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No. 07-320

In the Supreme Court of the United States

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 109, applies to elections for the United States House of Representatives in which a candidate spends more than $350,000 in personal funds. In such an election, when certain conditions are met, Section 319 modifies the contribution and coordinated-expenditure limits that would otherwise apply to the self-financing candidate's opponent, and it imposes certain disclosure requirements on all candidates. The questions presented are as follows:

1. Whether this case is moot.

2. Whether appellant has standing to challenge the modified contribution and coordinated-expenditure limits established by Section 319.

3. Whether those modified limits on their face violate the First Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.

4. Whether the disclosure requirements established by Section 319 are unconstitutional on their face.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-18a) is reported at 501 F. Supp. 2d 22.

JURISDICTION

The decision of the district court was issued on August 9, 2007. A notice of appeal was filed on August 16, 2007, and the jurisdictional statement was filed on September 7, 2007. On January 11, 2008, this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 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; and 28 U.S.C. 1253.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of BCRA (Section 319), 116 Stat. 109 (2 U.S.C. 441a-1 (Supp. V 2005)), part of the so-called "Millionaires' Amendment." Section 319 applies to elections for the United States House of Representatives in which a candidate contributes more than $350,000 in personal funds to his own campaign. If and when certain conditions are met, the opponents of such candidates may accept contributions from individuals in excess of the generally applicable limits. See 2 U.S.C. 441a-1(a)(1)(A)-(B) (Supp. V 2005). Under those circumstances, the usual statutory limits on political party expenditures that are coordinated with a candidate do not apply to expenditures in support of an opponent of the self-financing candidate. See 2 U.S.C. 441a-1(a)(1)(C) (Supp. V 2005). Appellant filed suit in federal district court, arguing that Section 319 on its face violates the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The three-judge district court rejected appellant's constitutional claims and granted the government's motion for summary judgment. J.S. App. 1a-18a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the appli-

cation of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Federal law has long prohibited any person from making contributions "to any candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed" a statutory cap, which is currently set at $2300. 2 U.S.C. 441a(a)(1)(A) (Supp. V 2005); 2 U.S.C. 441a(c) (2000 & Supp. V 2005); see J.S. App. 3a n.4. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld the $1000 contribution limit then imposed by FECA. See *id.* at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26. In response to the contention that the contribution limit had been set at too low a level, the Court in *Buckley* stated that "[i]f [Congress] is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30 (citation and internal quotation marks omitted). Because expenditures made in coordination with candidates have essentially the same value to candidates as contributions, federal law has also long treated "coordinated expenditures"—including expenditures by political parties made in coordination with their own candidates, *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001)—as "contributions" subject to statutory limits, see *Buckley*, 424 U.S. at 46-47 & n.53.

While upholding statutory limits on contributions *to* federal candidates, the Court in *Buckley* invalidated FECA caps on the amount of personal wealth a federal candidate could spend on his own campaign. 424 U.S. at 51-54. Those expenditure provisions barred presidential and vice-presidential candidates from spending more than $50,000 of their personal wealth on their campaigns, limited Senate candidates to $35,000, and limited most House candidates to $25,000. *Id.* at 51. The Court concluded that "the First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

The Court in *Buckley* upheld Congress's decision to provide public financing for presidential campaigns and to make the availability of public money contingent on a candidate's agreement to adhere to statutory expenditure limitations. 424 U.S. at 57 n.65, 92-93. Unlike mandatory expenditure caps, the Court concluded, such an arrangement does not "abridge, restrict, or censor speech," but instead "facilitate[s] and enlarge[s] public discussion and participation in the electoral process." *Id.* at 92-93. The Court explained that, "[j]ust as a candidate may voluntarily limit the size of contributions he chooses to accept, he may decide to forgo private fund-raising and accept public funding." *Id.* at 57 n.65.

3. Since 1910, federal law has required disclosure of various categories of information related to election campaigns. See *Buckley*, 424 U.S. at 61. Under current law, candidate campaign committees (among others) must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements to or from a person in excess of $200 in a calendar year (and in some instances, of any amount),

as well as total operating expenses and cash on hand. See 2 U.S.C. 433; 2 U.S.C. 434 (2000 & Supp. V 2005). The receipts that are required to be reported include both contributions and loans from the candidate. 11 C.F.R. 104.3(a)(3)(ii) and (vii)(B). FECA generally requires congressional candidate committees to file quarterly reports, a pre-election report no later than the 12th day before an election, and a post-election report within 30 days after an election. 2 U.S.C. 434(a)(2) (2000 & Supp. V 2005). In addition, candidate committees must file special notices regarding contributions of $1000 or more received less than 20 days but more than 48 hours before an election. 2 U.S.C. 434(a)(6)(A).

The Court in *Buckley* generally upheld FECA's reporting requirements at the then-applicable lower thresholds. See 424 U.S. at 60-84. The Court held that the required disclosures served the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted. *Id.* at 66-68. The Court explained that FECA's disclosure requirements would unconstitutionally infringe associational rights only in the limited circumstance when compelled disclosure would cause a "reasonable probability" of "threats, harassment, and reprisals" against an organization or its members. *Id.* at 66, 74. In 1980, Congress amended FECA to raise the reporting thresholds to their current levels. See Federal Election Campaign

Act Amendments of 1979, Pub. L. No. 96-187, § 104, 93 Stat. 1348 (2 U.S.C. 434 (1982)).

4. The Court in *Buckley* recognized that, "[g]iven the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court acknowledged, however, that this relationship "may not apply where the candidate devotes a large amount of his personal resources to his campaign." *Id*. at 56 n.63. Based on its assessment of federal elections in the thirty years since *Buckley*, Congress determined that increasing numbers of congressional candidates now choose to rely largely on their own personal wealth to finance their campaigns.

In the debates that culminated in BCRA's enactment, Members of Congress identified various harmful consequences that could follow from the increasing impact of candidates' personal wealth on elections for federal office. The disparity in campaign resources created by wealthy candidates' expenditures of personal funds was thought to "ma[k]e it more difficult for non-wealthy opponents to compete and to put their messages and their ideas across to the public." 147 Cong. Rec. 3967 (2001) (statement of Sen. DeWine); see 148 Cong. Rec. 1382 (2002) (statement of Rep. Davis) (explaining that Section 319 "evens the playing field" between a non-wealthy candidate and one "who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history"). The competitive advantage of self-financing candidates in turn threatened to create the public perception that "someone today who is wealthy enough can buy a seat" in Congress. 147 Cong. Rec. at 3976 (statement

of Sen. DeWine). Members of Congress also expressed concern that party officials increasingly consider individuals' wealth in recruiting potential candidates. See, *e.g.*, *id.* at 3969 (statement of Sen. McCain) ("[B]oth parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate.").

To address those phenomena, Congress enacted Section 319 of BCRA, which applies to elections for the United States House of Representatives.[1] Section 319 applies only to House election campaigns in which at least one candidate spends more than $350,000 in personal funds. For purposes of determining whether the $350,000 threshold has been crossed, the term "expenditure from personal funds" includes "an expenditure made by a candidate using personal funds," 2 U.S.C. 441a-1(b)(1)(A)(i) (Supp. V 2005), as well as "a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee," 2 U.S.C. 441a-1(b)(1)(A)(ii) (Supp. V 2005).

If a candidate for the House of Representatives makes expenditures from personal funds that exceed $350,000,

> his opponent may be permitted (1) to receive contributions at three times the limit for each donor that

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[1] Section 304 of BCRA, 116 Stat. 97 (2 U.S.C. 441a(i) (Supp. V 2005)), contains comparable provisions and applies to elections for the United States Senate. Section 304 is not at issue in this case. See J.S. App. 1a n.1; Appellant Br. 3 n.3. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), certain plaintiffs challenged the constitutionality of Sections 304 and 319 on their face, but the Court held that the plaintiffs lacked standing to sue and accordingly did not reach the merits of their challenge. See *id.* at 229-230.

> would otherwise be in place; (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations; and (3) to coordinate with their political party on additional party expenditures that would otherwise be limited.

J.S. App. 3a-4a (footnotes and citations omitted); see 2 U.S.C. 441a-1(a)(1)(A)-(C) (Supp. V 2005). To determine whether and to what extent he may accept contributions and coordinated expenditures that would otherwise exceed the statutory limits, an opposing candidate must calculate the "opposition personal funds amount" (OPFA). See 2 U.S.C. 441a-1(a)(2) (Supp. V 2005); J.S. App. 4a.[2] Section 319 limits the amount of increased contributions and increased coordinated party expenditures a candidate may receive to the amount of the total

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[2] The formula used to calculate the OPFA during the election year counts the expenditures from personal funds made by each candidate, adds 50% of the aggregate receipts raised by each candidate during the year prior to the election, and compares the totals. 2 U.S.C. 441a-1(a)(2) (Supp. V 2005). Only if the opponent has raised and spent $350,000 less of those funds than the self-financing candidate will he qualify to solicit additional financial support under the provision. The provision applies equally to all candidates, so that even a self-financing candidate can qualify to raise extra funds if he is running against a self-financing opponent who has raised and spent even more under the OPFA formula. The portion of the formula that takes into account a candidate's aggregate receipts during the non-election year—titled the "gross receipts advantage" provision—was added so that incumbents who raise a substantial amount of contributions in the year before an election year will not unduly benefit. See 147 Cong. Rec. at 5148 (statement of Sen. Durbin) (explaining that Congress's goal was to "get as close [as] possible to a level playing field but not create incumbent advantage").

