No. 07-320

IN THE

# Supreme Court of the United States

JACK DAVIS,
*Appellant*,
v.

FEDERAL ELECTION COMMISSION,
*Appellee.*

**On Appeal from the United States District Court for the District of Columbia**

## BRIEF FOR APPELLANT

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## QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002 created the so-called "Millionaires' Amendment." Congress purportedly enacted Section 319 to equalize the resources among congressional candidates utilizing personal funds for their campaigns and candidates relying mainly on contributed funds. Under the statute, when candidates for the United States House of Representatives exceed $350,000 in personal campaign expenditures, their opponents may be entitled to receive: (1) individual contributions at triple the statutory limit, from donors who have reached the limit for aggregate campaign donations; and (2) coordinated expenditures from party committees in excess of the statutory limit. To effectuate application of Section 319, the statute mandates burdensome disclosures for self-financed candidates, but not for their opponents if they do not self-finance. The questions presented are:

1. Whether the three-judge district court erred in finding that Congress's attempt to equalize a potential imbalance in resources among congressional candidates violates neither the First Amendment to the United States Constitution nor the equal protection component of the due process clause of the Fifth Amendment.

2. If equalizing a potential imbalance in resources among congressional candidates is constitutional, whether the statute accomplishes the stated purpose.

## PARTIES TO THE PROCEEDING

Jack Davis is the appellant in this Court and was the plaintiff in the three-judge district court.

The Federal Election Commission is the appellee in this Court and was the defendant in the three-judge district court.

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## OPINION BELOW

The opinion of the district court is reported at 501 F. Supp. 2d 22 (D.D.C. 2007).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment and the equal protection component of the due process clause of the Fifth Amendment to the United States Constitution are printed in the Appendix to the Jurisdictional Statement ("J.S. App.") at 20a. BCRA § 319 ("Section

319") (codified at 2 U.S.C. § 441a-1 and printed at J.S. App. 21a-26a) is printed at J.S. App. 27a-31a.

## JURISDICTION

The decision of the district court was issued on August 9, 2007. Appellant filed his notice of appeal on August 16, 2007, and his jurisdictional statement was filed on September 7, 2007. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114 (2002); and 28 U.S.C. § 1253.

## STATEMENT OF THE CASE

This is a First and Fifth Amendment facial challenge to the so-called "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (2002) (codified as amended at 2 U.S.C. § 441a-1). Congress ostensibly enacted Section 319 to "level the playing-field" among United States House of Representatives candidates who utilize personal funds for their campaigns and those who rely primarily on contributed funds.

Section 319 is Congress's second attempt to regulate candidates' spending on their own campaigns. In 1972, the Federal Election Campaign Act ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431-455), as amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263, established limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." FECA § 608(a)(1).[1] In

[1] FECA imposed a $25,000 limit for most candidates for the House of Representatives.

*Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (*per curiam*), this Court struck down those limits, holding that *any* ceiling on personal expenditures violates the First Amendment.[2] In 2002, Congress imposed new burdens on personal expenditures, creating an alternative system of higher contribution limits, strategy disclosure obligations, and other requirements in elections where one or more candidates spends a substantial amount of personal funds.

Federal election law generally applies uniform contribution limits and regulations to campaigns where all candidates rely on private contributions. BCRA § 319 ("Section 319"), however, confers advantages on the opponents of a candidate for the United States House of Representatives whose personal expenditures exceed $350,000, and also imposes additional reporting requirements that apply only to a self-financing candidate who *might* cross the $350,000 threshold.[3] Once a candidate's personal expenditures surpass that threshold, Section 319 may enable her opponents to match these expenditures by: (1) receiving contributions at triple the $2,300 per election limit, from donors who have already reached the $42,700 per election cycle limit for aggregate campaign donations; and (2) receiving *unlimited* coordinated party expenditures (normally subject to a $40,900 per election ceiling for most House races).[4] Congress also created a new reporting

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[2] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I.

[3] BCRA § 304(a) (2 U.S.C. § 441a(i)) applies parallel regulations to campaigns for the United States Senate. Appellant does not challenge this provision.

[4] These limits are indexed for inflation. Since BCRA's enactment in 2002, the individual contribution limit has in-

regime for candidates who intend to spend more than $350,000 of their own money, which requires the disclosure of their personal campaign expenditure plans.

In both 2004 and 2006, Appellant Jack Davis ran as the Democratic Party's nominee for New York's 26th Congressional District seat to the United States House of Representatives, challenging the Republican incumbent Thomas Reynolds. Mr. Davis funded his 2004 campaign primarily, though not exclusively, with personal expenditures. Mr. Davis spent over $1.2 million, but lost the 2004 election to Mr. Reynolds. *See* Davis FEC Form 3, J.A. 54; *Fed. Elections 2004: Election Results for the U.S. House of Representatives*, at 72, http://www.fec.gov/pubrec/fe2004/2004congresults.pdf. In 2006, the FEC began an investigation into alleged violations of Section 319 stemming from Mr. Davis's campaign committee's alleged failure to report his personal expenditures made during the 2004 campaign.[5] Aug 16, 2006 FEC Letter, Addendum ("Add.") 1a-2a. In January 2007, the FEC proposed a "conciliation agreement" in which Mr. Davis would pay a $251,000 civil penalty. Conciliation Agreement, Add. 8a. On August 27, 2007, Mr. Davis agreed to toll the statute of limitations for the action until final resolution of this case. *See* Consent, Add. 10a.

In 2006, Mr. Davis again challenged Mr. Reynolds. On June 28, 2006—prior to the start of the general election campaign and in anticipation of personally spending more than a million dollars—Mr. Davis

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creased from $2,000, 11 C.F.R. § 110.1(b)(1)(i),(ii), and the ceiling on coordinated party communication has increased from FECA's original $10,000 limit. 11 C.F.R. §§ 109.32(b)(ii), 110.17.

[5] Documents relating to the FEC's investigation are printed in an Addendum ("Add.") to this brief at Add. 1a-10a.

filed suit in United States District Court for the District of Columbia. *See* Complaint, J.A. 5. In his complaint and supporting declaration, Mr. Davis alleged that application of Section 319's disclosure requirements and expanded contribution limits to his race violated his First and Fifth Amendment rights. He requested that the court declare Section 319 unconstitutional and enjoin the FEC from enforcing the provision. *See* Complaint, J.A. 5; Davis Declaration, J.A. 20.

At the same time, Mr. Davis moved to expedite this case pursuant to BCRA § 403, which instructs the district court to "expedite to the greatest possible extent the disposition of the action and appeal." Mr. Davis asked the court to decide his claims before the September 12, 2006 start of the general election campaign. *See* Mot. to Expedite. The FEC opposed the request, asserting that it required extensive discovery to defend the matter.

On July 11, 2006, the district court granted Mr. Davis's application for a three-judge court. On July 28, the district court denied Mr. Davis's request to expedite, and set a briefing schedule. The parties filed cross-motions for summary judgment, and the district court heard oral argument on October 20, 2006. On August 9, 2007, the court granted the FEC's motion for summary judgment.

*A. Section 319, the So-Called "Millionaires' Amendment."* Congress enacted Section 319 to address a perceived disparity in resources. As one Senator explained, personal campaign spending makes it "more difficult for nonwealthy opponents to compete and to get their messages and their ideas across to the public." 147 Cong. Rec. S2536, S2538 (daily ed. Mar. 20, 2001) (Sen. DeWine). It also

identified a public perception "that someone today who is wealthy enough can buy a [congressional] seat." *Id.* at S2547 (Sen. DeWine).

To implement its remedy, Congress developed the means to compare opponents' respective financial data in an election campaign. These statutory formulae measure the pool of funds—comprised of personal expenditures and contributed funds—available to each candidate. If, under the formulae, a candidate relying primarily on contributions has received less money than his opponent's personal expenditures, Section 319 applies. The formulae first calculate "gross receipts," essentially the amount of private contributions received by a candidate. *See* 11 C.F.R. § 400.8. During an election cycle, this number may be calculated three separate times; the general election tally accounts for contributions received by December 31 of the year *before* the general election.[6] This amount remains fixed during the year of the general election. The formulae next measure the difference between these receipts and the respective amounts of personal funds expended by the candidates. This measure, which determines the amount of benefits available to a candidate, is called the "opposition personal funds amount" ("OPFA"). Because candidate committees' finances are in flux, Congress confronted measurement issues relating to the comparison of contributions and personal spending, when to authorize extra-limit funds, and how to determine when additional funds have eliminated the purported inequities in the race.

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[6] Section 319 applies to primary and general elections, differentiating only as to the schedule for making calculations. See 11 C.F.R. §§ 400.2; 400.10. The Statement of the Case addresses the general election provisions only.

*1.a. Disclosure of Personal Expenditures.* To utilize this regime, candidates require access to accurate, contemporaneous data about their opponents' personal expenditures. Before passage of Section 319, FECA's regulations provided for quarterly financial disclosures, with additional reports required near elections. *See* 11 C.F.R. pt. 104. To accelerate disclosure of personal spending, Congress imposed a 24-hour notification scheme, commencing at the start of a campaign. Candidates must "file a declaration [of intent] stating the total amount of expenditures from personal funds . . . that will exceed $350,000" within 15 days of declaring their candidacy. 2 U.S.C. § 441a-1(b)(1)(B). Candidates who do not intend to exceed the $350,000 threshold "may state the amount as $0." 11 C.F.R. § 400.20(a)(2). The requirement applies to the primary and general elections, respectively. If, at any time during an election, candidates make aggregate personal campaign expenditures in excess of the threshold amount of $350,000, they must, within 24 hours, file an "initial notification" with the FEC, each opponent, and the national party of each opponent. 2 U.S.C. § 441a-1(b)(1)(C); *see also* 11 C.F.R. § 400.21(b). This filing notifies their opponents that they may be eligible for Section 319's extra-limit funds.

For purposes of Section 319, the FEC defines personal expenditures as: (1) personal funds spent in support of a candidate's own campaign; (2) personal contributions or loans made to a candidate's campaign; (3) loans by any other person to a candidate's committee that are secured using the candidate's personal funds; and (4) "any obligation to make an expenditure from personal funds that is legally enforceable" against a candidate. 11 C.F.R. § 400.4(a)(1)-(4). If a candidate subsequently repays

personal expenditures or loans with contributed funds, Section 319 does not reduce its measure of her aggregate personal spending. *See, e.g.*, FEC Adv. Op. 2003-31 (Dec. 19, 2003) (no reduction in candidate's gross receipts advantage if personal loans are later repaid with contributions).

