No. 07-320

In the Supreme Court of the United States

JACK DAVIS, *Appellant*
v.
FEDERAL ELECTION COMMISSION, *Appellee*

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

BRIEF OF GENE DEROSSETT AND J. EDGAR BROYHILL II AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL
LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875
Counsel for Amici Curiae

February 27, 2008

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – continued

Page(s)

TABLE OF AUTHORITIES – continued

Page(s)

TABLE OF AUTHORITIES – continued

Page(s)

TABLE OF AUTHORITIES – continued

Page(s)

Legislative History

INTERESTS OF *AMICI CURIAE* [1]

Amici are individuals who have been ensnared by the Millionaires' Amendment because they used personal funds while running for Federal office in recent election cycles. *Amici* can attest that the Amendment chills their speech and further skews the political playing field in favor of incumbents. According to the FEC, each of the *Amici* has run afoul of the Amendment and has been made to pay a substantial fine for doing so. They wish to call the Court's attention to their experience, which illustrates that the Amendment, in its practical operation, discourages political participation and dampens political competition.

Amicus Oscar Gene DeRossett is an employee of the U.S. Department of Agriculture who ran for Congress in 2004 in Michigan's 7th Congressional District. Because he believed in our political system and was committed to doing what he thought was necessary to compete in it, Mr. DeRossett borrowed against his home and retirement savings to spend about $530,000 of his personal funds during his campaign in the Republican primary.

The FEC fined Mr. DeRossett $59,000 for failing to comply with the Millionaires' Amendment pro-

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

vision requiring disclosure within 24 hours of expending more than $350,000 of personal funds on a campaign. The violation occurred because Mr. DeRossett's outside vendor responsible for handling such matters was unaware of the new law's demanding provisions. Mr. DeRossett paid the fine in 2007 out of his retirement savings. Prior to his 2004 run for Congress, Mr. DeRossett had run three straight successful campaigns for Michigan's House of Representatives. The personal and reputational costs Mr. DeRossett has incurred under the Millionaires' Amendment, however, have effectively disqualified him from running for office.

Amicus J. Edgar Broyhill II ran in the 2004 Republican primary for the U.S. House of Representatives in North Carolina's 5th Congressional District. He invested $350,000 of his personal funds in his campaign because he believed in our political system and was facing a competitive and difficult field.

In 2006, Mr. Broyhill paid a $71,100 fine to the FEC for allegedly failing to comply with the Millionaires' Amendment by not filing the requisite disclosure forms within 24 hours of expending these funds. The problem arose because Mr. Broyhill's campaign staff had been unaware of the provision and its requirements and because of inadequate reporting systems implemented by the FEC. Like Mr. DeRossett, Mr. Broyhill was personally liable for the fine imposed by the FEC. The personal costs Mr. Broyhill has incurred under the Millionaires' Amendment have dissuaded him from making another run for political office.

SUMMARY OF ARGUMENT

Section 319 of the Bipartisan Campaign Reform Act of 2002, the so-called "Millionaires' Amendment" governing House races, is complex in its mechanics yet elementary in its practical effect: it changes the rules of the game as soon as a self-financed candidate expends over a threshold amount of personal funds, discouraging that candidate by imposing special reporting requirements and lifting the limits on contributions that would otherwise apply to that candidate's opponent.

The Amendment thus burdens a self-financed candidate's decision to advocate his own election with personal funds. As the personal experience of *Amici* attest, the disclosure rules are not only burdensome but perilous. The Amendment also forces a self-financed candidate to enable his own opponent's hostile counterspeech by triggering relaxation of limits on contributions to that opponent. Ceilings on expenditures in political campaigns have long required strict First Amendment scrutiny. Regulations that deter or penalize such expenditures require scrutiny no less strict.

The Millionaires' Amendment also burdens the speech of contributors to political candidates. An individual may contribute up to $2,300 to the self-financed candidate, but up to $6,900 to his opponent. Accordingly, the extent to which a contributor may express support for a candidate depends on which candidate he supports. By discouraging self-financed candidates' and their contributors' speech, the Amendment reduces the quantity and quality of political speech. This is a loss to the political system,

for self-financed candidates raise issues that would not otherwise be addressed and challenge incumbents who would not otherwise face competitive races. For these reasons too, the Amendment should not be upheld unless narrowly tailored to a compelling interest.

But no legitimate, let alone compelling, interest supports the Millionaires' Amendment. It cannot be justified as combating corruption (or the appearance thereof), for it designedly works against those candidates least susceptible to any disproportionate influence by contributors. Self-financed candidates are, by definition, financially beholden solely or principally to themselves. If anything, the Amendment encourages corruption by allowing self-financed candidates' expenditures to trigger higher cash contributions to their opponents.

Neither can any novel "equalization" interest justify the Amendment. The right to speak does not entail the right to speak as loudly or as effectively as one's rivals. It is not for the government to choose sides in order to equalize speaking power. Even if such an interest were not "wholly foreign to the First Amendment," it would fail the test of narrow tailoring here because Section 319 helps entrench well-funded incumbents against competition from their self-funded challengers.

Finally, any anti-distortion interest the government might advance here is a *post hoc* invention. Such an interest in any event has no application outside of corporate speech and could be advanced through less speech-restrictive means.

The Millionaires' Amendment may be best explained as a provision passed by incumbents for incumbents, as the legislative record confirms. In a political landscape where incumbents almost always win, the Amendment contains the most formidable threat to any incumbent's continued supremacy—a self-financed challenger with money to match conviction. Such suppression of dissent is inimical to the First Amendment.

ARGUMENT

I. THE MILLIONAIRES' AMENDMENT UNCONSTITUTIONALLY BURDENS CORE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT.

In *Buckley v. Valeo*, this Court struck down limitations on personal expenditures by a candidate in support of his own candidacy. 424 U.S. 1, 51-54 (1976). "[T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. Rejecting a provision of the Federal Election Campaign Act ("FECA") that capped the amount of personal funds a candidate could spend on his own campaign, this Court recognized that "[t]he [self-financed] candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Id.* at 52.