OPFA disparity between the candidates. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005).

Section 319 also establishes reporting requirements for self-financing candidates and their opponents. See J.S. App. 5a. Within 15 days after becoming a candidate, an individual must disclose the amount of personal funds in excess of $350,000 that he intends to spend during the campaign. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005). If a candidate actually spends more than $350,000 in personal funds on his campaign, he must file an "initial notification" of that expenditure within 24 hours after exceeding the threshold. 2 U.S.C. 441a-1(b)(1)(C) (Supp. V 2005). Thereafter, for each aggregate expenditure of $10,000 or more in personal funds, the candidate must file a notification within 24 hours. 2 U.S.C. 441a-1(b)(1)(D) (Supp. V 2005). Those notifications must be filed with the Commission and provided to each opponent in the same election, and to the national party of each opponent. 2 U.S.C. 441a-1(b)(1)(F) (Supp. V 2005).

The opponent of a self-financing candidate is also subject to additional real-time reporting requirements. See 11 C.F.R. 400.30-400.31. After receiving the self-financing candidate's initial or additional notifications of expenditures from personal funds, the opposing candidate must calculate the current OPFA and, if and when he becomes eligible to invoke the modified contribution and coordinated-expenditure limits, must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.30(b). If the opposing candidate reaches the maximum allowable amount and is no longer entitled to solicit increased contributions and coordinated party expenditures, he must notify the Commission and his political party within 24 hours. 11 C.F.R. 400.31.

5. Appellant Jack Davis was a candidate for United States Representative in New York's 26th Congressional District in both 2004 and 2006. J.S. App. 1a, 5a. In April 2006, appellant filed with the Commission a Statement of Candidacy for that congressional seat. See J.A. 102-103. Pursuant to Section 319, the Statement of Candidacy included a declaration of intent on which appellant was required to state the amount of personal funds in excess of the $350,000 threshold that he intended to spend in support of his primary and general election campaigns. J.A. 103. Appellant entered "$0.00" for the primary election and "$1,000,000" for the general election. *Ibid.*[3]

In June 2006, appellant filed suit in federal district court, asserting a facial challenge to Section 319. J.S. App. 5a. Pursuant to Section 403(a)(1) of BCRA, 116 Stat. 114, a three-judge district court was convened. See J.S. App. 1a, 6a. The district court granted the FEC's motion for summary judgment. *Id.* at 1a-18a.

a. The district court held that appellant had standing to sue. J.S. App. 6a-7a. The court explained that Section 319 "imposes new and added disclosure requirements on self-financing candidates such as [appellant]." *Id.* at 6a. The court concluded that "[t]hese additional disclosure requirements impose an injury-in-fact on self-

[3] Appellant ultimately loaned his campaign committee $2,257,280 in 2006, including $1,520,000 for the general election. See *Davis for Congress, Report of Receipts and Disbursements* (Mar. 10, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?F27930238050> (reporting $2,257,280 in candidate loans in the 2006 election cycle); *Davis for Congress, 24-Hour Notice of Expenditure from Candidate's Personal Funds* (Nov. 6, 2006) <http://images.nictusa.com/cgi-bin/fecimg/?_26960663096+0> (reporting $1,520,000 in total expenditures from personal funds in the general election).

financed candidates that can be traced directly to [Section 319]." *Ibid.*

b. The district court noted that appellant had brought a facial challenge to Section 319, and that such a suit is "the most difficult challenge to mount successfully." J.S. App. 7a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The district court held that appellant's facial challenge "fails at the outset" because Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." *Id.* at 9a. Rather, the district court explained, Section 319 "preserve[s] core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace." *Ibid.* The court observed that Section 319 "is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns," and that such regimes have "been consistently upheld against First Amendment challenges." *Ibid.*; see *id.* at 9a-10a (citing cases).

The district court rejected appellant's contention that Section 319, by conferring a competitive advantage on opponents of self-financing candidates, will impermissibly deter candidates for the House of Representatives from financing their own campaigns. See J.S. App. 10a-13a. The court acknowledged that "there may be cases in which a regulatory scheme creates a competitive advantage so extreme that it works an unconstitutional burden on a candidate's First Amendment right to pursue elective office." *Id.* at 11a. The court observed, however, that "no court has found such 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." *Ibid.* The court noted in that regard that this Court in *Buckley* had "upheld expenditure limitations for candidates who chose to participate in public financing of their campaigns." *Ibid.* (citing *Buckley*, 424 U.S. at 57 n.65); see p. 4, *supra*. The court further explained that appellant himself had not been deterred by Section 319, since he had chosen to self-finance his campaigns in both 2004 and 2006. See J.S. App. 13a.

c. The district court also rejected appellant's challenge to the disclosure requirements imposed by Section 319. J.S. App. 14a-17a. The court noted that this Court had upheld similar reporting obligations both in *Buckley* and in *McConnell* v. *FEC*, 540 U.S. 93, 194-195 (2003). J.S. App. 14a-15a. The court explained that, "[b]ecause [appellant] concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies," appellant's claim of an unconstitutional burden "is essentially a complaint about the timing elements of the reporting requirements." *Id.* at 16a. The court found that complaint to be unfounded, noting that "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Ibid.* The court further observed that Section 319 imposes reporting obligations not only on self-financing candidates, but also on their opponents and on political parties. *Id.* at 16a-17a.

d. The district court rejected appellant's equal protection claim as well. J.S. App. 17a-18a. The court explained that "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently."

Id. at 17a. The court held that appellant "cannot make this showing because 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 and that this difference creates adverse consequences dangerous to the perception of electoral fairness." *Ibid*.

6. While this case was pending before the three-judge district court, appellant lost the 2006 general election. His opponent, Congressman Thomas Reynolds, did not receive any increased contributions or coordinated party expenditures pursuant to Section 319. See *Reynolds for Congress Disclosure Reports* (visited Mar. 18, 2008) <http://images.nictusa.com/cgi-bin/fecimg/?C00336065> (reporting no increased contributions to Congressman Reynolds or coordinated party expenditures on his behalf pursuant to Section 319 in the 2006 election cycle).

7. On April 19, 2006, approximately two months before appellant filed this suit, the FEC notified appellant that the Commission had found reason to believe that appellant had violated Section 319's disclosure requirements during his 2004 House campaign. See App., *infra*, 1a-3a. On January 19, 2007, while this case was pending in the district court, the FEC found probable cause to believe that such violations had occurred. See Appellant Br. App. 3a. The Commission proposed a conciliation agreement under which appellant would acknowledge the violations and would pay a civil penalty of $251,000. See *id*. at 8a. Shortly after the district court issued its decision in this case, appellant consented to toll the limitations period for any enforcement action the FEC might file concerning the alleged 2004 violations, in return for the Commission's agreement to hold the matter

in abeyance pending final resolution of this suit. See *id.* at 10a.[4]

SUMMARY OF ARGUMENT

Section 319 represents a modest and constitutionally appropriate attempt to counteract the perception that a candidate who is wealthy enough can buy a seat in Congress. Section 319 serves to decrease the influence of personal wealth in congressional elections without in any way limiting the amount of personal funds that a candidate may spend in seeking office. Appellant has provided no basis for invalidating that law on its face. And his challenge fails for the even more basic reason that this Court lacks jurisdiction to entertain it.

I. This case is moot. Although appellant suffered judicially cognizable injury during the 2006 campaign as a result of Section 319's disclosure requirements, that injury ceased to be redressable once the election occurred. Such a challenge would likely fall within the "capable of repetition, yet evading review" exception to mootness principles if the plaintiff were to express his intent to run for the House of Representatives again. But the appellant here notably has not stated such an intent. Instead, appellant contends that the potential for an FEC enforcement action concerning the 2004 campaign gives him a continuing stake in the resolution of the disputed constitutional issues.

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[4] The record before the district court contained no information regarding the FEC's investigation of appellant for apparent violations of Section 319 during the 2004 campaign. Until appellant waived his right to confidentiality by revealing the existence and status of the investigation in his opening brief to this Court, the Commission was barred from publicly revealing the matter. See 2 U.S.C. 437g(a)(12); *In re Sealed Case,* 237 F.3d 657, 665-667 (D.C. Cir. 2001); App., *infra,* 3a.

That contention is flawed. Because appellant can raise his constitutional arguments as defenses to any enforcement action that the FEC may file, the pertinent issues will not "evad[e] review." Either the FEC will not pursue an enforcement action, in which case (given appellant's failure to profess an intent to run for office again) his challenge based on past elections will be moot; or the FEC will undertake such an action, in which case he can raise his constitutional objections in that context (so that those objections will not evade review).

