No. 07-320

In The Supreme Court of the United States

JACK DAVIS,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES & REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. The instant case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 319 of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441a-1, is facially unconstitutional because it burdens the exercise of protected self-financed political campaign speech without serving any compelling governmental interest. Section 319 penalizes a candidate who spends more than $350,000 from personal funds by enhancing the political speech of that candidate's opponent through increased contribution limits and unlimited coordinated party expenditures. Section 319 thus creates an unconstitutional *de facto* expenditure limit by chilling a self-financing candidate from engaging in protected political speech beyond that personal funds ceiling.

Section 319 also serves no compelling governmental interest. It does not prevent actual or apparent corruption because there is no threat of *quid pro quo* corruption from a candidate's expenditure of her own funds. Instead, the provision *undermines* the governmental interest in combating corruption by deterring self-financing candidates from reducing their dependence on outside contributions – all while increasing significantly the purportedly corruptive contributions and coordinated expenditures available to their opponents. Moreover, this Court has expressly rejected the district court's rationale for upholding Section 319 – "leveling the playing field" of financial resources – as an interest sufficient to justify infringement of First Amendment rights.

In addition to penalizing political speech, Section 319 further burdens protected speech and

association with compelled disclosure requirements. Those reporting provisions impose significant civil and criminal liability on the candidate personally, chilling the right to engage in unlimited self-financed political speech. The disclosure requirements also infringe on a candidate's associational right *not* to associate with campaign contributors. These additional disclosure burdens do not serve any informational interest because the underlying information ultimately is redundant of that disclosed to the FEC under preexisting requirements. Nor do they deter actual or apparent corruption, as disclosure of expenditures from personal funds cannot expose *quid pro quo* arrangements.

ARGUMENT

I. Section 319 Imposes an Unconstitutional Penalty on the Exercise of Fundamental First Amendment Rights to One's Own Political Speech.

As the three-judge district court correctly noted, to determine whether BCRA Section 319 is facially unconstitutional because it "punishes a 'substantial' amount of protected free speech," *Virginia v. Hicks*, 539 U.S. 113, 118 (2003), the Court "must ascertain whether it 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) (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (*per curiam*)). *See also McConnell v. FEC*, 540 U.S. 93, 205 (2003) (applying strict scrutiny in facial overbreadth challenge to BCRA Section 203, Court "must examine the degree to which BCRA burdens First Amendment expression and evaluate whether a compelling governmental interest justifies that burden.") (citing *Austin*, 494 U.S. at 657).

A. By Penalizing Protected Speech, Section 319 Burdens the Exercise of Political Speech by Self-Financed Candidates.

"'The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2666 (2007) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

In *Buckley*, this Court held that the expenditure limitations contained in FECA constituted "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The Court found that monetary expenditure limits directly restrain political speech "because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.*

Specifically with respect to FECA's limits on expenditures by candidates from their personal funds, the Court found that a "ceiling on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression," and "thus clearly and directly interferes with constitutionally protected freedoms." *Id.* at 52-53. Therefore, the Court held the restriction on a candidate's personal expenditures unconstitutional, concluding that "fundamentally, the First Amendment simply cannot tolerate [FECA]'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. *See also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) ("The central holding in [*Buckley*] is that spending money on one's own speech must be permitted.").

Relying on the absence of a direct expenditure limit such as those invalidated in *Buckley*, the district court erroneously concluded that "the Millionaires' Amendment does not 'burden[ ] the exercise of political speech'" because it "does not limit in any way the use of a candidate's personal wealth in his run for office." *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007). Instead, the court found that Section 319 merely "provides a benefit to his opponent, thereby correcting a potential imbalance in resources available to each candidate." *Id.* This Court long has held, however, that Congress may not use the provision of such a "benefit" to indirectly "place limitations upon the freedom of speech which if directly attempted would be unconstitutional," for to deny such benefit to speakers "who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). "Its deterrent effect is the same as if the State were to fine them for this speech." *Id. See also Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("Likewise, to condition the availability of [unemployment] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court further considered impermissible interference with First Amendment rights through the imposition of unconstitutional conditions on a government-conferred benefit, echoing *Speiser* in holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech." *Perry*, 408 U.S. at 597. "For if the

government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* *See also* *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (holding that the practice of conditioning a public benefit on the limitation of protected expression both "inhibits" that expression and "penalizes its exercise"). A statute burdening First Amendment rights by indirectly penalizing protected expression is subject to the same strict scrutiny as a direct limitation. *Buckley*, 424 U.S. at 65 ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct[.]").

