No. 07-320

In the Supreme Court of the United States

JACK DAVIS, APPELLANT

v.

FEDERAL ELECTION COMMISSION

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

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

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

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

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

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

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OPINION BELOW

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

JURISDICTION

The decision of the district court was issued on August 9, 2007. A notice of appeal was filed on August 16, 2007, and the jurisdictional statement was filed on September 7, 2007. The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114; and 28 U.S.C. 1253.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of BCRA, 116 Stat. 109 (2 U.S.C. 441a-1 (Supp. V 2005)). Section 319 applies to elections for the

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

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Federal law has long prohibited any person from making contributions "to any candidate and his autho-

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

While upholding statutory limits on contributions *to* federal candidates, the Court in *Buckley* invalidated FECA caps on the amount of personal wealth a federal candidate could spend on his own campaign. 424 U.S. at 51-54. Those provisions barred presidential and vice-presidential candidates from spending more than

$50,000 of their personal wealth on their campaigns, limited Senate candidates to $35,000, and limited most House candidates to $25,000. *Id.* at 51. The Court concluded that "the First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

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

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

In the debates that culminated in BCRA's enactment, Members of Congress identified various harmful consequences that could follow from the increasing impact of candidates' personal wealth on elections for federal office. The disparity in campaign resources created by wealthy candidates' expenditures of personal funds was thought to "ma[k]e it more difficult for non-wealthy opponents to compete and to put their messages and their ideas across to the public." 147 Cong. Rec. 3967 (2001) (Sen. DeWine); see 148 Cong. Rec. 1382 (2002) (Rep. Davis) (explaining that Section 319 "evens the playing field" between a non-wealthy candidate and one "who can go to McDonald's, have breakfast with himself, write himself a $3 million check and have the largest fund-raising breakfast in history"). The competitive advantage of self-financing candidates in turn threatened to create the public perception that "someone today who is wealthy enough can buy a seat" in Congress. 147 Cong. Rec. at 3976 (Sen. DeWine). Members of Congress also expressed concern that party officials increasingly consider individuals' wealth in recruiting potential candidates. See, *e.g.*, *id.* at 3969 (Sen. McCain) ("[B]oth parties have now openly stated that they recruit people who have sizable fortunes of their own in order to run for the Senate.").

To address those phenomena, Congress enacted Section 319 of BCRA, which applies to elections for the United States House of Representatives.[1] Section 319

[1] Section 304 of BCRA, 116 Stat. 97 (2 U.S.C. 441a(i) (Supp. V 2005)), contains comparable provisions and applies to elections for the United States Senate. Section 304 is not at issue in this case. See J.S. App. 1a n.1; J.S. 6 n.3. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), certain plaintiffs challenged the constitutionality of Sections 304 and 319, but the

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

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

> his opponent may be permitted (1) to receive contributions at three times the limit for each donor that would otherwise be in place; (2) to receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations; and (3) to coordinate with their political party on additional party expenditures that would otherwise be limited.

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

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Court held that the plaintiffs lacked standing to sue and accordingly did not reach the merits of their challenge. See *id.* at 229-230.

[2] The formula used to calculate the OPFA during the election year counts the expenditures from personal funds made by each candidate,

tion 319 limits the amount of increased contributions and increased coordinated party expenditures a candidate may receive to 100% of the amount of the total OPFA disparity between the candidates. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005).

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

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

nent in the same election, and to the national party of each opponent. 2 U.S.C. 441a-1(b)(1)(F) (Supp. V 2005).

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

4. Appellant Jack Davis was a candidate for United States Representative in New York's 26th Congressional District in both 2004 and 2006. J.S. App. 5a. In the spring of 2006, appellant filed with the Commission a Statement of Candidacy indicating that he intended to spend no personal funds in support of his primary campaign and to spend $1 million in personal funds during the general election campaign. *Ibid.*[3] In June 2006, appellant filed suit in federal district court, asserting a

[3] Appellant ultimately loaned his campaign committee $2,257,280 in 2006, including $1,520,000 for the general election. See *Davis for Congress, Report of Receipts and Disbursements* 4 (Mar. 10, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?F27930238050> (reporting $2,257,280 in candidate loans in the 2006 election cycle); *Davis for Congress, 24-Hour Notice of Expenditure from Candidate's Personal Funds* (Nov. 6, 2006)<http://images.nictusa.com/cgi-bin/fecimg/?_26960663096+0> (reporting $1,520,000 in total expenditures from personal funds in the general election).