Exceeding the $350,000 personal spending threshold triggers the 24-hour notification requirement for aggregate personal expenditures of $10,000 or more.[7] 2 U.S.C. § 441a-1(b)(1)(D); *e.g.*, Davis FEC Form 10, J.A. 106. Candidates provide the date and amount of each personal expenditure made since the last notification and calculate aggregate personal expenditures for the election. *See* 11 C.F.R. § 400.23(c)-(d). Candidates disclose this information to the same entities that receive the Declaration of Intent form. 2 U.S.C. § 441a-1(b)(1)(F). All disclosure requirements persist through Election Day. *See* 11 C.F.R. §§ 400.20-25.

*1.b. Disclosure of Receipt of Extra-Limit Contributions.* Once a candidate determines that he is eligible for extra-limit funds, he must notify the FEC and his political party within 24 hours. 11 C.F.R. § 400.30(b). He files another notice when he is no longer eligible for additional benefits. *Id.* § 400.31(e)(1)(ii). The regulations do not, however, require a candidate receiving extra-limit funds to notify his opponents of his receipt or expenditure of those benefits.

*2. Calculation of Available Extra-Limit Contributions*. Candidates utilize the various notices to calculate whether, and to what amount, they may

[7] Neither the threshold nor aggregate expenditure amount is indexed for inflation.

accept funds under the expanded limits. This is called the "opposition personal funds amount" ("OPFA"). 2 U.S.C. § 441a-1(a)(2); 11 C.F.R. § 400.10. The FEC dubbed this calculation the "Proportionality Provision." *See* Def. Mem. Summ. J. at 8-9. Similarly, the district court concluded that Section 319, and specifically the OPFA calculation, "provides a benefit to [a self-financed candidate's] opponent, thereby correcting a potential imbalance in resources available to each candidate." J.S. App. 9a. The opinion summarizes the OPFA calculation:

> [T]he opponent determines the amount of personal funds spent by each candidate (*i.e.,* the self-financed candidate and himself), adds 50% of the total funds raised by each candidate during the year prior to the election, and compares the totals. [2 U.S.C.] § 441a-1(a)(2). If the opponent's OPFA is above that of the self-financed candidate, he may not take advantage of the relaxed limits and coordinated expenditures. If it is not, then he may take advantage of the relaxed limits, but only until parity is achieved under the OPFA formula.

J.S. App. 4a. Because the OPFA, which determines the application of benefits, measures personal funds and contributions in significantly different ways, the formulae merit additional discussion.

*2.a. "Amount of Personal Funds Spent by Each Candidate."* Each time a self-financed candidate personally spends $10,000 or more, she must report the expenditures. 11 C.F.R. § 400.22(b). This notice authorizes her opponents to calculate (or recalculate) their OPFAs using her new aggregate personal expenditures. Accordingly, the OPFA formula ensures that the amount available to offset personal

spending increases after each additional expenditure. Opponents may match up to 100% of the personal funds spent, at which point their limits return to standard levels. *Id.* § 400.31(e).[8]

*2.b. "50% of the Total Funds Raised by Each Candidate During the Year Prior to the Election."* The OPFA measures contributions and personal funds differently. Section 319 measures only contributions that are received in the year preceding the year of the election, an amount that it designates as the "gross receipts advantage." 2 U.S.C. § 441a-1(a)(2)(B)(ii). During the 2008 election cycle, for example, the gross receipts advantage measures funds contributed to candidates' authorized committees during 2007. The calculation does not account for contributions left over from previous elections: funds known as the "war chest". *See, e.g.,* 147 Cong. Rec. S3183, S3195 (daily ed. Mar. 30, 2001) (Sen. Dodd) (discussing differential treatment of "incumbent's war chest [from] a challenger's personal wealth"). The gross receipts advantage also omits contributions received by candidates during the ten months before Election Day on November 4, 2008. From February 1, 2008, when the calculation is effective, through Election Day, the gross receipts advantage simply utilizes the "[a]ggregate amount of the gross receipts of the candidate's authorized committee . . . on December 31 of the year preceding the year in which the general election is held." *See* 11 C.F.R. § 400.10(b) (defining variables (e) and (f) of the general election OPFA).

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[8] Candidates must return all unused contributions received under Section 319 at the end of a campaign, or if their self-financed opponent withdraws from the race at any time. 11 C.F.R. § 400.53.

Section 319 further winnows the gross receipts advantage by segregating primary and general election contributions.[9] Accordingly, candidates utilize their total primary receipts on December 31, 2007 for calculations relating to their 2008 primary opponents and their total general receipts on that date for their general opponents. *E.g.*, Reynolds FEC Form 3Z-1, J.A. 62; *see also* 11 C.F.R. § 104.19(b)(2). The OPFA uses these totals, without further adjustment, for all calculations in the respective elections. 11 C.F.R. § 400.10. For example, a candidate who received no contributions designated for the general election between January 1, and December 31, 2007 would use "$0" for all 2008 OPFA general election calculations.

Finally, the statute halves the aggregate contributions before calculating the gross receipts advantage. *See id.* § 400.10(a)(3)(i). Personal expenditures are not reduced.

Ultimately, the gross receipts advantage measures a candidate's aggregate personal expenditures, plus: all contributions: (a) made to that candidate during the year preceding the year of the election; (b) that are designated for the applicable election; (c) totaled, and divided by half. *Id.* § 400.10. At its most basic, the OPFA formula operates as such: general election Candidate A receives $1 million in individual contributions to his general election account through December 31, 2007, which divided in half equals $500,000. His opponent, Candidate B, receives

[9] Because FEC regulations permit candidates to redesignate unused primary funds for use in the general election, individuals generally designate contributions made in the year before the election year to the primary election. See 11 C.F.R. § 110.3(c)(3); *see, e.g.*, Reynolds FEC Form 3Z-1, J.A. 62.

$600,000 in individual contributions to her general election account, which divided in half equals $300,000; the difference of Candidate A's $500,000 and Candidate B's $300,000 is $200,000, providing the gross receipts advantage between the two candidates during the election. Because no candidate has exceeded the $350,000 personal expenditure threshold, Section 319's benefits are not applicable. Subsequently, Candidate B personally spends $350,000 on the general election and files her 24-hour notice. Candidate A may now recalculate his OPFA to account for this expenditure. The difference between Candidate B's personal spending ($350,000) and Candidate A's gross receipts advantage ($200,000) equals $150,000, which is the amount of extra-limit funds that Candidate A may receive.

*3. Penalties and Enforcement.* FECA provides for civil penalties for submission of false, erroneous, or incomplete information on any of the forms relating to Section 319. *See* 2 U.S.C. § 437g(a)(5), (6). Penalties may match the expenditures involved and double for "knowing and willful" violations. *Id.* § 437g(a)(6)(C). FECA also authorizes criminal penalties—including both fines and imprisonment for less than five years—for "knowing and willful" violations. *Id.* § 437g(d)(1)(A).

*B. Application of Section 319 to Mr. Davis's 2004 and 2006 Election Campaigns.*

During the 2006 campaign, Mr. Davis's opponent, incumbent Thomas Reynolds, did not avail himself of his right to raise extra-limit funds. Mot. to Dismiss or Affirm at 12. However, Mr. Reynolds still enjoyed the benefits, and Mr. Davis assumed the burdens, of the unilateral reporting requirements imposed on

Mr. Davis. Mr. Davis filed numerous 24-hour notifications of personal expenditures. *See Davis for Congress Disclosure Reports*, http://images.nictusa.com/cgi-bin/fecimg/?C00421909 (last visited Feb. 19, 2008). At the end of the 2006 campaign—including a primary in which he ran unopposed and the general election against Mr. Davis—Mr. Reynolds received over $4.2 million in contributions (and other financial benefits) and expended more than $5.1 million. He reported no personal expenditures. *See Reynolds for Congress, 2006 Amended Post-General Report, FEC Form 3*, at 2 (filed Feb. 15, 2007), http://images.nictusa.com/cgi-bin/fecimg/?_27950065152+0. At the beginning of the 2006 election cycle, Mr. Reynolds's war chest totaled approximately $1,149,000; he finished the election cycle with approximately $260,000 cash-on-hand. *Id.* During the same election, Mr. Davis reported spending about $2.3 million on the primary and general elections, with his personal expenditures accounting for all but about $126,000 of that total. *See Davis for Congress, 2006 Amended Post-General Report, FEC Form 3, at 2* (filed Mar. 10, 2007), http://images.nictusa.com/cgi-bin/fecimg/?_27930237960+0. He finished the election with $23,657 cash-on-hand. *Id.* Based on Mr. Davis's disclosures, Mr. Reynolds's OPFA at the conclusion of the campaign authorized him to receive $1,459,562.50 in Section 319 benefits. *See supra Reynolds Form 3*. Mr. Reynolds ultimately prevailed in 2006, winning reelection by a 52%-48% margin, receiving 109,257 votes to Mr. Davis's 100,914 votes. *See 2006 Official Election Results for U.S. House of Representatives*, at 61, http://www.fec.gov/pubrec/fe2006/2006house.pdf.

## SUMMARY OF THE ARGUMENT

Section 319 infringes on the core political speech of self-financed candidates and violates their right to equal protection of the law. The provision targets a class of candidates who are exercising their fundamental right to pay for their own electoral efforts and diminishes the exercise of that right in a direct and substantial manner. Section 319 violates the First Amendment by compelling the publication of sensitive, strategic information relating to a self-financed candidate's personal expenditures and by enabling opposing candidates to benefit from those expenditures. This differential treatment of candidates for the same seat in the United States House of Representatives also offends the equal protection component of the due process clause of the Fifth Amendment. In both the 2004 and 2006 elections, Appellant Jack Davis suffered direct injury from the application of Section 319, and he retains a personal stake in the invalidation of that provision.