Indeed, Section 319 penalizes protected expression far more directly than would unconstitutional conditions, because it provides only penalties for self-financed political speech on behalf of one's own candidacy: any purported countervailing benefit is contingent and wholly illusory. Section 319 creates a *de facto* $350,000 limit on expenditures from personal funds, avoiding *Buckley*'s proscription on explicit ceilings by instead penalizing the exercise of a First Amendment right to speak in amounts exceeding that threshold (by increasing contribution limits and eliminating coordinated party expenditure limits for the self-financing candidate's opponent). A candidate approaching that *de facto* ceiling will be deterred from engaging in further protected self-financed speech because of the certainty that such exercise of her constitutional rights will result in conferring a significant competitive advantage to her opponent. Such forced

"self-censorship" burdens First Amendment rights as surely and heavily as direct statutory restriction. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1562 (8th Cir. 1996) (Lay, J., dissenting) (finding that Minnesota's campaign finance scheme impermissibly "burdens a candidate's free speech rights by chilling her decision to increase her political speech" beyond the set spending limits).

In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995), the court, construing a Minnesota statute that "enhanced" the political speech of candidates against whom independent expenditures were made, held:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. This "self-censorship" . . . is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship. . . . Therefore, even if section 10A.25 subd. 13 were content-neutral, the statute's negative impact on political speech must be a violation of the First Amendment rights of those who wish to make the independent expenditures at issue. The statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny.

34 F.3d at 1360, 1362. Similarly, in penalizing self-financed candidates' speech by favoring and enhancing their contribution-financed opponents' speech, Section 319 inexorably burdens self-financed candidates' protected political speech. *See Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue. . . . Such power in government to channel the expression of views is unacceptable under the First Amendment.").

Moreover, this statutory penalty cannot credibly be characterized as merely a benefit conferred upon candidates choosing not to exceed the threshold, because any such benefit is contingent on facing a candidate who spends more than $350,000 in personal funds – the very contingency the penalty is designed to eliminate. *Rosenstiel*, 101 F.3d at 1563 & n.26 (Lay, J., dissenting) (Minnesota campaign finance scheme unconstitutionally burdens free speech rights because the purported "incentives to publicly financed candidates here are contingent on their opponents' decision.").

Indeed, in most circumstances, the candidate who relinquishes her First Amendment right to speak without limit on behalf of her own candidacy receives no countervailing benefit whatsoever from Section 319, but rather is subjected to the same FECA contribution limits and coordinated party expenditure limits to which she otherwise would have been subject. *See Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1425 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (holding that expenditure "limits are not voluntary because they

provide only penalties for non-compliance rather than an incentive for voluntary compliance.").

In *Maupin*, the court held that the challenged provision impermissibly penalized candidates exercising their right to speak without expenditure limits, by foreclosing otherwise available sources of funding and by imposing daily reporting requirements, and could not credibly be construed as an incentive because "complying" candidates received no benefit other than the continued status quo (*i.e.*, avoidance of the penalty). *Id.* The court explained:

> No candidate would voluntarily agree to comply with the expenditure limits in exchange for access to sources of funding to which he or she already has a constitutional right of access. Rather, [the Missouri statute] forces compliance by imposing substantial penalties for non-compliance. The purported benefit is illusory, and the statute is coercive.

Id. Similarly, the only benefit Section 319 provides in return for a candidate's forfeiting her right to spend personal funds on political speech without limit is the avoidance of its penalty, which is no true benefit at all.

In this way, Section 319 operates solely as a stick deterring protected self-financed expenditures rather than as a carrot encouraging participation in an alternative campaign financing scheme, burdening protected speech to the same extent as a direct expenditure limitation. The district court's analogy

to public funding statutes therefore is inapt. Unlike Section 319, the public financing schemes provide a participating candidate the benefit of public funds, therefore any additional statutory disparities or advantages arguably may be interpreted as incentives to encourage voluntary participation in an alternative scheme that provides a tangible benefit to which the participating candidate would not otherwise have been entitled. *See Rosenstiel*, 101 F.3d at 1550 (finding that "the State's scheme in this case provides certain inducements--the expenditure limitation waiver and the contribution refund in addition to a public cash subsidy--in order to encourage maximum candidate participation."); *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998) (holding that, while Kentucky's public financing scheme exerted "financial pressure to participate" on candidates, that pressure was constitutionally acceptable because "a voluntary campaign finance scheme must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice."); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 467, 471 (1st Cir. 2000) (explaining "that the government may create incentives for candidates to participate in a public funding system" and finding that the Maine statute provided, in addition to the public funds themselves, "benefits [such as] the release from the rigors of fundraising, the assurances that contributors will not have an opportunity to seek special access, and the avoidance of any appearance of corruption."); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) ("Establishing unequal contribution caps

serves this multifaceted network of interests by making it more probable that candidates will choose to partake of public financing.").