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

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

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

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

c. The district court also rejected appellant's challenge to the disclosure requirements imposed by Section 319. J.S. App. 14a-17a. The court noted that this Court had upheld similar reporting obligations both in *Buckley* and in *McConnell* v. *FEC*, 540 U.S. 93, 194-195 (2003). J.S. App. 14a-15a. The court explained that, "[b]ecause [appellant] concedes that all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies," appellant's claim of an unconstitutional burden "is essentially a complaint about the timing elements of the reporting requirements." *Id.* at 16a. The court

found that complaint to be unfounded, noting that "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Ibid.* The court further observed that Section 319 imposes reporting obligations not only on self-financing candidates, but also on their opponents and on political parties. *Id.* at 16a-17a.

d. The district court rejected appellant's equal protection claim as well. J.S. App. 17a-18a. The court explained that "[t]he touchstone of an Equal Protection argument is that the challenged statute is flawed because it treats similarly situated entities differently." *Id.* at 17a. The court held that appellant "cannot make this showing because the reasonable premise of [Section 319] is that self-financed candidates are situated differently from those who lack the resources to fund their own campaigns and that this difference creates adverse consequences dangerous to the perception of electoral fairness." *Ibid.*

5. While this case was pending before the three-judge district court, appellant lost the 2006 general election. His opponent, Congressman Thomas Reynolds, did not receive any increased contributions or coordinated party expenditures pursuant to Section 319. See *Reynolds for Congress Disclosure Reports* (visited Dec. 4, 2007) <http://images.nictusa.com/cgi-bin/fecimg/?C00336065> (reporting no increased contributions to Congressman Reynolds or coordinated party expenditures on his behalf pursuant to Section 319 in the 2006 election cycle).

ARGUMENT

Appellant contends that Section 319's relaxed contribution and coordinated-expenditure limits for opponents of self-financed candidates on their face violate his rights under the First Amendment and under the equal protection component of the Fifth Amendment. Appellant lacks standing to raise those claims, since he has identified no actual or imminent injury to himself resulting from that aspect of Section 319. In any event, the district court correctly held that those facial challenges lack merit. Appellant's challenge to the disclosure requirements of Section 319 also presents no substantial federal question on the merits. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the court of appeals should be affirmed.

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

During the 2006 election campaign, appellant's opponent received no contributions, and the opponent's political party made no coordinated expenditures, in excess

of the generally applicable FECA limits. See p. 11, *supra*. The possibility that his opponent would invoke the modified limits established by Section 319 did not deter appellant from loaning his campaign approximately $2.25 million in 2006. See note 3, *supra*; J.S. App. 14a ("We struggle to see how [appellant] can credibly argue that his speech has been 'chilled' in light of the fact that he has chosen to pay for his campaign and has spent, after all, a considerable amount of his own money in excess of the $350,000 cap."). Although the election campaign had not ended at the time of the summary judgment briefing in the lower court, it is now clear that appellant suffered no injury from Section 319's modification of some of the statutory limits on financial support for candidates.

By the time that the district court issued its decision in this case, the 2006 election had taken place. Because Article III's "case-or-controversy requirement subsists through all stages of federal judicial proceedings," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990), the possibility that this case has become moot would present another potential obstacle to its adjudication by this Court, even if appellant had initially established his standing to sue. If appellant had been injured during the 2006 campaign by the relaxed contribution and coordinated-expenditure limits contained in Section 319, the prospect that appellant will self-finance a future federal electoral campaign would likely bring this case within "the established exception to mootness for disputes capable of repetition, yet evading review." *FEC* v. *Wisconsin Right to Life*, 127 S. Ct. 2652, 2662 (2007); see *id.* at 2662-2663. The fact that the events precipitating the parties' dispute are "capable of repetition," however, provides no basis for concluding that appellant will

be injured in future election cycles in light of the reality that he did *not* suffer any injury in the most recent campaign. Appellant's First Amendment and equal protection challenges to Section 319's modified contribution and coordinated-expenditure limits are therefore nonjusticiable.

