to lay a foundation for comparison between the Millionaire's Amendment and public financing program trigger provisions. Under federal law, candidates for the U.S. House of Representatives are typically subject to a $2,300 per election contribution limit, as well as a limit on coordinated party expenditures (*i.e.*, expenditures made by a political party in coordination with the candidate benefiting from the expenditure). Importantly, as the Court noted on the first page of its *Davis* opinion, "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat and their authorized committees."[6] But under the Millionaire's Amendment, as the *Davis* Court explained, when a candidate for the U.S. House of Representatives spent personal funds in excess of $350,000, "a new, asymmetrical regulatory scheme [came] into play."[7] The self-financing candidate remained subject to the original $2,300 contribution limit and coordinated spending limit, while a non-self-financing opponent was permitted to receive contributions up to treble the original limit (*i.e.*, $6,900 rather than $2,300) and the coordinated party spending limit was eliminated.

The legal claim in *Davis* was that a self-financed candidate's First Amendment rights are violated when such candidate's spending triggers the "asymmetrical regulatory scheme" of differential contribution limits. In assessing any claims that the First Amendment has been violated, the Court engages a two-step analysis. First, the Court examines the challenged statute to determine whether it does in fact burden activity protected by the First Amendment. Second, in the event that the challenged statute does burden First Amendment activity, the Court determines whether there is any government interest sufficient to justify the burden.

A. Millionaire's Amendment "Burden" Analysis

The Court began its "burden" analysis of the Millionaire's Amendment by noting that in its 1976 decision in *Buckley v. Valeo*[8] the Court had rejected a cap on candidate expenditure of personal funds as violative of the First Amendment.[9] The Court went on

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[6] *Davis*, 128 S. Ct. at 2765.
[7] *Id.* at 2766.
[8] 424 U.S. 1 (1976).
[9] *Davis*, 128 S. Ct. at 2771.

to find that, though the Millionaire's Amendment did "not impose a cap on a candidate's expenditure of personal funds, it impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right."[10] In the Court's view, the Millionaire's Amendment burdened First Amendment activity because it:

> [R]equire[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to *discriminatory fundraising limitations*. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite [the Millionaire's Amendment], but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures) . . . .[11]

The Court continued: "Under [the Millionaire's Amendment], the vigorous exercise of the right to use personal funds to finance campaign speech produces *fundraising advantages* for opponents in the competitive context of electoral politics."[12]

B. Millionaire's Amendment "Government Interest" Analysis

Having concluded that the Millionaire's Amendment burdened First Amendment activity, the Court proceeded to step two of its constitutional analysis—determining whether there was any government interest sufficient to justify the burden. The government offered three interests and the Court rejected them all. First, the Court rejected the argument that the burden was justified by a governmental interest in eliminating corruption, noting that the Court had found in *Buckley* that a candidate's "reliance on personal funds *reduces* the threat of corruption"[13] posed by private contributions and that by discouraging the use of personal funds the Millionaire's Amendment disserves the anticorruption interest.[14] Second, the Court rejected the government's argument that the Millionaire's Amendment's "asymmetrical limits are justified because they 'level electoral opportunities for candidates of different personal wealth,'" noting that the Court's prior decisions "provide no support for the proposition that this is a legitimate government objective."[15] Finally, the Court rejected the government's claim that the asymmetrical limits are justified because they "ameliorate[] the deleterious effects" of existing contribution limits that "make it harder for candidates who are not wealthy to raise funds

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[10] *Id.*
[11] *Id*. at 2771-72 (emphasis added) (citing *Day v. Holahan*, 34 F.3d 1356, 1359-1360 (8th Cir. 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures)).
[12] *Id*. at 2772 (emphasis added).
[13] *Id.* at 2773 (emphasis in original).
[14] *Id.*
[15] *Id*.

and therefore provide a substantial advantage for wealthy candidates."[16] Without judging the merits of this argument, the Court concluded that the "obvious remedy is to raise or eliminate those limits," not to burden the speech of self-financed candidates through asymmetrical treatment under the law.[17]