In other words, the only proceeding appellant identifies as giving him a continuing stake in the relevant constitutional issues has a built-in opportunity for review of the statute's constitutionality as applied to appellant. That built-in opportunity means the dispute will not evade review, and any enforcement action the FEC may file will certainly provide a sufficient forum to test appellant's constitutional claims. As-applied enforcement actions are, after all, "the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). Accordingly, appellant cannot establish that he falls within an exception to mootness principles, and his suit should be dismissed for lack of jurisdiction.

II. A. Appellant's challenge to Section 319's increased *contribution* limits (as opposed to Section 319's disclosure requirements) suffers from an additional jurisdictional defect—lack of standing. Because appellant's opponent did not invoke those increased limits during the 2006 campaign, appellant suffered no injury from those increased limits. Even if appellant could demonstrate that the parties' dispute is "capable of rep-

etition, yet evading review," there would be no basis for concluding that appellant will suffer in some future election an injury that he did *not* suffer in 2006. And because there is no prospect that appellant will be charged with having previously violated the expanded contribution limits (which applied to the *opponent's* fundraising rather than to appellant's own campaign), the possibility of an FEC enforcement action concerning appellant's own alleged violations of Section 319's *disclosure* provisions does not give appellant any continuing stake in the question whether the increased contribution limits are constitutional.

B. Section 319's increased contribution limits are consistent with the First Amendment. Those limits in no way burden political speech because they place no restrictions whatever on a candidate's ability to spend personal funds in support of his own campaign. If (as this Court held in *Buckley*) Congress may condition a presidential candidate's *own* access to federal funds on his agreement to abide by statutory spending caps, then relaxation of the contribution limits that apply to a self-financing candidate's *opponent* does not unconstitutionally penalize the decision to self-finance. Although the Constitution limits the means that Congress may employ to equalize electoral opportunities for wealthy and non-wealthy candidates, nothing in this Court's decisions supports appellant's contention that reducing wealth-based disparities in opportunity is an invalid governmental objective. In Section 319, Congress has sought to pursue that objective in a manner that furthers First Amendment values by increasing the volume of campaign-related speech without placing any restrictions whatever on the use of a candidate's personal wealth in running for office.

Contrary to appellant's contention, Section 319 does not reflect an abandonment of the anti-corruption purpose that contribution limits are generally intended to serve. Rather, they reflect Congress's effort to balance competing objectives in elections where a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support. And, of course, the perceptions that House and Senate seats may be bought and are the exclusive province of the rich are corrosive perceptions that Congress can seek to address. Nor is there any basis for appellant's repeated assertions that Sections 319 unconstitutionally favors incumbents over challengers. Section 319 by its terms draws no distinction between the two classes of candidates; appellant identifies no logical reason to suppose that challengers are more likely than incumbents to spend personal funds in excess of the $350,000 threshold; the available empirical evidence does not suggest that incumbents have benefitted disproportionately from Section 319's increased contribution limits; and any such speculation provides no basis for facial invalidation of an Act of Congress.

C. Appellant's equal protection challenge to Section 319's increased contribution limits also lacks merit. This Court has previously held that Congress may distinguish among candidates for public financing purposes and may deny public funds to candidates who refuse to abide by statutory spending caps. Congress therefore acted permissibly in concluding that, for purposes of the statutory contribution limits, appellant's large expenditures of personal funds rendered him differently situated from his opponent.

III. Section 319's disclosure requirements are also constitutional on their face. Although the declaration of

intent required by Section 319 has no direct analog in pre-BCRA law, its preparation is in no way burdensome, and the declaration does not unconstitutionally interfere with a candidate's campaign strategy. Indeed, appellant himself touted his personal wealth and ability to self-finance his campaign when he announced his candidacy. The other information that Section 319 requires to be reported would have been subject to mandatory disclosure under pre-BCRA law, and appellant identifies no basis for concluding that the somewhat different timing requirements imposed by Section 319 create a constitutional violation. And because a self-financing candidate's opponent is subject to significant additional disclosure requirements as well, Section 319 does not single out the self-financing candidate for unique burdens. In *Buckley* and *McConnell*, this Court upheld analogous disclosure requirements, and there is no basis for a different result here.

ARGUMENT

I. THIS CASE IS MOOT

A. Appellant's complaint in this case was filed on June 28, 2006, and alleged that appellant had declared his candidacy for the 2006 House election approximately three months earlier. See J.A. 7, 19. The complaint further alleged that appellant had been the Democratic candidate for the same House seat in 2004. J.A. 7. The complaint also alleged that, if appellant became the Democratic nominee, he intended to spend more than $350,000 of his own funds in the general election campaign, thereby triggering the application of Section 319. See J.A. 7, 21.

The district court issued its opinion in this case on August 9, 2007. See J.S. App. 18a. The court noted that

appellant had run for Congress in both 2004 and 2006. *Id*. at 5a. The court held that appellant had standing to sue because Section 319's disclosure requirements "impose an injury-in-fact on self-financed candidates that can be traced directly to [Section 319] and that would be removed by a favorable decision from this court." *Id*. at 6a. The court did not explain, however, why appellant's suit remained justiciable even after the 2006 election had concluded.

B. "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Ibid*.

This Court has recognized an exception to mootness principles for situations that are "capable of repetition, yet evading review." See, *e.g.*, *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2662 (2007) (*WRTL*); *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). "[T]he capable-of-repetition doctrine applies only in exceptional situations," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), "where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Spen-*

cer v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotation marks omitted) (quoting *Lewis*, 494 U.S. at 481). For an alleged wrong to be considered "capable of repetition," there must be a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *WRTL*, 127 S. Ct. at 2663 (internal quotation marks omitted) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam)); accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

C. Typically mootness problems are alleviated in the election context when the plaintiff alleges that he plans to participate in future campaigns and therefore will be subject to the same challenged laws. See *WRTL*, 127 S. Ct. at 2663 (holding that the plaintiff's challenge to BCRA's restrictions on the financing of certain broadcast advertisements was "capable of repetition" because the plaintiff had "credibly claimed that it planned on running materially similar" advertisements during future election years) (internal quotation marks and citation omitted). Appellant, however, has conspicuously failed to assert in this Court that he intends to self-finance another campaign that would trigger Section 319. Rather, appellant rests his claim (Br. 20-21) of a continuing controversy on two principal grounds: (1) the FEC's pending enforcement action stemming from the 2004 election (see pp. 13-14, *supra*) gives him a continuing "'personal stake' in the constitutionality of Section 319," and (2) the limited pre-election time period is insufficient for definitive resolution of the questions presented here.[5] Those arguments lack merit. In the ab-

[5] Appellant also states (Br. 18) that, "[i]n the 2006 campaign, [appellant] suffered additional injury arising from his compliance with the

sence of any basis for concluding that appellant himself is likely to self-finance a future House campaign, this case is moot and therefore non-justiciable.

1. The FEC's finding of probable cause to believe that appellant violated Section 319 during the 2004 campaign (see Appellant Br. App. 3a-4a), with the consequent prospect that the Commission will pursue an enforcement action pursuant to 2 U.S.C. 437g(a)(6) (2000 & Supp. V 2005) if appellant declines to enter into the proposed conciliation agreement (see Appellant Br. App. 5a-9a), provides no sound basis for this Court to decide the instant appeal on the merits. For purposes of the "capable of repetition, yet evading review" exception to mootness principles, it is doubtful that potential future litigation concerning primary conduct that occurred *be-*

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statute's disclosure requirements." As the government noted in its motion to dismiss or affirm (at 24), we agree with the district court's holding (see J.S. App. 6a-7a) that appellant suffered injury-in-fact as a result of Section 319's disclosure requirements. Proof of *past* injury, however, cannot prevent appellant's suit for declaratory and injunctive relief (see J.A. 18) from becoming moot. See *Lewis*, 494 U.S. at 477 ("To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed."); cf. *Lyons*, 461 U.S. at 105-109. The government's motion to dismiss or affirm also stated (at 24-25 n.8) that "appellant's prior history of participation as a candidate in elections for the House of Representatives presumably provides a sufficient basis for concluding that the current dispute between the parties over the constitutionality of Section 319's disclosure provisions is likely to recur," but that statement was based on the assumption that appellant planned to run again. Because appellant's opening brief contains no expression of an intent to undertake a future self-financed campaign, the possibility of such a future campaign (without more) is insufficient to provide a basis for treating this appeal as justiciable. If appellant makes his intent to run a future self-financed House campaign clear in his reply brief or elsewhere, it will effectively moot this mootness discussion.

fore this suit was filed would constitute a "repetition" of the current dispute. But in any event, it is altogether clear that appellant's constitutional claims will not "ev-ad[e] review" in any enforcement action. If the FEC does file suit alleging that appellant violated Section 319 during the 2004 campaign, appellant can raise his constitutional arguments as defenses in the enforcement proceeding. Compare *Lyons*, 461 U.S. at 109 (explaining that dismissal of the plaintiff's suit for injunctive relief would not cause the underlying constitutional challenge to "'evade' review" because that challenge "remain[ed] to be litigated in [the plaintiff's] suit for damages"). In such an enforcement action, moreover, the "limited period between elections" (Appellant Br. 20) would pose no potential obstacle to judicial resolution of the pertinent constitutional questions.