By enacting Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the so-called

"Millionaires' Amendment,"[2] Congress attempted an impermissible end run around *Buckley*, using means less blatant but no less unconstitutional to limit the speech of self-financed candidates. Instead of placing a direct ceiling on the amount of personal funds a candidate may spend on his own candidacy, the Millionaires' Amendment penalizes a candidate who spends in excess of $350,000 of his own funds by subjecting him to additional reporting requirements and trebling the fundraising capabilities of his opponent.[3]

The Amendment thus burdens core political speech in three ways: it deters and penalizes a self-financed candidate's political speech; it deters and penalizes speech by a self-financed candidate's contributors; and it diminishes the quantity and quality of political speech overall by discouraging candidacies that historically have made robust contributions

---

[2] Section 319 is codified at 2 U.S.C. § 441a-1 and only applies to elections for House of Representatives. The "Millionaires' Amendment" provision for Senatorial elections is found in Section 304 of the Act, codified at 2 U.S.C. § 441a(i).

[3] Under the Amendment, if a self-financed House candidate spends more than $350,000 in personal funds on his campaign, his opponent may, in some circumstances, (1) receive contributions at treble the $2,300-per-election limit for each donor; (2) receive these trebled contributions from donors who have already reached the $42,700-per-election-cycle limit for aggregate campaign donations; and (3) in general elections, coordinate with a political party committee to receive additional party expenditures over the normal $42,100-per-election limit in states with more than one congressional district, and the $82,100-per-election limit in states with only one congressional district. 2 U.S.C. § 441a-1(a)(1); Price Index Increases for Expenditure Limitations, 73 Fed. Reg. 8696 (Feb. 14, 2008).

to our democracy. Accordingly, the Millionaires' Amendment deserves the strictest First Amendment scrutiny.

A. Section 319 Burdens Self-Financed Candidates' Speech.

Section 319 burdens self-financed candidates' political speech both by imposing formidable reporting requirements upon such candidates and by transferring comparative advantage to their opponents. It therefore warrants strict scrutiny as a regulation of expenditures. As opposed to contribution regulations, which infringe upon speech indirectly, expenditure regulations are "direct restraints on speech" and are subject to "the exacting scrutiny required by the First Amendment." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (internal quotations omitted).

1. Special disclosure requirements imperil self-financed candidates.

Section 319 directly burdens self-financed candidates' political speech by imposing special disclosure obligations upon them,[4] and by punishing noncompliant candidates with civil penalties of up to 100% of the triggering expenditures, or up to 200% for knowing and willful violations. 2 U.S.C. § 437g(a)(5)-

[4] The Millionaires' Amendment requires a candidate who intends to spend in excess of $350,000 to file a declaration stating such intent within 15 days of becoming a candidate; to file initial notification within 24 hours of spending in excess of $350,000; and, after passing the $350,000 threshold, to file additional notifications within 24 hours of spending anything over $10,000. 2 U.S.C. § 441a-1(b)(1).

(6). This burden is obvious and serious: no less than seven congressional candidates, including these *Amici*, have already suffered fines in amounts from $34,000 to $91,000 for supposed noncompliance.[5] Although the FEC downplays the declaration requirement as entailing nothing more than candidates' "estimates" of their projected personal expenditures, the FEC has in fact censured at least one candidate for failing to timely file a declaration of intent to spend personal funds when the candidate later decided to increase the amount of his personal spending.[6]

---

[5] These candidates include *Amicus* Broyhill, *see* FEC, CONCILIATION AGREEMENT (June 26, 2006), http://eqs.nictusa.com/eqsdocs/00005581.pdf (fined $71,000); Mike Crotts, *see* FEC, CONCILIATION AGREEMENT (July 18, 2005), http://eqs.nictusa.com/eqsdocs/000045A7.pdf (fined $40,000); *Amicus* DeRossett, *see* FEC, CONCILIATION AGREEMENT (Aug. 8, 2007), http://eqs.nictusa.com/eqsdocs/0000684D.pdf (fined $59,000); Sandy Lyons, *see* FEC, CONCILIATION AGREEMENT (Feb. 3, 2006), http://eqs.nictusa.com/eqsdocs/0000516D.pdf (fined $34,000); John Raese, *see* FEC, CONCILIATION AGREEMENT (Dec. 3, 2007), http://eqs.nictusa.com/eqsdocs/00006797.pdf (fined $74,500); James Socas, *see* FEC, CONCILIATION AGREEMENT (Mar. 10, 2006), http://eqs.nictusa.com/eqsdocs/00005041.pdf (fined $68,250); Charles Taylor, *see* FEC, CONCILIATION AGREEMENT (Dec. 12, 2006), http://eqs.nictusa.com/eqsdocs/00005967.pdf (fined $91,000).

[6] Mike Crotts, a House candidate in 2004, filed an initial amended Form 2 in September 2003 declaring that he did not intend to spend personal funds. In October 2004, he loaned to his campaign $400,000 funded by a personal home equity line. The FEC left open the possibility that its censure was for Crotts' failure to be prescient about his later decision to spend personal funds beyond the threshold. *See* FEC, CONCILIATION AGREEMENT (July 18, 2005), http://eqs.nictusa.com/eqsdocs/000045A7.pdf.

The disclosure requirements also compel self-financed candidates to reveal, at crucial campaign junctures, personal information they otherwise would not. While self-financed candidates would ultimately need to disclose the amount of their personal expenditures to the FEC, the special disclosure requirement puts the issue of their personal wealth front and center at the start of election season. Instead of being free to frame their candidacies and to make disclosures on the schedule followed by other candidates, particularly their opponents, self-financed candidates are forced to announce themselves as "fat cats" at the inception of their campaigns.

While upholding FECA's disclosure requirements for political campaign contributions and expenditures in *Buckley*, this Court treated such disclosure requirements as burdens on protected speech requiring a compelling justification. 424 U.S. at 64-68. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. Accordingly, mandatory disclosure can be justified only by government interests surviving "exacting scrutiny." *Id.*; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995) (mandatory reporting "undeniably impedes protected First Amendment activity"). Thus, were the Millionaires' Amendment limited to disclosure requirements, and nothing more, it would still be subject to strict scrutiny of both its ends and means.