By contrast, Section 319 does not incentivize participation in anything but the status quo of contribution limits and coordinated party expenditure limits, and thereby provides only disincentives and penalties for protected self-financed expression. For example, in his dissent in *Rosenstiel*, Judge Lay rejected the majority's characterization of the Minnesota statute's penalties for private financing as mere "inducements" for participation in the public finance scheme, arguing instead that they unconstitutionally burdened a candidate's free speech:

> I respectfully submit such an analysis is irrelevant in evaluating the concerns of whether the non-public financed candidate's First Amendment rights are chilled. This case is not about the publicly financed candidate's free speech rights. It is not a matter of balancing benefits with restrictions. . . . The issue is whether a candidate who faces a choice not to limit her full access to political speech will be any worse off in choosing to do so. . . . When such a choice is made, however, Minnesota's campaign finance scheme adds disincentives which make a privately financed candidate worse off than she otherwise would be. . . . The disincentives are invoked as a means to influence directly a candidate's choice (to keep the candidate in line within the spending limit). To call such coercive

> conduct by any other name does not diminish the effect upon the candidate's choice. The issue is whether a candidate's decision to exercise her constitutional right to free speech has been chilled.

101 F.3d at 1560-61 & n.20 (Lay, J., dissenting). This reasoning, persuasive even as to public financing schemes conferring benefits upon participating candidates, applies *a fortiori* to Section 319, which provides no incentive or countervailing benefit to candidates who abandon their rights but rather only penalties to those retaining their full right to unlimited self-financed political expression. Section 319 burdens the political speech of self-financed candidates, and therefore must be narrowly tailored to serve a compelling governmental interest to survive constitutional scrutiny. *Austin*, 494 U.S. at 657.

B. Section 319's Burden on Self-Financed Political Speech Serves No Compelling Governmental Interest.

1. Section 319 Does Not Serve, and Indeed Undermines, a Governmental Interest in Preventing Corruption or the Appearance of Corruption.

In *Buckley*, the Court held the governmental interest in limiting "the actuality and appearance of corruption resulting from large individual financial contributions" a "constitutionally sufficient justification" for FECA's $1,000 contribution limit. 424 U.S. at 26. The Court further explained that the

particular corruption constituting that government interest was *quid pro quo* corruption, noting that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. *See also FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985) (explaining that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."); *Wis. Right to Life*, 127 S. Ct. at 2672 (holding that the advertisements at issue "are by no means equivalent to contributions, and the *quid pro quo* corruption interest cannot justify regulating them.").

The *Buckley* Court went on to clarify that the "appearance of corruption" justification is similarly related to *quid pro quo* arrangements, explaining that "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. This Court since has reiterated "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for

restricting campaign finances." *Nat'l Conservative PAC*, 470 U.S. at 496-97.[2]

Section 319 does not prevent corruption or the appearance of corruption because there is a complete "absence of any threat of corruption" from "a candidate's expenditure of his own funds," for which there can be no *quid pro quo*. *Buckley*, 424 U.S. at 53 n.59. In *Buckley*, the Court squarely rejected the argument that a limitation on a candidate's expenditure of personal funds served the interest in preventing corruption or the appearance of corruption:

> The primary governmental interest served by the Act the prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself[.]"

Id. at 53 (internal citation omitted).

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[2] The Court has recognized a variation on this interest specific only to "the unique state-conferred corporate structure," a variation clearly inapplicable to Section 319's burdens on individual candidates. *See Austin*, 494 U.S. at 660 (emphasizing that the interest recognized was not applicable to the mere accumulation of large amounts of wealth, but rather only to "the unique state-conferred corporate structure that facilitates the amassing of large treasuries[.]").