In short, the prospect of such an enforcement action cannot provide a sufficient stake to bring this case within the "capable of repetition, yet evading review" exception to mootness principles because the enforcement action has a built-in mechanism to ensure that review is provided, not evaded. And such as-applied challenges are the preferred method of constitutional adjudication. See *Carhart*, 127 S. Ct. at 1639.

2. In arguing that the FEC's probable-cause determination gives him a continuing stake in the question whether Section 319 is constitutional, appellant seeks in essence to use the judicial-review provisions of BCRA § 403(a), 116 Stat. 113, as a mechanism for pretermitting a possible Commission enforcement action. BCRA's provisions for expedited review allowed this Court to resolve a variety of constitutional challenges to the statute well in advance of the 2004 election. See *McConnell*, *supra*. On a going-forward basis, those provisions will

enable future participants in the federal electoral process to determine whether conduct in which they propose to engage is constitutionally protected. But when, as here, a plaintiff does not assert an intent to engage in future activities regulated by BCRA, there is no reason and no need to use BCRA's extraordinary judicial-review procedures—and this Court's scarce resources —as an alternative means of resolving the legality of *prior* conduct with respect to a candidate who has not stated an intent to run again.

Appellant's effort to derail the FEC's possible enforcement action is also in tension with established principles governing judicial review of Executive Branch action. In *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), this Court held that the issuance by the Federal Trade Commission (FTC) of an administrative complaint alleging reason to believe that a private party (Socal) had violated the law was not "final agency action" subject to review under the Administrative Procedure Act, 5 U.S.C. 704. See *Standard Oil Co.*, 449 U.S. at 239-246. The Court explained that the FTC's issuance of the complaint had no "legal or practical effect, except to impose upon Socal the burden of responding to the charges made against it." *Id.* at 242. The Court further observed that "every respondent to a[n] [FTC] complaint could make the same claim that Socal had made," and that "[j]udicial review of the averments in the [FTC's] complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *Id.* at 242-243; cf. *Younger* v. *Harris*, 401 U.S. 37, 43-54 (1971) (holding that federal courts should ordinarily decline to entertain suits to enjoin pending state enforcement actions); *id.* at 54 (explaining that "the possible unconstitu-

tionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it").

It is also significant that, while the FEC has found probable cause to believe that appellant violated Section 319 during the 2004 campaign, appellant's brief does not concede that such a violation occurred. Thus, appellant seeks an immediate ruling as to the validity of his constitutional defenses to any enforcement action, while reserving the option of later contending (if this Court rejects his constitutional arguments) that he complied with Section 319 in 2004. That approach contravenes the bedrock principle that a federal court should not resolve constitutional questions unless and until its disposition of pertinent non-constitutional issues compels it to do so. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

If appellant had not been a candidate in the 2006 election, but had instead premised his claim of standing on the possibility of an FEC enforcement action concerning his conduct in 2004, the instant suit would have been subject to dismissal *ab initio* under the principles set forth above. Although the application of Section 319's disclosure requirements to appellant's 2006 campaign subjected him to judicially cognizable injury, the injunctive and declaratory relief that appellant seeks can do nothing to prevent or redress that harm now that the 2006 election has occurred. Because continued adjudication of appellant's constitutional challenge is not supported either by the injury that the district court identified, or by the potential harm on which appellant now relies, the appeal should be dismissed as moot.[6]

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[6] If appellant's suit for declaratory and injunctive relief were otherwise justiciable, as it was during the period while the 2006 campaign

II. APPELLANT LACKS STANDING TO CHALLENGE THE INCREASED CONTRIBUTION LIMITS ESTABLISHED BY SECTION 319, AND THOSE LIMITS ARE IN ANY EVENT CONSTITUTIONAL ON THEIR FACE

A. Appellant Cannot Establish Any Actual Or Imminent Injury Resulting From The Increased Contribution Limits

1. In order to satisfy the "irreducible constitutional minimum" of Article III standing, appellant must establish (1) an injury-in-fact that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1992)). Insofar as appellant challenges Section 319's modifications of the generally applicable limits on contributions and party coordinated expenditures, he cannot satisfy Article III's "injury in fact" requirement. Appellant has not shown that Section 319 caused him any "concrete and particularized" injury in the past, or that any such injury is imminent.

During the 2006 election campaign, appellant's opponent received no contributions, and the opponent's political party made no coordinated expenditures, in excess of the generally applicable FECA limits. See p. 13, *su-*

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was ongoing, the possibility of an FEC enforcement action based on alleged violations in 2004 would not preclude the suit from going forward. Cf. *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 187-192 (1981). But while the prospect of an enforcement action alleging prior violations does not *bar* appellant's suit, neither does it serve to keep alive claims for prospective declaratory or injunctive relief that are otherwise moot.

pra. The possibility that his opponent would invoke the modified limits established by Section 319 did not deter appellant from loaning his campaign approximately $2.25 million in 2006. See note 3, *supra*; J.S. App. 14a ("We struggle to see how [appellant] can credibly argue that his speech has been 'chilled' in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money in excess of the $350,000 cap."). Although the 2006 election campaign had not ended at the time of the summary judgment briefing in the lower court, it is now clear that appellant, in fact, suffered no injury from Section 319's modification of some of the statutory limits on financial support for candidates.

Even if appellant could demonstrate that the "capable of repetition, yet evading review" exception to mootness principles applies to this case, appellant could not pursue his constitutional challenge to the aspects of Section 319 that caused him no injury during the 2006 campaign. A showing that the parties' dispute is "capable of repetition" would provide no basis for concluding that appellant will be injured by Section 319's increased contribution limits in future election cycles in light of the fact that appellant was *not* injured by those provisions in the most recent campaign. Appellant's First Amendment and equal protection challenges to Section 319's modified contribution and coordinated-expenditure limits would therefore be non-justiciable even if appellant could establish a live controversy concerning the aspects of Section 319 (*i.e.*, the disclosure requirements imposed by that provision) that previously subjected him to judicially cognizable injury.

2. Appellant contends (Br. 18) that "[t]he injuries imposed by Section 319's disclosure regime are suffi-

cient to confer standing on [appellant] to challenge the statute in its entirety." Standing, however, "is not dispensed in gross," and proof of injury from one aspect of a statutory scheme does not establish standing to challenge provisions that have not caused the plaintiff harm. *Lewis* v. *Casey*, 518 U.S. 343, 358-359 n.6 (1996); see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) ("[W]e have insisted * * * that a plaintiff must demonstrate standing separately for each form of relief sought.") (internal quotation marks and citation omitted); *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982) (explaining that "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, though similar, to which he has not been subject"). Although the FEC has found probable cause to believe that appellant previously violated Section 319's *disclosure* requirements, appellant has not been accused—and, in the nature of things, could not plausibly be accused—of violating Section 319's increased contribution limits, which applied to his *opponent*. Thus, although appellant has standing to challenge Section 319's disclosure requirements (assuming the controversy is otherwise justiciable), he lacks standing to challenge the contribution and coordinated-expenditure provisions.

3. In a related vein, appellant contends (Br. 18-19) that he has standing to challenge Section 319's expanded contribution limits, notwithstanding his opponent's failure to invoke those limits in the 2006 campaign, because those limits cannot be severed from Section 319's disclosure requirements. That contention ignores BCRA's express severability provision, which states that, if any BCRA provision or any application of a BCRA provision

"is held to be unconstitutional, the remainder of this Act * * * and the application of the provisions * * * to any person or circumstance, shall not be affected by the holding." BCRA § 401, 116 Stat. 112. But, more fundamentally, appellant's severability argument gets things backwards. Even if appellant's severability analysis were correct, that would simply mean that a successful challenge to Section 319's disclosure requirements would have the ultimate practical effect of invalidating the enhanced contribution limits as well. It would not follow that appellant has standing to challenge the contribution limits.

Moreover, this Court has not viewed disclosure requirements and substantive financing limits as standing or falling together. Even if Section 319's enhanced contribution limits for the opponents of self-financing candidates were held to be invalid, the disclosure requirements applicable to the self-financing candidates themselves would serve a valid informational purpose and would remain in effect pursuant to BCRA's severability provision. The validity of the disclosure requirements thus is not dependent on the validity of the enhanced contribution limits.

B. Section 319's Enhanced Contribution Limits Are Consistent With The First Amendment

Section 319's modified limits on financial support for the opponents of self-financing candidates do not violate the First Amendment and certainly do not do so on their face.

1. Appellant repeatedly describes Section 319 as "regulat[ing]" (Br. 21, 34, 44, 46), "burden[ing]" (Br. 29, 40, 47), or "punish[ing]" (Br. 34) a self-financing candidate's campaign-related speech. As the district court

recognized, however, Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." J.S. App. 9a. In particular, Section 319's expanded contribution limits are by their terms directed at the *opponent's* fundraising and in no way alter the range of legally permissible options that are available to the self-financing candidate himself.