2. Increased contribution limits force self-financed candidates to enable the counterspeech of their opponents.

The Millionaires' Amendment also penalizes the self-financed candidate's expenditures by expanding his opponent's relative fundraising capabilities. While self-financed candidates remain shackled by the normal limits for individual and aggregate contributions and for coordinated expenditures, opponents are free to enjoy trebled individual contributions from donors freed from aggregate contribution limits, and to benefit from relaxed limits on coordinated expenditures.[7]

It makes no difference that here, unlike in *Buckley*, there is no absolute ceiling on a self-financed candidate's expenditures. Regulations that deter or penalize protected speech trigger strict First Amendment scrutiny no less than outright bans. *See, e.g.*, *United States v. Playboy Entm't Group*, 529 U.S. 803, 812, 826 (2000); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Moreover, making one's expression a trigger for an opponent's enhanced competing expression is as much a burden on speech as government dampening one's expression in the first place. *See Miami Herald*

---

[7] In addition to the *trebled* contribution limits that may be triggered in House races under the Amendment, the Senate version may allow opponents of self-financed candidates to raise *six* times the normal contribution amounts from individuals. *See* 2 U.S.C. § 441a(i)(1)(C)(iii). Although not before the Court, the Senate version of the Millionaires' Amendment is even more burdensome on First Amendment rights.

Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a state law requiring a newspaper to afford political candidates space for replying to its criticism).

Nor does it matter that the government here does not restrict the self-financed candidate but rather confers a windfall on his opponent. In a competitive race, it makes no difference whether the government slows down a faster sprinter by shackling his heels or gives the slower sprinter a head start that gives him one-third the distance to run; such a transfer of relative advantage might not prevent the faster runner from running as fast as he can, but nonetheless might alter the outcome of the race. So too here: for the prototypical situation the Millionaires' Amendment addresses, where a self-financed candidate is pitted against an opponent vying for the same office, it makes no difference whether the self-financed candidate's contribution limits are shrunk to a third (say, from a baseline of $6,900 to $2,300) or the opponent's are trebled (say, from $2,300 to $6,900), once some personal expenditure threshold is cleared—in either event, the competitive penalty is functionally and constitutionally the same.

Compounding the offense to the First Amendment, this transfer of relative speaking power is a direct response to the candidate's own speech. If a candidate chooses to self-finance, he must enable hostile counterspeech that would not exist but for the candidate's decision to advocate his own election. In effect, the Amendment compels a self-financed candidate to support his opponent's campaign.

This is presumptively unconstitutional, for although a speaker may not "have the right to be free

from vigorous debate," he "does have the right to be free from government restrictions that abridge [his] own rights in order to 'enhance the relative voice' of [his] opponents." *Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 14 (1986); *see also Tornillo*, 418 U.S. at 256-57 (holding that speech on one side of the debate cannot trigger a benefit to the other side). As the Eighth Circuit explained in holding unconstitutional a comparable provision of Minnesota's campaign finance law, the knowledge that a self-funded candidate's opponent will be freed of otherwise applicable campaign finance limits, "as a direct result of [one's] independent expenditure, chills the free exercise of that protected speech. This 'self-censorship' . . . is no less a burden on speech . . . than is direct government censorship." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (citation omitted).

The chilling effect of the Millionaires' Amendment can be especially potent for "*non*-millionaire" self-financed candidates—aspiring politicians who might lack vast personal wealth but believe so strongly in their candidacies that they nonetheless are willing to overextend their own finances to fund them. The Amendment thus advantages incumbents not only against wealthy candidates, but also against self-financed candidates of relatively modest means yet devout belief who spend what they can in order to compete.

Amicus DeRossett fits this profile. A civil servant, he is not a millionaire, but felt so strongly about his candidacy that he borrowed against his home to run for Congress in 2004. DeRossett's precise situation was presciently outlined in the 2001 BCRA debate:

> Under the amendment that passed, some poor guy or woman who runs against me-I don't mean "poor" in the sense of not having anything-say they mortgage their home, and take a loan out someplace, and spend their own money. I would be able to increase my fundraising limits because they mortgaged their home. This is what the millionaire amendment does. It has nothing to do with millionaires. It has everything to do with protecting us. It is an incumbent advantage measure in this underlying bill.

147 Cong. Rec. S2845-02, S2852 (Mar. 26, 2001) (statement of Sen. Reid in opposition to BCRA).

True to Senator Reid's broader prediction, these burdens are indeed hindering self-financed candidates from challenging incumbents and chilling their speech. Before the passage of BCRA, the number of challengers whose personal expenditures exceeded BCRA thresholds had steadily increased over the previous ten election cycles. Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment," in* MICHAEL J. MALBIN, THE ELECTION AFTER REFORM 210 (2006). After BCRA, the number of self-financed challengers dropped from 17 in 2002 to 13 in 2004. *Id.* The practical effect of the Millionaires' Amendment thus may well have been that fewer self-financed candidates run for office and fewer incumbents are challenged. Similarly, in the 2004 congressional election, only 43 candidates self-financed above the BCRA thresholds, a decrease from 57 candidates in the 2002 cycle whose personal expenditures exceeded the thresholds subsequently enacted. *Id.* at 209.

The court below relied on lower court cases involving public financing that supposedly suggest Section 319 does not burden self-financed candidates' speech. *Davis v. FEC*, 501 F. Supp. 2d 22, 29 (D.D.C. 2007) (three-judge court). To be sure, lower courts have upheld state statutes that permit increased contribution and expenditure limits for candidates who agreed to participate in public financing programs. *See Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000); *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998); *Rosenstiel*, 101 F.3d at 1551; *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996); *VoteChoice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). *But see Day*, 34 F.3d at 1359-62 (invalidating a public financing scheme as an insufficiently justified burden on speech).

But these cases all turned on a feature absent from Section 319: the presence of a public subsidy. The courts of appeals declined to find impermissible coercion from the mere fact that a candidate's refusal to participate in a public funding scheme triggered relaxation of otherwise applicable limits on an opponent's fundraising. *See Gable*, 142 F.3d at 948-49; *Rosenstiel*, 101 F.3d at 1550; *VoteChoice*, 4 F.3d at 38-39. According to those courts, lifting limits on candidates participating in public funding merely offsets sacrifices they made by accepting public funding in the first place. *See, e.g.*, *VoteChoice*, 4 F.3d at 39. The statutes thus were not "inherently penal." *Id.* at 38; *Rosenstiel*, 101 F.3d at 1550.