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

a. Appellant characterizes the instant case as one "involving the regulation of a candidate's personal expenditures." J.S. 11. As the district court recognized, however, Section 319 "places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters, nor does it reduce the amount of money he is able to raise from contributors." J.S. App. 9a. In short, as the district court explained, Section 319 "does not limit in any way the use of a candidate's personal wealth in his run for office." *Ibid.* Section 319 therefore is not naturally described as "regulation" of a self-financing candidate's campaign-related activities.

b. The principal thrust of appellant's First Amendment argument is that (i) because appellant has a constitutional right to make unlimited expenditures in support of his own campaign, he cannot be penalized for exercising that right; and (ii) because an election can have only one winner, any benefit provided to his opponent should be regarded for constitutional purposes as a penalty imposed on appellant. That line of reasoning cannot be reconciled with *Buckley* (whose validity appellant does not question). The Court held in that case that, although the First Amendment precludes Congress from placing

binding limits on a candidate's independent campaign expenditures, Congress "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. The obvious consequence of that holding is that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled.

The Court in *Buckley* thus recognized that a candidate's First Amendment right to make unlimited campaign expenditures is not violated simply because the candidate is subjected to some practical disadvantage as a result of exercising that right.[4] The disadvantage to which self-financing presidential candidates are subjected—*i.e.*, the denial of federal funds that would otherwise be paid to the candidate himself—is much more direct and immediate than the competitive injury that appellant claims he would suffer if his opponent were enabled to raise greater amounts of money. If, as *Buckley* holds, use of a self-financing presidential candidate's spending decisions as a ground for withholding

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[4] Appellant contends (J.S. 12) that "[t]he government may not attach either direct or indirect financial disincentives upon a particular speaker based on the content of that speech." The application of Section 319, however, does not turn on the content of a candidate's speech, but on the amount of personal funds expended. This Court's decision in *Buckley* makes clear that Congress may create "financial disincentives" to independent campaign spending without violating the Constitution. The cases on which appellant relies (see J.S. 12-13), moreover, all involved extractions of funds directly from persons engaged in First Amendment activity. Section 319, by contrast, neither deprives the self-financing candidate of funds nor divests him of any other potential benefit; it simply loosens the fundraising restrictions placed upon his opponents.

federal money from that candidate does not unconstitutionally burden the candidate's First Amendment rights, there is no basis (especially in the context of a facial challenge such as this) for treating the modification of limits on an opponent's fundraising as a constitutional violation.

c. As the district court recognized, Congress enacted Section 319 to reduce the natural advantage that wealthy individuals possess in campaigns for federal office. J.S. App. 2a-3a n.2; see p. 5, *supra*. The Court in *Buckley* explained that, under the FECA contribution limits, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. The Court viewed this as a healthy byproduct of the contribution limits it upheld. The Court also noted, however, that, in light of the Court's invalidation of expenditure limits, "[t]his normal relationship may not apply where the candidate devotes a large amount of his personal resources to his campaign." *Id.* at 56 n.63. In enacting Section 319, Congress sought partially to restore the "normal relationship" between the resources that a candidate can acquire through private contributions and the level of public support that the candidate has mustered. Section 319 also serves to counteract the public perception that wealthy people can buy seats in Congress, to increase the incentives for less wealthy candidates to run for office, and to encourage political parties to recruit candidates based on merit, rather than personal financial wherewithal. See p. 5, *supra*.

Nothing in this Court's decisions supports appellant's suggestion (see J.S. 10-11) that the equalization (or relative equalization) of electoral opportunities for

wealthy and non-wealthy candidates is an illegitimate governmental objective. To be sure, the Constitution limits the *means* that Congress may employ to achieve that goal. Thus, the Court in *Buckley* held that the "interest in equalizing the relative financial resources of candidates competing for elective office" was a constitutionally insufficient justification for restrictions on a candidate's own campaign spending. 424 U.S. at 54. That holding, however, was based not on doubt as to the legitimacy of the relevant government interest, but on the conclusion that "the First Amendment simply cannot tolerate [the spending cap's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Ibid.* Section 319, by contrast, reflects Congress's effort to achieve the same objective *without* limiting the self-financing candidate's freedom of expression, in a manner calculated to *increase* the volume of campaign-related speech. And Congress chose to do so by *relaxing* contribution and coordinated-expenditure limits that themselves trigger First Amendment scrutiny.

d. Appellant contends (J.S. 9-10) that, because Section 319 permits opponents of self-financing candidates to accept contributions in excess of the generally applicable FECA limit, it is inconsistent with the anti-corruption rationale on which those limits have been sustained. That claim lacks merit.