In short, as the district court explained, Section 319 "does not limit in any way the use of a candidate's personal wealth in his run for office." J.S. App. 9a. Thus, contrary to appellant's suggestion, Section 319 does not reflect a congressional effort to "restrict the speech of some elements of our society in order to enhance the relative voice of others." Br. 42 (quoting *Buckley*, 424 U.S. at 48-49). Rather, Congress sought to "enhance the relative voice" of non-wealthy candidates *without* "restrict[ing] the [self-financing candidate's] speech." And the First Amendment poses no bar to Congress's efforts to *increase* political speech. Section 319 does impose some consequences on a candidate's choice to self-finance beyond certain amounts. But this Court has already upheld the constitutionality of statutes imposing similar consequences on a candidate's spending choices.

2. The principal thrust of appellant's First Amendment argument (see, *e.g.*, Br. 40) is that (i) because appellant has a constitutional right to make unlimited expenditures in support of his own campaign, he cannot be penalized for exercising that right; and (ii) because an election can have only one winner, any benefit provided to his opponent should be regarded for constitutional purposes as a penalty imposed on appellant. That line of reasoning, however, is flatly contradicted by *Buckley*.

Appellant has not challenged the validity of *Buckley*, and that decision is therefore entitled to full *stare decisis* effect. See *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500-2501 (2006) (Alito, J., concurring in part and concurring in the judgment).

The Court held in *Buckley* that, although the First Amendment precludes Congress from placing binding limits on a candidate's independent campaign expenditures, Congress "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. Thus, *Buckley* establishes that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated by Congress as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled. Moreover, the Court in *Buckley* recognized that a candidate's First Amendment right to make unlimited campaign expenditures is not violated simply because the candidate is subjected to some practical disadvantage as a result of exercising that right.[7]

This case follows *a fortiori* from *Buckley* because the disadvantage to which self-financing presidential candidates are subjected—*i.e.*, the denial of federal funds that would otherwise be paid to the candidate himself—is

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[7] Appellant characterizes Section 319 as content-based regulation of a self-financing candidate's speech. See Br. 35, 45. The application of Section 319, however, does not turn on the content of a candidate's speech, but on the amount of personal funds expended. This Court's decision in *Buckley* makes clear that Congress may create financial disincentives to independent campaign spending without violating the Constitution. Section 319 neither deprives the self-financing candidate of funds nor divests him of any other potential benefit; it simply loosens the fundraising restrictions placed upon his opponents.

much more direct and immediate than the competitive injury that appellant claims he would suffer if an opponent were enabled to raise greater amounts of money. If, as *Buckley* holds, Congress may treat a self-financing presidential candidate's spending decisions as a ground for declining to provide federal money to the candidate *himself*, there is no basis (especially in the context of a facial challenge such as this) for treating the modification of limits on an *opponent's* fundraising as a constitutional violation.

Appellant seeks to distinguish *Buckley* on the ground that, unlike a presidential candidate who receives public funds in exchange for his agreement to comply with statutory spending limits, appellant would have "receive[d] no countervailing benefits" if he had decided to forgo self-financing. Br. 55. *Buckley* makes clear, however, that appellant cannot establish a First Amendment violation simply by showing (Br. 41) that Section 319 differentiates between House candidates who spend $350,000 or more on their own campaigns and House candidates who do not. More fundamentally, however, appellant cannot have it both ways. If he claims constitutional injury from his opponent's increased funding options, he cannot turn around and deny that he derives a benefit from keeping the baseline limits in place.

The fundamental premise of appellant's First Amendment challenge is that, in a zero-sum game like a candidate election, any benefit to one candidate is for constitutional purposes a burden on the other. Appellant argues on that basis that he was penalized for constitutionally protected conduct when the fundraising restrictions on his opponent were loosened as a result of his own campaign spending. That analysis logically suggests, however, that appellant would derive a bene-

fit if the limits on contributions to his opponent were made more restrictive. By agreeing to spend less than $350,000, appellant could have prevented Section 319's expanded contribution limits from taking effect, thereby reducing the pool of funds to which his opponent would have access. It is therefore incorrect to say that the candidate who forgoes self-financing derives no countervailing benefit.

Appellant contends (Br. 55) that, "[i]n 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*." But as the volume of stay requests this Court receives attests, in many cases a party may derive substantial benefits from simply preserving the status quo. Congress has no constitutional obligation, moreover, to limit private contributions to federal candidates at all. From a constitutional standpoint, application of the "standard contribution limits" to appellant's opponent is just as gratuitous as the federal subsidy involved in *Buckley*.[8] In determining whether appellant could have derived a benefit by agreeing to spend less of his own money on his campaign, the relevant question is not whether his opponent would then have been subject to contribution limits lower than those that applied to *other* House campaigns, but whether the limits would have been lower than those

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[8] Likewise, Congress could have structured the relevant BCRA provisions such that the default contribution limit was higher and would be reduced only if an opposing candidate certified that he would not self-finance beyond a certain limit. Under such a statute, spending restraint would obviously be rewarded with reductions in an opponent's contribution limits, but the substance of the statute would remain unchanged.

that otherwise would have applied in appellant's *own* race.[9]

3. As the district court recognized, Congress enacted Section 319 to reduce the natural advantage that wealthy individuals possess in campaigns for federal office. J.S. App. 2a-3a n.2; see pp. 6-7, *supra*. The Court in *Buckley* explained that, under the FECA contribution limits, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court viewed that correlation as a healthy byproduct of the contribution limits it upheld.

The Court in *Buckley* also noted, however, that in light of the Court's invalidation of expenditure limits, the "normal relationship" between a candidate's financial resources and the level of popular support for his candidacy "may not apply where the candidate devotes a large amount of his personal resources to his campaign." 424 U.S. at 56 n.63. In enacting Section 319, Congress sought partially to restore that "normal rela-

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[9] Appellant argues (Br. 46) that a self-financing candidate may sometimes "forgo substantial reliance on private contributions" in order to convey the message "that he will best represent the electorate because he is not beholden to individual, party, and committee donors." But a self-financing candidate who spends large amounts of personal wealth, while declining on principle to accept contributions above the generally applicable BCRA limits, is clearly better off under the BCRA regime taken as a whole than he would be if campaign fundraising were unregulated. Such a candidate suffers no harm from the application of the BCRA limits to his own campaign (since those limits simply bar him from accepting contributions that he would decline in any event), and (under appellant's zero-sum theory) even the expanded limits that apply to his opponent under Section 319 will place appellant in a better position than if no contribution limits existed.

tionship." Section 319 also serves to counteract the public perception that wealthy people can buy seats in Congress, which can certainly have a corrosive effect by contributing to cynicism in the electorate. In addition, Section 319 increases the incentives for less wealthy candidates to run for office, and it encourages political parties to recruit candidates based on merit, rather than personal financial wherewithal. See pp. 6-7, *supra*.

Although appellant repeatedly contends (*e.g.*, Br. 25, 28) that attempting to level electoral opportunities for candidates of different personal wealth is an illegitimate governmental objective, this Court's decisions do not support that assertion. To be sure, the Constitution limits the *means* that Congress may employ to achieve that goal. Thus, the Court in *Buckley* held that the "interest in equalizing the relative financial resources of candidates competing for elective office" was a constitutionally insufficient justification for restrictions on a candidate's own campaign spending. 424 U.S. at 54. That holding, however, was based not on doubt as to the legitimacy of the relevant government interest, but on the conclusion that "the First Amendment simply cannot tolerate [the spending cap's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Ibid.* Section 319, by contrast, reflects Congress's effort to achieve the same objective *without* limiting the self-financing candidate's freedom of expression, in a manner calculated to *increase* the volume of campaign-related speech. Indeed, not only are Congress's goals unproblematic, but the means it chose to pursue those objectives actually *relax*

contribution and coordinated-expenditure limits that themselves trigger First Amendment scrutiny.[10]

In a related vein, appellant contends (Br. 28, 31) that the Court's decisions identify the prevention of actual or apparent corruption as the *only* government interest that can support campaign-finance regulation. That argument is incorrect. It is true that, in sustaining statutory contribution limits against contentions that those limits infringed the First Amendment rights of either the potential recipient or the would-be donor, the Court has relied exclusively on that anti-corruption rationale. See, *e.g.*, *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-389 (2000) (*Shrink Mo.*); *Buckley*, 424 U.S. at 26-27.