Section 319 favors incumbents by discouraging challengers from personally financing their campaigns. For those who remain undeterred, the statute punishes them for making personal expenditures by rewarding their opponents. Section 319 provides benefits to the opponents of candidates who personally spend more than $350,000 on their campaigns. The statute authorizes opponents of self-financed candidates to match personal spending with: (1) contributions at triple the $2,300 individual limit that do not apply toward a donor's aggregate election cycle contribution limit; and (2) unlimited coordinated national party communications (normally capped at $40,900 per candidate). To provide access to these benefits, the statute measures all personal

expenditures, within 24 hours, through Election Day. In contrast, the statute counts *only contributed funds received in the year before the year of the election*. Accordingly, it ignores both an incumbent's "war chest," stocked with excess funds from previous election cycles, and all additional contributions that she receives during the year of the election.

Although applied "evenhandedly," the availability of extra-limit funds also confers an advantage on incumbents. *See Buckley*, 424 U.S. at 31 n.33 ("[T]he appearance of fairness . . . may not reflect political reality."). Many self-financed candidates are challengers who do not have access to high dollar donors. Or, as in this matter, candidates self-finance to convey a campaign message of independence from lobbyists, large donors, and other political "insiders." In raising the ceiling for hard money contributions, Congress sought to dampen the influence of large personal expenditures that could offset the natural financial benefits of incumbency. See *id.* ("[I]t is axiomatic that an incumbent usually begins the race with significant advantages."). As this Court first recognized in *Buckley*, 424 U.S. at 32 n.37, incumbents receive the lion's share of "hard money" contributions. *See also McConnell v. FEC*, 540 U.S. 93, 249 (2003) ("Is it accidental, do you think, that incumbents raise about three times as much 'hard money' . . . as do their challengers?") (Scalia, J., concurring in part, dissenting in part). This Court also upheld a ceiling on party coordinated communications because it believed that the absence of limits would foster circumvention of individual contribution limits and result in the improper use of party funds. *See FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 465 (2001); *see also id*. at 460 n.23 (incumbent may use

coordinated communications to "become a player beyond his own race" by raising money for others). Section 319 abolishes the limit on these communications, as well.

Congress crafted Section 319 to resemble a public financing regime. However, unlike such provisions, the statute does not substitute public funds for contributed money. Conversely, it promotes increased expenditures of the latter. Section 319 is also coercive because it provides potential self-financers with no beneficial option; they either forgo their constitutional right to fund their own campaigns or they provide opponents with financial benefits correlated to their personal expenditures.

Section 319 is a provision of significant complexity, in operation and in effect. *See McConnell*, 540 U.S. at 264 (Scalia, J., concurring in part, dissenting in part) (the "federal election campaign laws . . . are already . . . so voluminous, so detailed, so complex, that no ordinary citizen dare run for office . . . without hiring an expert adviser in the field."). Section 319's intricacies include, *inter alia*, multiple formulae applied differently in different years, significantly varied calculations and benefits for House and Senate candidates, and a burdensome reporting regime applicable to self-financers only. The hypothetical published by the FEC to "provide a better understanding" of the statute is over 8,000 words long. *See* 68 Fed. Reg. 3970, 3987-94 (Jan. 27, 2003).

Congress also larded Section 319 with invented terminology. "Opposition personal funds amount" ("OPFA") and "gross receipts advantage" are terms that provide little insight into their measure. Even Congress's chosen name for Section 319, the "Mil-

lionaires' Amendment," is a misnomer. The statute applies to any candidate contemplating expending personal funds, and the House provision is triggered after a candidate expends or secures a campaign loan of $350,000, a modest amount in the current electoral landscape.

Finally, Congress claimed a governmental and public interest in creating equality in races involving personal expenditures. But the statute leaves incumbents free to raise extra-limit funds even while maintaining a significant financial advantage over their opponents. In this case, the statute authorized the incumbent to receive over $1.4 million in extra-limit funds in the 2006 election, even though he had already outspent Mr. Davis by more than $3 million dollars. Even if this Court had recognized that "leveling the playing field" was an independent, sufficient governmental interest, Section 319 fails to advance that goal.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION OVER THIS MATTER BECAUSE APPLICATION OF SECTION 319 INJURED MR. DAVIS IN BOTH THE 2004 AND 2006 ELECTIONS AND HE RETAINS A "PERSONAL STAKE" IN ITS INVALIDATION.

Mr. Davis has suffered injuries-in-fact sufficient to confer Article III standing to challenge Section 319. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[10] As described in the Statement of the

[10] In its Motion to Dismiss or Affirm, the Government conceded that Section 319's notice and disclosure provisions injured Mr. Davis, but asserted that because his opponent did not avail himself of the increased contribution limits, Mr. Davis "has

Case, *see supra* p. 13, in both 2004 and 2006, Section 319 obligated Mr. Davis to provide a series of public disclosures, commencing with his Declaration of Intent to exceed the $350,000 personal expenditure limit, and continuing through Election Day. The injuries imposed by Section 319's disclosure regime are sufficient to confer standing on Mr. Davis to challenge the statute in its entirety.

First, the FEC has alleged that Mr. Davis failed to comply with Section 319's disclosure requirements during the 2004 election and seeks a significant monetary penalty. Add. 1a-9a. This pending action against Mr. Davis satisfies the test for standing articulated in *Lujan*, 504 U.S. at 560-61 (injury must be "concrete"). In the 2006 campaign, Mr. Davis suffered additional injury arising from his compliance with the statute's disclosure requirements. "This Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003) (*citing Buckley,* 424 U.S. at 64-68 (disclosure of campaign contributions)); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462-63 (1958*)* (disclosure of membership lists). Indeed, Mr. Davis filed this matter prior to the 2006 general election in order to avoid the unconstitutional burden imposed by these obligations.

His opponent's decision not to raise funds pursuant to Section 319 does not deprive Mr. Davis of standing to challenge the statute. Severability of a statute is

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identified no actual or imminent injury to himself resulting from that *aspect* of Section 319." Mot. to Dismiss or Affirm at 12 (emphasis added).

only appropriate where the invalidation of an unconstitutional provision does not affect the rest of the statute. The power to sever a statute exists only "on the basis of the Court's assessment as to whether Congress would have enacted the remainder of the law without the invalidated provision." *Miller v. Albright*, 523 U.S. 420, 457 (1998) (citations omitted); *see also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (severing a line-item veto provision because congressional intent to allow such severability was clear and remaining statute could operate independently).

Congress enacted Section 319 as a unified scheme involving the disclosure of personal expenditures and the establishment of alternative limits based on those disclosures. Without immediate access to information about a candidate's personal spending, opponents would be unable to use the formulae to calculate the availability of Section 319's extra-limit funds. Prior to the enactment of Section 319, no reporting mechanism existed to provide this data. Section 319's disclosure obligations cannot be separated from the monetary benefits contingent upon that disclosure.

Mr. Davis has also suffered significant injury due to the availability of the extra-limit funds to his opponent. Litigants have established Article III standing in cases with far more speculative injuries than are presented here. In *Shays v. FEC*, the plaintiffs had standing simply because they were candidates who were obligated to comply with a fundraising regime with which they disagreed. *See Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005) ("[T]he statute's regulation of candidates is part of the reason *why* candidates like Shays and Meehan

possess APA standing, for who suffers more directly when political rivals get elected using illegal financing?"). This Court has also recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Lujan*, 504 U.S. at 578 (reaffirming this principle of standing). Were it not for Section 319, Mr. Davis would be free to make personal expenditures without conferring electoral advantages on his opponents.

Because the FEC maintains a pending enforcement action against Mr. Davis, stemming from his campaign committee's alleged failure to comply with Section 319 during the 2004 election, this case is not moot. Mr. Davis's "personal stake" in the constitutionality of Section 319 presents this Court with a live dispute that it is capable of resolving. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Separate from the FEC enforcement action, Mr. Davis's challenge falls within the "established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right to Life, Inc. ("WRTL")*, 127 S. Ct. 2652, 2662 (2007); s*ee also Storer v. Brown*, 415 U.S. 724, 737 n.12 (1974) (in electoral context the issues persist after conclusion of the elections). The limited period between elections does not leave "ample time" for litigation of electoral challenges. *WRTL*, 127 S. Ct. at 2662-63; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (challenge to a state referendum was not moot after the election, because the time between legislative approval of the measure and submission to the voters was too short a period

in which to litigate). Finding that Mr. Davis's claims are moot because they were not litigated within the 2006 election cycle would also thwart Congress's intention that challenges to BCRA should be expedited. *See* 2 U.S.C. § 437h; *WRTL*, 127 S. Ct. at 2662 (granting review to Wisconsin Right to Life, Inc. in light of "BCRA's command that the cases be expedited 'to the greatest possible extent,' § 403(a)(4).").

## II. SECTION 319 UNCONSTITUTIONALLY BURDENS SELF-FINANCED CANDIDATES' POLITICAL SPEECH AND EXACERBATES INCUMBENTS' INHERENT ADVANTAGES.

Section 319 is Congress's second attempt to regulate personal spending. After *Buckley* struck down FECA's ceilings on personal expenditures, Congress responded with this BCRA provision expanding contribution limits for the opponents of self-financers. The district court, however, failed to examine whether Section 319 actually advances the purported equality interest. *See* J.S. App. 9a (Section 319 corrects a "potential imbalance in resources") and J.S. App. 17a (It is a "reasonable premise" that self-financers are "dangerous to the perception of electoral fairness."). This deference does not rise to the level of strict scrutiny. *See WRTL*, 127 S. Ct. at 2664 ("[T]he burden is on the government to show the existence of [a compelling] interest." (*quoting Bellotti*, 435 U.S. at 786 (footnote omitted))). Because the district court did not address Mr. Davis's claim that Section 319 creates an advantage for incumbents, its opinion is ill-suited to a matter "raising First Amendment issues, [where] we have repeatedly held that an appellate court has an obligation to 'make an

independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) *(quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964)). In its plurality opinion in *Randall*, this Court applied such scrutiny to limits set well below the norm. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (plurality opinion). Equal care should apply here.

### A. Section 319 Favors Incumbents by Subverting Standard Contribution Limits and Increasing Financial Inequality.

Section 319 favors incumbents by providing informational and financial benefits to the opponents of candidates who personally spend more than $350,000 on their campaign. It provides advance strategic information about the self-financed candidate's budget and authorizes their opponents to match their personal spending with: (1) contributions at triple the $2,300 individual limit which do not apply to a donor's aggregate election cycle contribution ceiling; and (2) unlimited coordinated national party communications (normally capped at $40,900 per candidate). *See* 11 C.F.R. § 400.41.

