

No. ____

IN THE
Supreme Court of the United States

JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Section 319 of the Bipartisan Campaign Reform Act of 2002 created the so-called “Millionaires’ Amendment.” The three-judge district court found that Congress enacted section 319 to achieve equity between congressional candidates utilizing personal funds for their campaigns and candidates relying mainly on contributed funds. Under the statute, when candidates for the United States House of Representatives exceed \$350,000 in personal campaign expenditures their opponents may be entitled to receive: 1) contributions from donors at triple the statutory limit; 2) contributions from donors who have reached their statutory limit for aggregate campaign donations; and 3) coordinated expenditures from party committees in excess of the statutory limit. To effectuate application of section 319, the statute also imposes significant notification and disclosure obligations upon self-financed candidates. The questions presented are:

1. Whether the three-judge district court erred in finding that Congress’s attempt to equalize a potential imbalance in resources between congressional candidates violates neither the First Amendment to the United States Constitution nor the Equal Protection Clause of the Fifth Amendment.

2. If equalizing a potential imbalance in resources of congressional candidates is constitutional, whether the federal statutory provision accomplishes the stated purpose.

PARTIES TO THE PROCEEDINGS

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

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

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court is not yet reported. *See* Appendix (“App.”) 1a-18a. Appellant’s notice of appeal is reprinted at App. 33a.

JURISDICTION

The decision of the three-judge district court was issued on August 9, 2007. Appellant filed his timely notice of appeal on August 16, 2007. This Court has appellate jurisdiction pursuant to section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81, 113-14. App 32a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This constitutional challenge is brought pursuant to the First Amendment to the United States Constitution, reprinted at App. 20a, and the Equal Protection Clause of the Fifth Amendment to the United States Constitution, reprinted at App. 20a. Plaintiff challenged section 319 of BCRA, reprinted at App. 27a-31a, which is codified at 2 U.S.C. § 441a-1, reprinted at App. 21a-26a.

STATEMENT OF THE CASE

This case presents a facial challenge to the constitutionality of the so-called “Millionaires’ Amendment” of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (codified as amended at 2 U.S.C. § 441a-1). A three-judge panel of the District Court for the District of Columbia held that the provision violated neither the First Amendment to the Constitution nor the Equal Protection Clause of the Fifth Amendment. Congress has vested this Court with direct appellate jurisdiction over the district court’s decision. *See* BCRA § 403(a)(3).

In 2006, appellant Jack Davis ran as the Democratic Party’s candidate for New York’s 26th Congressional District seat in the United States House of Representatives. In lieu of relying on campaign contributions, appellant elected to fund his election campaign primarily, though not exclusively, with personal funds. Appellant exceeded the statute’s \$350,000 personal spending threshold and ultimately triggered an increase in the contribution limits applicable to his opponent. *See* BCRA § 319(a). The statute authorized his opponent to: (1) receive contributions at triple the then-\$2,100 per election limit for each donor; (2) receive these tripled contributions from donors who had already reached the normal \$37,500 per election cycle limit for aggregate campaign donations; and (3) to coordinate with his political party committee to receive

additional party expenditures over the normal \$10,000 per election limit. *See id.*¹

Obviously, BCRA applies standard contribution limits and regulations to races between candidates relying mainly on private contributions. In contrast, under BCRA's Millionaires' Amendment a candidate who chooses to engage in personal campaign expenditures – political expression “at the core of our electoral process and of the First Amendment freedoms,” *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quotations omitted) – confronts an opponent entitled to collect funds under contribution limits that are significantly higher than normal.

In light of the statute's unique and disparate treatment of his core political expression, and pursuant to BCRA § 403(a), appellant filed suit on June 28, 2006, requesting declaratory and injunctive relief.² In challenging the constitutionality of the Millionaires' Amendment, appellant looked to this Court's opinions addressing restrictions on campaign expenditures and contributions.

Congress's first contemporary regulation of campaign finance occurred in 1971, when it enacted the Federal Election Campaign Act (“FECA”). *See* Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263,

¹ Although straightforward in summary, the statute's triggering provision and means for calculating the permissible amount of increased contributions are complex. The timing and accounting procedures are based on complicated formulae that require continual updating of a self-financed candidate's spending while allowing the contribution-financed candidate to rely on less-exacting calculations. *See* 2 U.S.C. § 441a-1(a). Congress also enacted an extensive disclosure and notification process to facilitate application of the statute. *See id.* § 441a-1(b).

² The district court found that because BCRA § 319's “additional disclosure requirements impose an injury-in-fact on self-financed candidates” appellant had standing to challenge the provision. App. 6a.

FECA established, *inter alia*, limits on the amount of money that individuals, political committees, and political parties were permitted to contribute to candidates for federal office. It also placed limits on candidates' campaign expenditures from personal resources; *e.g.*, limiting most candidates for the House of Representatives to \$25,000 in personal expenditures.

In *Buckley* this Court considered challenges to various FECA provisions, basing much of its analysis on two fundamental principles. First, this Court established that while limits on both contributions and expenditures implicate the First Amendment rights of free speech and free association, restrictions on expenditures constitute "significantly more severe" restrictions than contribution limitations. *See* 424 U.S. at 19-23. Specifically, this Court stated that limitations on a candidate's personal expenditures "impose a substantial restraint on the ability of persons to engage in protected First Amendment expression" and stressed that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53.

Second, this Court recognized that the government has a compelling interest in the "prevention of corruption and the appearance of corruption." *Id.* at 25. While the court did not define "corruption," it repeatedly referred to "*quid pro quo*" arrangements in which contributions or expenditures were made in order to secure or "influence" a particular action. *See id.* at 26, 27, 45. Because contribution limits address this interest, *Buckley* upheld the constitutionality of these FECA restrictions. *See id.* at 24-38.

In contrast, this Court found that personal expenditures actually "reduce[] the candidate's dependence on outside contributions and thereby counteract[] the coercive pressures

and attendant risks of abuse to which the Act's contributions limitations are directed." *Id.* at 53. Because the "ancillary" interest of "equalizing the relative financial resources of candidates" did not justify the constitutional intrusion of such limits, this Court rejected FECA's restrictions on a candidate's personal expenditures. *Id.* at 54.

Buckley also rejected a Fifth Amendment equal protection challenge to FECA's public financing provision, largely because such restrictions eliminate the deleterious influence of large private contributions. *See id.* at 95-97.

In a series of decisions following *Buckley*, this Court recognized Congress's legislative authority to protect the integrity of federal elections and prevent corruption of federal office-holders. *See, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*). *Colorado II* upheld FECA's \$10,000 per candidate limit on party coordinated expenditures. This Court held that because unlimited committee contributions are funded with private donations they are "tailor-made to undermine contribution limits." 533 U.S. at 464. Accordingly, Congress was entitled to choose to limit these coordinated "expenditures whose special value as expenditures is also the source of their power to corrupt." *Id.* at 464-65.