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[10] Appellant cites three different passages in *Buckley* that, in appellant's view, hold that leveling electoral opportunities is an illegitimate governmental objective. See Br. 25 (citing *Buckley*, 424 U.S. at 48-49, 54); Br. 57 (citing 424 U.S. at 98). None of the cited passages supports that proposition. The first passage states that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. By its terms, that statement disapproves a particular *means* of achieving equalization ("restrict[ing] the speech of some elements of our society") but does not suggest that equalization is an invalid *objective*. Similarly in the second passage, the Court stated that the government's "interest in equalizing the relative financial resources of candidates competing for elective office * * * is clearly not sufficient to justify the * * * infringement of fundamental First Amendment rights" that a mandatory spending cap entails. *Id.* at 54. The Court's conclusion that the equalization interest is not "sufficient" to justify direct restrictions on a self-financing candidate's speech does not imply that the interest is illegitimate. The third passage simply states that Congress need not treat all major and minor parties identically in fashioning a public financing scheme. *Id.* at 98. The conclusion that a different form of equalization is not constitutionally *required* says nothing about the legitimacy of the government interest asserted here.

But even in that context, the Court has not identified the rooting out of quid pro quo corruption as the only relevant interest, but has also allowed regulation of corporate electoral spending to ensure that the extent of such spending correlates with actual public support for the recipient or beneficiary. See, *e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 154, 162-163 (2003) (requirement that corporate contributions to federal candidates be made from a separate segregated fund ensures that such contributions reflect the will of the persons from whom the corporation has obtained the money); *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 659-660 (1990) (requirement that corporate express advocacy of electoral results be financed from a separate fund validly addresses "the corrosive and distorting effects of immense aggregations of wealth that * * * have little or no correlation to the public's support for the corporation's political ideas"). Any public perception that House seats are available only to the wealthy would raise analogous concerns.

Moreover, in upholding BCRA's disclosure requirements, the Court relied not only on the government's interest in "deterring actual corruption and avoiding any appearance thereof," but also on the separate interests in "providing the electorate with information" and "gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; see *id*. 321 (Kennedy, J., concurring in the judgment in part and dissenting in part) (finding BCRA's disclosure requirements generally constitutional based on the informational interest identified in the Court's opinion). The Court's decisions thus do not announce a per se rule that the prevention of actual or apparent corruption is the only government interest that can jus-

tify campaign-finance legislation. Rather, those decisions indicate that the range of interests that may support such legislation will vary depending on the nature of the particular law involved and the severity of its impact on a candidate's ability to conduct his campaign. Because Section 319's enhanced contribution limits impose *no* restrictions on a self-financing candidate's own electoral activities, they may be upheld based on government interests that would be insufficient to support more intrusive regulation.[11]

The core rationale for Section 319—*i.e.*, the public interest in diminishing the importance of personal wealth as a criterion for election to federal office (and the related interest in diminishing the perception that wealth

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[11] Appellant argues (Br. 44) that "Section 319 regulates a self-financed candidate's speech on his own behalf" and therefore "is subject to strict scrutiny." That is not correct. As stated, appellant's own spending remains unrestricted by Section 319. And to the extent Section 319 imposes consequences on anyone, it lessens the First Amendment burdens of opponents in certain circumstances. The burdens lifted or relaxed are themselves subject to "relatively complaisant review under the First Amendment." *Beaumont*, 539 U.S. at 161. In reviewing contribution limits against potential recipients' claims that the limits had been set too *low*, this Court has held that such limits should be sustained unless they "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 126 S. Ct. at 2492 (quoting *Buckley*, 424 U.S. at 21); see *Shrink Mo.*, 528 U.S. at 397. There is no basis for applying any stricter standard of review to the increased contribution limits at issue in this case, which have no direct impact on the self-financing candidate's conduct of his *own* campaign, but simply expand the range of funds potentially available to his opponent. But, in reality, the more straightforward way to decide this case is to recognize that Section 319 allows a potential self-financing candidate to choose which of two alternative regimes will govern his opponent's fundraising. Neither regime nor the choice between them runs afoul of the First Amendment.

has become an essential prerequisite for federal elective office)—was not specifically identified in *Buckley* and is not identical to the interests that public financing of presidential campaigns is intended to serve. Appellant makes no meaningful effort, however, to explain why the reduction of wealth-based disparities in electoral opportunity *should* be regarded as an illegitimate government objective. Congress has permissibly sought to reduce such disparities in a variety of contexts. See, *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 536 (2001) (access to legal services); *Schweiker* v. *Hogan*, 457 U.S. 569, 571-572, 590 (1982) (access to medical services). Although the Constitution of course imposes important limits on the means by which Congress may address such disparities (*e.g.*, Congress may not take private property without compensation in order to transfer it to a less wealthy individual), appellant identifies no other sphere of endeavor in which the reduction of wealth-based disparities in opportunity has been treated as an illegitimate governmental goal. There is no reason why Congress is prohibited from seeking to level the playing field when it comes to the pursuit of federal elective office, particularly when, as here, it places no restrictions on a candidate's ability to use his own personal wealth in seeking office.

Appellant also argues (Br. 48-49, 50) that Section 319 fails to achieve its equalization objective because it ignores (or discounts the significance of) other sources of funding, such as incumbents' "war chests." Unlike a self-financing candidate's personal fortune, however, money raised (even in large aggregate amounts) through contributions subject to the BCRA limits "will normally vary with the size and intensity of the candidate's support." *Buckley*, 424 U.S. at 56. In enacting Section 319,

Congress could therefore legitimately regard financial disparities produced by one candidate's great personal wealth as more problematic than similar disparities created by another candidate's superior fundraising prowess. Cf. *Austin*, 494 U.S. at 659-660 (noting that corporate express advocacy is potentially problematic for non-*MCFL* corporations because corporate wealth bears no relationship to public support for a candidate). And, in all events, Congress specifically adopted a "gross receipts advantage" approach (see p. 8 & note 2, *supra*) to reduce any benefit to incumbents and other candidates who may be able to raise sizable amounts in the year prior to the election.[12]

4. Appellant contends (Br. 28-29) that, because Section 319 permits opponents of self-financing candidates to accept contributions in excess of the generally appli-

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[12] The "gross receipts advantage" is calculated based on funds acquired by each candidate as of December 31 of the year before the general election and counts 50% of gross receipts "that may be expended in connection with the election." 2 U.S.C. 441a-1(a)(2)(B)(ii) (Supp. V 2005). By taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do not unduly benefit from "war chests" they may have built up in advance.

Section 319 thus reflects a compromise between (a) treating funds raised from private donors subject to the BCRA contribution limits in precisely the same manner as a self-financing candidate's accumulated personal wealth, and (b) ignoring contributed funds altogether in calculating the self-financing candidate's monetary advantage. That choice was Congress's to make. In upholding the FECA provisions that govern public financing of presidential campaigns, the Court in *Buckley* explained that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. * * * Without any doubt a range of formulations would [adequately serve the relevant congressional purposes]. We cannot say that Congress' choice falls without the permissible range." 424 U.S. at 103-104; see pp. 39-43, *infra*. The same analysis applies here.

cable FECA limit, it is inconsistent with the anti-corruption rationale on which those limits have been sustained. That claim lacks merit.

In setting and later adjusting the FECA limit on individual contributions, Congress has sought to prevent the actual or apparent corruption that large contributions might engender, while ensuring that candidates can obtain the resources needed to run effective campaigns. As this Court has recognized, the task of identifying the specific dollar limit that strikes the most appropriate balance between those objectives is largely entrusted to Congress. See *Buckley*, 424 U.S. at 30 (explaining that, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000") (citation omitted); accord *Shrink Mo.*, 528 U.S. at 397.[13]

The modified contribution and coordinated-expenditure limits contained in Section 319 do not reflect congressional abandonment of FECA's anti-corruption purpose. Rather, they reflect Congress's determination that the balance should be adjusted in a subset of elections to address an additional legitimate interest that is distinctly raised in that subset. Congress's decision is analogous to a State's decision to set different contribution limits for different races based on a variety of factors such as the costs of different elections and the numbers of voters that need to be reached. This Court might have concluded that the highest contribution limit

[13] Because Congress has substantial discretion to craft the details of a campaign-finance regime, Section 319 is not rendered unconstitutional simply because thresholds other than $350,000 could reasonably have been chosen (see Appellant Br. 50), or because the $350,000 threshold is not indexed for inflation (see *id*. at 23).

for any race must apply to every race, on the theory that the State had apparently concluded that the highest limit was consistent with preventing quid pro quo corruption. Instead, the Court upheld a variable-limit regime in *Shrink Missouri*, and struck down such a system in *Randall* because the applicable limits were too low in absolute terms, not just in relation to other state limits. There is no reason that Congress cannot make an analogous judgment that certain kinds of House races require higher contribution limits.

