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 FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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February 27, 2008

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

STATEMENT

In examining whether the Millionaires' Amendment, BCRA § 319, 2 U.S.C. § 441a-1, abridged appellant's First Amendment rights, the court below focused exclusively upon the isolated action of the Millionaires' Amendment itself, ignoring the background restrictions already in place that interact with § 391

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

to create a differential burden on appellant's First Amendment rights.

For example, the court found no burden on appellant because § 319 did not prevent him from spending his own money or reduce the amount he could raise from others. App. at 8. Although viewing the section merely as providing a "benefit" to his opponent, that is a distinction without a difference as appellant is indeed prevented from raising money from others to the same degree as his opponent. The only concern considered by the court, however, was whether § 319 "chilled" his speech, not whether it restricted him to a greater extent than his opponent. App. 10.

The court below also failed to give adequate consideration to the different nature of the alleged government interests asserted in support of § 391, accepting uncritically that § 319 provided a remedy for the supposed problem of differential resources and a "dangerous" public perception. App. 16.

Such a narrow and uncritical consideration of the First Amendment injury and the alleged government interests led the court to underestimate the First Amendment implications of § 319.

SUMMARY OF ARGUMENT

1. To properly evaluate the First Amendment harms presented by this case, this Court should look to the interaction between § 319 and the existing contribution limits in BCRA. Appellant indeed faces a greater burden on his speech than his opponent because he must comply with lower contribution limits, which reduce his opportunity to raise funds for speech. Ignoring pre-existing limits as not part of the

relative burden imposed on appellant and focusing exclusively on any chill created by § 319 alone ignores the First Amendment harm from the existence of discriminatory burdens from existing limits or exemptions therefrom.

2. The interests asserted in this case do are a far stretch from the corruption interests recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and a considerable stretch even from the somewhat expanded interests applied by this Court in *McConnell* v. *FEC*, 540 U.S. 93 (2003). Alleged public perception of unfairness, or the talismanic invocation of the word corruption to misdescribe such supposed unfairness, does not create corruption where none exists. The interest in a supposedly "fair" allocation of speech between candidates does not concern corruption, is novel at best, and has been repeatedly and properly rejected by this Court as a basis for regulating speech.

Section 319's abandonment of the lower contribution limits as unnecessary to prevent corruption when an opponent is self-financed also undermines the legitimacy of the lower contribution limits in total. Having found the marginal benefits from lower limits to be outweighed by the minor or invalid interests supporting § 319, they can no longer be relied upon to support the lower limits in other contexts and even as applied to the appellant and his opponent in this case.

In addition, the increased disclosure burdens in this case are not supported by the traditional justifications for disclosure, and are unjustified if the underlying interests supporting the differential contribution limits are invalid.

Finally, this Court should apply genuine strict scrutiny to this case because the interests alleged are novel and there is a significant likelihood that § 319 was designed and will operate to protect incumbents from those most capable of overcoming the advantages of incumbency by spending their own money as challengers

ARGUMENT

I. The Court Below Unduly Limited the First Amendment Injury It Was Willing to Consider.

In asking only whether § 319 would *chill* appellant's speech, the court below ignored the First Amendment harm resulting from the selective maintenance of the lower contribution limits on appellant while exempting his opponent from such limits. It is the differential burden of the remaining contribution limits that abridges appellant's rights, selectively burdening his ability to raise money for additional speech and more effectively to associate with others for expressive purposes simply because he has exercised his unquestioned First Amendment right to make personal expenditures for political speech. The operation of § 319, exempting appellant's opponent from pre-existing limits, is no different than if it had, *ab initio*, selectively imposed the lower limit on him but not his opponent. Such a discriminatory burden based on the exercise of protected First Amendment rights violates the First Amendment.

A. *Speaker Discrimination Is a Distinct First Amendment Injury Wholly Apart from Any Potential Chilling of Speech.*

It is hornbook First Amendment law that viewpoint or content discrimination infringes upon First Amendment rights and must be strictly scrutinized. For viewpoint discrimination, such scrutiny is generally fatal because the discrimination itself violates the First Amendment. For content discrimination, this Court has explained that, while not necessarily illegitimate in certain contexts, it is often highly suspect because it can act as a mask for viewpoint discrimination even when imposed by a nominally viewpoint-neutral law. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992).