In 2002, after a period when the amount of political fund-raising and spending grew substantially, Congress enacted the Millionaires' Amendment as part of BCRA. Shortly after BCRA became law a number of complaints were filed in the United States District Court for the District of Columbia. One of these constitutional claims was filed by the "Adams plaintiffs" and challenged both the increase in contribution limits and the Millionaires' Amendment as applied to the

United States Senate and House of Representatives.³ See *McConnell v. FEC*, 540 U.S. 93, 226 (2003).

Citing a lack of standing, this Court dismissed the Adams plaintiffs, none of whom was “a candidate in an election affected by the millionaire provision.” *McConnell*, 540 U.S. at 230. This Court rejected their assertion that a purported government interest in equalizing electoral resources provided the Adams plaintiffs with standing to challenge the provisions increasing the limits. *Id.* at 227, 230. This Court stated that, “[p]olitical “free trade” does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.” *Id.* at 227 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1976) (per curiam)).

Addressing the constitutionality of the various contribution limits established by BCRA, *McConnell* reaffirmed that the governmental interest in preventing both the appearance and actuality of corruption serves as the foremost justification for provisions burdening First Amendment freedoms. See *McConnell*, 540 U.S. at 136-37. In 2006, this Court again applied this framework in holding that Vermont’s restrictive contribution limits (well under BCRA’s current \$2,300 limit) violated the First Amendment. See *Randall v. Sorrell*, 126 S. Ct. 2479, 2491-92 (2006).

In assessing the constitutionality of the Millionaires’ Amendment in this matter, the three-judge court (Griffith, Circuit Judge, and Kessler and Kennedy, District Judges) bypassed nearly all of this precedent. Entering summary judgment for appellee, the court, in an opinion by Judge Griffith, held that BCRA § 319 violated neither the First

³ Neither appellant’s complaint nor the district court’s opinion in this matter addressed the Millionaires’ Amendment provisions applicable to candidates for the United States Senate. See App. 1a n.1.

Amendment nor the Equal Protection Clause of the Fifth Amendment.

As a point of departure, the court found that Congress enacted the statute to “correct[] a potential imbalance in resources available to each candidate.” App. 9a. The court equated the effect of the increased contribution limits to that of “statutes that permit higher contribution limits for candidates who agree to public financing of campaigns.” App. 9a.

Utilizing this framework the court dismissed appellant’s claims that the increased limits afforded to his opponent burdened appellant’s right of political expression under the First Amendment. App. 9a-17a. Rejecting the claim that self-financed candidates are chilled from exercising free speech, the court pointed to the “voluntary” nature of such expression, App. 12a-13a, and noted that appellant’s speech was not “limited in any way.” App. 13a. The court relied on *Buckley* and a series of public financing cases to reach this conclusion. It found that any possible harm to appellant stemmed solely from his choice to self-finance: “[T]here is no issue of compulsion here. The Millionaires’ Amendment does not create disparities, but rather seeks to reduce them by ‘leveling the playing-field’ between candidates” App. 12a. Thus, the court concluded that appellant failed to demonstrate that his speech had been limited. The court also held that the amount of appellant’s personal expenditures belied his claim that the statute chilled his speech. App. 13a-14a.

The court next assessed appellant’s First Amendment claims regarding the statute’s disclosure and notification provisions. Citing to the relevant portions of *Buckley* and *McConnell*, the court rejected appellant’s claims regarding the unconstitutionality of these reporting burdens. App. 14a-17a.

The court utilized a similar analysis for appellant’s Fifth Amendment Equal Protection Clause claim, concluding that

BCRA § 319 “is an attempt to provide at least a partial remedy for what Congress decided was an unavoidable problem when political opponents for elected office are not similarly situated in their abilities to fund a campaign from their own resources.” App. 17a-18a. Again looking to *Buckley’s* public financing analysis – and citing a Medicaid decision upholding the constitutionality of “more generous benefits to poor people” – the opinion found no infringement in the statute’s disparate treatment of congressional candidates. App. 18a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress vested this Court with direct appellate jurisdiction over the district court’s resolution of challenges to BCRA’s constitutionality, and asked this Court to “expedite to the greatest possible extent the disposition of the . . . appeal.” *See* BCRA § 403(a)(3)-(4). The three-judge district court’s decision to reject appellant’s constitutional challenges is a clear departure from this Court’s jurisprudence relating to FECA and BCRA. Accordingly, this Court should note probable jurisdiction over these issues.

Congress enacted BCRA § 319 after *Buckley’s* rejection of FECA’s personal expenditure limits, Congress’s first foray into “leveling the playing field.” While section 319 does not directly restrict candidates’ personal expenditures, it does punish such speakers by providing their contribution-financed opponents with significant electoral benefits. The statute also compels self-financed candidates to make exceptional disclosures regarding their personal expenditures, unlike candidates relying primarily on contributed funds.

The district court held that “leveling the playing field” constituted a legitimate statutory objective for section 319’s relaxed contribution limits and other provisions. In so holding, the district court elevated equity – what *Buckley* called an “ancillary interest” – into the sole justification for a statute

that infringes upon core political expression. This approach is unique in the history of campaign finance jurisprudence.

This Court has consistently evaluated contribution restrictions with a view toward the important “interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’” *McConnell*, 540 U.S. at 136 (quoting *NRWC*, 459 U.S. at 208). In assessing the lower boundaries of contribution limits this Court has reaffirmed that this anti-corruption interest is the primary constitutional justification for such restrictions. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388-89 (2000); *Randall*, 126 S. Ct. at 2499-500. Apparently, “leveling the playing field” has never sufficed as the sole governmental justification for the statutory abridgement of core political expression.

In light of this jurisprudence relating to contribution limits (both per candidate and aggregate by donor), coordinated party expenditure limits, and personal expenditure restrictions, a fundamental incongruity pervades the district court’s opinion:

It is well-established that addressing corruption serves as the primary justification for campaign finance provisions. In general terms, the present contribution limits constrain political donors’ influence and reduce the reality and the appearance of corruption. This Court has repeatedly found that the standard limits enacted by Congress roughly achieve this intended purpose when applied to races between candidates primarily utilizing privately contributed funds. Yet, when candidates rely upon what *Buckley* described as non-corrupting – even ameliorative – personal funds, section 319 authorizes a substantial increase in the authorized amount of contributions and coordinated funds for their opponents. The district court’s opinion never explains why a legitimate congressional response to non-corrupting political expression

is the authorization of contributions and expenditures which axiomatically increase the influence of donors and the appearance of corruption. Ignoring this conundrum clouds the legitimacy of all contribution restrictions. If the answer to the corrupting influence of campaign donations is the application of uniform limits, how can the answer to non-corrupting expenditures be found in higher limits made available only to those candidates most susceptible to corruption?

Because section 319 is irreconcilable with the jurisprudence, the district court looked beyond corruption for a legitimate government interest. It found refuge in a purported interest in “leveling the playing-field’ between candidates who are able to spend large amounts of personal wealth on their campaigns and those who cannot.” App. 12a.⁴ Yet, in rejecting Congress’s first attempt to regulate personal expenditures, *Buckley* found this “equalizing” interest to be “ancillary” and “clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights.” 424 U.S. at 54. Indeed, *McConnell* dismissed a previous challenge to section 319 largely because the asserted right to “equality” was not “legally cognizable” and, therefore, did not provide the appellants with standing. 540 U.S. at 227, 230.