II. *Duke v. Leake* and Public Financing Program Trigger Provisions

In *Duke*, the Fourth Circuit considered a constitutional challenge to a North Carolina state law provision that triggers additional public funding for a candidate participating in the voluntary public financing program if the "funds in opposition" to the publicly-financed candidate exceed specified amounts.[18] "Funds in opposition" are defined by the law "to include the amount any one nonparticipating candidate has raised or spent (whichever is greater) plus the amount that independent entities have spent to support the nonparticipating candidate or to oppose the participating candidate."[19] The trigger amounts under the statute vary for primary and general elections and are based on several factors. In 2006, for example, the trigger amount for a supreme court primary election was $74,280, while the trigger amount in the general election was $216,650.[20] "Funds in opposition" exceeding the trigger amounts are matched with additional public funds for participating candidates up to two times the trigger amount.[21]

In *Duke*, "the plaintiffs' First Amendment argument against the matching funds provision [was] that it 'chill[s] and penalize[s] contributions and independent expenditures made on behalf of [nonparticipating] candidates.'"[22] The court, however, disagreed, concluding:

> [T]he state's provision of matching funds does not burden the First Amendment rights o nonparticipating candidates . . . or independent entities . . . that seek to make expenditures on behalf of nonparticipating candidates. The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system. But this does not impinge on the plaintiffs' First Amendment rights. To the contrary, the distribution of these funds "furthers, not abridges, pertinent First Amendment values" by ensuring that the participating candidate will have an opportunity to engage in responsive speech.[23]

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[16] *Id*. at 2774.
[17] *Id.*
[18] *Duke*, 524 F.3d at 436.
[19] *Id.* at 433.
[20] *Id.*
[21] *Id*.
[22] *Id*. at 437.
[23] *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976)).

The Fourth Circuit in *Duke* explicitly rejected the reasoning of the Eighth Circuit Court of Appeals in *Day v. Holahan*—a case cited by the Supreme Court in *Davis* without substantial discussion. In *Day*, the Eighth Circuit "struck down a matching funds provision, reasoning that the potential 'self-censorship' created by the scheme 'is no less a burden on speech . . . than is direct government censorship.'"[24] The Fourth Circuit in *Duke* found the *Day* court's reasoning "unpersuasive," noting that "*Day*'s key flaw is that it equates the potential for self-censorship created by a matching funds scheme with 'direct government censorship.'"[25] Rejecting *Day*, the *Duke* court instead endorsed the reasoning of more recent Eighth Circuit decision in *Rosenstiel v. Rodriguez*,[26] as well as the First Circuit decision in *Daggett v. Comm'n on Governmental Ethics & Election Practices*[27] and the Sixth Circuit decision in *Gable v. Patton*[28]—all of which upheld public financing trigger provisions.

Perhaps encouraged by the Supreme Court's passing reference, without discussion, to the *Day* decision in Supreme Court's *Davis* opinion, plaintiffs/appellants in *Duke* filed a petition for a writ of certiorari with the Supreme Court, hoping at least four justices (the number necessary for the Court to grant the petition) would view the Fourth Circuit's refusal to apply the rationale of *Day* in the aftermath of the Supreme Court's *Davis* decision as an error in law. Plaintiffs/appellants in *Duke* asked the Court to overturn the Fourth Circuit's decision or, in the alternative, to send the case back to the Fourth Circuit for reconsideration in light of the *Davis* decision. The Court not only declined to hear the appeal, but also declined to send the case back to the Fourth Circuit for reconsideration. Instead, the Court allowed the Fourth Circuit's decision rejecting the rationale of *Day* and upholding the public financing trigger provision to stand.

Consequently, every circuit court to have considered the constitutionality of a public financing trigger provision—the First, Fourth, Sixth and Eighth Circuits—has upheld the trigger. The Supreme Court by denying certiorari in *Duke* in November 2008 allowed this heavy weight of federal appellate court authority to stand.

III. Applying *Davis* to Public Financing Program Trigger Provisions

Applying the *Davis* Court's analytical structure and reasoning to assess the constitutionality of public financing program trigger provisions reveals significant distinctions between the Millionaire's Amendment and public financing program trigger provisions—both with respect to the "burden" prong of the constitutional analysis and with respect to the "government interest" prong of the analysis. Given these distinctions, the Supreme Court correctly allowed the Fourth Circuit's decision in *Duke* to stand.

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[24] *Id.* (quoting *Day*, 34 F.3d at 1360).
[25] *Id*. at 437-38 (quoting *Day*, 34 F.3d at 1360).
[26] 101 F. 3d 1544 (8th Cir. 1996).
[27] 205 F. 3d 445 (1st Cir. 2002).
[28] 142 F. 3d 940 (6th Cir. 1998).