A corollary of such First Amendment anti-discrimination principles is that discrimination in the speech restrictions imposed upon different *speakers* also can be highly suspect. *See, e.g., Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"). As with content discrimination, imposing differential restrictions on different categories of speakers raises the prospect that such discrimination is merely a mask for differentially restricting the viewpoints of one class of speaker or another.

In this case, § 319, in combination with the existing limits on contributions and coordinated party expenditures, creates a differential burden on speakers who choose to self-finance more than a limited amount of their political speech. Such speakers are

subject to lower contribution limits for their supporters, and more restricted coordinated spending from their parties than are their opponents.

This Court has, of course, recognized since *Buckley*, that contribution and coordinated expenditure restrictions impose a First Amendment burden, but has justified that burden by the interest in preventing corruption of the *quid pro quo* or undue influence sort – *i.e.*, the supposed ability of contributors or spenders to influence the candidate they have supported after he is elected. In this case, however, such burdens are not in the service of preventing corruption as described from *Buckley* to *McConnell*. Rather, they are claimed to serve quite different alleged interests that are not even remotely compelling. *See infra* Part II.

B. The More Restrictive Reporting Requirements Cause a First Amendment Injury.

In addition to the differential contribution and coordinated expenditure limits applied to self-financed candidates, the added reporting requirements for such candidates also burden their First Amendment rights. Unlike the usual candidate that relies upon contributions and spends little of his own money, a candidate that pays for more than a limited amount of his own speech must provide more frequent and immediate reports of his spending activity. Such reports are an added burden in and of themselves, and are not in the service of public information or enforcing any limits on their spending – the usual justifications for disclosure requirements – but rather serve the exclusive purpose of aiding the candidate's oppo-

nent in raising more money and in *avoiding* otherwise applicable limits.

Being forced to make immediate and frequent reports of expenditures for speech, merely because of the exercise of a protected right to self-finance that poses no risk of the supposed "corruption" claimed to justify campaign finance restrictions in the first place, is a burden on the freedom of speech. And to be forced to do so exclusively to benefit one's opponent smack's of government manipulation of the political marketplace in a manner that should raise grave skepticism by this Court. Whether such a burden on the freedom of speech actually "chills" self-financed speech is somewhat secondary to the fact that it penalizes constitutionally protected activities without a constitutionally valid justification. A discriminatory speech tax imposed on one side of a public debate, or on only one class of debaters, would violate the First Amendment regardless whether the tax were small or large and regardless whether it was actually effective at chilling the speech or speaker being taxed.[2]

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[2] Furthermore, the fact that the beneficiaries of § 391 also have added reporting requirements does not cure the discrimination here. Such beneficiaries are given benefits (the exemptions from otherwise applicable contribution limits) to go along with their added reporting burdens, while the targets of § 391 get no such benefits. Being "allowed" to exercise their protected right to self-fund their speech is not a benefit conferred by the government; it is a right protected by the Constitution. Government cannot exact a "price" for allowing that which it has no constitutional power to stop.

II. The Asserted Government Interest Is Novel and Invalid.

Once it is recognized that § 319, in combination with the existing restrictions imposed by BCRA, creates a First Amendment injury, the burden shifts to the government to establish a sufficiently important interest to justify that injury. This Court's precedent generally has limited such an interest to the prevention of the actuality or appearance of corruption. While this Court's conception of what constitutes "corruption" has admittedly (and, with regrets, improperly) expanded since *Buckley*, it has never expanded beyond the core notion of corruption as involving the exercise of improper influence by third parties over an actual or potential office-holder. *See, e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (government interest in preventing "'undue influence on an officeholder's judgment, and the appearance of such influence'" stemming from large campaign contributions) (citation omitted); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (interest in preventing "the broader threat from politicians too compliant with the wishes of large contributors"); *McConnell*, 540 U.S. at 144, 146 (interest in preventing the "the appearance of undue influence" and the alleged danger that large contribution beget "access to high-level government officials" and create an atmosphere of "debt").[3] "The hallmark of corruption is

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[3] This Court also has noted an interest in dampening the influence of certain entities deemed to have supposed "special advantages" of the corporate form "that enhance their ability to attract capital and * * * to use resources amassed in the economic marketplace to obtain an unfair advantage in the political mar-

the financial quid pro quo: dollars for political favors." BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1270 (1994).