Congress staked out new territory in proffering its concept of equity as a legitimate constitutional justification for section 319. Judicial endorsement of this attempt to engineer the relative levels of candidates’ resources would have far-

⁴ In reaching its conclusion, the district court relied upon statements from section 319’s legislative backers. App. 2a n.2. Contrary to these assertions, the statute does not engender such a leveling affect in its application. *See infra* pp. 15-17. Moreover, to the extent that these congressional assertions informed the district court’s examination of section 319, countervailing statements from the bill’s congressional opponents describe the bill as bald incumbency protection. For example, Senator Christopher Dodd stated: “There is simply no way to justify treating an incumbent’s war chest differently than a challenger’s personal wealth.” 147 Cong. Rec. 3195 (2001).

reaching implications. Utilizing this justification, Congress could prescribe regulations to fashion nearly any model of political fairness. If expanding limits to achieve equity in response to personal expenditures is constitutional, then certainly Congress could expand limits in response to the expenditure of contributed funds. There would be no bar to the creation of, say, a “Contributed Millionaire’s Amendment,” expanding limits for political candidates from minority parties who could not match their opponents’ fundraising and spending. Alternatively, Congress could apply this equity rationale to “level the playing-field” among the media or for various types of religious expression.

1. Accepting this equity justification, the district court upheld the constitutionality of BCRA § 319, the so-called Millionaire’s Amendment, and rejected appellant’s First Amendment and equal protection claims. Because it ignores clear precedent from this Court informing a contrary result, the district court’s opinion should be reversed.

a. The district court held that section 319’s relaxed contribution limits, abolished coordination limits, and disclosure and notification provisions did not infringe on appellant’s First Amendment free speech rights. In so ruling, the Court erroneously relied upon appellate decisions addressing public financing for candidates who voluntarily accept financial limitations on their campaigns. App. 9a-10a.

This holding is unique and novel. Appellant believes that no other court has ever applied the rationale for public financing to a case involving the regulation of a candidate’s personal expenditures. Specifically, public financing presents a candidate with a constitutionally acceptable *quid pro quo*. Section 319, by contrast, exacts only a *quid*. Appellant’s opponent receives these benefits solely because appellant exercised his fundamental First Amendment right to expend personal funds in support of his campaign – a right which Congress *a fortiori* has no ability to curtail. *See Buckley*, 424

U.S. at 51-58. Appellant has not opted out of a public financing regime; he has simply elected to fund his own political expression in a system where private campaign contributions are the norm.

Normally, the provision of public funds by the government is a whole or partial substitute for private contributions and is provided in trade with the candidate for stricter contribution limits and/or expenditure limits. The thrust of public financing is reducing the importance and influence of private contributions. *Buckley*, 424 U.S. at 96. Section 319 subverts these goals. By increasing the funds available to candidates the statute produces the opposite result: more contributed money is available for federal elections and candidates become more dependent on large donations and coordinated party spending.

In relying upon public financing cases, the district court chose to forego more relevant precedent relating to the questions of the statute's constitutionality. Given *Buckley's* determination that personal expenditures constitute core personal expression under the First Amendment, 424 U.S. at 52-53, any benefit conferred to an opponent in response to such speech is highly suspect. Yet, the district court overlooks this issue.

This Court has repeatedly invalidated laws that have, either through taxes or more subtle financial disincentives, attempted to curtail or impermissibly burden speech based on its content. The government may not attach either direct or indirect financial disincentives upon a particular speaker based on the content of that speech. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking down law that placed revenues earned from writings of convicted criminals into escrow); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (applying strict scrutiny to statute that singled out magazines and newspapers from generally applicable

gross receipts tax); *cf. Minneapolis Star and Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 593 (1983) (striking down use tax on paper and ink that only fell on newspapers as desire for an “equitable” tax system would not support singling out a small group of newspapers).

Both the contribution limits and the disclosure requirements violate these principles, as they single out appellant and reward his opponent simply because he has chosen to spend his own money on his campaign – for First Amendment purposes, to speak in support of himself. Given the questionable governmental justification for the statute, it is hard to gainsay that section 319 “punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep.” *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quotations omitted).⁵

b. Section 319 violates basic principles of equal protection to the extent that it regulates speech by some candidates but not the speech of other similarly situated candidates. The government’s obligation to act neutrally among speakers is found not only in the concept of equal protection, but also in the First Amendment itself. *See Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). As with its First Amendment analysis, the district court’s rejection of appellant’s equal protection claim violates this Court’s decisions construing federal election law under the Equal Protection Clause to the Fifth Amendment.

The district court compared section 319’s disparate treatment of appellant’s self-financed campaign to the treatment of candidates subject to public financing provisions. App. 18a. The justification for that regime, according to *Buckley*, lay in “eliminating the improper influence of private contribu-

⁵ Indeed, this punishment extends to criminal fines and imprisonment for a “knowing and willful” violation of some of the statute’s disclosure provisions. *See* 2 U.S.C. § 437g(d).

tions” and “relieving major-party Presidential candidates from the rigors of soliciting private contributions.” *Buckley*, 424 U.S. at 96. Indeed, as the district court’s quotation of *Buckley* illustrates, this Court expressly rejected the *Buckley* appellants’ argument that public financing violates the Constitution by exacerbating the difference in financial resources to the detriment of minority parties. App. 18a (quoting *Buckley*, 424 U.S. at 97-98 (“[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes.”)). The district court’s opinion resurrects this justification, incongruously, in upholding a statute created to assist majority party candidates best able to garner large private campaign contributions.

Moreover, the district court obscured the basic distinction between public financing and increased contribution limits. Providing public funds in return for a candidate’s voluntary acceptance of a spending ceiling furthers legitimate government interests. No equivalent benefits can be found in expanding contribution limits for a candidate who happens to be in a race with a self-financed opponent. Indeed, section 319 is detrimental to the same government interests that public financing seeks to ameliorate. For example, *Colorado II* identified the corruptive dangers inherent in unlimited party coordinated expenditures and upheld strict limits on such spending. See 533 U.S. at 464-65. Yet, a candidate benefiting from section 319 could traduce those limits and benefit from hundreds of thousands of dollars in coordinated party expenditures. See 2 U.S.C. § 441a-1(a)(1)(C).

When removed from the context of public finance jurisprudence all justification for BCRA § 319’s disparate treatment of candidates disappears. Candidates are not situated differently simply because one of them exercises his First Amendment rights by making personal expenditures. Section 319 violates the Equal Protection Clause because in every applicable circumstance it treats similarly situated candidates

differently and fails to address a compelling state interest. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Judicial approval of this statute would provide Congress with sanction to legislate to its definition of political equity, free of any obligation to justify its discriminatory choices.

2. Even if equalizing resources between candidates constitutes a legitimate government purpose, section 319 fails to create the “level playing-field” Congress purported to advance. By design, section 319 fails to achieve parity for self-financed candidates facing well-funded opponents. Instead, it rewards incumbents and others who have previously amassed large campaign “war chests.”