To the contrary, limiting or chilling a candidate's use of her own personal funds for political speech actually undermines the governmental interest in preventing corruption, as the "use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed." *Id.* Indeed, Section 319 undermines that interest not only by deterring potential self-financing candidates from reducing their dependence on outside contributions, but also by increasing the size and availability of outside contributions to a self-financer's opponent through increased contribution limits and coordinated party expenditure limits. Section 319's burdens on protected political expression therefore cannot be justified as serving a governmental interest in preventing corruption or the appearance of corruption.

2. Leveling the Playing Field Is Not a Compelling Governmental Interest.

In *Buckley*, this Court rejected the proposed "ancillary interest in equalizing the relative financial resources of candidates competing for elective office" as "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." *Id.* at 54; *cf. Colo. Republican Campaign Comm.*, 518 U.S. at 609 (in its original form, prior to *Buckley*, FECA "sought both to remedy the appearance of a corrupt political process (one in which large contributions seemed to buy legislative votes) and to level the electoral playing field by reducing campaign costs."). Rejecting the "level playing field" rationale, the *Buckley* Court explained:

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

424 U.S. at 48-49 (internal quotations and citations omitted). *See also Austin*, 494 U.S. at 705 (Kennedy, J., dissenting) ("[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment.") (citing *Buckley*, 424 U.S. at 48-49); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."); *McConnell*, 540 U.S. at 227 (citing *Buckley*, 424 U.S. at 48-49, for its rejection of asserted governmental interest in equalizing the relative abilities of speakers to justify a burden on speech).

Specifically with respect to candidates' expenditures from personal funds, this Court held that equalizing candidates' relative financial resources was "fundamentally" an insufficient

government interest as "the First Amendment simply cannot tolerate … restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. In addition to rejecting "leveling the playing field" as a compelling government interest, the Court further noted that limiting expenditures from a candidate's personal funds does not even serve that rejected interest because a candidate relying on self-financing easily may be outspent by an opposing candidate relying on outside contributions, and in fact reliance on personal funds may even exacerbate that disparity. *Id*. ("Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign.").

Ignoring this Court's clear rejection of the relative "enhancement" interest in *Buckley*, the district court nevertheless held that Section 319 "accomplishes its sponsors' aim to preserve core First Amendment values by protecting the candidate's ability to enhance his participation in the political marketplace" and reduces disparities "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*, 501 F. Supp. 2d at 29-31. The district court stands alone in this rejection of *Buckley*'s holding. *See, e.g.*, *Maupin*, 71 F.3d at 1426 ("The state's interest in maintaining individual participation is what the District Court correctly described as an effort to 'level the playing field between the rich and the poor.' The Supreme Court in *Buckley*, however, specifically held that the government may not 'restrict the speech of some

elements of our society in order to enhance the relative voice of others,' and no subsequent decision of the Court has undermined that holding.") (citations omitted); *Kruse v. City of Cincinnati*, 142 F.3d 907, 917 (6th Cir. 1998) ("These arguments, all concerning or stemming from the notion that the government has an interest in eliminating the advantage of wealth in the electoral process, or 'leveling the playing field,' are directly rebutted by Buckley[.]") (citation omitted); *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 317 n.10 (6th Cir. 1998) ("To the extent that this is an effort to 'level the playing field' and enhance the voice of other less organized or less affluent segments of society . . . relative to that of unions and corporations, it is impermissible.").

In a further departure from *Buckley*, the district court cites *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) in support of its 'relative enhancement' conclusion. *Davis*, 501 F. Supp. 2d at 29. In *Red Lion*, this Court upheld portions of the FCC's now-defunct "fairness doctrine," which required licensees of scarce public broadcast frequencies to cover both sides of controversial public issues. 395 U.S. at 400-01. In *Buckley*, however, this Court specifically rejected *Red Lion* as support for the very position advanced by the district court, finding that "[n]either the voting rights cases nor the Court's [*Red Lion*] decision upholding the Federal Communication Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." 424 U.S. at 49 n.55.

Distinguishing *Red Lion* as limited to broadcast media licenses, which "pose unique and special problems not present in the traditional free speech case," this Court concluded that "Red Lion therefore undercuts appellees' claim that [FECA]'s limitations may permissibly restrict the First Amendment rights of individuals in this 'traditional free speech case.'" *Id.* Therefore, *Buckley* directly rebuts the district court's asserted "leveling the playing-field" interest and its supporting citation to *Red Lion*. The desire to equalize relative financial resources of candidates for public office is not a compelling governmental interest and cannot justify the burdens Section 319 imposes on constitutionally protected political speech.