A. The Interest Here Is Not Related to Preventing Corruption or its Appearance, and Is Invalid.

The alleged government interests in this case do not even come close to implicating even the fairly broad conception of corruption recognized by this Court. Rather, the interests are almost exclusively a faux-egalitarian concern with attempting to equalize the resources available to competing candidates, an interest that not only is not compelling, but that is in fact illegitimate on its face.

Congress and the court below, however, have sought to shoehorn the actual interests in this case into the "corruption" paradigm by claiming that § 391 combats a supposed public perception "that someone today who is wealthy enough can buy a seat" in Congress," which is supposedly akin to preventing the "appearance of corruption" recognized by this Court in the different context of third-party influence over elected officials. *See* 147 CONG. REC. at S3976 (March 21, 2001) (Sen. DeWine).

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ketplace," and in the prevention of corporations being used "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Beaumont*, 539 U.S. at 155 (citations and quotation marks omitted). *Amicus*, of course, disputes that rationale as a valid justification for restricting corporate speech, Brief of *Amici Curiae* Center for Competitive Politics, *et al.*, *Wisconsin Right to Life* v. *FEC*, No. 04-1581 (Nov. 14, 2005), but regardless of the validity of such an interest *per se*, no such "special" advantages are at issue here, and no possibility of circumventing contribution limits applicable to third parties.

More candidly, Congress also claimed a "fairness" interest in countering the supposed problem that uniform contribution limits "will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win elections." 148 CONG. REC. at S2142 (Mar. 20, 2002) (Sen. McCain); 147 CONG. REC. at S2451 (March 19, 2001) (Senator Domenici) (BCRA § 319 is intended to be "an equalizer amendment' * * * a fair play amendment; * * * a let's be considerate of a candidate who isn't rich amendment – whatever you choose to call it"); 147 CONG. REC. at S2461 (March 19, 2001) (Senator Durbin) (Amendment is a way to "make certain [Senators] have a level playing field" and thus ensure "fairness in * * * basic election campaigns").

Neither interest, however, can be warped, stretched, or tortured to fit within this Court's admittedly broad definition of preventing corruption.[4]

Regarding the first claimed interest in preventing the "appearance" of corruption, merely applying the epithet of "corruption" to the exercise of the right to expend one's own funds on political speech does not make it so. Regardless whether some might think it unfair that a wealthier candidate may have and exer-

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[4] *Amicus* agrees with Justice Kennedy that the Court would be wise to narrow its unwieldy definition of corruption. Restrictions on First Amendment activity should be valid "only if [a statute] regulates conduct posing a demonstrable quid pro quo danger." *McConnell*, 540 U.S. at 292 (Kennedy, J., dissenting). The unprincipled expansion of the corruption interest to include every possible situation where influence peddling is possible or appears possible has emboldened Congress to the point that it, in this case, argues that the unequal exercise of political speech is somehow corrupting.

cise greater means of engaging in political speech than his opponent, such means do not create any indebtedness to, or undue influence by, campaign contributors given that the money does not come from contributors. And the notion that such a candidate will be indebted to himself borders on the ridiculous. Running for (and attaining) elective office generally is a financial negative for a wealthy candidate that forgoes the opportunity to continue to make more money in the private sector. Such candidate cannot be said to be likely to provide valuable political favors to himself, and is decidedly less likely to do so than a candidate that lacks wealth to begin with and thus may be more motivated to take advantage of the temptations of elective office.[5]

As for the supposed public perception that there is something corrupt about wealthy individuals using their own money to fund an election campaign, that interest too is a far cry from the usual theories of corruption that turn upon a candidate being beholden to or solicitous of third-party contributors or supporters.