The provision favors incumbents over challengers with the personal wealth sufficient to offset some of the financial advantages of incumbency. As Justice Scalia noted in *McConnell*, "*[a]ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents. . . . Is it accidental, do you think, that incumbents raise about three times as much 'hard

money'—the sort of funding generally *not* restricted by this legislation—as do their challengers?" *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Section 319 exacerbates the advantages of incumbency. While it discounts the presence of incumbents' war chests, Section 319 does not provide additional money for challengers without access to a preexisting source of funds. The provision also ignores other advantages of incumbency, including: greater voter recognition, the ability to earmark funds for one's district, mail franking privileges, and paid travel for official duties. *See Buckley*, 424 U.S. at 31 n.33 (discussing advantages of incumbency). Addressing the Vermont campaign finance law's contribution and expenditure limits in *Randall*, Justice Breyer observed that the "typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent" created too many obstacles to challengers for the law to be constitutional. 126 S. Ct. at 2496 (plurality opinion). Section 319's advantages for those who already enjoy the benefits of incumbency similarly serve to make a challenger's burden heavier.

This boost to incumbents extends to the provision's disclosure triggers. For example, because neither the $350,000 personal expenditure threshold nor the $10,000 reporting level is indexed for inflation, "limits which are already suspiciously low . . . will become almost inevitably low over time . . . thereby impos[ing] the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to assure adequate financing of electoral challenges." *Randall*, 126 S. Ct. at 2499 (plurality opinion). In contrast, the standard contribution limits are adjusted for

inflation every two years. 11 C.F.R. § 110.1(b)(i), (ii). Thus, the thresholds for Section 319 decline, while the expanded contribution levels maintain their value.

By burdening self-financed challengers, Section 319 "*targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents," *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Some members of Congress recognized the biases inherent in Section 319. One Senator stated that "[t]here is simply no way to justify treating an incumbent's war chest differently than a challenger's personal wealth . . . [there is] a substantial loophole for incumbents." 147 Cong. Rec. S3183, S3195 (daily ed. Mar. 30, 2001) (Sen. Dodd).[11] Another Senator concluded that this regime "flies in the face of McCain-Feingold. There is nothing in the spirit of McCain-Feingold in this amendment. This is not reform. This makes a mockery of reform." 147 Cong. Rec. S2536, S2544 (daily ed. Mar. 20, 2001) (Sen. Daschle).

### B. Discouraging Personal Expenditures for the Benefit of Some Candidates is an Impermissible Legislative Purpose.

#### 1. *Congress's Stated Governmental Interests are Novel and Unconstitutional.*

Congress originally imposed contribution limits in election campaigns to address concerns about the appearance and actuality that large campaign donations could unduly influence politicians. *See*

[11] The Senate debate addressed BCRA § 304(a), enacting regulations for United States Senate elections parallel to Section 319.

*Buckley*, 424 U.S. at 26-28. Yet, Congress did not advance this interest in enacting Section 319. Even with evidence of the most sincere congressional intent to compensate for some inequality, this Court has repeatedly rejected campaign finance reforms that simply seek to "level the playing field" for all candidates. *See id.* at 48-49, 54 (no relevant interest exists in "equalizing the relative ability of individuals and groups to influence the outcome of elections"); *see also McConnell*, 540 U.S. at 138 n.40, 227 ("Less rigorous scrutiny [applied] to contribution restrictions aimed at the prevention of corruption" but no deference given when a statute is aimed at equalizing resources in the "political marketplace."). No decision by this Court—whether addressing contributions, disclosure requirements, or expenditure limits—has held otherwise. *McConnell* dismissed a previous challenge to, *inter alia*, Section 319 by individuals who asserted that the statute's increased limits "deprive[d] them of an equal opportunity to participate in the election process based on their economic status." 540 U.S. at 227. In finding that the appellants lacked standing, *McConnell* held that a claim of "curtailment of the scope of their participation in the electoral process" did not confer injury "fairly traceable" to the statute. *Id.* at 227, 230 (*citing FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 257 (1986) ("Political free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.")). *Randall's* plurality opinion continues the thread. In invalidating the Vermont campaign finance law's unconstitutionally restrictive contribution limits, the plurality opinion found that such limits exacted too great a burden on the First Amendment rights of contributors. *See*

126 S. Ct. at 2492 (contribution limits may create more harm than can be justified by purported anticorruption objectives).

Congress has also asserted a related interest in countering negative public perception about the integrity of the electoral process and eliminating wealth as a prerequisite for running for office. Certainly, this a congressional interest that "directly implicate[s] 'the integrity of our electoral process and, not less, the responsibility of the individual citizen for the successful function of that process.'" *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*quoting United States v. Automobile Workers,* 352 U.S. 567, 570 (1957)). This Court, however, has never separated that interest from the corruption concerns articulated in *Buckley*. *WRTL* explained that, "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 127 S. Ct. at 2672 (*quoting Buckley*, 424 U.S. at 26-27). Accordingly, this Court has found that uniform contribution limits, and to some extent expenditure limits, adequately address concerns about electoral integrity. *See WRTL*, 127 S. Ct. at 2672.

During debate, Senator McCain, the co-sponsor of BCRA, acknowledged that raising limits creates tension with preexisting regulations:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. [Regulation of self-financers] 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. S2096, S2142 (daily ed. Mar. 20, 2002) (Sen. McCain). Congress provided a related justification for allowing some candidates to bypass the standard contribution scheme, "leveling the playing field" for all candidates, regardless of financial resources. Apparently, Congress determined that *Buckley's* rejection of a ceiling on personal expenditures, in tandem with its acceptance of generally applied contribution limits, created a financial disparity for candidates who rely primarily on contributions. *See* 147 Cong. Rec. S2536, S2536 (daily ed. Mar. 20, 2001) (Sen. Durbin) (discussing *Buckley*). As one Senator asserted, the provision is an "attempt to correct the inequities in the system and establish fairness in the process. . . . 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. . . ." *Id.* at S2538 (Sen. DeWine).

Congress also expressed a concern about the "public perception that there is something inherently corrupt about a wealthy candidate who can use a substantial amount of his or personal resources to win an election." *Id.* "Many people believe that candidates are attempting to buy their way into office." 148 Cong. Rec. S2096, S2153 (daily ed. Mar. 20, 2001) (Sen. Domenici). The district court agreed, holding that this rationale justified the unequal treatment imposed by Section 319: "[T]he reasonable premise of the Millionaires' Amendment is that self-

financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." J.S. App. 17a.

Finally, members voiced concern that party recruitment of wealthy candidates prevents non-wealthy individuals from participating in elections. *See* 147 Cong. Rec. S2433, S2464 (daily ed. Mar. 19, 2001) (Sen. Sessions). As one member stated: "Running for office has become increasingly expensive, forcing candidates to spend unacceptable amounts of time fundraising, and discouraging qualified challengers from running for office because they cannot afford the price of admission." 148 Cong. Rec. H339, H351 (daily ed. Feb. 13, 2002) (Rep. Kind).

No member of Congress offered justification for Section 319's compelled disclosure of self-financed candidates' strategic spending plans.

### 2. *None of the Equality Interests Expressed by Congress is Compelling.*

In disavowing any interest in the actuality or appearance of *quid pro quo* corruption, Congress disregarded the only sanctioned justification for regulation of political speech. Congress's purported interest in "leveling the playing field" is neither a legitimate, nor compelling, governmental interest. Section 319 provides a conflicting message to candidates and voters. First, Congress asserts that the statute promotes "equality" by permitting an increase in contributed funds for some "underfunded" candidates. Yet for this limited purpose, it maintains that these increased limits—normally deemed "cor-

ruptive"—actually decrease influence and buttress the integrity of the electoral process. Congress "put more money into the political system . . . [and] the effect of that money will be to enhance the first amendment." 147 Cong. Rec. S2536, S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). However, Congress fails to explain how Section 319 transmutes purportedly corruptive contributions into ameliorative ones. Neither Congress nor the district court explains why a legitimate congressional response to "core" protected political expression is the authorization of contributions and expenditures which, in every other circumstance, allegedly increase the influence of donors and the appearance of corruption. If application of uniform limits addresses the corrupting influence of campaign donations, higher limits made available only to the candidates supposedly most susceptible to corruption cannot be the appropriate response to benign personal expenditures.

By its operation, Section 319 also conveys Congress's belief that more than $350,000 in personal expenditures in an election is deleterious speech. "[I]t is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Buckley*, 424 U.S. at 17 (*quoting United States v. O'Brien*, 391 U.S. 367, 382 (1968)). Yet, it is hard to reconcile Section 319's burden on personal spending with *Buckley's* holding that "the use of personal funds reduces the candidate's dependence on the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *Id.* at 53.

Finally, Congress asserted that Section 319 lowers barriers to entry for candidates without substantial personal wealth. Again, because the statute raises or abolishes the ceilings on contributions to candidates and thus encourages more spending, it does not reduce the amount of money necessary (whether personal or contributed) to run a competitive campaign. It may, in some situations, encourage a spending battle between a candidate with a sizable personal fortune and one with a sizable war chest, to the detriment of those candidates without access to large amounts of money from either source. One Senator commented that any equality interest was specious: "The contest is between the wealthy with financial resources versus the people who have access and are dependent upon the wealthy with financial resources." 147 Cong. Rec. S2536, S2544 (daily ed. Mar. 20, 2001) (Sen. Wellstone).

In sum, Section 319's unmistakable message is that personal expenditures over $350,000 in a House race detrimentally effect voters and elections in general. Congress, by making this determination, has run afoul of this Court's admonition in *Brown v. Hartlage* that the government's "fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to 'select which issues are worth discussing or debating,' *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), in the course of a political campaign." *Brown v. Hartlage*, 456 U.S. 45, 59-60 (1982).

### C. Section 319 Has a Negative Effect on Democracy Because It Does Not Serve an Anticorruption Interest and Increases the Public Perception of Corruption in the Electoral System.

Congress expressed concern that the supposed increased participation of wealthy candidates creates the public perception that great wealth is a prerequisite for access to a House seat. However, Section 319 does not address this issue. Indeed, by raising the contribution limits for some candidates, the statute is likely to increase the total amount of money ultimately spent on campaigns. As such, Congress has exacerbated the problem that it purportedly tried to solve.