The district court credited various legislative assertions that Congress designed section 319 to correct “a potential imbalance in resources available to each candidate.” App. 9a. In uncritically accepting this claim, the district court failed to examine evidence that the statute rewards contribution-financed candidates regardless of the actual difference in resources in any given race.

Indeed, a closer examination reveals that in determining eligibility for increased funds section 319 allows contribution-reliant candidates to distort their financial status in order to avail themselves of the statute’s benefits. The statute fosters this type of imbalance because it does not require contribution-financed candidates to account accurately for their campaign finances. Conversely, section 319 requires self-financed candidates to account precisely for their personal expenditures. This approach ignores the realities of contemporary campaign finance.

First, section 319 ignores all private contributions received after December 31 of the year preceding the election. 2 U.S.C. § 441a-1(a)(2)(B)(ii). For a general election race, this excludes ten months of fundraising. Second, even those funds amassed before the end of the preceding year need not be

allocated to the election account for which they will actually be used. *Id.* For example, candidates running without primary opponents may apportion all funds to their primary account, even though the bulk of those funds will actually be used in the general election. *See id.* Finally, the statute halves the amount ultimately reported by the contribution-financed candidate. *See id.* For purposes of section 319, the result is an essentially voluntary reporting system that permits contribution-funded candidates to disclose selectively any amount between \$0 and half of the private contributions actually received before the end of the year preceding the election. Section 319 labels this arbitrary amount as the “gross receipts advantage.” App. 28a.

The statute compares this gross receipts advantage to a self-financed candidate’s personal expenditures to calculate the “opposition personal funds amount” (“OPFA”). App. 27a-28a. This calculation requires self-financed candidates to provide accurate, running accounts of their personal spending through election-day. *See* 2 U.S.C. § 441a-1(b)(1)(C)-(D) (imposing 24-hour reporting requirements for personal expenditures above \$10,000). Accordingly, each time self-financed candidates make additional expenditures, their contribution-financed opponents may recalculate their OPFA and raise additional statutory funds. Under section 319, this additional fundraising opportunity is available regardless of the actual difference in funds between opponents at the time of the calculation.

The district court’s opinion failed to scrutinize these imbalances. App. 3a-5a. If Congress truly intended to “even the playing field,” why does section 319: 1) account for all personal expenditures up to election-day but cut-off reporting of private contributions on December 31 of the preceding year; 2) account for every dollar of personal expenditures, but account for only half of private contributions; and 3) permit candidates to account for funds from campaign “war chests”

intended for use in general elections to primary election accounts? The district court's opinion never takes up any of these questions.

In enacting section 319, Congress paid lip-service to achieving financial "parity." In reality, the statute allows most candidates to use the relaxed limits to exceed greatly their self-financed opponents' personal expenditures. Concurrently, without diminishing any of the statute's benefits, contribution-financed candidates may expend campaign funds that they have accumulated previously and/or raised independently of section 319.

Section 319's statutory formulae reverse the conventional justifications for regulation of campaign funds. The statute treats non-corrupting, personal expenditures as suspect while encouraging significant increases in contributed funds. No circumstance exists where the statute actually achieves the equitable aims ascribed to section 319 by Congress. Accordingly, even if "leveling the playing field" were a constitutional endeavor for Congress, section 319 is not tailored to achieve the stated goal.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil No. 06-01185 (TG)(GK)(HK)
Three-judge Court

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Before: GRIFFITH, *Circuit Judge*; KESSLER, *District Judge*;
and KENNEDY, *District Judge*.

MEMORANDUM OPINION

GRIFFITH, *Circuit Judge*:

Plaintiff Jack Davis, the 2006 Democratic Party candidate for New York's 26th District seat in the United States House of Representatives, brings a facial challenge to the so-called "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 ("BCRA" or the "Act"), 2 U.S.C. § 441a-1 (2002), which relaxes limits on the ability of the opponent of a self-financed House candidate to raise money from donors and to coordinate his campaign spending with party committees.¹ Davis argues that the Millionaires' Amendment violates the First Amendment by chilling the speech of self-financed candidates and the Equal Protection Clause of the Fifth

¹ The Millionaires' Amendment includes a separate and similar (though not identical) provision for elections to the United States Senate. *See* 2 U.S.C. § 441a(i). Davis does not address the BCRA provisions that apply to Senate candidates, nor do we.

Amendment by giving the opponents of self-financed candidates a competitive advantage. Both Davis and the defendant, the Federal Election Commission (“Commission” or “FEC”), have moved for summary judgment. Because we conclude that the Millionaires’ Amendment poses no threat to either the First Amendment or the Equal Protection rights of self-financed candidates, we deny Davis’s motion for summary judgment and grant the FEC’s.

BACKGROUND

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending the Federal Election Campaign Act or “FECA,” 2 U.S.C. §§ 431 *et seq.* (1971)), represents Congress’s most recent attempt to regulate what it has determined to be the potentially corrupting influence of campaign contributions on our political system. *See McConnell v. FEC*, 540 U.S. 93, 115 (2003) (“BCRA is the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money campaign contributions.” (quotation marks omitted)). The Act includes a provision, commonly referred to as the “Millionaires’ Amendment,” that addresses what Congress deemed an inequity created when the Supreme Court struck down, on First Amendment grounds, FECA’s caps on the amount of personal money a candidate could spend on his campaign, but left in place rigid limits on the amount of campaign contributions he could accept from others.² *Buckley v. Valeo*, 424 U.S.

² Its purpose, in the words of one of its sponsors, is to counteract the perception that “someone today who is wealthy enough can buy a seat” in Congress. *See* 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine); *see also* 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (statement of cosponsor Sen. Durbin) (“[I]n America we won’t let you buy an election”). Another sponsor explained that it was intended to “mitigate the countervailing risk that [contribution limits] will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections.” 148 CONG. REC. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Its sponsors thought it worked to

1, 51-54 (1971). The struck provision had limited Presidential and Vice-Presidential candidates to spending \$50,000 of their own money on their campaigns, Senate candidates to \$35,000, and most House candidates³ to \$25,000. *Buckley*, 424 U.S. at 51. The Supreme Court left intact provisions that limited persons (other than candidates helping their own campaigns) to contributing a total of \$25,000 to all campaigns in a year and \$1,000 to any single campaign. The Millionaires' Amendment relaxes the contribution limits for a candidate who faces a wealthy opponent whose personal fortune put towards his bid for office might give him a significant advantage. It also permits a political party to spend more on behalf of the candidate facing a self-financed opponent.

The Millionaires' Amendment mandates that once a self-financed candidate spends more than \$350,000 of his personal funds on a campaign, his opponent may be permitted (1) to receive contributions at three times the limit for each donor that would otherwise be in place,⁴ 2 U.S.C. § 441a-1(a)(1)(A); (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations,⁵ *id.* § 441a-1(a)(1)(B); and

“increase free speech [by] giv[ing] the non-wealthy candidate the opportunity to get his or her message out, “ without “punish[ing], . . . inhibit[ing], [or] discourag[ing]” the self-financed candidate “from putting in his or her own money.” 147 CONG. REC. S2536-02 (daily ed. Mar. 20, 2001) (Sen. DeWine).