II. Section 319's Compelled Disclosure Provisions Unconstitutionally Infringe First Amendment Rights.

In addition to its penalizing and chilling burden discussed above, Section 319 further burdens First Amendment freedoms of speech and association through its imposition of compelled disclosure requirements, including exposure to personal civil and criminal liability for the candidate forced to disclose. *See Buckley*, 424 U.S. at 64 ("But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."). Those additional burdens, specific to compelled disclosure, subject Section 319 to strict scrutiny to determine whether it is "narrowly tailored to serve a compelling state interest." *Austin*, 494 U.S. at 657; *see also Buckley*, 424 U.S. at 64-65 (holding "that significant encroachments on First Amendment rights of the

sort that compelled disclosure imposes . . . must survive exacting scrutiny.").

A. Section 319's Disclosure Requirements, With Attendant Personal Civil and Criminal Liability, Burden the Exercise of First Amendment Freedoms of Speech and Association.

The district court rejected the argument "that the new and added disclosure requirements on self-financed candidates created by the Millionaires' Amendment burden [Petitioner's] First Amendment right to participate freely in political activities." *Davis*, 501 F. Supp. 2d at 32. Noting that "[t]he 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[,]" the district court misconstrued the holdings in *Buckley* and *McConnell* as "illustrat[ing]" that Section 319's "reporting provisions do not in fact burden First Amendment speech rights." *Id.* at 32-33 (emphasis added).

In *Buckley* and *McConnell*, however, this Court held that the compelled disclosure provisions at issue did burden speech or associational rights, but the provisions survived strict scrutiny because they were justified by compelling governmental interests. *See Buckley*, 424 U.S. at 66 (holding that three categories of governmental interests served by FECA's disclosure requirements were "sufficiently important to outweigh the possibility of infringement" upon the exercise of First Amendment rights); *McConnell*, 540 U.S. at 196 (holding "that

the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA."). In fact, the district court contradicts its conclusion that Section 319's reporting provisions do not burden protected speech rights not only by acknowledging that the statutes challenged in *Buckley* and *McConnell* "impose the burden of reporting," but also by previously finding that "[t]hese additional disclosure requirements impose an injury-in-fact on self-financed candidates" sufficient for Petitioner to have standing. *Davis*, 501 F. Supp. 2d at 27, 32.

At the outset, Section 319's disclosure requirements burden the exercise of protected speech by imposing new reporting obligations based solely on a candidate's decision to exercise what this Court found in *Buckley* to be a First Amendment right "of particular importance." 424 U.S. at 52 & n.58, 53 (describing a candidate's right to make expenditures from personal funds "in furtherance of his own candidacy" that "directly facilitates his own political speech"). Those reporting burdens include filing amended FEC Form 2, FEC Form 3Z-1, and most notably the disclosure of additional information in FEC Form 10 within twenty-four hours of each expenditure greater than $10,000 from personal funds upon exceeding the $350,000 triggering threshold. *See* 2 U.S.C. § 441a-1(b)(1); *see also* 11 CFR §§ 101.1(a); 104.19; 400.20(a), (b)(2); 400.21(b); 400.22; 400.24.

Not only do these provisions impose self-evident mechanical calculation and reporting burdens upon the exercise of protected self-financed political speech, but the requirement to provide FEC Form 10

to one's opponent within twenty-four hours of each qualifying personal expenditure inevitably signals certain elements of a self-financing candidate's political strategy to her opponent in ways not previously required, conferring a competitive advantage upon the opponent that chills and deters the exercise of First Amendment rights to unfettered self-financed political speech. *See Bellotti*, 435 U.S. at 785-86 ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."); *Rosenstiel*, 101 F.3d at 1562 n.25 (Lay, J., dissenting) ("A candidate's interest in speaking is in winning the election in which she is running; her speech will clearly be chilled if, by speaking she advances the campaign of her opponent."); *Day*, 34 F.3d at 1360 ("This 'self-censorship' … is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship.").