Addressing *quid pro quo* corruption remains the only accepted justification for campaign finance restrictions. *See WRTL*, 127 S. Ct. at 2676-78 (Scalia, J., concurring in part, concurring in the judgment) (discussing Supreme Court jurisprudence regarding corruption).

Section 319 advances no anticorruption interest. *See* 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (Sen. McCain) (Congress "relax[ed]" limits to "mitigate" influence of personal expenditures). Rather, the provision allows wealthy donors to subvert limits regulating both contributions to individual candidates and the donors' aggregate contribution levels. The only way for candidates to garner Section 319's extra-limit funds is to solicit more money from donors who have already reached the standard limits, and have likely made similar contributions in previous elections. But the entire justification for contribution limits is to free candidates from the influence of a few wealthy donors.

*See, e.g., Buckley*, 424 U.S. at 26-28. By allowing select candidates and donors to bypass the standard campaign finance regulations, Congress undermines its assertion that contribution limits are the best tool to combat the perception of corruption in the electoral system.

Abolishing the coordinated party expenditure limits may also increase circumvention of individual contribution limits. *Colorado II* held that "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." 533 U.S. at 464; *see also id.* at 458-59. "[T]here is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 464.[12] Apart from any putative corruptive effect, this Court also received evidence that incumbents use coordinated communications to fund other candidates and "increase personal power and a claim to party leadership." *Id.* at 460 n.23. Unlimited funds for coordinated communication accentuate this perk of incumbency.

### D. In Scrutinizing Section 319, This Court Need Not Defer to Incumbents Who Legislate to Serve Their Own Interests.

Section 319 preserves the power of incumbents at the expense of fairness in the political system. "'The first instinct of power is the retention of power,' and those who hold public office can be expected to attempt to insulate themselves from meaningful electoral review." *Miller v. Cunningham*, 2007 U.S.

[12] The dissent in *Colorado II* expressed skepticism about the harmful effects of unlimited coordinated spending. *See* 533 U.S. at 481-82 (Thomas, J., dissenting)

App. LEXIS 29882, *13 (4th Cir. Dec. 20, 2007) (Wilkinson, J., dissenting from the denial of rehearing en banc) (*quoting McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part, dissenting in part)). In the case of incumbents, and "under a Constitution that requires periodic elections, [retention of power] is best achieved by the suppression of election-time speech," *McConnell*, 540 U.S. at 263 (Scalia, J., concurring in part, dissenting in part), particularly the speech of candidates who possess the financial resources to challenge those in power. Generally, Congress is afforded some deference in its legislative determinations, but Section 319 does not deserve such respect: "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgment—*at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge*." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (emphasis added).

It is not dispositive that, on its face, Section 319 applies to all candidates. Despite the presence of *higher* expenditure limits for challengers, the *Randall* plurality opinion found that excessively low contribution limits imposed too great a financial burden on challengers to be constitutional. 126 S. Ct. at 2495-96. As Justice Scalia has observed:

> If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, *any* restriction upon a type of campaign

> speech that is equally available to challengers and incumbents tends to favor incumbents.

*McConnell,* 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). The Committee on House Administration's Adverse Report reveals Congress's view of the regulation. The report, issued prior to the insertion of Section 319 into BCRA, laments its absence: "Senate candidates receive more preferential treatment in the form of a "millionaire's amendment" . . . House candidates who find themselves in a race against a wealthy opponent receive no such relief." H.R. Rept. No. 107-131 (Pt. 1), July 10, 2001 (accompanying H.R. 2356). Although the provision applies evenhandedly, Congress had no ambivalence about its operation.

## III. SECTION 319'S ENTIRE FINANCING SCHEME, ENACTED TO "LEVEL THE PLAYING FIELD," VIOLATES THE FIRST AMENDMENT.

### A. Personal Campaign Spending is "Core" First Amendment Speech.

In regulating personal spending by candidates, Section 319 punishes what this Court has described as "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (*quoting Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Section 319 seeks to discourage the use of, and diminish the effectiveness of, personal campaign expenditures, ostensibly to "level the playing field" among opposing candidates for Congress. Under Justice Kennedy's framework, last articulated in his concurrence in *Republican*

*Party of Minnesota v. White*, this Court would require no further analysis to strike down Section 319:

> [C]ontent-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (*quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in judgment)).

Even employing its traditional inquiry into tailoring and governmental interests, this Court has repeatedly invalidated regulations, like Section 319, that diminish core political speech. Again, this Court has never found that a governmental interest in equality alone constitutes a compelling justification for the infringement of political speech.

*Buckley* struck down a ceiling on personal expenditures that "clearly and directly interfere[d] with constitutionally protected freedoms":

> 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. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53. Personal expenditure limitations impose a "substantial restraint on the ability of persons to engage in protected First Amendment expression." *Id.* at 52. Further, "prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds." *Id.* at 53. *Buckley* also established that although contribution limitations implicate First Amendment rights of free speech and free association, restrictions on expenditures are "significantly more severe." *See id.* at 19-23. In contrast to ceilings for individual contributions, limits on personal expenditures actually "reduce[] the candidate's dependence on outside contributions and thereby counteract[] the coercive pressures and attendant risks of abuse to which the Act's contributions limitations are directed." *Id.* at 53. As recently as its plurality opinion in *Randall*, this Court reaffirmed that limitations on personal campaign spending infringe upon the core of political speech protected by the First Amendment. *See* 126 S. Ct. at 2490-91.

### B. Section 319's Reporting Requirements Impose a Substantial Burden on Political Expression by Compelling Disclosure of Campaign Strategy.

Section 319 burdens protected First Amendment rights to political expression by compelling intrusive and unilateral reporting obligations on candidates who contemplate spending substantial personal funds on their campaign. And upon exceeding the $350,000 personal expenditure threshold, the reporting burden grows heavier.

No less than direct regulation, "compelled disclosure [of political activities], in itself, can seriously infringe" on First Amendment guarantees. *Buckley*, 424 U.S. at 64. *Buckley* held that a governmental interest in disclosure of campaign finance data is permissible *only* when the requirement is necessary to: (1) enable the voting public to place each candidate along the political spectrum by alerting it to the interests to which the candidate is likely to be responsive; (2) deter both corruption and the appearance of corruption by exposing large contributions and expenditures to scrutiny; and (3) detect violations and enforce the previous two interests. 424 U.S. at 66-67. For example, in *McConnell,* this Court upheld BCRA's notice and disclosure requirement for executory contracts for electioneering communications, 540 U.S. at 201, reasoning that the regulation addressed both a corruption interest and provided voters with information about the entity making the communication. *Id.* at 196-97. This Court has recognized however, that additional burdensome disclosure regulations may "create a disincentive" to engage in political speech. *MCFL*, 479 U.S. at 254 n.7.

Section 319's Declaration of Intent satisfies no legitimate interests and is particularly burdensome. Self-financed candidates are required to disclose planned personal expenditures for both the primary and general elections. *See* 11 C.F.R. § 400.20(a)(2). In *McConnell*, this Court acknowledged that the First Amendment contemplates "some form of protection against premature disclosure of campaign strategy." 540 U.S. at 242-43. This information is protected speech, because candidates, including those who are merely contemplating spending personal funds, must reveal their strategy to all potential primary and general election opponents. This disclosure details a candidate's most sensitive, confidential campaign information. Publishing the information assists opponents in tailoring their own fund-raising, expenditure, and campaign strategies, while self-financers receive no opportunity to anticipate their opponents' financial plans.

Moreover, a candidate's Declaration of Intent must reveal the amount by which she "intends to exceed the threshold amount." *Id.* § 400.20(b)(2).[13] This requirement, at the campaign's outset, forces the self-financed candidate to publicize his campaign strategy. *See AFL-CIO*, 333 F.3d at 176 (Even where disclosure to the government may be necessary, "'compelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986)). Because self-financers are the only candidates reporting at the start of the campaign, disclosure does not enable the voting

[13] As with all disclosures, this statement is subject to the FEC's civil and criminal enforcement rules. *See* 2 U.S.C. §§ 437g(a)(5), (6), 437g(d)(1)(A).

public to "place each candidate in the political spectrum" by alerting it to the interests to which candidates are likely to be responsive. *Buckley*, 424 U.S. at 67.[14] If Congress intended to deter pre-campaign corruption, it did not achieve this end by subjecting only self-financed candidates' strategies to public scrutiny. *See id.*

The aggregate $10,000 expenditure disclosure requirement provides no informational benefit either, because, like all candidates, a self-financer files standard quarterly and pre-election FEC reports disclosing total personal expenditures. *See* 11 C.F.R. pt. 104. Yet contemporaneous notification of personal expenditures subjects contribution-financed candidates to a significant burden. In the 2006 election, $10,000 represented a modest sum in competitive House campaigns. *See The Campaign Finance Institute*, Tbl. 3-1: The Cost of Winning an Election, 1986-2006, http://www.cfinst.org/data/pdf/VitalStats_t1.pdf (last visited Feb. 19, 2008). In Mr. Davis's race in 2006, the candidates combined to spend over seven million dollars. See *supra* p. 13. An aggregate $10,000 reporting threshold imposes a continual reporting burden on the self-financed candidate. Although all candidates do share some

[14] It is particularly quixotic that a candidate who chooses to spend less than $350,000 need only indicate "$0" on her Declaration of Intent. *See, e.g.,* Davis FEC Form 2, J.A. 103. This belies any informational rationale for early disclosure of a candidate's intent to make personal expenditures. Full disclosure would require accurate statements of self-financing by all candidates, not merely those who may exceed the statute's $350,000 threshold.

reporting burdens,[15] the self-financed candidate bears the most intrusive responsibilities.

The district court concluded that Mr. Davis's complaint focused on Section 319's "timing deadlines." J.S. App. 16a. Burdensome as the 24-hour reporting rule may be, timing is not Section 319's primary flaw. The self-financer's unilateral disclosure of sensitive campaign strategy disclosure directly infringes his First Amendment rights.