Specifically, Congress determined that, for elections in which a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support, the fundraising limits applicable to opposing candidates should be recalibrated to account for the fact that one candidate's spending is enhanced based on factors not tied to any indication of popular support. See 148 Cong. Rec. at 3603 (statement of Sen. McCain) ("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 election."). That is a permissible determination.[14]

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[14] Section 319 was carefully crafted to target the problems that Congress identified without unduly burdening or benefitting either self-financing candidates or their opponents. Section 319's disclosure requirements do not apply to all self-financing candidates, but only to those who spend more than $350,000 on their own campaigns. The opponent's contribution limits are relaxed only when the OPFA disparity between the two candidates exceeds $350,000. See note 2, *supra*. Section 319 caps the amount of increased contributions and

Nothing in this Court's decisions suggests that Congress is foreclosed from recalibrating the statutory limits for particular elections in which one candidate's large expenditures of personal wealth implicate a government interest distinct from those that inform the generally applicable caps. Cf. *Buckley*, 424 U.S. at 36 (explaining that FECA "provisions [excepting some volunteers' expenses from contribution limits] are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates"). Such accommodation of competing interests is the norm rather than the exception in legislation, and "[c]ourts * * * must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). As this Court has explained,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent sim-

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coordinated party expenditures that an opponent may accept, and thus in most circumstances prevents an opponent from raising more in additional funds under the provision than the self-financing candidate's expenditures of personal funds on his own campaign. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005). In addition, the opponents of self-financing candidates remain subject to substantial statutory fundraising restrictions that help to reduce the possibility of corruption or the appearance thereof. Section 319 does not affect the contribution restrictions on corporations, labor unions, foreign nationals, or political committees, and it relaxes but does not eliminate the limits on contributions by individuals.

> plistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

5. Appellant's repeated assertions (Br. 22, 32, 34) that Section 319 favors incumbents over challengers is unsupported by the statutory text or by record evidence. Section 319 draws no express distinction between incumbents and challengers; its application turns solely on whether a particular candidate has made campaign-related expenditures of personal funds in an amount exceeding the statutory threshold. And the prospect of self-financing was not a mere hypothetical possibility; many incumbents had engaged in self-financing in the past and would likely do so in the future.

The record evidence concerning Section 319's actual implementation also does not support appellant's characterization of Section 319 as an incumbent-protective measure. During the first four years after Sections 304 and 319 were adopted, 110 House and Senate candidates became eligible to receive enhanced contributions under the modified limits, but only six were incumbents. See J.A. 86, 88. The other 104 "beneficiaries" were not incumbents. If Section 319 were designed as appellant suggests, it has proved remarkably ineffective. Especially in the context of a facial challenge such as this, appellant's speculation about the impact of Section 319 on incumbents versus challengers provides no basis for invalidating Section 319.

Appellant's reliance (Br. 33) on the plurality opinion in *Randall*, 126 S. Ct. at 2495-2496, is therefore misplaced. In *Randall*, the plurality's conclusion that the contested contribution limits would often impair a challenger's ability to mount an effective campaign was

based in part on extensive record evidence. See *ibid.* Because appellant has identified no comparable evidentiary basis for concluding that Section 319 is skewed in favor of incumbents, his challenge should be rejected. See *Buckley*, 424 U.S. at 31 ("Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.").

C. Appellant's Equal Protection Challenge To Section 319's Expanded Contribution Limits Lacks Merit

Appellant contends (Br. 56) that "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 * * * obligations." Appellant's claim to a constitutional entitlement to a perfectly level playing field is both ironic in light of the thrust of his other arguments and unavailing in any event. The district court correctly recognized that a showing of differential treatment cannot by itself establish a constitutional violation. Rather, "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats *similarly situated* entities differently." J.S. App. 17a (emphasis added). As the district court explained, "[appellant] cannot make this showing because the reasonable premise of [Section 319] is that" candidates who spend more than $350,000 of their own money on a House campaign are "situated differently from those who lack the resources to fund their own campaigns." *Ibid.*

The Court in *Buckley* held that "the Constitution does not require Congress to treat all declared candi-

dates the same for public financing purposes." 424 U.S. at 97. The Court rejected equal protection challenges to the FECA criteria used to determine whether and to what extent presidential candidates would receive public funding. *Id.* at 97-108. And, as explained above, the Court held that public funds could be denied to any candidate who refused to abide by statutory spending limits. That holding establishes that, while Congress may not *require* compliance with statutory spending caps, it may permissibly treat candidates who adhere to such limits as differently situated from those who decline to do so, even when both candidates seek the same electoral office. Appellant is therefore wrong in arguing (Br. 57) that, for equal protection purposes, "[a] self-financed candidate and her opponents are fundamentally similar because they are all competing for the same House seat." There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private contributions as more suspect than analogous differentials in the distribution of federal funds.

Appellant further contends that Section 319 violates equal protection principles because (a) the equalization of electoral opportunities for wealthy and non-wealthy candidates is not a legitimate government interest (Br. 57), and (b) the statute treats accumulated personal wealth differently from funds raised from private donors under BCRA's contribution limits (Br. 58). Framed as First Amendment arguments, those contentions lack merit for the reasons stated at pp. 34-38 and 38-39, *supra*. They are no more persuasive when repackaged as equal protection theories.

III. SECTION 319's DISCLOSURE REQUIREMENTS ARE CONSTITUTIONAL ON THEIR FACE

Section 319 creates three new reporting requirements for self-financing candidates: a declaration of intent to self-finance, an initial notification that the candidate has spent more than $350,000 of personal funds, and additional notifications within 24 hours of each $10,000 in aggregate expenditures of personal funds. 2 U.S.C. 441a-1(b) (Supp. V 2005). Except for the declaration of intent, similar information is ultimately disclosed under FECA provisions that long predate Section 319, and the constitutionality of those statutory predecessors was upheld by this Court in *Buckley*. See 424 U.S. at 66-68, 80-82; p. 5, *supra*. As the district court correctly held (J.S. App. 6a-7a), appellant established a judicially cognizable injury resulting from Section 319's disclosure requirements. Because appellant loaned his campaign more than $350,000, he was subject to those requirements even though his opponent did not ultimately invoke Section 319's modified contribution and coordinated-expenditure limits. And while Section 319's disclosure obligations do not differ substantially from the pre-existing FECA requirements, the differences are sufficient to constitute an Article III "injury in fact."

On the merits, however, appellant has identified no colorable basis for holding that the challenged disclosure requirements are unconstitutional on their face. Because the disclosure requirements at issue here pertain solely to a self-financing candidate's own campaign spending, they do not implicate the privacy interests of donors or other supporters. Appellant does not challenge the generally applicable FECA disclosure requirements, and he makes no meaningful effort to explain why the insubstantial differences between those require-

ments—which this Court has upheld—and Section 319's disclosure provisions should be accorded any constitutional significance.

A. The provisions at issue in *Buckley* required disclosure by candidate committees and other political committees of the contributions of any person who had given in excess of $100 in a calendar year, as well as disclosures by any person making an independent expenditure of over $100. See 424 U.S. at 63, 74-75. Because compelled disclosure of contributors' names "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court reviewed the provisions to determine whether there was a "relevant correlation or substantial relation between the government interest and the information required to be disclosed." *Id.* at 64 (internal quotation marks omitted) (quoting *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960), and *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)). The Court found that the disclosures required by FECA bore a "substantial relation" to the important governmental interests of (a) encouraging maximum transparency in political activity by providing financial information to the public, (b) facilitating enforcement of substantive funding regulations, and (c) deterring actual or apparent corruption. *Id.* at 66-68, 80-82; see p. 5, *supra*. The disclosure of independent expenditures, the Court noted, was "a reasonable and minimally restrictive method of furthering First Amendment values by opening up the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82.

The disclosure requirements at issue here are significantly *less* intrusive than the requirements this Court has previously upheld. Disclosure of a self-financing can-

didate's spending does not reveal the names of supporters and therefore does not implicate the privacy interests of persons other than the candidate himself. Like the disclosure provisions upheld in *Buckley*, moreover, Section 319's disclosure requirements serve important government interests. Knowing that a candidate is funding his campaign from accumulated wealth, rather than from a broad base of supporters, "provides the electorate with information 'as to where political campaign money comes from * * * ' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67 (footnote and citation omitted).[15] Disclosure regarding personal spending also deters corruption and its appearance, and enables the gathering of data necessary to detect violations of the contribution limits, because of the possibility that money received from private donors may be misrepresented to be part of the candidate's personal wealth. In addition, as appellant concedes (Br. 19), timely reporting of a self-financing candidate's expenditures of personal funds furthers the operation of Section 319's funding provisions.

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[15] Appellant suggests (Br. 46) that some voters may find self-financing candidates attractive because such candidates are "not beholden to individual, party, and committee donors." Other voters may view with suspicion a candidate who eschews efforts to attract the broad public support that is necessary to raise substantial funds under BCRA's contribution limits. Other voters may not view the information as inherently positive or negative but may be prompted to investigate the underlying source of personal wealth being brought to bear for insights into how the candidate may vote, much as they might do in evaluating the sources of contributions. For any of those classes of voters, information concerning the extent to which a particular candidate relies on personal wealth to finance his campaign is relevant to the voter's assessment of the candidate's worthiness for public office.