While there is no doubt that money buys speech, and that speech, if persuasive, helps a candidate get elected, a candidate relying on extensive contributions from third parties is no less "buying" speech (and hence presumably the election, in the government's condescending view of the public as sheep who react favorably to any speech, regardless of content or merit) than is the self-financed candidate. To suggest

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[5] And, of course, ethics and conflict of interest laws already penalize any attempt to misuse elective office for personal gain, as the spate of bribery prosecutions in recent years has made apparent.

that all money in politics – even a candidate's own money used only for speech – is corrupting is to radically depart from the notion of policing large contributions by third parties, and would eliminate virtually any possibility of "freedom" of speech in a world where "effective political speech" necessarily costs money. *See Buckley*, 424 U.S. at 19.

In addition, even if the public wrongly perceived self-financing as corrupt, such public misconception or "corruption" should not be sufficient to establish a constitutionally meaningful appearance of corruption. Particularly where there is no evidence of and no link to actual corruption, the proper response to such opinion is to correct the misperception, not to restrict speech. Otherwise, were mere public opinion enough to justify overriding the First Amendment, it would effectively eviscerate the very purpose of a Bill of Rights, which "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638 (1943).

As for the second interest in supposed fairness for the candidate unable or unwilling to spend significant personal resources on an election campaign, that interest does not even purport to involve corruption as understood by this Court. Rather, the theory underlying the claimed "fairness" interest is ultimately the false equation between speech and voting, and the attempt to map the one-person-one-vote theory of voting rights onto First Amendment speech rights. Fairness, after all, presupposes a certain "fair" base-

line amount of relative speech from which a self-financed candidate purportedly deviates. Such a theory, and the assumption of a fair amount of relative speech as between political competitors, is entirely at odds with the First Amendment and takes a condescending and impermissible view of the public, though, not surprisingly, it has been touted by certain academics for years.[6]

This Court in *Buckley* correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995). Both this Court as a whole and various of its justices, have continued to recognize the illegitimate nature of

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[6] *See* Strauss, *Corruption, Equality, and Campaign Finance*, 94 COLUM. L. REV. 1369 (1994) (analogizing efforts to equalize speech to "one person one vote" principle); Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (arguing that "the market status quo" should not be allowed to set the baseline for the amount of speech a person should be allowed to fund); Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996 (arguing that citizens should be equal in their ability "to command the attention of others for their own candidates, interests and convictions"); Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance Reform*, 94 COLUM. L. REV. 1204 (1994) (arguing that "each eligible voter should receive the same amount of financial resources for the purposes of participating in electoral politics").

having the government seek to define and enforce a "fair" amount of speech or to adjust the relative voices of participants in the political marketplace. *See, e.g., McConnell*, 540 U.S. at 138 n. 40, 227 (rejecting deference for statute aimed creating equality in the "political marketplace."); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 704 (1990) (Kennedy, J. dissenting) ("The argument [that the expenditure of money to increase the quantity of political speech somehow fosters corruption] is flawed * * *. [I]t assumes that the government has a legitimate interest in equalizing the relative influence of speakers. [Similar arguments were] rejected in *Bellotti*."); *id.* at 679 (Scalia, J., dissenting) ("I dissent because that principle is contrary to our case law and incompatible with the absolute central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of the political debate."); *id* at 695 (Scalia, J., dissenting) (the claim that those who spend more money for speech will have greater influence on elections "is not an argument that our democratic traditions allow – neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be 'unduly' extensive (because they are rich) or 'unduly' persuasive (because they are movie stars) or 'unduly' respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech – that the people are not foolish, but intelligent, and will separate the wheat from the chaff.").