³ A candidate for a House seat in a state with only one Representative was permitted the \$35,000 limit.

⁴ Contribution limits are adjusted every election cycle to account for changes in the consumer price index. For the current election cycle, donors may not contribute more than \$2,300 to a candidate per election. Press Release, Federal Election Commission, FEC Announces Updated Contribution Limits (Jan. 23, 2007), <http://www.fec.gov/press/press2007/20070123limits.html>.

⁵ During an election cycle—beginning January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year—no

(3) to coordinate with their political party on additional party expenditures that would otherwise be limited,⁶ *id.* § 441a-1(a)(1)(C). To take advantage of those benefits, the opponent of a self-financed candidate must first calculate the “opposition personal funds amount” (“OPFA”) to determine whether he is eligible for relaxed limits on fundraising. *Id.* § 441a-1(a)(1). To calculate the OPFA, the opponent determines the amount of personal funds spent by each candidate (*i.e.*, the self-financed candidate and himself), adds 50% of the total funds raised by each candidate during the year prior to the election, and compares the totals. *Id.* § 441a-1(a)(2). If the opponent’s OPFA is above that of the self-financed candidate, he may not take advantage of the relaxed limits and coordinated expenditures. If it is not, then he may take advantage of the relaxed limits, but only until parity is achieved under the OPFA formula. Once each candidate’s OPFAs are equal, the Millionaires’ Amendment no longer applies, and the opponent of the self-financed candidate cannot take advantage of the relaxed limits on contributions and coordinated expenditures. *Id.* § 441a-1(a)(3)(ii).

individual may make contributions totaling more than \$37,500 to candidates and their authorized committees. Once the Millionaires’ Amendment has been triggered, however, individuals who had previously reached the statutory limit on their total contributions may contribute more money to the self-financed candidate’s opponent subject to the limitations of 2 U.S.C. § 441a-1(a)(1)(A) (which allows for contributions up to three times the normal limit).

⁶ 2 U.S.C. § 441a(d) limits the amount of money the national and state committees of a political party may spend in coordination with the general election campaign of a candidate for federal office. Although these “coordinated expenditures” may be limited, *see FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001), “independent expenditures” (*i.e.*, expenditures made by a party committee that are not coordinated with the candidate’s campaign) made by these same committees may not, *see Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996). The Millionaires’ Amendment removes FECA’s limits on coordinated expenditures.

The Amendment also changes the reporting requirements for self-financed candidates and their opponents. Each candidate must, within fifteen days of announcing his candidacy, file a Statement of Candidacy with the FEC declaring the amount of personal funds over \$350,000 that he intends to spend, if any. *Id.* § 441a-1(b)(1)(B). A candidate who makes or obligates to make expenditures of more than \$350,000 in personal funds on his campaign must notify the FEC within twenty-four hours of doing so. *Id.* § 441a-1(b)(1)(C). Once that threshold is crossed, the self-financed candidate must notify the FEC within twenty-four hours of each additional aggregate expenditure of personal funds of \$10,000. *Id.* § 441a-1(b)(1)(D). The opponent of a self-financed candidate who takes advantage of the relaxed contribution limits and coordinated party expenditures must notify the FEC and his party within twenty-four hours of receiving contributions and party expenditures that equal 100% of the OPFA. 11 C.F.R. § 400.31(e)(1)(ii). Political parties are also required to notify the candidate and the FEC within twenty-four hours of making any coordinated party expenditures. *Id.* § 400.30(c)(2).

* * *

Jack Davis ran and lost a self-financed campaign as the Democratic nominee for a congressional seat in the 2004 general election. He ran again for the same seat in the 2006 general election. As required by BCRA, on March 23, 2006, he filed his Statement of Candidacy, and declared that he intended to spend no personal funds during the primary campaign for the Democratic Party nomination and \$1,000,000 in personal funds during the November general election. On June 6, 2006, Davis filed a facial challenge to the Millionaires' Amendment in this Court. He moved for summary judgment, as did the FEC, and on October 20, 2006, sitting as a three-judge district court, we heard oral argument on both motions. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1331 ("district courts shall have original jurisdiction

of all civil actions arising under the Constitution”). Venue is proper pursuant to § 403 of BCRA (“[t]he action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court”) and 28 U.S.C. § 2284 (“a district court of three judges shall be convened when otherwise required by Act of Congress”).

DISCUSSION

Although the FEC does not challenge Davis’s standing to bring this claim, our independent duty to confirm our authority over each case before us requires that we certify standing “even when not otherwise suggested.” *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (citation omitted). The “irreducible constitutional minimum of standing” consists of three elements: (1) an “injury in fact” that is (2) “fairly . . . trace[able] to the challenged action of the defendant,” and (3) “likely . . . redress[able] by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (first alteration in original, internal quotations marks and citations omitted). The Millionaires’ Amendment imposes new and added disclosure requirements on self-financed candidates such as Davis, including a declaration of intent to spend more than \$350,000 of the candidate’s own funds that must be filed within fifteen days of becoming a candidate; an initial notification that the candidate has spent more than \$350,000 of his own funds; and additional notifications throughout the campaign for aggregate expenditures in excess of \$10,000. 2 U.S.C. § 441a-1(b). These additional disclosure requirements impose an injury-in-fact on self-financed candidates that can be traced directly to the Millionaires’ Amendment and that would be removed by a favorable decision from this court. *Cf. Larson v. Valente*, 456 U.S. 228, 241 (1982) (concluding that state’s attempt to enforce reporting requirements under Minnesota charitable solicitation statute constituted sufficient injury for standing). Davis there-

fore has standing to challenge the Amendment, and we may turn to the merits of his argument.

Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also* FED. R. CIV. P. 56. Davis mounts a facial challenge to the constitutionality of the Millionaires’ Amendment based upon the First and Fifth Amendments, asking us to “go beyond the facts before [us] to consider whether . . . the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable on its face.” *Sanjour v. EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (citation omitted). As the Supreme Court has observed, a facial challenge to legislation is, in general, “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). As-applied challenges, by contrast, seek to “declare the challenged statute or regulation unconstitutional on the facts of the particular case.” *Sanjour*, 56 F.3d at 92 n.10. Because of the potentially broad remedial sweep a facial challenge seeks—invalidating the entire statute—it is “manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort,” *Nat’l Endowment for the Arts v. Finely*, 524 U.S. 569, 580 (1998) (internal quotation marks omitted).

Davis’s facial challenge has two prongs—the First Amendment’s protection for freedom of speech and the Fifth Amendment’s requirement of equal protection. We examine the two challenges under different modes of analysis. When examining facial challenges, there are “two quite different ways in which a statute or ordinance may be . . . invalid ‘on its face’—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘over-

broad.”” *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1312 (D.C. Cir. 2005) (quotation marks and citation omitted). “Although the ‘every application’ formulation is the general rule, the latter is the rule for facial challenges brought under the First Amendment.” *Id.* Because Davis is challenging the Millionaires’ Amendment on First Amendment grounds, he need not demonstrate that there are no circumstances under which the amendment would be constitutionally valid, but must show that it “punishes a substantial amount of protected free speech.” *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (quotation marks omitted). For other challenges to prevail, including Davis’s Fifth Amendment claim, “the challenger must establish that no set of circumstances exists under which the Act would be valid.” *Salerno*, 481 U.S. at 745.