But that premise does not hold for Section 319, which confers benefits upon opponents of self-financed candidates without them having made any

offsetting sacrifice. Unlike the triggers involved in the public funding cases, therefore, the Millionaires' Amendment does not compensate for a governmental burden that has been imposed on only one candidate; to the contrary, both candidates in this instance have been subject to *precisely the same* contribution limit. In this sense, the Millionaires' Amendment is "inherently penal" toward the self-financed candidate, irrespective of how a public financing scheme might properly be characterized.

In all these respects, the Amendment burdens self-financed candidates' speech so as to require strict scrutiny.

B. Section 319 Burdens the First Amendment Rights of Contributors to Self-Financed Candidates.

In addition to the burden it imposes directly on self-financed candidates, Section 319 also burdens the First Amendment rights of contributors by limiting their ability to choose and contribute as they see fit between competing candidates of their choice. As this Court recognized in *Buckley*, the ability to contribute money to a candidate for elective office is a protected part of freedom to associate. 424 U.S. at 25. Although this right is not absolute, *Buckley* noted that "the size of [a] contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 21. Section 319 infringes the right of association by disabling contributors from associating with a self-financed candidate to the same extent they may associate with his opponent.

Under the Millionaires' Amendment, the extent to which a contributor may exercise political speech in association with a candidate depends on *which* candidate he supports. Section 319's expanded contribution limits allow individuals to contribute up to $6,900 to the opponent of a self-financed candidate, while contributions to the self-financed candidate remain limited to $2,300. *See* 2 U.S.C. § 441a-1; 73 Fed. Reg. 8696, 8698. Thus, once a self-financed candidate triggers the Amendment, contributors to his campaign can express their support only one-third as strongly as his opponent's contributors. By making individuals' level of participation in the democratic process contingent on one's political views, the Millionaires' Amendment strikes at the heart of the First Amendment.

Worsening matters, Section 319 effectively taxes political contributions to self-financed candidates. Because the triggering formula includes outside contributions, every donation to a self-financed candidate helps enable his opponent to raise more money under the relaxed contribution limits. This penalty can be as high as 50% of the contributor's donation, since every $2 given to a self-financed candidate might allow his opponent to raise an extra dollar to catch up. *See* 2 U.S.C. § 441a-1(a)(2); (describing calculation of opposition personal funds amount ("OPFA")); *id.* § 441a-1(a)(3) (allowing opponents to self-financed candidates to raise 100% of OPFA under increased limits); *see also* 11 C.F.R. §§ 400.10, 400.31.[8]

---

[8] This result will obtain when a self-financed candidate has triggered Section 319's relaxed contribution limits but has

This Court reiterated in *Shrink* that "a contribution limit involving 'significant interference' with associational rights . . . could survive [only] if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25). Although not as demanding as the scrutiny applied to expenditure limits, the standard of review for regulations on contributions is nevertheless an exacting one. *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (striking down Vermont's contribution limits as too restrictive). Where, as here, a law distorts the political donation process by effectively choosing sides among contributors, especially exacting application of this standard is warranted.

C. Section 319 Burdens the Political System by Reducing the Quantity and Quality of Speech.

The Millionaires' Amendment burdens First Amendment interests not only by penalizing self-financed candidates' speech on behalf of their own candidacies and by taxing contributors' support of such candidates, but also by restricting the quantity and quality of political speech in the democratic system as a whole—a goal this Court found impermissible in *Buckley*, 424 U.S. at 57 (government may not control "the quantity and range of debate on public issues in a political campaign"). This too is an independent ground for applying strict scrutiny here.

---

raised less money in outside contributions than his opponents by the relevant benchmark date. *See* 11 C.F.R. § 400.10.

The Millionaires' Amendment ignores the particularly important contributions that self-financed candidates make to electoral debate. Candidates who believe so strongly in their ideologies that they are willing to use their own money to advance their political messages increase political dialogue and, in turn, the competitiveness of elections. It is a fallacy, however, to suppose that personal wealth translates automatically into electoral success, for self-financed candidates lose elections routinely.

1. Self-financed candidates increase political dialogue.

Whether or not self-financed candidates ultimately attain political office, they meaningfully influence politics and policy by contributing to political debate during election campaigns and drawing attention to otherwise-neglected issues. As several prominent self-financed presidential campaigns illustrate, a self-financed candidate can influence debate by introducing new ideas that might not be forthcoming from candidates who must take safe positions to amass donations from contributors.

Self-financed presidential candidate Ross Perot, for example, focused his 1992 candidacy on a message of economic populism that defined the political debate in that election season and gave voice to millions of Americans whose concerns had gone unaddressed by the two major parties. Ross Anderson, *Bill Clinton's Big Debt to H. Ross Perot*, SEATTLE TIMES, Nov. 6, 1992, at A8 (Perot won 19 million votes by "point[ing] out the ideological bankruptcy of the major parties."). Perot characterized the federal budget deficit as comparable to "a crazy old aunt in

the attic" that neither party wanted to discuss. Ted G. Jelen, *If Gore Loses, He Can Point to Nader Votes*, NEWSDAY, Nov. 9, 2000, at A59. By the end of the decade, both the Republican and Democratic parties had endorsed plans to reduce the budget deficit and, by 1998, the federal government was operating at a surplus. *See* George Hager, *End of Deficit Era Marks Beginning of Battle Over Surpluses*, WASH. POST., Sept. 30, 1998, at C10.

Steve Forbes, another self-financed presidential candidate, contributed to political dialogue by focusing attention on ideas for radical tax reform, which—from the "flat tax" to the "fair tax"—that have remained salient in American politics since Forbes's 1996 campaign. James O'Toole, *Huckabee Candidacy Fueled by Stand on Tax*, PITTSBURGH POST-GAZETTE (Penn.), Dec. 9, 2007, at A13.