### C. Section 319's Differential Treatment of Opposing Candidates Violates the First Amendment.

To the extent that Section 319 burdens a self-financed candidate's campaign, or enhances her opponent's campaign, the self-financed candidate's political speech is impaired. In *New York Times Co.,* 376 U.S. at 270*,* this Court spoke of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." This Court has subsequently held that "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (rejecting tax on paper and ink that only applied to large newspapers); *Mosley*, 408 U.S. at 95-96 (rejecting picketing ordnance that distinguished between peaceful labor picketing and other peaceful

[15] In the last 20 days of a campaign, all candidates must report, within 48 hours, the receipt of all contributions of $1,000 or more. See 11 C.F.R. § 104.5(f).

picketing).[16] In the context of political speech, this Court has rejected any attempt to govern the messages of candidates for elected office:

> Th[e First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating" in the course of a political campaign.

*Hartlage*, 456 U.S. at 60 (citation omitted). Section 319 does not regulate candidates who do not expend personal funds on their election (or spend less than $350,000); it applies only when the candidate exceeds the threshold. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley*, 424 U.S. at 57 (discussing FECA's expenditure limits).

Section 319 subjects candidates' speech to differential regulation. Self-financed candidates use one set of contribution limits, while their opponents campaign with a higher ceiling. A candidate's additional expenditure of personal funds allows her opponents to raise additional funds in excess of the standard limits. As such, a self-financed candidate's speech amplifies her opponent's voice as well.

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[16] The government has "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Congress asserted that Section 319 does not penalize self-financed candidates because it imposes no ceiling on expenditures, and, by authorizing higher contributions for some candidates, similarly encourages more political speech. *See* 147 Cong. Rec. S2536, S2546 (daily ed. Mar. 20, 2001) (Sen. DeWine). This claim ignores the realities of any competitive election campaign. *See also* J.S. App. 13a (Davis "has failed to show that his speech has been limited in any way because of the benefits the Amendment provides his opponent."). That the burden is not an absolute limit does not mitigate the harm. The First Amendment does not permit state regulation to burden speech so long as speakers "remain free to employ other means to disseminate their ideas." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). While it may be less burdensome for some candidates to fund their own campaigns than to rely on contributions, that choice should be of no concern to the government. The First Amendment "protects" a self-financed candidate's "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* "Such notions run afoul of 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" *WRTL,* 127 S. Ct. at 2671-72 n.9 (*quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 573 (1995)).

In striking down FECA's personal expenditure limits, *Buckley* rejected the "wholly foreign" idea "that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. By providing an avenue for candidates to benefit from their opponents' personal expenditures, Section 319

resembles the "right of reply" provision struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting law granting candidates right to equal space to answer criticism and attacks by newspapers). The First Amendment does not permit Congress to choose sides in a political forum. *See Bellotti*, 435 U.S. at 785-86 (Where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.") (footnote omitted).

Application of this one-sided benefit will discourage or "chill" some self-financed candidates from making personal expenditures.[17] In *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), the Eighth Circuit struck down a similarly structured law affecting independent expenditures in Minnesota state campaigns. Under that provision, when an entity made independent expenditures on behalf of one candidate, his opponents received: (1) corresponding increases in their independent expenditure limits; and (2) matching funds from the state campaign commission, if they otherwise qualified. *See id.* at 1360.

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[17] It is true, as the district court recognized, that Mr. Davis spent significant personal funds on his campaigns, and, thus, may be hard-pressed to argue that Section 319 "chilled" his speech. J.S. App. 14a. However, despite the significant personal expenditures, his opponent outspent Mr. Davis by more than a 5 to 2 ratio. And despite this significant financial advantage, Section 319 authorized his opponent to collect approximately $1.4 million more in statutory benefits. See *supra* p.13. As such, it is not unreasonable for a candidate who has exceeded the threshold to curtail additional personal spending because of concerns that he will eventually spur his opponent to utilize Section 319's benefits.

Assessing these benefits, the Eighth Circuit found that "the knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." *Id*. As with the provision in *Day,* Section 319 improperly "enhance[s] the relative voice" of self-financed candidates' opponents. *Buckley*, 424 U.S. at 48-49.

Finally, candidates who are dissuaded by Section 319 from making expenditures in excess of the $350,000 threshold are also burdened because they abandon their right to make unlimited expenditures on their own behalf. As such, Section 319 may reduce the "total quantum of speech," *Meyer*, 486 U.S. at 423, in an election.

### D. Section 319 is Subject to Strict Scrutiny Because it Burdens Political Expression.

Because Section 319 regulates a self-financed candidate's speech on his own behalf, it burdens political speech and is subject to strict scrutiny. *See WRTL,* 127 S. Ct. at 2664. Regulations of "pure speech" applying "evenhandedly to advocates of differing viewpoints" can constitute "direct regulation of the content of speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (applying exacting scrutiny to anonymous speech ban); *see also Burson v. Freeman*, 504 U.S. 191, 198 (1992) (applying exacting scrutiny to law forbidding campaign-related speech within 100 feet of a polling place); *see also id.* at 212-13 (Kennedy, J., concurring); *id* at 217 (Stevens, J., dissenting). This Court applies the "most exacting scrutiny to regulations that suppress,

disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FEC*, 512 U.S. 622, 642 (1994). For purposes of disclosure, there must be a "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." 424 U.S. at 64 (footnotes and quotations omitted). Such scrutiny applies even when the "deterrent effect on the exercise of First Amendment rights arises . . . indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

This Court should apply a content-based standard of review because Section 319 regulates speech based on its content. The trigger for regulation is self-funded, core political speech by a candidate promoting his candidacy. His funding of speech unrelated to his candidacy, at the same expenditure levels, would not trigger regulation. For example, he could produce a documentary or finance a publication on a political issue without being subjected to regulation. Nor would the provision apply to the funding of his campaign speech with an equivalent amount of contributed money. Therefore, Section 319 imposes a content-based regulation.

A "candidate's expenditure of his personal funds directly facilitates his own political speech," *Buckley*, 424 U.S. at 52 n.58, and the candidate has a "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Id.* at 52. Both the content and the financial basis of a candidate's communication constitute protected expression, particularly in the context of a winner-take-all election. In Mr. Davis's campaigns—as with many candidates

who forgo substantial reliance on private contributions—his expenditures and public statements conveyed the complementary message that he will best represent the electorate because he is not beholden to individual, party, and committee donors. *See* Davis Second Declaration, J.A. 31, ¶ 5. As such, a self-financed candidate's personal spending not only conveys his general electoral message, it is often an integral element of that message.

It is irrelevant that Section 319 imposes no ceiling on personal expenditures. "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000).[18]

Because Section 319 is a direct regulation of political speech at the "core" of the First Amendment, this case "'involves a limitation on political expression subject to exacting scrutiny.'" *McIntyre*, 514 U.S. at 346 (*quoting Meyer*, 486 U.S. at 420). As such, Section 319 can survive a constitutional challenge only if the government can show that it is narrowly drawn to serve a compelling state interest. *See WRTL*, 127 S. Ct. at 2664; *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also Bellotti*, 435 U.S. at 786.[19]

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[18] In his concurrence in *Republican Party of Minn. v. White*, Justice Kennedy maintained that all content-based restrictions "that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests." 536 U.S. at 793.

[19] Section 319 is also susceptible to a facial challenge. While the availability of expanded limits varies depending on the

## IV. SECTION 319 IS NOT NARROWLY TAILORED TO ADDRESS A COMPELLING STATE INTEREST.

Because Section 319 burdens political speech at the core of the First Amendment it must be narrowly tailored to address a compelling state interest. *WRTL*, 127 S. Ct. at 2664. In scrutinizing state regulation of expression, this Court has applied "rigorous constitutional standards. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. Jacksonville*, 422 U.S. 205, 217-18 (1975). To meet this standard, Section 319 must satisfy three conditions: it must be "necessary," *Buckley*, 424 U.S. at 44-47; be neither "overinclusive" nor "underinclusive," *compare Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 121-23 (1991) (regulation not narrowly tailored if it is overinclusive) *with Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (underinclusive); and constitute the least restrictive means available, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *MCFL*, 479 U.S. at 262. The Eighth Circuit stated that the "seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as

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statute's assessment of the candidates' financial status, application of those benefits is governed by defined formulae. *See* 11 C.F.R. § 400.10. Accordingly, this Court can readily discern the consequences of any hypothetical. No additional insight into Section 319 would be gained by a "case-by-case analysis of the fact situations." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

*precisely* tailored as possible." *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

Congress expressed three related interests in enacting Section 319: (1) creating a "level playing field" for all House candidates; (2) combating the public perception that wealthy individuals can buy their way into the electoral process by spending large sums of their own money; and (3) lowering barriers of entry to the electoral system. *See, supra* p. 21. But while these may be weighty general concerns about the integrity of the political system, Section 319 is not narrowly tailored to address any of them.

### A. Section 319 is Not Narrowly Tailored to Foster Equality.

The district court afforded significant deference to Congress's stated interests, an approach that does not satisfy the burdens demanded by strict scrutiny. *See WRTL*, 127 S. Ct. at 2664; *see supra* p. 21. Where "danger signs, that such risks [of incumbent advantage] exist (both present in kind and likely serious in degree), courts . . . must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Randall*, 126 S. Ct. at 2492 (plurality opinion).

#### 1. *Because it Accounts for Personal Expenditures and Contributed Funds Differently, Section 319 Is Underinclusive.*

Section 319 does not foster equality because it does not accurately account for all sources of funds available to candidates. "Exemptions from an otherwise legitimate regulation of a medium of

speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *see also Florida Star*, 491 U.S. at 540 (facial underinclusiveness of a statute "raises serious doubts" about whether the statute actually serves the state's purported interest).

a. Section 319 is Not Narrowly Tailored Because It Does Not Account for Significant Sources of Contributed Funds.

In determining the extra-limit funds available to each candidate, the OPFA calculation measures every dollar employed by a substantial self-financer. The OPFA presumes, however, that all candidates begin the election cycle with no contributed funds on hand. Discussing this provision, Justice Scalia asked:

> Is it an oversight, do you suppose, that the so-called "millionaire provisions" raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election "war chest"?

*McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part, dissenting in part). Mr. Davis's opponent began the 2006 election cycle with a $1.15 million war chest, yet Section 319 authorized him to raise and spend about $1.4 million more under the increased

limits. *See* Reynolds FEC Form 3Z-1, J.A. 62; *see also supra* at p. 13.