To determine whether the Millionaires’ Amendment “punishes a substantial amount of free speech” and thus unconstitutionally infringes a candidate’s First Amendment rights, we must first determine whether it actually “burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990). The Supreme Court has warned that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign” may create such a burden “because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Buckley*, 424 U.S. at 19.

And so we approach Davis’s claim mindful that when Congress legislates to regulate the raising and spending of funds to finance a campaign for elective office, we have a special duty to safeguard core First Amendment values.⁷ But

⁷ “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection

Davis’s First Amendment facial challenge fails at the outset because the Millionaires’ Amendment does not “burden[] the exercise of political speech.” It 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. Rather, the Millionaires’ Amendment accomplishes its sponsors’ aim to preserve core First Amendment values by protecting the candidate’s ability to enhance his participation in the political marketplace. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”).

The Millionaires’ Amendment does not limit in any way the use of a candidate’s personal wealth in his run for office. Instead, it provides a benefit to his opponent, thereby correcting a potential imbalance in resources available to each candidate. In this respect, it is similar to statutes that permit higher contribution limits for candidates who agree to public financing of their campaigns. This means of regulating the way candidates raise and spend money to pursue elective office has been consistently upheld against First Amendment challenges. See *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445, 464–65 (1st Cir. 2000) (upholding statute that provided public matching funds to candidate participating in public financing scheme when independent expenditures were made against him or on behalf of his non-participating opponent); *Gable v. Patton*, 142 F.3d

to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (alteration in original); see also *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”) (quotation marks omitted).

940, 948 (6th Cir. 1998) (where the statute provided 2-1 public matching funds for candidates who agreed to limit campaign expenditures, upholding a provision that waived the expenditure limit when a non-participating opponent raised funds in excess of that amount); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (where the statute provided public financing to candidates who agreed to limit overall expenditures, upholding a “waiver” provision that raised the agreed-to expenditure limitation when a privately financed opponent spent in excess of the limit); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding statute that permitted candidates who agreed to accept public funding and limit their expenditures to accept \$2,000 contributions, while limiting non-participating opponents to accepting \$1,000).

Davis nonetheless argues that the Millionaires’ Amendment burdens the free speech rights of wealthy candidates because it discourages them from self-financing their campaigns, which the Supreme Court has held is a form of protected First Amendment speech. *See Buckley*, 424 U.S. at 51-54. According to Davis, candidates who are considering self-financing will be reluctant to do so—a chill on their political speech—because the Millionaires’ Amendment will (1) give their electoral opponents a competitive advantage, (2) allow even more “corrupt special interest money” into the system, and (3) burden self-financing candidates with additional reporting provisions and prescribed calculations. We consider each of these arguments in turn.

Davis builds his argument of competitive advantage on a common sense observation about the hardball nature of electoral politics in dicta in a case from the First Circuit: “[B]ecause a head-to-head election has a single victor, *any* benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office.” *Vote Choice*, 4 F.3d at 38 (emphasis in original). But

recognizing that electoral politics may be a zero-sum game in which a benefit conferred on one candidate is a disadvantage to his opponent fails to address the only issue that might raise constitutional concerns: whether the benefit conferred chills political speech. To prove a First Amendment violation, Davis must demonstrate that a self-financed candidate's speech would be impermissibly chilled, not simply that his opponent would gain some benefit. In fact, the *Vote Choice* case undercuts Davis's argument. The First Circuit rejected a challenge to Rhode Island's public financing statute based on a claim, much like Davis's, that it impermissibly raised the donor limit for candidates who accepted public funds. The First Circuit determined that the statute, which, like the Millionaires' Amendment, provided the benefit of increased contribution limits to the challenging candidate's opponent, was constitutional because it merely "facilitate[d] communication by candidates with the electorate" and "a [non-participating] candidate suffer[ed] no more than a countervailing denial" of the benefit. *Id.* at 39 (quotation marks omitted).

Davis is correct to suggest 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. But 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. In *Buckley*, the Supreme Court upheld expenditure limitations for candidates who chose to participate in public financing of their campaigns. 424 U. S. at 57 n.65. The Court concluded that because the candidate's participation was voluntary, the otherwise impermissible burden on his speech rights passed constitutional muster:

Congress may engage in public financing of election campaigns and may condition acceptance of public

funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id.; see also *Vote Choice*, 4 F.3d at 38 (“[V]oluntariness has proven to be an important factor in judicial ratification of government-sponsored campaign financing schemes.”); *Rosenstiel*, 101 F.3d at 1550 (“Because participation is truly voluntary . . . the Appellants’ argument that their First Amendment rights are burdened is without merit.”); *Republican Nat’l Comm. v. FEC*, 487 F.Supp. 280, 283-86 (S.D.N.Y.) (1980) (three-judge court), *af’d mem.*, 445 U.S. 955 (1980) (holding that the public funding scheme did not burden a candidate’s First Amendment rights because it simply provided an additional option for accumulating funds).

It is conceivable that the disadvantage imposed by the statute may be so onerous that the candidate, in effect, has no choice. In such cases, the disadvantage may well create an unconstitutional burden. See *Gable*, 142 F.3d at 948 (“[A]lthough a statutorily created benefit does not per se result in an unconstitutional burden, such benefits could conceivably snowball into a coercive measure upon a non-participating candidate.”) (quotation marks omitted); *Vote Choice*, 4 F.3d at 38 (“[T]here is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.”); *Rosenstiel*, 101 F.3d at 1550 (“[T]he State’s public financing package does not . . . create such a large disparity between benefits and restrictions that candidates are coerced to publicly finance their campaigns.”). But there is no issue of compulsion here. The Millionaires’ Amendment does not create disparities, but rather seeks to reduce them by “leveling the playing-field” between candidates who are able to spend large amounts of personal wealth on their campaigns and those who cannot. Davis pre-

sents no evidence that, or credible explanation why, the Amendment coerces wealthy candidates into foregoing self-financing. Davis has offered no evidence that self-financed candidates are not running for office or choosing not to self-finance or self-financing less because of the Millionaires' Amendment.

Perhaps most significantly of all, he has failed to show that his speech has been limited in any way because of the benefits the Amendment provides his opponent. In fact, Davis himself has *twice* elected to self-finance. We thus conclude that the Millionaires' Amendment does not “stray beyond the pale, . . . becoming impermissibly coercive.” *Vote Choice*, 4 F.3d at 38. As Davis himself has shown, whether a candidate incurs the burdens and benefits of the Amendment is entirely his option, and a statute whose application turns on such a choice does not impose an unconstitutional burden on First Amendment rights. *See id.* at 39 (“[W]e have difficulty believing that a statutory framework which merely presents candidates with a voluntary alternative to an otherwise applicable, assuredly constitutional, financing option imposes any burden on [F]irst [A]mendment rights.”); *Republican Nat’l Comm.*, 487 F. Supp. at 285 (“[A]s long as the candidate remains free to engage in unlimited private funding and spending . . . the law does not violate the First Amendment rights of the candidate or supporters.”).