Self-financed candidates often run on campaign platforms that emphasize the independence of their ideas from those espoused by the special interests upon whom non-self-financed candidates depend. *See* JENNIFER A. STEEN, SELF-FINANCED CANDIDATES IN CONGRESSIONAL ELECTIONS 6, 15, 127 (2006). Senator Herb Kohl of Wisconsin, for example, spent more than $7 million of his own funds in his 1988 senatorial race, campaigning on the slogan, "Nobody's Senator but Yours." Jessica Lee, *Candidates' Wealth a Detriment No More*, USA TODAY, Oct. 5, 1994, at 2A. In the 2000 New Jersey senatorial race, self-financed candidate Jon Corzine campaigned under the slogan "Unbought and Unbossed." Michael Cooper, *Rich are Different*, N.Y. TIMES, Dec. 5, 2001, at D3. Similarly, Minnesota Senator Mark Dayton ran a primary election television advertisement in which

he stated, "I won't be workin' for the wealthy or the powerful, or the special interests, and won't be takin' my money from them. I don't need their money." Conrad deFiebre, *Routes Differ Sharply Along Money Trail*, STAR TRIBUNE (Minneapolis, Minn.), Sept. 27, 2000, at 1A.[9]

A candidate's decision to self-finance communicates a political message about his campaign: "Unbought and Unbossed."[10] Section 319 not only burdens this message, but also forces the candidate to communicate the opposite message: that self-financing *corrupts* the political process so as to warrant reporting and penalties. Thus, the Amendment does not merely seek to cure a problem that does not exist—namely, a candidate's "corruption" of himself through self-financing—but creates an appearance of corruption by casting aspersions on the self-financed candidate (see Part II.A *infra*).

---

[9] Other self-financed candidates have noted their independent status without centering campaigns around it. Senate candidate Tom Bruggere, for example, stated, "No one owns me. I don't have special interests controlling me, and a $5,000 contribution won't buy me." Kenneth T. Walsh & Linda Kulman, *The Gilded Age of American Politics*, U.S. NEWS & WORLD REPORT, May 20, 1996, at 26, 28. More recently, Republican presidential candidate Mitt Romney commented that supporting his own candidacy kept him free of special interest influences: "I'm not beholden to any particular group for getting me in this race or getting me elected." Bob Dart, *Family, Mormonism, Wealth*, AUSTIN AMERICAN-STATESMAN (Tex.), Nov. 30, 2007, at A23.

[10] Voters themselves may embrace the campaign platforms of self-financed candidates, viewing these candidates as "buying immunity from special interests" rather than "buying the election." Jessica Lee, *Candidates' Wealth a Detriment No More*, USA TODAY, Oct. 5, 1994, at 2A.

2. Self-financed candidates increase the competitiveness of elections by challenging incumbents.

In addition to being likelier to inject novel ideas into political debate, self-financed candidates are better able than non-self-financed candidates to mount competitive races against incumbents—and they do. Incumbents enjoy numerous, tremendous advantages over challengers—greater name recognition, rollover funds (potentially on the order of millions of dollars) from prior campaigns, media access, comprehensive fundraising databases and strategies, franking privileges, and paid travel expenses for official duties, to name just a few—and overwhelmingly win reelection.[11] *See generally* GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 32-41, 85 (2004).

Non-self-financed candidates typically cannot keep pace with incumbents when it comes to fundraising. Without adequate funds and in light of the non-financial advantages already skewed in incumbents' favor, most non-self-financed candidates cannot compete against incumbents; indeed, few even try. *See* STEEN, *supra*, at 54. Although campaigns against incumbents are similarly difficult for self-

---

[11] In the 2000-2006 House races, 94-98% of incumbents won reelection. *See* Center for Responsive Politics, The Big Picture: Election Stats, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2006 (94% in 2006); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2004 (98% in 2004); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2002 (96% in 2002); *id.*, http://www.opensecrets.org/bigpicture/elec_stats.asp?cycle=2000 (98% in 2000).

financed candidates, self-financed candidates are better able to use their financial resources to overcome incumbents' inherent institutional advantages. As the self-financed candidate gets closer to matching the incumbents' financial resources, the race becomes more competitive, and the amount of political dialogue, and thus political accountability, increases.

By lifting contribution limits for the opponents of such self-financed candidates, Section 319 effectively insulates incumbents by making it easier for them to avoid competitive challengers. As Senator Chris Dodd explained during floor debates on BCRA, the self-financed candidate who challenges an incumbent "spend[s] a million dollars of his own money to level the playing field" against the incumbent. 147 Cong. Rec. S2536-02, S2542 (Mar. 20, 2001). The Millionaires' Amendment tilts the playing field again, to the detriment of political debate.

3. Self-financed candidates' wealth does not translate automatically into electoral success.

Although self-financed candidates' campaigns thus increase both the quantity and quality of political dialogue, it is wrong to suppose that these candidates' resources will enable them to "buy" elections or corrupt the political process, for they rarely actually win. While candidates such as Ross Perot and Steve Forbes have been able to draw national attention to important issues, their spending millions of dollars on their own campaigns did not guarantee success.

In fact, the overwhelming majority of self-financed candidates do not win. *See* STEEN, *supra*, at

161 ("The bottom line is that self-financing has had a surprisingly small effect on election outcomes."). For example, in the 2002 House elections, before Section 319 was enacted, 50 candidates self-financed $350,000 or more.[12] Of the 50 candidates, only 10 won the general election.[13] During the congressional election cycles spanning 1990 through 1998, 16% of non-incumbent Senate candidates who self-financed $1 million or more won, compared to 32% of non-incumbent candidates who fundraised $1 million or more. In House elections during the same years, 21% of non-incumbents who self-financed more than $1 million won seats, compared to 67% of non-incumbents who fundraised more than $1 million. Jennifer Steen, *Maybe You Can Buy an Election, But Not With Your Own Money*, WASH. POST, June 25, 2000, at B1.

No amount of money guarantees success on Election Day. Al Checchi, for example, invested nearly $40 million in his campaign to win the California Democratic gubernatorial nomination, but lost to Lieutenant Governor Gray Davis. Todd S. Purdum,

---

[12] The $350,000 figure includes both contributions and loans. The 50 candidates include those in primaries, special elections, and general elections.