Furthermore, the attempt to equalize the resources of competing candidates in this case is even

more suspect than in many past cases because the differential treatment applied to self-financed candidates and their opponents occurs despite the fact that the *claimed* justification for the underlying contribution and coordinated expenditure limits – the prospect or appearance of "corruption" from the undue influence over a candidate of large contributors – is actually *weaker* for a self-financed candidate than for his opponent. The non-self-financed opponent, after all, is presumably more dependant upon any contributions or coordinated expenditures than is a candidate with his own means of engaging in political speech, and will presumably be more grateful or indebted for such contributions or expenditures than would be the candidate that is not so dependant.

The discrimination in the application of BCRA's various limits thus not only selectively burdens a self-financed candidate, it does so in a manner that worsens, rather than mitigates, the supposed problem to which such limits were addressed. The apparent hypocrisy of Congress in adopting § 319 thus gives great weight to the suspicion that it is acting for improper ends in manipulating the resources available to different candidates.

In the end, any disparities in the ability or willingness of candidates to spend their own money on speech is not at all incompatible with our constitutional system. "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238,

257 (1986) ("*MCFL*").[7] Any supposed interest in trying to manipulate available resources in the service of some supposedly "fair" amount of relative political speech is simply a bottomless pit of temptation absent some coherent baseline of what amount of relative speech is proper; a baseline Congress is constitutionally disabled from declaring. *Cf.* Jaffe, McConnell *v.* FEC: *Rationing Speech to Prevent "Undue" Influence*, 2003-2004 Cato Supreme Court Review 245, 295-96 (2004) (criticizing the notion of "undue" influence as lacking a baseline and allowing manipulation of the political process). Such a claimed interest is simply "too amorphous" or "indefinite[]" and has "no logical stopping point," making the interest non-compelling for constitutional purposes. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality) (lack of compelling interest for racial classifications).

B. The Millionaire Amendment Actually Undermines the Alleged Interest In Preventing Corruption that Underpins BCRA Generally.

In addition to failing to advance any interest in preventing corruption as defined by this Court, the

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[7] That this Court does not view mere disparities in political activity based on financial means to be corrupt can be seen in its refusal to consider the poor a "suspect" class. If mere economic disparities corrupted the political process, one would think the products of that corrupt process would receive heightened scrutiny. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). That they do not suggests the absence of meaningful "corruption" from different economic means of engaging in political speech and the lack of a compelling interest in ameliorating such differences in the amount of speech by different political actors.

higher limits allowed by § 319 actually undermine the supposed justification for the otherwise applicable lower limits, as applied to appellant and his opponent here, and to candidates in general. Congress' determination in § 391 that higher limits did not pose a meaningful risk of corruption or that the marginal added risk was less significant than its marginal or illegitimate interest in "fairness" and more speech, necessarily declares the limited or non-existent value of the corruption interest being served by the lower limits as compared to the higher ones. But if the added corruption risk supposedly solved by the lower limits is not enough to outweigh the dubious interests served by raising the limits in § 391, then it cannot possibly outweigh the recognized burden that lower limits place on the First Amendment rights of candidates and their supporters. In other words, if the higher contribution limits are sufficient to serve Congress' claimed interest in battling corruption here, any supposed gains to be had from the lower limits are not compelling as compared to the First Amendment rights at issue and the higher limits should be sufficient generally, not just for the opponents of self-financing candidates.

Indeed, even in the less-scrutinized context of commercial speech, this Court has recognized that exceptions to restrictions based on the alleged dangers of speech tend to weaken the alleged government interest and render the interest incapable of outweighing the First Amendment burden imposed. *See, e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regula-

tory scheme undermined asserted government interest).

When Congress' abandonment of the claimed need for lower limits in this case is coupled with the fact that the supposed problem of resource imbalance is largely one of its own making, the case for the lower contribution limits becomes even weaker. The problem of unfairness identified by Congress is said to stem from *Buckley*'s different treatment of contributions and expenditures, leading to greater restrictions on those who cannot finance their own campaigns. *See* 147 CONG. REC. S2537 (March 21, 2001) (Sen. Dewine) ("The *Buckley* decision has effectively created a substantial disadvantage for opposing candidates who must raise campaign funds under the current fundraising limitations."). In reality, it was not *Buckley* that created the problem, but rather Congress' decision to impose contribution limits in the first place that handicapped candidates by limiting the amount of money they could raise. The simple solution, of course, is to raise or eliminate such limits for all, thus leaving candidates free to raise funds for political speech either from themselves or their supporters.