A. Public Financing Program Trigger Provision "Burden" Analysis

Regarding the "burden" on speech, the *Davis* Court's analytical starting point was the fact that "[u]nder the usual circumstances, the same restrictions apply to all the competitors for a seat."[29] This simply is not the case in the context of public financing programs. Candidates participating in public financing programs are subject to much more severe campaign finance restrictions than candidates who choose to finance their campaigns using private funds.

- A candidate participating in a public financing program is constrained by a much lower limit or an outright prohibition on private contributions than is a nonparticipating candidate.
- A candidate participating in a public financing program is subject to an expenditure limit, whereas a nonparticipating candidate is subject to no expenditure limit.
- A candidate participating in public financing programs is often subject to restrictions on *how* they can spend their campaign funds, while no such restrictions apply to nonparticipating candidates.
- A candidate participating in a public financing program is often subject to more comprehensive auditing of campaign finances than is a nonparticipating candidate.
- A candidate participating in a public financing program is often subject to more extensive disclosure requirements than is a nonparticipating candidate.

In short, "under usual circumstances," the same restrictions *do not* apply to a candidate participating in a public financing program and a candidate who is not. A participating candidate accepts significant burdens and disadvantages *vis-à-vis* a nonparticipating candidate from the get-go. The *Buckley* Court recognized this fact, explaining:

> Any disadvantage suffered by operation of the eligibility formulae under [the public financing law] is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates. But eligible candidates suffer a countervailing denial. As we more fully develop later, acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation.[30]

Comparing a system in which candidates start under the same rules (*e.g.*, the Millionaire's Amendment system) to a system in which candidates start under different rules (*e.g.*, a public financing system) is comparing apples to oranges. The Supreme Court in *Davis* gave no consideration whatsoever to the latter scenario—the issue simply was not before the Court.

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[29] *Davis v. FEC*, 128 S. Ct. at 2765.
[30] *Buckley*, 424 U.S. at 95.

Is a privately-financed candidate who has been operating under less restrictive rules than her publicly-financed opponent *burdened* when the more severe restrictions willingly suffered by the publicly-financed opponent are eased a bit under a public financing program trigger provision? The privately-financed candidate would still arguably be operating under less restrictive rules than her publicly-financed opponent notwithstanding the operation of the trigger provision.

Consider the hypothetical example of two candidates running for governor in a state that offers a voluntary public financing option. Candidate A decides to forego the public financing option and instead privately finance her campaign under the state's $10,000 contribution limit with no limit on how much she may spend. Candidate B decides to participate in the public financing program and, consequently, must agree to raise *no private contributions* beyond 10,000 $5 "qualifying contributions," which are turned over to the state, and to spend no more than the $1 million grant of public funds. If Candidate A raises and spends $10 million, is Candidate A burdened by a public financing program trigger provision that provides Candidate B with up to $1 million dollars in additional public funds to match expenditures above $1 million by a nonparticipating opponent? Bear in mind that Candidate B remains bound by the increased $2 million spending limit and may raise no private funds, while Candidate A continues to raise private funds under a $10,000 limit and spend as much as she raises—$10 million and counting.

Unlike the Millionaire's Amendment context, where the self-financed candidate was subject to *more restrictive campaign finance laws* that a non-self-financed opponent, a self-financed candidate in the public financing context typically operates under *less restrictive campaign finance laws* than a publicly-financed opponent, even when a trigger provision is in effect. Whereas the *Davis* Court concluded that under the Millionaire's Amendment, "the vigorous exercise of the right to use personal funds to finance campaign speech produce[d] *fundraising advantages* for opponents in the competitive context of electoral politics,"[31] the same can not credibly be said about public financing program trigger provisions.

It is on this basis that the "burden" analysis in the public financing context is distinguishable from the *Davis* Court's burden analysis in the Millionaire's Amendment context.

B. Public Financing Program Trigger Provision "Government Interest" Analysis

Even greater distinctions can be drawn between the government interests asserted and rejected in *Davis* to justify the Millionaire's Amendment and those that have been asserted and accepted by the Supreme Court and lower courts to justify constitutional burdens that might be associated with public financing programs.

In *Buckley*, the Supreme Court rejected several constitutional challenges to the federal presidential public financing program. In doing so, the Court recognized several

[31] *Id*. at 2772 (emphasis added).

important governmental interests that support public financing generally—several of which arguably justify any First Amendment burdens that might be deemed to result from public financing program trigger provisions.