[13] *See* FEC, Search Campaign Finance Summary Data (U.S. House, 2001-2002), http://www.fec.gov/finance/disclosure/srssea.shtml (select "2001-2002" under "Election Cycle" and "U.S. House" under "Office"; select an individual candidate to determine whether he or she self-financed $350,000 or more); *see also* FEC, 2002 U.S. House of Representatives Results, http://www.fec.gov/pubrec/fe2002/house1.htm (database listing voting data for Alabama through Mississippi), http://www.fec.gov/pubrec/fe2002/house2.htm (same for Missouri through Wyoming).

The Tried and True in California Triumph Over the Rich and New, N.Y. TIMES, June 4, 1998, at A1. Michael Huffington self-financed $28 million in the 1994 California Senate race and lost to the incumbent, Senator Dianne Feinstein. Susan Yoachum, *Huffington Concedes, Drops Voter Challenge*, S.F. CHRON., Feb. 8, 1995, at A3.[14] The consistent losses of self-financed candidates, regardless of how much they contribute to their campaigns, belie legislators' fear that these candidates will corrupt the political process.

Even when self-financed candidates do win elections, their personal spending is rarely the key to victory. *See* STEEN, *supra*, at 113. For instance, Peter Fitzgerald spent over $16 million and defeated Senator Carol Moseley Braun in the 1998 Illinois senatorial election. *Final Election Results*, USA TODAY, Nov. 5, 1998, at 6A. But Moseley Braun's reelection campaign was plagued by allegations of ethical breaches related to her expenditures of both personal and campaign finances and controversy over her meeting with a Nigerian dictator. Jon Jeter, *Moseley-Braun in Trouble*, WASH. POST, Oct. 1, 1998, at A16. Mark Dayton, who self-financed a $10 million campaign, also won against an opponent riddled with well-publicized personal scandal. *The Midwest*, WASH. POST, Nov. 9, 2000, at A39. The ability to self-

---

[14] Additional examples include Mark Warner, *see* Ellen Nakashima, *Mark Warner's $10 Million Sets a Record in Virginia*, WASH. POST, Dec. 6, 1996, at A40; Darrell Issa, *see* Janet Hook, *Big Spenders Can Be Losers in Campaigns*, L.A. TIMES, June 5, 1998, at A1 (self-financed $12 million); and Charles Owen, *see* Paul West, *Primaries Demonstrate Money Isn't Everything*, BALTIMORE SUN, June 4, 1998, at 1A (self-financed $5 million).

finance simply enabled these challengers to be in the game and compete with incumbents; it cannot be assumed that it won them their elections.

Taken together, therefore, the Millionaires' Amendment's burdens on self-financed candidates, their contributors, and their contributions to political debate, clearly warrant strict scrutiny.

II. NO GOVERNMENT INTEREST JUSTIFIES THE BURDEN ON SPEECH THE MILLIONAIRES' AMENDMENT IMPOSES.

Since *Buckley*, this Court has "explicitly rejected" mere intermediate scrutiny for expenditure limitations, explaining that "expenditures restrictions [are] direct restraints on speech" that demand "exacting scrutiny," because core political speech is at stake. *See Shrink*, 528 U.S. at 386; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256-63 (1986) (requiring "compelling state interest" and applying traditional strict scrutiny analysis to expenditure restrictions).

Buckley and subsequent cases have recognized combating "corruption" as the only compelling interest that justifies meddling in the electoral marketplace—and even then, only when a regulation is genuinely likely to combat that corruption. Corruption, in this context, refers to problems arising when money changes hands between contributor and candidate such that the contributor may achieve "undue influence on an officeholder's judgment, and the appearance of such influence." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). Such problems are, by definition, limited to monetary contributions and their functional equivalent, and

have *never* been thought to extend to independent expenditures.

As explained *supra* in I.A., however, the Millionaires' Amendment tracks, regulates, and penalizes independent expenditures by self-financed candidates. It does so by enabling *higher* cash contributions to candidates who are most desperate for the money because they are in danger of being outspent by self-financed candidates. The Amendment thus turns any anti-corruption rationale on its head. To the extent that the Millionaires' Amendment does not target corruption but rather aims to *equalize* electoral speaking power, that is an end *Buckley* rejected altogether as illegitimate. Any novel alternative justifications the FEC may posit are foreign to this Court's precedents and unsupported by the legislative record.

Lacking any other justification, the Millionaires' Amendment may reduce to incumbency protection, pure and simple. *Cf. Shrink*, 528 U.S. at 402 (Breyer, J., concurring) (calling for heightened scrutiny to guard against "such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). BCRA's legislative history is bereft of an anti-corruption rationale for the House and Senate Millionaires' Amendments and does not reveal any convincing equalization rationale. Instead, the legislators (all incumbents by definition) repeatedly appealed to a different concern—namely, collective fear of being unseated by wealthy challengers.[15]

---

[15] *See, e.g.,* 148 Cong. Rec. S2096-02, S2142 (Mar. 20, 2002) (statement of Sen. McCain) ("Congress has concluded that the

A. Section 319 Does Not Prevent But Actually Encourages Corruption.

Corruption is "the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office," *Buckley*, 424 U.S. at 25, and "post-election special favors that may be given in return" for large contributions, *id.* at 67. The anti-corruption rationale self-evidently cannot justify penalizing or discouraging a candidate's personal expenditures because there is no third party to exert influence in exchange for the funds; a candidate cannot corrupt himself. To the contrary, "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 . . . contribution limitations are directed." *Id.* at 53. The expenditure of

---

contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election."); 148 Cong. Rec. H256-03, H261 (Feb. 12, 2002) (statement of Rep. Reynolds, opposing the House version of BCRA because the Millionaires' Amendment did not go far enough to protect incumbents) ("My colleagues should live in fear, all 435 of us, that a wealthy American decides to run . . . ."). *Cf. McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part) (attributing the Millionaires' Amendment to incumbency protection). Senator McCain even predicted to reporters that a Millionaires' Amendment would pass because "everyone [was] scared to death of waking up one morning and reading in the newspaper that some Fortune 500 C.E.O. or heiress is going to run against them . . . ." Alison Mitchell, *Senate Votes to Aid Candidates Facing Deep Pockets*, N.Y. TIMES, Mar. 21, 2001, at A16.

personal funds frees the candidate to promote the electorate's interests over those of large donors. When voters elect a candidate with less allegiance to donors, the voters know they are electing the name on the ballot—not the patrons behind it. *See id.* at 67; *see also* Part I.B *supra*.

