

No. 07-320 SEP 07 2007

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IN THE

**Supreme Court of the United States**

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JACK DAVIS,

*Appellant,*

v.

FEDERAL ELECTION COMMISSION,

*Appellee.*

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

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**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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**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.*<sup>1</sup>

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.<sup>2</sup> 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,

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<sup>1</sup> 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).

<sup>2</sup> 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 fundraising 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.<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup> 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-

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<sup>4</sup> 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).<sup>5</sup>

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-

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<sup>5</sup> 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 Amendments 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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