However slight the district court may have perceived the reporting burdens, Section 319's additional disclosure requirements also carry significant civil and criminal liability, personal to the candidate. *See* 2 U.S.C. §§ 441a-1(b)(3), 437g. *See also* FEC Matter Under Review 5648 (Broyhill), Second General Counsel's Rep. at 9 (Mar. 1, 2006) ("The 'Millionaire's Amendment,' unlike other [federal campaign finance] statutes, specifically assigns responsibility for compliance with its reporting requirements to the candidate."). Accordingly, a candidate who does not properly comply with Section 319's reporting requirements, triggered solely by the exercise of protected self-

financed political speech on behalf of one's own candidacy, is personally subject to civil penalties of up to two hundred percent of the expenditure involved, *see* 2 U.S.C. § 437g(a)(5)(B), (6)(C), and criminal penalties of up to $250,000 in fines and five years imprisonment. *See* 2 U.S.C. § 437g(d)(1)(A)(i); 18 U.S.C. §§ 3551(b)(2), (b)(3), 3571(b)(3).

This significant civil and criminal liability, overlooked by the district court, burdens First Amendment rights by chilling protected speech. *See, e.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654, 668 (2003) ("[A] threat of a civil action, like the threat of a criminal action, can chill speech.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964)); *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (noting "deterrent effect" whereby "criminal sanctions may well cause speakers to remain silent rather than communicate" at the risk of prosecution); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (noting "that a threat of criminal or civil sanctions after publication 'chills' speech"); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions … [has a] chilling effect on protected expression."). *See also Wis. Right to Life*, 127 S. Ct. at 2666 (noting potential for "chilling speech through the threat of burdensome litigation.") (citing *Hicks*, 539 U.S. at 119). Section 319 thus burdens the exercise of protected self-financed campaign speech.

In addition to the burdens on protected speech, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64 (citations omitted). "[A] corollary of the right to

associate is the right not to associate." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("'[F]reedom of association . . . plainly presupposes a freedom not to associate.'") (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Section 319's compelled disclosure provisions infringe on a candidate's right not to associate with campaign contributors by instead self-financing his campaign. *See Buckley*, 424 U.S. at 53 ("Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."). By forcing a self-financing candidate to disclose regularly the nature and extent of his association or disassociation, with attendant civil and criminal liability for misreporting, Section 319 makes it more difficult for a candidate to eschew outside contributors and thus burdens his right not to associate.

B. Section 319's Burdensome Disclosure Provisions Serve No Compelling Governmental Interest.

The governmental interests recognized by this Court as "sufficiently important" to vindicate compelled disclosure requirements "fall into three categories," *Buckley*, 424 U.S. at 66, summarized as "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive . . . restrictions[.]" *McConnell*, 540

U.S. at 196. Section 319's disclosure requirements serve none of these interests.

1. Section 319 Does Not Provide the Electorate Additional Information or Data Beyond That Already Required to be Disclosed Elsewhere.

The first of the three recognized interests is in "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67 (internal quotation omitted). By providing such information, disclosures "allow[] voters to place each candidate in the political spectrum" and "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id*. at 67. Similarly, another recognized "informational" interest is providing "an essential means of gathering the data necessary to detect violations" of substantive federal campaign finance restrictions. *Id*. at 67-68.

Section 319's disclosure requirements do not serve either of the informational interests because, as the district court recognized, "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[.]" *Davis*, 501 F. Supp. 2d at 32; *see also* 2 U.S.C. § 434(a)(2). Instead, Section 319's disclosures, which are expedited but ultimately redundant, merely enable the candidate's opponent to calculate the extent to which she can utilize

increased contribution limits, which serves only the illegitimate "interest in equalizing the relative financial resources of candidates competing for elective office[.]" *Buckley*, 424 U.S. at 54; *see also* Section I.B.2., *supra*. The informational interests are inapplicable and cannot justify Section 319's compelled disclosure burdens.

2. Section 319's Disclosure Requirements Do Not Prevent Corruption or the Appearance of Corruption.

The final recognized interest, listed second in *Buckley*, is to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. Disclosure serves this interest if it "may discourage those who would use money for improper purposes" or "detect any post-election special favors that may be given in return." *Id.* As discussed in Section I.B.1., *supra*, however, this Court has held that there is an "absence of any threat of corruption" from "a candidate's expenditure of his own funds," for which there can be no *quid pro quo*. *Id.* at 53 n.59. Section 319's disclosure provisions, designed to enable an opposing candidate to calculate his OPFA and thereby receive increased contributions and increased coordinated party expenditures, cannot be upheld as serving a compelling government interest in deterring actual or apparent corruption.

CONCLUSION

For the reasons stated above, the Court should find BCRA § 319 facially unconstitutional and reverse the district court judgment.

Respectfully submitted,

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