In setting and later adjusting the FECA limit on individual contributions, Congress has sought to prevent the actual or apparent corruption that large contributions might engender, while ensuring that candidates can obtain the resources needed to run effective campaigns. As this Court has recognized, the task of identifying the specific dollar limit that strikes the most ap-

propriate balance between those objectives is largely entrusted to Congress. See *Buckley*, 424 U.S. at 30 (explaining that, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000") (citation omitted); accord *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000). The modified contribution and coordinated-expenditure limits contained in Section 319 do not reflect congressional abandonment of FECA's anti-corruption purpose. Rather, they reflect Congress's determination to adjust the balance in a subset of elections to address an additional legitimate interest that is distinctly raised in that subset. Specifically, Congress determined that, for elections in which a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support, the fundraising limits applicable to opposing candidates should take into account the distinct public interest in equalizing electoral opportunities for wealthy and non-wealthy individuals. As Senator McCain explained:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. Section [319] does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits—despite their fundamental importance in fighting actual and apparent corruption—should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election.

148 Cong. Rec. at 3603.[5]

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

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[5] Section 319 was carefully crafted to target the problems that Congress identified without unduly burdening or benefitting either self-financing candidates or their opponents. The provision does not apply to all self-financing candidates, but only to those who spend more than $350,000 on their own campaigns. Section 319 caps the amount of increased contributions and coordinated party expenditures that an opponent may accept, and thus in most circumstances prevents an opponent from raising more in additional funds under the provision than the self-financing candidate's expenditures of personal funds on his own campaign. 2 U.S.C. 441a-1(a)(3)(A)(ii) (Supp. V 2005). In addition, the opponents of self-financing candidates remain subject to substantial statutory fundraising restrictions that help to reduce the possibility of corruption or the appearance thereof. Section 319 does not affect the contribution restrictions on corporations, labor unions, foreign nationals, or political committees, and it relaxes but does not eliminate the limits on contributions by individuals.

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987).[6]

e. The courts of appeals have consistently rejected First Amendment challenges to campaign-finance statutes similar to Section 319, including statutes that permit increased contribution limits for certain qualifying candidates, on the ground that such laws do not restrict the speech of opposing candidates. See *Daggett* v. *Committee on Gov't Ethics & Election Practices*, 205 F.3d 445, 464-465 (1st Cir. 2000) (upholding statute that provided public matching funds to candidate who accepted public financing when independent expenditures were made against him or on behalf of non-participating opponent; court explained that the matching funds provision "in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures"); *Gable* v. *Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (upholding statute that provided 2-1 public matching funds for candidates who agreed to limit expenditures and that waived the expenditure limit

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[6] Nor is it obvious why Congress's use of higher limits in this one context would lead to invalidation of the higher limits imposed by Section 319, as opposed to calling into question whether the basic limits are "too low." Appellant does not make the latter challenge, and it is foreclosed by precedent.

when a non-participating opponent raised funds in excess of that amount; court explained that "a statutorily created benefit does not per se result in an unconstitutional burden") (internal quotation marks omitted), cert. denied, 525 U.S. 1177 (1999); *Rosentiel* v. *Rodriquez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (upholding statute that provided public financing to candidates who agreed to limit overall expenditures and that raised the expenditure limit when a privately-financed opponent spent in excess of the limit); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 37 n.13, 39 (1st Cir. 1993) (upholding statute that permitted candidates who agreed to public financing and to limit their expenditures to accept contributions of $2000, while limiting non-participants to $1000 contributions). But cf. *Day* v. *Holahan*, 34 F.3d 1356, 1359-1362 (8th Cir. 1994) (striking down state law that increased a candidate's expenditure limits *and* provided the candidate with public funds when any person made independent expenditures in support of the candidate's opponent).[7]