By ignoring war chests, and all contributions made during the year of the election, and by halving the funds that it does recognize, Section 319 ignores a significant proportion (arguably the majority) of contributions made to candidates. Given Congress's concerns about "leveling the playing field," these omissions are unjustifiable and do not evince narrow tailoring. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part, concurring in judgment) (quotation and citation omitted); *see also White,* 536 U.S. at 783 ("[T]he announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms."). Section 319 does not accurately measure the relative wealth of opponents in the same race. To achieve even rough equality, the statute would have to account for all available sources of campaign funds in a consistent and contemporaneous manner.

The statute also fails to reach candidates who make personal expenditures but remain below the $350,000 threshold. Congress did not explain why a candidate who spends $349,999 creates different equality concerns than one who spends one dollar more.

b. Section 319 Does Not Create Equality for Candidates Without Access to Large Donors or National Political Parties.

For all of its discussion of equality, Section 319 provides no aid for candidates who rely on small donors and do not have large national parties supporting them. In "leveling the playing field," Congress did not address why these candidates need less assistance than those who can solicit extra-limit contributions. If this concept of equality is narrowly tailored, Congress could, in the name of fairness, adjust contribution limits for any group of candidates that it deemed worthy of assistance.

c. Section 319 Does Not Regulate Political Expression from Other Sources.

While Section 319 burdens personal spending for equality purposes in one's own election campaign, it does not address individuals who spend personal funds on behalf of others. In *Buckley,* this Court found that independent expenditures merit the highest protection as "core First Amendment expression." 424 U.S. at 48. While independent expenditures are not the functional equivalent of a candidate's own speech, *id.* at 47, Section 319 treats a candidate's message with less deference than that of an outside party. This cannot be what *Buckley* intended in prescribing an "unfettered opportunity" for a candidate to "vigorously and tirelessly advocate . . . his own election." *Id.* at 52-53.

Section 319 also omits other sources of political communication that may influence the financial equities of an election. For example, it provides no

assistance for opponents of a candidate who receives a celebrity endorsement, which may generate significant public and media attention to a campaign and encourage additional contributions to the endorsed candidate.

### 2. Section 319 is Not the Least Restrictive Alternative for Regulating Political Speech.

Section 319 does not constitute the least restrictive alternative to addressing the "problem" of self-financed candidates. "Absent a showing that the proposed less restrictive alternative would not be as effective . . . the more restrictive option preferred by Congress [can]not survive strict scrutiny." *Playboy Entm't Group, Inc.,* 529 U.S. at 826 (reversing adult programming regulation because "[t]he record is silent as to the comparative effectiveness of the two alternatives").

For example, the Declaration of Intent disclosure identifying candidates who intend to self-finance is not the least restrictive alternative. *See* 11 C.F.R. § 400.20. Given that Section 319 requires immediate notification once a self-financed candidate has reached the $350,000 threshold, *id*. § 400.21(b), it is unclear what purpose the earlier declaration serves. Nor does the $350,000 threshold constitute the least restrictive means to determine which candidates are too "wealthy" for an equitable election. Congress provided no basis for setting the threshold at $350,000. In 2002, when Congress enacted BRCA, that amount represented approximately one-third of the cost of the average winning House race. *See supra* The Campaign Finance Institute, Tbl. 3-1: *The Cost of Winning an Election, 1986-2006* (average cost

of House race in 2002 was about $912,000). For the 2006 election, the threshold amount covered about 27% of the $1.26 million average cost. *Id; see also supra* p. 23 (discussing indexing). As the $350,000 threshold declines in relative value in future election cycles, Section 319 will only become more and more restrictive.

## V. SECTION 319 DOES NOT ADVANCE LEGITIMATE ELECTORAL INTERESTS IN THE SAME MANNER AS A PUBLIC FUNDING REGIME.

The district court found that Section 319's expanded limits "correct[] a potential imbalance in resources available to each candidate" and that Section 319 "is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns." J.S. App. 9a-10a (citing precedent upholding public financing schemes). The decision ignores the significant functional distinction between the two funding regimes and disregards Section 319's coercive effect, not present in any constitutional public funding provision.

*Buckley* held that public funding generally does not infringe on the First Amendment because such schemes represent a "congressional effort, 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." 424 U.S. at 92-93; *see also Daggett v. Committee on Governmental Ethics & Election Practices,* 205 F.3d 445, 464 (1st Cir. 2000) (Public funding "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political

speech, nor does it threaten censure or penalty for such expenditures."). "Public funding for candidates of major parties is intended as a substitute for private contributions," *Buckley*, 424 U.S. at 98, and as a "means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.

Section 319 involves no public funds, providing, instead, an avenue for more private money to enter the system. A competitive candidate contemplating self-financing can either stay under the threshold and rely more heavily on contributed funds or exceed the threshold and authorize opponents to match personal expenditures with extra-limit funds. In either case, Section 319 likely increases the amount and influence of contributed funds in an election. In Mr. Davis's 2006 race, for example, his opponent spent over $5 million in contributed funds to win reelection. *See supra* p. 13. Had he not exceeded the $350,000 personal expenditure threshold, Mr. Davis would have required millions of dollars in private contributions to remain competitive in the race.

The district court correctly noted that a public funding system does not pose an unconstitutional burden "where the disadvantage is the result of the candidate's choice to fund his campaign from one of several permissible funding sources." J.S. App. 12a. (*quoting Buckley*, 424 U.S. at 57 n.65 ("Just as a candidate may voluntarily limit the size of contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.")). "The issue is whether a candidate who faces a choice not to limit her full access to political speech will be any worse off in choosing to do so." *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1560-61 (8th Cir. 1996) (Lay, J., dissenting). Thus, the court held that

Section 319 does not infringe on speech because a candidate's decision to exceed the personal spending threshold is a *choice* which provides a basis for the government to authorize his opponents to benefit from the expanded limits. However, Section 319 provides a self-financed candidate with no beneficial option. It either coerces him to forgo political expression in the form of personal campaign expenditures or burdens his full exercise of that right.

*Buckley* also held that a public funding scheme must provide "countervailing" benefits and burdens for all candidates. 424 U.S. at 94-96. "[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling" and refusal of, or the failure to qualify for, such funding frees candidates from these limitations. *Id.* at 95. *See also Daggett*, 205 F.3d at 467 (The appropriate First Amendment benchmark is "whether the system allows candidates to make a 'voluntary' choice about whether to pursue public funding.") (quotation omitted); *Vote Choice*, *Inc. v. DiStefano*, 4 F.3d 26, 38-39 (1st Cir. 1993) (same). Unlike recipients of public funds, however, self-financed candidates receive no countervailing benefits in return for their burdens. According to the district court, candidates who limit spending to the threshold amount benefit because their opponents do not receive funds at Section 319's higher ceilings. J.S. App 11a-12a. In the context of the campaign finance system, imposition of the standard contribution limits on one's opponents—limits that are uniformly applied to all other candidates—confers no benefit; it simply preserves the *status quo.* And from the perspective of the opponent of the self-financed candidate, Section 319 presents no countervailing burden in return for its benefits. Either her self-financing opponent limits his personal expenditures

in their race or she receives access to Section 319's extra-limit funds.

## VI. BECAUSE SECTION 319 TREATS SIMILARLY SITUATED CANDIDATES DIFFERENTLY, IT VIOLATES THE FIFTH AMENDMENT'S EQUAL PROTECTION GUARANTEE.

Section 319 violates the equal protection component of the due process clause of the Fifth Amendment because it subjects opposing candidates in the same election to different fundraising and disclosure obligations. This Court has "frequently condemned such discrimination among different users of the same medium for expression." *Mosley*, 408 U.S. at 96; *see also Burson*, 504 U.S. at 197 n.3. "Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause." *Ladue*, 512 U.S. at 51 n.9; *Carey v. Brown*, 447 U.S. 455, 459-71 (1980) (ordinance that exempted labor picketing from picketing ban violated Clause). "As in all equal protection cases . . . the critical question is whether there is an appropriate government interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95.[20]

### A. Section 319 Treats Political Opponents Differently.

The district court rejected the claim that Section 319 violated to the Fifth Amendment, holding that

[20] The government's obligation to act neutrally among speakers is found not only in the concept of equal protection, but also in the First Amendment itself. *Mosley*, 408 U.S. at 96. Section 319's differential burden on First Amendment speech similarly violates the Fifth Amendment. *See supra* pp. 40-44.

the "reasonable premise of [Section 319] is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns" because a substantial self-financer is "subject to no limits, while his opponent has chosen to finance his campaign with contributions that are subject to statutory limits." J.S. App. 17a-18a.[21] The court cited *Buckley's* rejection of minority party claims that public funding subjected them to unequal treatment. *See id.* However, *Buckley* expressly rejected the concept, at the heart of Section 319, that equalizing resources for candidates provides a legitimate basis for public funding. 424 U.S. at 98. Instead, *Buckley* permitted differential treatment because the provision merely "substitute[d] public funding for what the parties would raise privately and additionally impose[d] an expenditure limit." 424 U.S. at 96 n.129. The district court incongruously utilizes *Buckley's* analysis to uphold a statute that, for purposes of equality, provides more funds to candidates without any corresponding diminution in funding from other sources.

A self-financed candidate and her opponents are fundamentally similar because they are all competing for the same House seat. "All persons similarly circumstanced shall be treated alike." *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quotation omitted). Section 319 is based on the premise that one candidate's personal expenditures distinguish her from her opponents. But, unlike in a public financing context, a self-financed candidate does not opt into a state-created financing regime, she simply exercises

[21] The district court again relied on *Buckley's* public financing discussion. 424 U.S. at 97-98. As discussed *supra* pp. 53-56, public financing has no relevance to this matter.

her First Amendment right to fund her own political expression. Her exercise of political speech in her campaign should not operate to create any distinction from other candidates.

"Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *McConnell*, 540 U.S. at 188 (rejecting argument that restrictions on political parties were discriminatory). In this matter, however, Congress ignored the real-world similarities among candidates. As detailed *supra* pp. 22-24, Section 319 does not accurately compare all funds utilized by competing candidates; it accurately measures only personal expenditures. Section 319 ignores both the war chests that incumbents often accumulate and the election year contributions received in greater amounts by incumbents. Indeed, rather than considering "real-world differences," Section 319 contemplates an alternative reality without these sources of money. Section 319 applies to a self-financed candidate who spends $350,000, but ignores an opponent who spends one dollar less. Only the latter is eligible for benefits, and the formulae for determining extra-limit funds would apply as if he had spent no personal funds at all. The "differential burdens," *Mosley*, 408 U.S. at 95-96, imposed on self-financed candidates do not reflect the electoral reality.