Davis further claims that he is concerned about the corrupting influence on the electoral process of “special interest money,” although he never defines this pejorative term.⁸

⁸ It is not clear to us what Davis means by his reference to “corrupt special interest money,” especially in light of his filings with the FEC that report that he accepts contributions to fund his campaign and does not rely entirely on his own money. *See* Jack Davis, Report of Receipts and Disbursements, FEC Form 3, 11 (filed Apr. 14, 2005). Davis never explains why the contributions he accepts are not “corrupting special interest money.” It is safe to say that one candidate’s “corrupting special interest

Plaintiff's Mem. of Points and Authorities at 24. The Millionaires' Amendment, he argues, has a chilling effect on his speech because it enables "his opponent to partake in a deluge of the same corrupting money that fostered [his] self-financed candidacy in the first instance." *Id.* In other words, a candidate who chooses to self-finance because he abhors the "corrupting influence of special interest money" in the campaign finance system will be reluctant to spend more than \$350,000 of his own money because doing so will, from his perspective, further corrupt the system. However, Davis never explains how the fact that his opponent's campaign is funded by "corrupting money" has a chilling effect on his mostly self-financed campaign. In fact, the day Davis filed his Statement of Candidacy with the FEC, he indicated that he planned to spend \$1,000,000 of his own money on his campaign. We struggle to see how Davis 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. Many a candidate would welcome the opportunity to be similarly "chilled."

We are also not persuaded by Davis's claim that the new and added disclosure requirements on self-financed candidates created by the Millionaires' Amendment burden his First Amendment right to participate freely in political activities. *See Davis Compl.*, ¶ 24 (June 28, 2006). The Supreme Court has consistently upheld against First Amendment challenges statutes that impose the burden of reporting campaign finance fundraising and expenditures no less onerous than those that trouble Davis.

In *Buckley*, the Court reviewed the constitutionality of FECA's reporting provisions, which replaced all prior disclo-

money" may be another candidate's "contributions from devoted supporters who believe in her legislative policies."

sure laws and imposed an entirely new disclosure regime on candidates and “political committees.”⁹ 424 U.S. at 62. FECA required candidates and political committees to keep detailed contribution and expenditure records including “the name and address of everyone making a contribution in excess of \$10, along with the date and amount of the contribution. If a person’s contributions aggregate more than \$100, his occupation and principal place of business are also to be included.” *Id.* at 63. Additionally, each candidate and political committee was to file quarterly reports that contained “detailed financial information” on its contributions and contributors. The Court found “no constitutional infirmities in the recordkeeping reporting, and disclosure requirements of [FECA].” *Id.* at 84.

In *McConnell*, the Court examined the constitutionality of a provision in BCRA that required a disclosure statement to be filed with the FEC “whenever any person makes disbursements totaling more than \$10,000 during any calendar year for the direct costs of producing and airing electioneering communications,” 540 U. S. at 194, and “[t]he statement must be filed within twenty-four hours of each ‘disclosure date’—a term defined to include the first date and all subsequent dates on which a person’s aggregate undisclosed expenses for electioneering communications exceed \$10,000 for that calendar year,” *id.* at 195. The Court upheld these BCRA reporting provisions, as bothersome as they are, concluding that they were constitutional because they “d[o] not prevent anyone from speaking.” *Id.* at 201 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) (quotation marks omitted). The challenged reporting provisions of the Millionaires’ Amendment do not either.

⁹ FECA defined a “political committee” as “a group of persons that receives contributions or makes expenditures of over \$1,000 in a calendar year.” *Buckley*, 424 U.S. at 62 (quotation marks omitted).

Because Davis concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not the Millionaires' Amendment ever applies, his argument that the reporting provisions "impose a significant burden on self-financed candidates and thus, violate the First Amendment," Plaintiff's Mem. of Points and Authorities at 16, is essentially a complaint about the timing elements of the reporting requirements—specifically the twenty-four-hour deadline for reporting aggregate spending of \$10,000. But the timing deadlines of the Millionaires' Amendment are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*. The twenty-four-hour deadline for reporting each \$10,000 expenditure in excess of \$350,000 mirrors the deadline for reporting each \$10,000 expenditure on electioneering communications upheld by the *McConnell* Court. 540 U. S. at 194-95.

Davis also complains that the reporting provisions are unconstitutional because they create "a unilateral burden." This argument fares no better than the others. First and foremost, as illustrated above, the reporting provisions do not in fact burden First Amendment speech rights. Moreover, any burden that the reporting provisions may hypothetically impose is not "unilateral." The opponent of a self-financed candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate's. After receiving the self-financed candidate's initial or subsequent notice of expenditures from personal funds, the opposing candidate must, within twenty-four hours, notify the FEC and his political party of the OPFA. 11 C.F.R. § 400.30(b). If the opposing candidate receives increased contributions and increased coordinated party expenditures equal to 100% of the OPFA, the opposing candidate must notify the FEC and his political party within twenty-four hours. *Id.* § 400.31(e)(1)(ii). He must also report when the contributions are Millionaires' Amendment contributions, when he reaches the proportion-

ality cap, and if he ever refunds Millionaires' Amendment contributions. *Id.* Additionally, political parties that make coordinated party expenditures under the Millionaires' Amendment must notify the FEC, as well as the candidate on whose behalf the expenditure was made, within twenty-four hours. *Id.* § 400.30(c)(2).

Finally, we reject Davis's claim that the "substantial and unjustified competitive injury inflicted on self-financed candidates" violates the Equal Protection Clause of the Fifth Amendment. Plaintiff's Mem. of Points and Authorities at 26. The touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 200 (1981) (plurality opinion); *see also Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 736 (D.C. Cir. 2007) (noting that in order "to survive summary judgment [plaintiff] must show that it was treated differently" than a party who is similarly situated).

Davis cannot make this showing because the reasonable premise of the Millionaires' Amendment is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness. Davis, in fact, is situated quite differently from his opponent because he has chosen to finance his campaign with personal wealth, which is subject to no limits, while his opponent has chosen to finance his campaign with contributions that are subject to statutory limits. A candidate like Davis who chooses to self-finance his campaign may have access to funds that are unavailable to an opponent who cannot pay for his campaign personally or chooses not to. In Congress's view, it was this fundamental difference between candidates that posed the problem it sought to address through the Millionaires' Amendment. The Millionaires' Amendment is an attempt to provide at least a

partial remedy for what Congress decided was an unavoidable problem when political opponents for elected office are not similarly situated in their abilities to fund a campaign from their own resources. By trying to reduce such a disparity, Congress does not run afoul of the Equal Protection Clause:

[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in *Jenness v. Fortson*, “there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike”

Buckley, 424 U.S. at 97-98 (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-442 (1971)) (first ellipsis in original); *see, e.g., Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) (declining to find an equal protection violation in a state Medicaid program which provides more generous benefits to poor people because “in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same”). We find no Fifth Amendment violation in Davis’s claim.

CONCLUSION

For the reasons set forth above, we grant FEC’s motion for summary judgment and deny Davis’s motion for summary judgment.

This the 9th day of August, 2007.