3. Appellant's equal protection claim would present no substantial federal question even if appellant had standing to contest Section 319's modifications of the contribution and coordinated-expenditure limits that apply to his opponent. Appellant contends (J.S. 13) that

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[7] Unlike the state law at issue in *Day*, Section 319 is triggered only by substantial expenditures of personal funds made by the candidate himself, not by independent expenditures made by the candidate's supporters. Also unlike the law struck down in *Day*, Section 319 does not make public funds available to the opponent of a self-financing candidate. Two years after its decision in *Day*, the Eighth Circuit upheld against First Amendment challenge a state law under which a candidate's own expenditures above a threshold amount triggered the elimination of limits on his publicly-financed opponent's campaign spending. See *Rosenstiel*, 101 F.3d at 1551-1552.

"Section 319 violates basic principles of equal protection to the extent that it regulates speech by some candidates but not the speech of other similarly situated candidates." As the district court explained, however, "the reasonable premise" underlying Section 319 is that candidates who spend more than $350,000 of their own money on a House campaign are "situated differently from those who lack the resources to fund their own campaigns." J.S. App. 17a.

The Court in *Buckley* held that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." 424 U.S. at 97. The Court rejected equal protection challenges to the FECA criteria used to determine whether and to what extent various presidential candidates would receive public funding. *Id.* at 97-108. And, as explained above, the Court held that public funds could be denied to any candidate who refused to abide by statutory spending limits. That holding establishes that, while Congress may not *require* compliance with statutory spending caps, it may permissibly treat candidates who adhere to such limits differently from those who decline to do so. There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private sources as more suspect than analogous differentials in the distribution of federal funds.

While acknowledging that the public financing system upheld in *Buckley* "furthers legitimate government interests," appellant contends that "[n]o equivalent benefits can be found in expanding contribution limits for a candidate who happens to be in a race with a self-financed opponent." J.S. 14. Appellant is correct that the core rationale for Section 319—*i.e.*, the public interest in diminishing the importance of personal wealth as a crite-

rion for election to federal office—was not specifically identified in *Buckley* and is not identical to the interests that public financing of presidential campaigns is intended to serve. Appellant makes no effort, however, to refute Congress's determination that the interests underlying Section 319 are legitimate and weighty ones. Because Section 319 serves important government interests, and because *Buckley* makes clear that Congress may differentiate between candidates who abide by statutory spending thresholds and candidates who choose to exceed them, appellant's equal protection claim lacks merit.

Appellant's contention (J.S. 15) that Section 319 on its face favors incumbents over challengers is unsupported by the record. To the contrary, Congress adopted a "gross receipts advantage" approach (see note 2, *supra*) to reduce any benefit to incumbents and other candidates who may be able to raise sizable amounts in the year prior to the election. The "gross receipts advantage" in the election year is calculated based on funds acquired by each candidate as of December 31 of the year before the general election and counts 50% of gross receipts "that may be expended in connection with the election." 2 U.S.C. 441a-1(a)(2)(B)(ii) (Supp. V 2005). By taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do not unfairly benefit from "war chests" they have built up in advance. Indeed, during the first four years after Sections 304 and 319 were adopted, 110 House and Senate candidates became eligible to receive enhanced contributions under the modified limits, but only six were incumbents. See FEC's Statement of Material Facts Not in Genuine Dispute paras. 63, 75 (Sept. 8, 2006). If

Section 319 were designed as appellant suggests, it has proved remarkably ineffective.

Finally, appellant's complaints (J.S. 16) about the details of the percentages, dates, and calculations included in Section 319 are not of constitutional dimension. In upholding the FECA provisions that govern public financing of presidential campaigns, the Court in *Buckley* explained that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would [adequately serve the relevant congressional purposes]. We cannot say that Congress' choice falls without the permissible range." 424 U.S. at 103-104. The same analysis applies here.