B. Since *Buckley*, FECA has subjected *all* federal candidates to disclosure requirements similar to those imposed by Section 319. See pp. 5-6, *supra*. A candidate's name, the office sought, the date and amount of each expenditure of personal funds, and the total amount of personal funds spent to date in a particular election cycle all must be publicly disclosed either in a candidate's Statement of Candidacy, 2 U.S.C. 432(e)(1); 11 C.F.R. 101.1, or on the periodic reports each candidate's committee must file, 2 U.S.C. 434(b); 11 C.F.R. 104.3. Thus, appellant would ultimately have been required to disclose all of the information that Section 319 requires to be contained in the initial and additional reports of personal funds spending. Section 319's disclosure requirements go beyond those imposed by pre-existing provisions of law only in that (1) Section 319 requires each candidate to file a declaration of intent regarding projected expenditures of personal funds, and (2) Section 319 requires self-financing candidates to disclose certain information at an earlier date than would have been required under pre-existing FECA provisions. Neither of those requirements imposes a burden of constitutional dimension.

1. Although Section 319's "declaration of intent" requirement has no close analog in pre-BCRA law, that requirement places no significant burden on self-financing candidates. Under Section 319, each candidate for federal office must provide, within 15 days after becoming a candidate, an estimate of the amount (if any) by which his campaign-related expenditures of personal funds will exceed $350,000. See 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005); J.A. 102-103. As its name implies, the declaration is a statement of current *intent*, not a binding decision as to the amount of personal funds that the

candidate will spend. The filing of a declaration of intent does not preclude the candidate from ultimately spending more (or less) than the projected amount of personal funds if circumstances change, and the Commission has never commenced an enforcement action premised on the alleged falsity of the declaration.

The requirement that a declaration of intent be filed does not violate the First Amendment rights of any candidate. Appellant's contention (Br. 38) that the declaration of intent "details a candidate's most sensitive, confidential information" is untenable. Far from describing the nuances of a candidate's "strategy" (*ibid.*), the declaration of intent simply provides an estimate of the amount of personal funds in excess of $350,000 that a House candidate will spend on his campaign. For appellant's own 2006 campaign, for example, the declaration of intent revealed only the information "$0.00" for the primary election and "$1,000,000" for the general election. J.A. 103. Moreover, the basic information that is the subject of the declaration of intent (the amount of personal funds spent on a campaign) must ultimately be disclosed in any event.

Appellant's constitutional challenge to Section 319's "declaration of intent" requirement is further undermined by the fact that appellant actively publicized the same information that he now characterizes as sensitive strategic data. On March 29, 2006, six days after filing his initial statement of candidacy with the FEC, see J.S. App. 5a, appellant issued a press release announcing his candidacy. See *Jack Davis 2006 Candidacy Announcement* (Mar. 29, 2006) <http://jackdavis.org/new/press/2006.asp>. That press release stated that appellant "self funded his campaign with over 1 million dollars in [2004] and will do that again." *Ibid.* Appellant himself

contends (Br. 46), moreover, that a self-financing candidate's "personal spending not only conveys his general electoral message, it is often an integral element of that message." It is therefore especially unlikely that the declaration of intent required by Section 319 will result in the disclosure of information that the self-financing candidate regards as sensitive or confidential. Certainly there is no basis to assume, for purposes of a facial challenge such as this, that the declaration will typically result in disclosure of sensitive or confidential information.[16]

2. Section 319 further provides that a self-financing candidate must file (a) an initial notification within 24 hours after making or obligating aggregate campaign-related expenditures from personal funds of more than $350,000 and (b) an additional notification whenever the candidate spends a further increment of more than

[16] If a particular candidate believed that the declaration would impose an unconstitutional burden because of the unique circumstances of his own campaign, he could of course bring an as-applied challenge. The timing and frequency of the declaration are not constitutionally burdensome. Only one declaration is required, and it covers both the primary and general elections. See, *e.g.*, J.A. 102-103. The declaration is incorporated into the long-required Statement of Candidacy, so that no additional forms need be filed. *Ibid.* Fifteen days is the same amount of time Congress set for all candidates to designate a campaign committee. 2 U.S.C. 432(e)(1). Advance disclosure requirements regarding expenditures of $10,000 or more for "electioneering communications" were found constitutional in *McConnell* because they "d[o] not prevent anyone from speaking." 540 U.S. at 201 (citation omitted). The brief report seeks only easily ascertainable information wholly within the knowledge of the candidate and candidate's committee, and could be completed and filed within minutes. See, *e.g.*, J.A. 102-103. It does not require disclosure of the names of supporters, the source of the personal funds, or the manner in which the money will be spent to support the candidate's campaign.

$10,000 of personal funds on his campaign. See 2 U.S.C. 441a-1(b)(1)(C)-(D) (Supp. V 2005). Those provisions ensure, inter alia, that opposing candidates are promptly apprised of information bearing on their entitlement to invoke Section 319's expanded contribution limits. Because every federal candidate must ultimately disclose the amount of personal funds expended on his campaign, Section 319's initial and additional notification requirements affect only the timing, not the substance, of the required disclosures. See J.S. App. 16a.

As the district court correctly concluded, Section 319's timing requirements do not impair appellant's rights under the First Amendment, particularly because those requirements "are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." J.S. App. 16a; see *McConnell*, 540 U.S. at 196-201. The 24-hour deadline to disclose the making or obligating of personal funds is not unique to Section 319. Any person making disbursements in an aggregate amount in excess of $10,000 in a calendar year on "electioneering communications," as defined in BCRA, 2 U.S.C. 434(f)(3) (Supp. V 2005), must report those disbursements within 24 hours. 2 U.S.C. 434(f)(1) (Supp. V 2005). This Court upheld that requirement, noting that "the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant." *McConnell*, 540 U.S. at 200. In addition, all candidates must report contributions of $1000 or more received between two and 20 days before an election within 48 hours of receipt, even if the contribution is from the candidate. 2 U.S.C. 434(a)(6) (2000 & Supp. V 2005).

3. The district court also correctly explained that "any burden that [Section 319's] reporting provisions

may hypothetically impose is not 'unilateral'" because "[t]he opponent of a self-financing candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate[]." J.S. App. 16a. Under Section 319, *all* candidates must file a declaration stating whether they intend to spend personal funds in excess of the statutory threshold. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005); see J.A. 103 (FEC form states: "If you do not intend to expend personal funds exceeding the threshold amount for either [the primary or general] election, you must enter '0.00' for each."). The opponent of a self-financed candidate must (1) calculate the OPFA when the threshold is reached and each time the self-financed candidate reports an additional $10,000 expenditure and file a notice within 24 hours if and when the new OPFA entitles the candidate to solicit increased contributions; (2) file a notice with the Commission and the national and state committees of his political party within 24 hours if and when increased contributions received have reached the proportionality cap; and (3) report any refunds of money raised under Section 319. 11 C.F.R. 400.30(b), 400.31(e)(1)(ii), 400.54.

Moreover, if the opponent of a self-financing candidate accepts increased contributions from individuals under Section 319, these contributions must be reported in the same format as all contributions above $200, in mandatory periodic reports, with an indication that the particular contribution was permitted pursuant to Section 319.[17] Additionally, political parties that make coor-

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[17] See Schedule A of *FEC Form 3, Report of Receipts and Disbursements for an Authorized Committee* (Feb. 2003) <http://www.fec.gov/pdf/forms/fecfrm3.pdf> (providing a check-box for the committee to inform the Commission, opponents, and the public that a particular con-

dinated expenditures under Section 319 must report, within 24 hours, those expenditures to the FEC and to the candidate on whose behalf the money was spent. 11 C.F.R. 400.30(c)(2). The reporting requirements that apply to self-financing candidates are thus part of a larger disclosure regime, not a unique imposition on a discrete class of individuals. This Court has upheld such requirements in *Buckley* and *McConnell*, and there is no basis for a different result here.

CONCLUSION

The appeal should be dismissed on the ground that the case is moot. In the alternative, appellant's challenge to Section 319's increased contribution limits should be dismissed for lack of standing, and the judgment of the district court with respect to Section 319's disclosure requirements should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General

THOMASENIA P. DUNCAN
General Counsel
DAVID KOLKER
Associate General Counsel
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Assistant General Counsel
HOLLY J. BAKER
CLAIRE N. RAJAN
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Federal Election Commission

MARCH 2008

tribution was permissible due to "Limits Increased Due to Opponent's Spending (2 U.S.C. §441a(i)/441a-1)").

APPENDIX

[LOGO]

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED APR 19 2006

Jack Davis
Jack Davis for Congress
P.O. Box 2004
Akron, NY 14001

Robert R. Davis, Treasurer
Jack Davis for Congress
P.O. Box 2004
Akron, NY 14001

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

Dear Messrs. Davis:

Based on information ascertained in the normal course of carrying out its supervisory responsibilities, the Commission, on April 4, 2006, found that there is reason to believe 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 ("the Act"), and 11 C.F.R. §§ 400.21(b) and 400.22(b). Additionally, the Commission found that there is reason to believe that Jack Davis violated 2 U.S.C. §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D). The Factual and Legal Analyses, which formed a basis for the Commission's findings, are attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved. If you are interested in expediting the resolution of this matter by pursuing pre-probable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public. If you have any questions, please contact Zachary Mahshie, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Michael E. Toner
Chairman

Attachments

1. Davis Factual and Legal Analysis
2. Jack Davis for Congress Factual and Legal Analysis
3. Proposed Conciliation Agreement
4. Designation of Counsel Form