United States Circuit Judge

United States District Judge

United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

[Filed August 9, 2007]

Civil Action 06-01185
(Three-Judge Court)

JACK DAVIS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

JUDGMENT

For the reasons stated in the court's memorandum opinion docketed this same day, it is this 9th day of August, 2007, hereby

ORDERED that JUDGMENT is entered in favor of defendant and against plaintiff.

Thomas B. Griffith
United States Circuit Judge

Gladys Kessler
United States District Judge

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX C

UNITED STATES CONSTITUTION

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * *

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES

2 U.S.C. § 437g. Enforcement

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating \$25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

* * * *

2 U.S.C § 441a-1. Modification of certain limits for House candidates in response to personal fund expenditures of opponents

(a) Availability of increased limit

(1) In general

Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds \$350,000—

(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and

(C) the limits under subsection (d) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

(2) Determination of opposition personal funds amount

(A) In general

The opposition personal funds amount is an amount equal to the excess (if any) of—

(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1) of this section) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(B) Special rule for candidate's campaign funds

(i) In general

For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage

For purposes of clause (i), the term gross receipts advantage means the excess, if any, of—

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(3) Time to accept contributions under increased limit

(A) In general

Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)—

(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1) of this section; and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(4) Disposal of excess contributions

(A) In general

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the in-

creased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(b) Notification of expenditures from personal funds

(1) In general

(A) Definition of expenditure from personal funds

In this paragraph, the term expenditure from personal funds means—

(i) an expenditure made by a candidate using personal funds; and

(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(B) Declaration of intent

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed \$350,000.

(C) Initial notification

Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of

\$350,000 in connection with any election, the candidate shall file a notification.

(D) Additional notification

After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds \$10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

(E) Contents

A notification under subparagraph (C) or (D) shall include—

(i) the name of the candidate and the office sought by the candidate;

(ii) the date and amount of each expenditure; and

(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(F) Place of filing

Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with—

(i) the Commission; and

(ii) each candidate in the same election and the national party of each such candidate.

(2) Notification of disposal of excess contributions

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the

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candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under subsection (a) of this section) and the manner in which the candidate or the candidate's authorized committee used such funds.

(3) Enforcement

For provisions providing for the enforcement of the reporting requirements under this subsection, see section 437g of this title.

BCRA § 319, 116 Stat. at 109-12

SEC 319. MODIFICATION OF INDIVIDUAL CONTRIBUTION LIMITS FOR HOUSE CANDIDATES IN RESPONSE TO EXPENDITURES FROM PERSONAL FUNDS,

(a) Increased Limits.—Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by inserting after section 315 the following new section: modification of certain limits for house candidates in response to personal fund expenditures of opponents Sec. 315A. (a) Availability of Increased Limit.—

(1) In general.—Subject to paragraph (3), if the opposition personal funds amount with respect to a candidate for election to the office of Representative in, or Delegate or Resident Commissioner to, the Congress exceeds \$350,000—

(A) the limit under subsection (a)(1)(A) with respect to the candidate shall be tripled;

(B) the limit under subsection (a)(3) shall not apply with respect to any contribution made with respect to the candidate if the contribution is made under the increased limit allowed under subparagraph (A) during a period in which the candidate may accept such a contribution; and (C) the limits under subsection (D) with respect to any expenditure by a State or national committee of a political party on behalf of the candidate shall not apply.

(2) Determination of opposition personal funds amount.—

(A) In general.—The opposition personal funds amount is an amount equal to the excess (if any) of—

(i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1)) that an opposing candidate in the same election makes; over

(ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

(B) Special rule for candidate's campaign funds.—

(i) In general.—For purposes of determining the aggregate amount of expenditures from personal funds under subparagraph (A), such amount shall include the gross receipts advantage of the candidate's authorized committee.

(ii) Gross receipts advantage.—For purposes of clause (i), the term 'gross receipts advantage' means the excess, if any, of—

(I) the aggregate amount of 50 percent of gross receipts of a candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held, over

(II) the aggregate amount of 50 percent of gross receipts of the opposing candidate's authorized committee during any election cycle (not including contributions from personal funds of the candidate) that may be expended in connection with the election, as determined on June 30 and December 31 of the year preceding the year in which a general election is held.

(3) Time to accept contributions under increased limit.—

(A) In general.—Subject to subparagraph (B), a candidate and the candidate's authorized committee shall not accept any contribution, and a party committee shall not make any expenditure, under the increased limit under paragraph (1)—

(i) until the candidate has received notification of the opposition personal funds amount under subsection (b)(1); and

(ii) to the extent that such contribution, when added to the aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits under this subsection for the election cycle, exceeds 100 percent of the opposition personal funds amount.

(B) Effect of withdrawal of an opposing candidate.—

A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

(4) Disposal of excess contributions.—

(A) In general.—

The aggregate amount of contributions accepted by a candidate or a candidate's authorized committee under the increased limit under paragraph (1) and not otherwise expended in connection with the election with respect to which such contributions relate shall, not later than 50 days after the date of such election, be used in the manner described in subparagraph (B).

(B) Return to contributors.—

A candidate or a candidate's authorized committee shall return the excess contribution to the person who made the contribution.

(b) Notification of Expenditures From Personal Funds.—

(1) In general.—

(A) Definition of expenditure from personal funds.—

In this paragraph, the term `expenditure from personal funds' means—

(i) an expenditure made by a candidate using personal funds; and

(ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(B) Declaration of intent.—

Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed \$350,000.

(C) Initial notification.—

Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of \$350,000 in connection with any election, the candidate shall file a notification.

(D) Additional notification.—

After a candidate files an initial notification under subparagraph (C), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds \$10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

(E) Contents.—A notification under subparagraph (C) or (D) shall include—

(i) the name of the candidate and the office sought by the candidate;

(ii) the date and amount of each expenditure; and

(iii) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(F) Place of filing.—

Each declaration or notification required to be filed by a candidate under subparagraph (C), (D), or (E) shall be filed with—

(i) the Commission; and

(ii) each candidate in the same election and the national party of each such candidate.

(2) Notification of disposal of excess contributions.—

In the next regularly scheduled report after the date of the election for which a candidate seeks nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under subsection (a)) and the manner in which the candidate or the candidate's authorized committee used such funds.

(3) Enforcement.—For provisions providing for the enforcement of the reporting requirements under this subsection, see section 309.

(b) Conforming Amendment.—Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a), as amended by section 304(a), is amended by striking subsection (i), and inserting subsection (i) and section 315A.

* * * *

BCRA § 403(a), 116 Stat. at 113-14

SEC. 403. JUDICIAL REVIEW

(a) Special Rules for Actions Brought on Constitutional Grounds.—

If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No: 1:06cv01185
(TG)(GK)(HK)
THREE-JUDGE COURT

JACK DAVIS

Plaintiff,

v.

FEDERAL ELECTION COMMISSION

Defendant.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jack Davis, plaintiff in the above-named case, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge district court, dismissing the complaint entered in this action on August 9, 2007.

This appeal is taken pursuant to Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the final decision of a three-judge district court).

Dated this 16th day of August, 2007.

Respectfully submitted,
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