4. As the district court correctly held (J.S. App. 6a-7a), appellant has standing to challenge the disclosure requirements imposed by Section 319. Because appellant loaned his campaign more than $350,000, he was subject to those disclosure requirements even though his opponent did not ultimately invoke Section 319's modified contribution and coordinated-expenditure limits. And while Section 319's disclosure obligations do not differ substantially from the pre-existing FECA requirements, the differences are sufficient to constitute an Article III "injury in fact."[8]

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[8] Whether appellant's challenge to Section 319's disclosure provisions remained justiciable after the 2006 election presents a closer question. Appellant has not filed with the Commission a Statement of Candidacy for the 2008 election cycle or otherwise indicated to the Court that he intends to run another self-financed federal campaign. On balance, however, appellant's prior history of participation as a candidate in elections for the House of Representatives presumably provides a sufficient basis for concluding that the current dispute between the

On the merits, however, appellant's constitutional challenge raises no substantial federal question. Appellant contends (J.S. 13) that Section 319's disclosure requirements "single out appellant and reward his opponent simply because [appellant] has chosen to spend his own money on his campaign." That is incorrect. For two reasons, Section 319's disclosure provisions do not impermissibly "single out" self-financing candidates.

a. The disclosure requirements that Section 319 imposes on self-financing candidates do not differ substantially from the obligations that are imposed on *all* candidates for federal elective office. Section 319 requires self-financing candidates to file (i) a declaration of intent to self-finance; (ii) an initial notification that the candidate has spent more than $350,000 of personal funds; and (iii) additional notifications within 24 hours after each $10,000 in aggregate expenditures. 2 U.S.C. 441a-1(b) (Supp. V 2005). Except for the declaration of intent, similar information is ultimately disclosed under preexisting FECA provisions. See, *e.g.*, 2 U.S.C. 432(e)(1), 434(b); 11 C.F.R. 101.1, 104.3; J.S. App. 16a (noting appellant's concession that "all of the information required by [Section 319's] reporting provisions would eventually have to be disclosed to the FEC whether or not [Section 319] ever applies").

As the district court explained, this 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 [appellant]." J.S. App. 14a. The district court noted in particular that, because appel-

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parties over the constitutionality of Section 319's disclosure provisions is likely to recur.

lant's challenge "is essentially a complaint about the timing elements of the reporting requirements," the challenge must fail because "the timing deadlines of [Section 319] are no more burdensome than other BCRA reporting deadlines that were upheld in *McConnell*." *Id.* at 16a. Even the requirement that a self-financing candidate report within 24 hours each additional expenditure of $10,000 in personal funds after spending $350,000 "mirrors the deadline for reporting each $10,000 expenditure on electioneering communications upheld by the *McConnell* Court." *Ibid.*; see *id.* at 15a (explaining that the Court in *McConnell*, 540 U.S. at 194-202, upheld a 24-hour deadline for reporting each $10,000 expenditure on electioneering communications). Because Section 319's disclosure provisions are substantially similar to requirements that have previously been upheld by this Court, they impose no unconstitutional burden on appellant's political expression, and they cannot properly be said to "single out" self-financing candidates.

b. The district court also correctly explained that "any burden that [Section 319's] reporting provisions may hypothetically impose is not 'unilateral'" because "[t]he opponent of a self-financed candidate also faces additional reporting requirements, which are similar to those of the self-financed candidate[]." J.S. App. 16a. Under Section 319, *all* candidates must file a declaration about whether they intend to spend personal funds. 2 U.S.C. 441a-1(b)(1)(B) (Supp. V 2005). The opponent of a self-financed candidate must (i) calculate the OPFA when the threshold is reached and each time the self-financed candidate reports an additional $10,000 expenditure; (ii) file a notice within 24 hours if and when the new OPFA entitles the candidate to solicit increased

contributions; (iii) file a notice with the Commission and the national and state committees of his political party within 24 hours if and when increased contributions received have reached the proportionality cap; and (iv) report any refunds of money raised under Section 319. 11 C.F.R. 400.30(b), 400.31(e)(1)(ii). In addition, political parties that make coordinated expenditures pursuant to Section 319 must report, within 24 hours, those expenditures to the FEC and to the candidate on whose behalf the money was spent. 11 C.F.R. 400.30(c)(2). For those reasons as well, appellant is wrong in arguing that Section 319's disclosure provisions "single out" self-financing candidates.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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