To the extent that a self-financed candidate also solicits contributions, the statute requires her to do so at standard levels, rather than at the increased limits applicable to her opponents. Again, this differential treatment occurs simply because one candidate has exercised her fundamental right to expend

personal funds on her own behalf. Her party committee may not coordinate with her, nor may her individual donors exceed their limits. The effect of this discrimination is to limit self-financed candidates' First Amendment rights in a manner not faced by other candidates.

### B. Section 319 Treats a Self-Financed Candidate Differently From Others Participants in the Political Process.

A self-financed candidate is also treated differently from both individuals or committees who wish to make independent expenditures opposing her candidacy and other individuals or entities participating in the political process. Her spending enables her opponents to add to their own political speech. Yet personal expenditures by the entities opposing a self-financed candidate, regardless of the source of those funds, provide no concomitant benefit to the self-financed candidate.

## CONCLUSION

For the reasons stated above, this Court should find that, on its face, BRCA § 319's disclosure requirements for self-financed candidates and authorization of extra-legal funds for their opponents unconstitutionally infringes on self-financed candidates' First Amendment rights of political expression and violates their right to equal protection of the law under the Fifth Amendment. This case should be remanded for entrance of appropriate declaratory and injunctive relief.

Respectfully submitted,

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February 20, 2008

**ADDENDUM**

[LOGO]

FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA FAX AND CERTIFIED FIRST CLASS MAIL

Helen-Mary B. McGovern
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Aug. 16, 2006

RE: MUR 5726
Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer

Dear Ms. McGovern:

After considering all the available evidence, the Office of the General Counsel is prepared to recommend that the Federal Election Commission (the "Commission") find probable cause to believe that your client, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D), provisions of the Federal Election Campaign Act of 1971, as amended, and 11 CFR §§ 400.21(b) and 400.22(b). Enclosed for your review is a brief stating the position of the General Counsel on the legal and factual issues of this matter.

You may file a brief stating your position on the issues and replying to the brief of the General Counsel. Your brief should be submitted to the Secretary of the Commission (ten copies if possible) within fifteen days of receipt of this notice. Three copies of your brief should also be forwarded to the Office of the General Counsel, if possible. The General Counsel's brief and any brief you submit will be considered

by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within fifteen days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing at least five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not grant extensions greater than twenty days.

The Commission may or may not approve the General Counsel's probable cause recommendation. If the Commission finds probable cause to believe a violation has occurred, the Office of the General counsel will contact you and attempt for a period of not less than thirty days, hut not more than ninety days to settle this matter through conciliation.

Should you have any questions, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lawrence H. Norton
General Counsel

Enclosure
Brief

[LOGO]

FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA FACSIMILE AND FIRST CLASS MAIL

Helen-Mary B. McGovern
Brand Law Group
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Jan. 31, 2007

RE: MUR 5726
Jack Davis for Congress and Robert R. Davis,
in his official capacity as treasurer Jack Davis

Dear Ms. McGovern:

On January 19, 2007, the Federal Election Commission found that there is probable cause to believe your clients, Jack Davis and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C) and 441a-1(b)(1)(D), provisions of the Federal Election Campaign Act of 1971, as amended, and that Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 11 C.F.R. §§ 400.21(b) and 400.22(b) in connection with the failure to timely report expenditures made by Mr. Davis during the 2004 general election campaign.

The Commission has a duty to attempt to correct such violations for a period of at least 30 days and no more than 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement after 30 days, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within ten days. I will then recommend that the Commission accept the agreement. Please make the check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely.

Lawrence H. Norton
General Counsel

/s/ Rhonda J. Vosdingh
By: Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL
ELECTION COMMISSION

In the Matter of MUR: 5726

Jack Davis for Congress and
Robert R. Davis, in his official
capacity as treasurer Jack Davis

CONCILIATION AGREEMENT

This matter was initiated by the Federal Election Commission ("Commission"), pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities. The Commission found probable cause to believe that Jack Davis violated 2 U.S.C. § 441a-1(b)(1)(C) and 2 U.S.C. § 441a-1(b)(1)(D), and Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C), 2 U.S.C. § 441a-1(b)(1)(D), 11 C.F.R. § 400.21(b), and 11 C.F.R. § 400.22(b).

NOW, THEREFORE, the Commission and Jack Davis, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over Jack Davis, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer (collectively, "the Respondents") and the subject matter of this proceeding.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Jack Davis for Congress is a political committee within the meaning of 2 U.S.C. § 431(4). It was the principal campaign committee for Jack Davis, a candidate for the Democratic Party's nomination for the louse of Representative from the 26th Congressional District in New York in 2004.

2. Robert R. Davis is the treasurer of Jack Davis for Congress.

3. If a candidate makes an aggregate amount of expenditures from personal funds in excess of $350,000, the candidate or authorized committee shall file a notification of the expenditure within 24 hours of exceeding the threshold (FEC Form 10). 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R. § 400.21(b). For each additional expenditure of $10,000 or more, the candidate is required to file additional notifications. 2 U.S.C. § 441a-1(b)(1)(D); 11 C.F.R. § 400.22.

4. These notifications must be filed with the Commission, each candidate in the same election, and the national party of each such candidate. 2 U.S.C. § 441a-1(b)(1)(F); 11 C.F.R. §§ 400.21(b) and 400.22(b).[1]

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[1] A candidate's personal expenditures could entitle his opponents to a threefold increase in the contribution limit under 2 U.S.C. § 441a(a)(1)(A) and a waiver of the limits on coordinated party expenditures under 2 U.S.C. § 441a(d). *See* 2 U.S.C. § 441a-1(a)(1); 11 C.F.R. § 400.41. Candidates are entitled to higher limits when the "opposition personal funds amount" exceeds $350,000. The opposition personal funds amount is distinct from the threshold reporting amount of $350,000 because it takes into account the personal funds expenditures of the other candidates and, depending on the date of calculation, may also take into account the gross receipts of both candidates. 2 U.S.C. § 441a-1(a)(2); 11 C.F.R. § 400.10. A candidate with a significant "gross receipts advantage" is less likely to qualify for the higher limits. *See* 2 U.S.C. § 441a-1(a)(2)(B)(ii); 11 C.F.R.

Although FEC Form 10 is signed by the committee treasurer, the candidate is responsible for ensuring that it is filed in a timely manner. *See* 11 C.F.R. § 400.25.

5. Each Form 10 filed with the Commission must include, among other things, "the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification." 2 U.S.C. § 441a-1(b)(1)(E)(iii).

6. Between March 18, 2004 and August 11, 2004, Mr. Davis expended $347,280 in personal funds on his campaign.

7. On September 2, 2004, Mr, Davis made an $80,000 loan to the Committee, increasing his total personal expenditures to $427,280. By expending over $350.000, the Committee and candidate were obligated to file with the Commission and with Mr. Davis's opponents an FEC Form 10, Notification of Expenditures from Personal Funds, within 24 hours of the threshold expenditure, or by September 3, 2004. *See* 2 U.S.C. § 441a-1(b)(1)(C). The Committee never filed this Form 10 with the Commission.

8. In addition, the Committee failed to file six additional FEC Form 10s regarding additional loans in excess of $10,000 made by Mr. Davis to the Committee on September 17, September 25, September 28, October 12, October 13, and October 22, 2004, in the amounts of $80,000, $100,000, $200,000, $150,000, $200,000, and $100,000, respectively.

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§ 400.10. Similarly, a candidate seeking higher limits may be limited by the amount of personal funds that he or she expended. *See* 11 C.F.R. § 400.10.

V. Respondents committed the following violations:

1. Respondent Jack Davis violated 2 U.S.C. § 441a-1(b)(1)(C) by failing to file an initial notification disclosing that the candidate expended personal funds in excess of $350,000 and violated 2 U.S.C. § 441a-1(b)(1)(D) by failing to file six additional notifications following additional expenditures of personal funds in excess of $10,000.

2. Respondent Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b)(1)(C) and 11 C.F.R. § 400.21(b) by failing to file an initial notification disclosing that the candidate expended personal funds in excess of $350,000 and violated 2 U.S.C. § 441a-1(b)(1)(D) and 11 C.F.R. § 400.22(b) by failing to file six additional Form 10s following additional expenditures of personal funds in excess of $10,000.

VI. Respondents will take the following actions:

1. Respondents will pay a civil penalty to the Federal Election Commission in the amount of two hundred fifty-one thousand dollars, ($251,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. Respondents will cease and desist from violating 2 U.S.C. § 441a-1(b)(1)(C), 2 U.S.C. § 441a-1(b)(1)(D), 11 C.F.R. § 400.21(b), and 11 C.F.R. § 400.22(b).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a

civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall he enforceable.

FOR THE COMMISSION:

Lawrence H. Norton
General Counsel

BY: _____ _____

Rhonda J. Vosdingh — Date
Associate General Counsel
for Enforcement

FOR THE RESPONDENTS:

_____ _____

Robert R. Davis — Date
Treasurer

BEFORE THE FEDERAL
ELECTION COMMISSION

In the Matter of MUR 5726

Jack Davis for Congress and
Robert R. Davis, in his official
capacity as treasurer Jack Davis

CONSENT TO EXTEND THE TIME TO
INSTITUTE A CIVIL LAW ENFORCEMENT SUIT

As consideration for the Federal Election Commission's agreement to hold MUR 5726 in abeyance until the constitutional challenge to the Millionaire Amendment to the Federal Election Campaign Act of 1971, as amended, filed by Jack Davis has been fully litigated, Jack Davis for Congress and Robert R. Davis, in his official capacity as treasurer, and Jack Davis hereby consent to toll the statute of limitations for any civil enforcement action that the Federal Election Commission might institute against it in connection with MUR 5726 pursuant to 2 U.S.C. § 437g(a)(6) for the period beginning on August 9, 2007 and extending through the date of final disposition on the constitutional claim.

This action will extend the time to institute a civil law enforcement suit for a commensurate period of time from the expiration date of the five-year statute of limitations found at 28 U.S.C. § 2462, or any other statute of limitations or repose that may be applicable in this matter.

/s/ Andrew Herman 8/27/07
Counsel for Jack Davis for Date
Congress and Robert R. Davis,
in his official capacity as treasurer,
and Jack Davis