Even if an anti-corruption interest were in any way implicated by Section 319's burden on personal candidate expenditures, it is not narrowly tailored to serve any such interest. To the contrary, Section 319 only exacerbates any corruption problem. By allowing opponents of self-financed candidates to receive donations from contributors at up to three times the otherwise applicable limit, 2 U.S.C. § 441a-1(a)(1)(A), it allows contributors who are willing and able to donate at such large levels to obtain greater influence on elected officials. The candidate who invokes Section 319's provisions to avoid contribution and coordinated expenditure limits will presumably be especially beholden to the small number of contributors who are able to make large contributions quickly. If a self-financed candidate injects a large sum of cash into his campaign, the rival candidate will want to take in offsetting contributions as quickly as possible.[16] A candidate in this position will go to the contributors he knows have deep pockets and strong incentives.

Further, Section 319 increases any governmental concern that contributors will expressly or implicitly negotiate a *quid pro quo*. Because contributors will

[16] The Amendment's rapid-fire disclosure provisions—requiring a 24-hour reporting turnaround—emphasize that time is of the essence. 11 U.S.C. § 441a-1(b)(2)(C)-(D).

be unlikely to know that the Section was invoked absent affirmative communication by the candidate, and because the candidate's existing contribution framework should already screen out over-the-limit contributions, it is unlikely that donors would know and choose of their own initiatives to make the enhanced contributions. Instead, the needy candidate will likely select and contact the largest donors for a special favor. Where *multiples* of the usual contribution amounts are at play, such exchanges are more likely to devolve into subtle or even explicit *quid pro quo* negotiations.

For all these reasons, Section 319 cannot be justified as preventing corruption or the appearance of corruption. It turns any such interest on its head.

B. A Purported Equalization Interest Cannot Save Section 319.

The FEC and the court below rely instead on a supposed interest in "equalization," or minimizing the perceived advantage of candidates who can help finance their own campaigns. M.D.A. 16-17; 501 F. Supp. 2d at 34 ("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."). No equalization theory has ever succeeded in this Court because the Constitution protects the right to speak, not the right to speak as loudly or effectively as everyone else. Nor should such a theory succeed for the first time here.

In rejecting an equalization interest offered to justify FECA's ceiling on independent expenditures,

Buckley recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign to the First Amendment*." 424 U.S. at 48-49 (emphasis added). Accordingly, this Court has never upheld an equalization rationale as valid. *See Shrink*, 528 U.S. at 428 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

It is no answer to recharacterize the government interest here as simply reducing the time burden that the campaign finance regime imposes on candidates who must raise funds from contributors. First, the distinction makes no difference because funds (and obtaining funds) are part and parcel of speech itself. *Buckley*, 424 U.S. at 19. Second, this Court has already rejected the argument that the *Buckley* framework recognizes an interest in equalizing the relative time candidates spend on fundraising. *See Randall*, 126 S. Ct. at 2490.

Even if equalizing speaking power between self-financed candidates and their opponents *were* a valid interest, Section 319 would still fail strict scrutiny because it is not narrowly tailored to that interest. The "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. Because the Government asks for a novel equalization justification here, only the clearest empirical support for such a rationale will suffice.

For several reasons, however, Section 319 fails any requirement of narrow tailoring.[17] First, it discounts the contributions in a candidate's "war chest" by 50%. 2 U.S.C. § 441a-1(a)(2)(B)(ii). This was legislative logrolling: the legislators were well aware that incumbents would be the candidates with the largest pre-election war chests and they had to at least purport to offset this advantage. But it is untenable to justify offsetting this advantage by *only half* its actual value while accounting for *100%* of the value of personal expenditures. A dollar expended from an incumbent's war chest is no less valuable than a dollar expended from a challenger's personal savings, yet Congress—predictably—did not call a fair game in this regard. *See* 147 Cong. Rec. S3183-01, S3192 (Mar. 30, 2001) (statement of Sen. Durbin introducing the Senate version of the 50% offset provision) (explaining that the offset was created because "some incumbents may have cash on hand and that ought to be taken into consideration when you consider the triggers as to millionaires' expenditures."); *id.* at

---

[17] In addition, the district court appeared to get certain particulars of the Amendment's supposed equalization features wrong. *Compare* 501 F. Supp. 2d at 26 (stating that the formula "adds 50% of the total funds raised by each candidate during the year prior to the election"), *with* 2 U.S.C. § 441a-1(a)(2)(B)(ii) (adding this number, the gross receipts advantage, only to the campaign-funded candidate); *accord* 11 C.F.R. § 400.10(a)(2)-(3) (expressing the same function in terms of alternative conditionals); *compare* 501 F. Supp. 2d at 26 (stating that Section 319's new limits end "[o]nce each candidate's OPFAs ["oppositional personal funds amount," which is the result of the 50%-adjustment formula] are equal"), *with* 2 U.S.C. § 441a-1(a)(3)(A) (calculating only one OPFA); *accord* 11 C.F.R. § 400.31(e).

S3195 (statement of Sen. Dodd) (identifying the incumbent-protecting feature of the offset).

Second, incumbents can further reduce the purported offset by moving funds between their primary and general election accounts. This is so because Section 319 looks only at the primary and general election account balance as of the benchmark date, after which the candidate is free to shift funds. *See* 11 C.F.R. § 110.3(c)(3). Third, the Section completely disregards contributions received after the benchmark date,[18] allowing a contribution-funded candidate to structure his donations and solicitations to occur after December 31.

Together, these features of Section 319 can exacerbate inequalities even if the self-financed candidate is somehow lucky enough to match the incumbent's war chest on the benchmark date. Suppose that Challenger A (an up-and-coming candidate with new ideas) and Incumbent B (the longstanding officeholder) each have $400,000 in campaign funds as of the December 31 statutory benchmark date. In the beginning of September, Challenger A goes on a media campaign to publicize her new platform. By September 5, Challenger A has exhausted her campaign treasury. In response, Incumbent B exhausts his funds as well. Incumbent B then holds a fundraiser on September 7, raising $1,000,000, which he spends by September 15. Challenger A does not have the political connections to put on such a large event; instead, on the same day, she gives her campaign a

[18] Section 319 does not count contributions made after the statutory benchmark date. 2 U.S.C. § 441a-1(a)(2)(B)(ii); 11 C.F.R. § 400.10(b).

