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Memorandum

To: The Honorable Robert A. Brady, Chairman
The Honorable Daniel E. Lungren, Ranking Minority Member
Committee on House Administration, U.S. House of Representatives
From: Monica Youn and Ciara Torres-Spelliscy
Brennan Center for Justice at NYU School of Law
Re: H.R. 1826: Response to Questions to Arn Pearson, dated August 13, 2009
Question Number 2
Date: September 11, 2009

The Committee asked: "Looking at the current trends in appellate and Supreme Court campaign finance laws, is there anything in HR. 1826 that may be subject to constitutional scrutiny?"

Brennan Center Response:

Public financing programs such as H.R. 1826, which provide public funding to candidates who voluntarily agree to certain restrictions, have consistently been praised and upheld by the United States Supreme Court and several federal circuit courts of appeals. *See*, *e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding the presidential public financing system under Federal Election Campaign Act ("FECA")); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding for elections); *see also Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina's judicial public financing system). These courts have concluded that public financing *furthers* First Amendment values and thus advances sufficiently important and significant state interests. *See Buckley*, 424 U.S. at 92-107.

Public financing systems have typically been subject to constitutional challenge on two constitutional grounds: (1) whether the program chills free speech rights under the First Amendment or (2) whether the program implicates equal protection rights under the Fourteenth Amendment. These grounds for challenges are usually unsuccessful, and public financing systems have traditionally been upheld by most courts. However, this is not universally true – in two cases, courts have enjoined public financing systems that feature matching funds "triggered" by opposing or independent expenditures and/or a distinction between the treatment of major and minor party candidates. *See Day v. Holahan*, 34 F.3d 1356 (enjoining provision of Minnesota's campaign finance statute that increased candidate's expenditure limit and public subsidies based on amounts of independent expenditures); *Green Party of Connecticut v. Garfield*, 3:06 cv 1030 (SRU) (Aug. 27, 2009) (enjoining Connecticut's Citizens Election Program). However, the public financing system in H.R. 1826 exhibits neither of these features. Additionally, the pending case of *Citizens United v. FEC*, No. 08-

205 (U.S. 2009), which is under submission to the Supreme Court, does not bear on public financing systems such as that in H.R. 1826. Accordingly, nothing in current trends in appellate and Supreme Court campaign finance law casts doubt upon the constitutionality of H.R. 1826.

Public Financing Systems Such as FENA Enhance, Rather Than Inhibit, the Exercise of First Amendment Freedoms

Modern campaign finance jurisprudence springs from the seminal case of *Buckley v. Valeo*, which reviewed the constitutionality of contribution limits, expenditure limits and public financing. In *Buckley*, the U.S. Supreme Court explained that a public funding system aims, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. The Court further noted that:

> the 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 a 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.

Id. at 93 n.127 (citations omitted).

Public financing promotes "uninhibited, robust, and wide-open public debate" not only through direct subsidies for speech but also through more indirect means. A full public funding system restructures the incentives between candidates hungry for cash and donors hungry for influence. In this sense, then, a public financing system serves the same interest as contribution limits, *i.e.*, combating "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation omitted). "Because the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,' . . . measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate." *Id.* at 137 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

Public funding systems also foster First Amendment interests by freeing candidates from the rigors of fundraising and permitting them to devote time to communication and debate. *See Buckley*, 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving . . . candidates from the rigors of soliciting private contributions.") (internal quotation omitted); *Rosenstiel*, 101 F.3d at 1553 (recognizing Minnesota's compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island public financing law because such programs "'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising") (quoting *Buckley*, 424 U.S. at 91).

The Roberts Supreme Court has reaffirmed *Buckley*'s support of public financing systems. In *Davis v. FEC*, 128 S.Ct. 2759 (2008), the Court reaffirmed *Buckley's* strong approval of public financing

systems, reiterating the government's ability to condition acceptance of public funds on a requirement that candidates abide by specific expenditure limits,. The *Davis* Court noted that:

> In *Buckley*, we held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though we found an independent limit on overall campaign expenditures to be unconstitutional. 424 U.S., at 57, n. 65; see *id.,* at 54–58.

Davis v. FEC, 128 S.Ct. 2759, 2772 (2008) (affirming *Buckley*'s holdings on voluntary public financing).

Because public funding programs include a voluntary agreement by participating candidates to abide by spending limits and to forego (or limit) private contributions, such programs are subject to attack on the ground that they violate the First Amendment rights of contributors as well as candidates, but this claim has so far been found to be without merit. *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court) ("[S]ince the candidate has a legitimate choice whether to accept public funding and forego private contributions, the supporters may not complain that the government has deprived them of the right to contribute."), *aff'd*, 445 U.S. 955 (1980).

FENA, like the presidential public financing program and those in Maine, Arizona and North Carolina, furthers First Amendment values by seeking to enlarge public discussion, prevent corruption and its appearance, and open elective offices to a broader pool of candidates.