The *Buckley* Court found that, in enacting the presidential public financing program, "Congress was legislating for the "general welfare" to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."[32]

The *Buckley* Court explicitly rejected the argument that the presidential public financing program violated the First Amendment, reasoning that the public financing program was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the electoral process, *goals vital to a self-governing people*."[33] The presidential public financing program, according to the Court, "furthers, not abridges, pertinent First Amendment values."[34] The Court's elaboration on this point is worth quoting at length.

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.[35]

The *Buckley* Court continued:

> It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions.[36]

Importantly, with respect to public financing program trigger provisions, the *Buckley* Court rejected the argument that the public financing program is unconstitutional because "it does not treat all declared candidates the same."[37] The Court concluded that Congress "was justified in providing both major parties full funding and all other parties only a

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[32] *Buckley*, 424 U.S. at 91.
[33] *Id*. at 92-93 (emphasis added).
[34] *Id*. at 93.
[35] *Id.* at 93 n.127 (internal citations omitted).
[36] *Id.* at 96.
[37] *Id.* at 97.

percentage of the major-party entitlement."[38] The Court recognized that providing the same amount of funding to all parties would "make it easy to raid the United States Treasury."[39] The Court examined the formula by which the federal public financing program differentially allocates public funds to major and minor party candidates and concluded:

> [T]he choice of percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We can not say that Congress' choice falls without the permissible range.[40]

Unlike the Millionaire's Amendment scrutinized in *Davis*, which the Court found advanced no legitimate governmental interest, a system of public financing was found by the *Buckley* Court to advance governmental interests "vital to a self-governing people."[41]

Whereas the Millionaire's Amendment did not advance the governmental interest in preventing corruption because it *increased* the size of allowable private contributions for certain candidates and discouraged the non-corrupting expenditure of personal funds, public financing programs have been found by the Court to further the significant governmental interest of eliminating the improper influence of large private contributions."[42]

Considering specifically the constitutionality of public financing trigger provisions, a court following *Buckley* should recognize that just as the presidential public financing program's provisions allocating precious limited public resources to the races where they are most needed (*e.g.*, differential allocation of funds to major and minor party candidates) advances the important governmental interest in protecting the public fisc, so too do public financing trigger provisions that allocate public resources to races where they are most needed (*e.g.*, races in which nonparticipating candidates or independent groups spend well in excess of the original allotment of public funds to participating candidates) advance the important governmental interest in protecting the public fisc.

Further, the viability of public financing programs depends on candidates' voluntary decision to participate. If participating candidates do not receive sufficient funds to run competitive races, serious candidates simply will not participate. Given that the *Buckley* Court found that public financing generally is supported by strong governmental interests, it stands to reason that mechanisms such as trigger provisions that are designed to ensure the viability of public financing programs are supported by the same governmental interests.

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[38] *Id*. at 98.
[39] *Id.*
[40] *Id.* at 103-04 (internal citation omitted).
[41] *Id*. at 92-93 (emphasis added).
[42] *Id.* at 96.

Again, a hypothetical example can illustrate this important point of law. In designing a public financing programs, where a legislature determines that a highly competitive race for the office of state representative costs $1 million, surely it is constitutionally permissible under *Buckley* for the legislature to enact a public financing program that allocates $1 million in public funds to all eligible participating candidates. But recognizing that only 10% of races for state legislature are competitive, and that the other 90% noncompetitive races cost only $500,000, the legislature might wisely choose to allocate only $500,000 initially to participating candidates in order to advance the important governmental interest in protecting the public fisc—but to incorporate into the public financing program a trigger provision that allocates up to an additional $500,000 on a matching basis to candidates in the approximately 10% of races that are competitive, where the participating candidate's opponent spends in excess of $500,000.

Given that *Buckley* establishes the constitutionality of a program that allocates $1 million to every participating candidate, a program designed to protect the public fisc by targeting $1 million only to those races where it is truly needed, and allocating a lesser amount in other races, is likewise constitutional under *Buckley*.

IV. Conclusion

Opponents of public financing laws have and may continue to argue that public financing programs generally, and public financing program trigger provisions specifically, are unconstitutional under the Supreme Court's *Davis* decision. But, simply put, the *Davis* Court did not decide the issue and public financing program trigger provisions can be distinguished from the Millionaire's Amendment invalidated in *Davis*. Furthermore, the overwhelming weight of federal court authority—including the Fourth Circuit decision this year in *Duke*, which the Supreme Court left standing when it declined to review the decision last month—makes clear that public financing programs generally, and trigger provisions specifically, are constitutional.