$500,000 loan to counter Incumbent B's $1,000,000 blitz. Challenger A's loan to herself triggers the Section's $350,000 threshold.

Under Section 319, Incumbent B can now take advantage of trebled contribution limits and increased coordinated party expenditures until B raises $500,000 in new funds. *See* 2 U.S.C. § 441a-1(a)(3)(A); 11 C.F.R. § 400.31(e). Incumbent B works his party connections, convincing the party to make $500,000 in coordinated expenditures by September 20. Disregarding—as the statute does—the money raised and spent by both candidates between December 31 and September 5, Challenger A spent a total of $900,000 whereas Incumbent B spent $1,900,000; and it is Section 319 that enabled B to inject $500,000 of that amount so quickly. In light of other built-in fundraising advantages that incumbents enjoy, *see supra* I.C.2, of which the Millionaires' Amendment takes no account, it is especially clear that the Amendment is underinclusive with respect to candidate equality.

The Amendment is also overinclusive because a self-financed candidate's personal expenditures do not necessarily translate dollar-for-dollar into a match for a contribution-funded candidate's media volume or quantity of speech. As *Buckley* recognized, self-financed candidates will not always have a net advantage, because "a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions." *Id.* at 54. Thus, wealthy candidates may need to finance large portions of their campaign in order to match contribution-funded candidates because voters—even if they agree with the wealthy candidate's platform—are

less likely to donate to a candidate that is well off. *Buckley* similarly noted that it may be harder for wealthy candidates to find the volunteer staff to make the campaign's speech as effective as possible. *Id.* Thus, a wealthy candidate might have to add his own funds not just to match his opponent but also to offset the inherent disadvantages his wealth and self-financing causes his campaign.

Finally, Congress had several less restrictive alternatives from which to choose. Assuming, *arguendo*, that lower court decisions upholding incentives to participate in public-financing schemes are correct, Congress could have made the voluntary choice to make public financing more attractive. *See* Part I.A *supra*. It might also have chosen a voluntary limit. For example, the most-debated alternative to the House bill that became BCRA contained a "voluntary personal funds expenditure limit." 148 Cong. Rec. H369-01, H381-82 (Feb. 13, 2002). This alternative would have allowed a "millionaire" candidate to declare to the FEC that he would not exceed the voluntary limit and authorized the FEC to monitor the candidate's spending and impose fines equal to personal funds spent in excess of the limit. *Id.* Candidates would have been encouraged to comply voluntarily by the risk of having their noncompliance publicized by the opposition. Such a provision would have been less restrictive than the Millionaires' Amendment, allowing voters to decide for themselves whether and how to account for a particular candidate's decision to self-finance.

C. Section 319 Cannot Be Justified as Counteracting "Distortion" Resulting from Self-Financed Candidates' Speech.

The FEC attempts to bolster its claim that equalization is a legitimate justification for Section 319, arguing that "a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support." M.D.A. 18. The FEC thus seeks to rationalize Section 319 as protecting voters' perceptions of campaign treasuries as indicators of popularity. But the Government's attempt fails because Congress has no legitimate interest in policing a candidate's expenditures to accord with what Congress considers popular support; and in any event this justification is *post hoc*. But even if Congress had some evidence that candidates' self-financing "distorts" the political process, Section 319 is not narrowly tailored to serve any anti-distortion interest.

This Court has never found that Congress has a valid interest in limiting the money a candidate expends to what Congress deems the candidate's popular support. The closest this Court has ever come to such reasoning is its decision in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), upholding a Michigan law prohibiting corporations from making political expenditures through corporate treasuries. *Austin*, however, was expressly about special features of the corporate form that enable "vast reservoirs of capital" to be amassed; these features gave rise to a corresponding interest in combating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with

the help of corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660-61. This Court has never expanded *Austin* outside the corporate context.

Nor should it here. There is nothing corrosive or distorting about a candidate's use of his own money to fund his own political campaign—to conclude otherwise would overrule *Buckley*. *See* 424 U.S. at 54. Indeed, this Court recognized in *Buckley* that the "normal relationship" between a candidate's funds and public support "may not apply where the candidate devotes a large amount of his personal resources to his campaign." 424 U.S. at 45 n.63. And *Buckley rejected* the notion that Congress may attempt to influence the amount of money that each candidate should have to spend on his campaign: "In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 57.

Setting aside that any anti-distortion interest is constitutionally foreclosed, no such interest is presented here. No legislative findings or record evidence supports such an interest, which Congress never invoked to justify the Millionaires' Amendment. Instead, FEC lawyers simply posit the interest *post hoc* in this litigation. Under heightened scrutiny, however, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Finally, Section 319 is not narrowly tailored to meet any anti-distortion objective. Other provisions of federal election law require that candidates disclose the source of their political contributions. *See* 2 U.S.C. §§ 431-439. A voter who sees lots of advertising by a self-financed candidate can turn to disclosure databases on the internet, discover that the money behind those ads came from the candidate himself, decide whether that money correlates with popular support, and, if not, what the implications are. With full disclosure, there is no distortion—an informed public can draw its own conclusions about individuals and their speech.

Section 319, if anything, impedes this disclosure regime by allowing opponents to self-financed candidates to exceed normal contribution limits, thereby diluting the natural relationship between funding and support that voters might otherwise infer. Thus, Section 319 undermines the effectiveness of the pre-existing disclosure rules. Accordingly, this Court should not allow the FEC to justify Section 319 as an anti-distortion measure.

In sum, anti-distortion is an end foreclosed by precedent, disconnected from Congress's actual purpose, and ill-fit to the means of the Millionaires' Amendment. Absent any other legitimate or plausible justification, the Amendment fails strict scrutiny.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
DEREK L. SHAFFER
STANFORD CONSTITUTIONAL
LAW CENTER
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875

February 27, 2008

Counsel for Amici Curiae