HR 1826 Avoids Challenges to "Trigger" Provisions Based on *Davis v. FEC*

Because of the careful drafting of H.R. 1826, this bill avoids one of the most contested questions in campaign finance law: the constitutionality of trigger matching funds. Trigger matching funds, which are also known as "rescue funds" or "fair fight funds" in some jurisdictions, are additional public funds that are made available to a publicly funded candidate facing high spending from either a privately-funded opponent or from an independent spender. The additional public grants are "triggered" by spending above a set monetary threshold by an opponent or an independent spender.

Buckley and its follow-up case *Republican Nat'l Comm. v. FEC*, did not address the constitutionality of trigger matching funds because FECA does not contain this type of funding mechanism. For years, the federal courts held trigger matching funds to be presumptively constitutional. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 465 (1st Cir. 2000) (holding public funding system's matching fund provision based on independent expenditures did not burden speakers' First Amendment rights); *Jackson v. Leake*, 476 F. Supp. 2d 515, 529 (E.D.N.C. 2006), *aff'd sub nom.*, *Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (rejecting argument that trigger provisions in public campaign financing scheme impairs speaker's First Amendment speech rights); *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197, 1199-1203 (D. Ariz. 2005) (rejecting plaintiffs' First Amendment challenge to public financing scheme's matching fund provisions and adopting reasoning of *Daggett*); *Wilkinson v. Jones*, 876 F. Supp. 916, 927-28 (W.D. Ky. 1995) (rejecting constitutional challenge to trigger provision that increased participating candidate's expenditure limit based on the expenditures of privately-financed candidates).

The one outlier to this reading of the constitutionality of trigger matching funds was the Eighth Circuit's decision in *Day v. Holahan*, 34 F.3d 1356, 1359-60 (8th Cir. 1994), which found that a trigger which matched independent spending in Minnesota was unconstitutional. The Eighth Circuit itself abandoned the reasoning of *Day* in a later case by upholding opponent trigger matching funds. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551-2 (8th Cir. 1996); *see also Daggett*, 205 F.3d at 464 n.25 (noting that the "continuing vitality of Day is open to question"); *Leake*, 524 F.3d at 438 ("the Day decision appears to be an anomaly even within the Eighth Circuit, as demonstrated by that court's later decision in Rosenstiel").

At least one court has opined that the presumed constitutionality of trigger matching funds was called into question when the Supreme Court mentioned *Day* favorably in *dicta* in *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008), a case which struck down the Millionaire's Amendment to the Bipartisan Campaign Reform Act (BCRA). Although *Davis* is about contribution limits in privately funded elections, and not about public financing, a federal district court in Connecticut recently stated that "[t]here is no question that the Supreme Court's decision in *Davis* has breathed new life into the legal reasoning of *Day*." *Green Party of Connecticut v. Garfield*, 3:06 cv 1030 (SRU) slip op. at 134-36 (Aug. 27, 2009) (relying on *Davis* to strike down Connecticut's trigger matching funds). Presently, the question of the constitutionality of trigger matching funds is an open issue in on-going federal cases in Arizona and the Second Circuit, and this question may ultimately reach the Supreme Court.[1]

However, H.R.1826 has avoided this debated constitutional issue because as presently drafted, FENA does not have trigger matching funds. Instead, participating candidates retain the ability to gather small private contributions throughout the election cycle so that they can respond to high spending in a race as necessary.

HR 1826's Equal Treatment of Major and Minor Parties

As mentioned above, a federal court in Connecticut recently enjoined that state's public financing system, in part, because the Connecticut system imposed different qualification requirements on major and minor party candidates, requiring an additional showing of electoral support from minor party and independent candidates before they were given the same public funding as major party candidates. However, this holding does not bear upon FENA, since the proposed congressional public financing system makes no distinction between candidates from major and minor parties.

Connecticut implemented a popular support-based system that allowed non-major party candidates to receive public campaign funding upon demonstrating a broad base of support. Under this system, non-major party candidates could receive one-third, two-thirds, or full funding in a general election by winning over 10, 15 or 20 percent of the vote, respectively, in the previous election or by collecting an equivalent number of signatures. Furthermore, non-major party candidates could be reimbursed after an election if their popular support increased.

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[1] The Supreme Court last year declined to hear a case in which the Fourth Circuit had upheld the constitutionality of North Carolina's judicial public financing system, which included triggered matching funds in high-spending races or those with independent expenditures. *See North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008).

The Connecticut district court held that this differential treatment of major and minor party candidates violated the Fourteenth Amendment's guarantee of equal protection. As the judge in the case explained, "[t]he government . . . in creating such a public campaign financing scheme to combat the influence and appearance of corruption in politics, may not simultaneously disadvantage minor party candidates' political opportunity." *Green Party of Connecticut v. Garfield*, 3:06 cv 1030 (SRU) slip op. at 68 (Aug. 27, 2009). By contrast, H.R. 1826 avoids this equal protection issue by making no distinction between candidates from major and minor parties.

Conclusion

The public financing system for Congressional elections created by H.R. 1826 was carefully structured to maximize its ability to survive judicial scrutiny. Like all public financing systems it enhances First Amendment values and does so while providing equal access to public funding from candidates of all stripes. For these reasons, the Brennan Center urges the Committee to approve H.R. 1826.