At a minimum, because Congress has effectively determined that a $6900 limit does not pose a serious threat of corruption, it no longer has a constitutionally adequate justification for the lower limits applied to appellant or other candidates. If an incumbent legislator desperate to survive the onslaught of a millionaire challenger is not moved to alter his voting patterns by a $6900 contribution, then how is an incumbent who is not nearly so worried about retaining

his seat corrupted by a contribution of $2300? Just as "[s[tatutory interpretation is a holistic endeavor," turning on the relationship among different parts of a statute, *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988), so too is the evaluation of the government's interests underlying the various restrictions in BCRA. Having partially abandoned its corruption justification in raising the limits under § 319, Congress cannot credibly rely on that justification to support lower limits elsewhere in the statute. The moment Congress approved BCRA § 319's increased contribution limits as being adequate to further the government's interest in preventing *quid pro quo* corruption or its appearance, Congress also must have simultaneously found that BCRA's general individual contribution limit was impermissibly overbroad. If anything, Congress' decision to approve higher contribution limits is *prima facie* evidence that the everyday $2300 limit is not tailored to achieving a compelling government interest and that a large amount of First Amendment protected activity is restricted without justification.

If, as Appellant claims, BCRA § 319 adequately prevents the appearance of corruption or its appearance, as classically defined, then BCRA § 307's more stringent requirements must fall because they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

C. *The Interest in Added Disclosure Is Not Supported by the Interests Found Sufficient for Prior Disclosure Requirements.*

As appellant has pointed out, the added disclosure in this case places additional burdens on a self-financed candidate that do not exist for other candidates raising money through contributions. Those burdens are imposed exclusively in the service of the candidate's opponent, as a means of enabling that opponent to raise more money.

The court below defended those increased disclosure requirements as minimal in comparison to other disclosure requirements that previously have been upheld by this Court, and thus found no First Amendment infirmity. But previous disclosure requirements have been justified on the much different grounds of informing the public regarding who is supporting the candidate and what that supposedly says about the candidate's views and who the candidate might favor as an office-holder, and on the supposed utility of disclosure in enforcing the substantive limits imposed by other sections of the federal election laws. Such interests, however, are simply not present in the case of the self-financed candidate and are not advanced by the more onerous reporting requirements imposed by § 319.

For example, a self-financed candidate, by definition, cannot be "beholden" to himself in the way that he might supposedly be beholden to contributors. There are no third parties who would expect favors from the candidate based on self-financing, and to the extent that a self-financed candidate might be suspected of posing a greater risk of self-dealing – to cre-

ate a return on his investment in himself – the existing disclosure requirements are more than ample to address that speculative risk. Indeed, such self-dealing poses a uniform risk for any candidate who might see elective office as a means of personal financial gain, and one would logically expect such a risk to be greater for the *poor* candidate rather than for the candidate that was already wealthy enough to devote considerable personal resources to his own election campaign. In any event, the existing disclosure requirements applicable to all candidates fully serve any interest in informing the public, and the added disclosure obligations do not further that interest in any greater manner.

As for the utility of disclosures in aiding the enforcement of contribution and other limits, once again, such an interest has nothing to do with reporting personal expenditures given that such expenditures are not limited at all, and hence there is nothing to enforce regarding such limits. The only thing the disclosure serves to "enforce" is the removal of limits on the candidate's opponent, a distinctly different interest that goes to issues of purported equality or competition, not to the underlying corruption concerns justifying enforcement of other limits.

In the end, therefore, this Court's past cases on disclosure offer no support whatsoever for the additional disclosure requirements currently being considered. Those new disclosure requirements can be justified, if at all, only on the same basis as § 319 as a whole – the faux egalitarian interest in equalizing the resources available to candidates and the supposed public concern that wealthy candidates can "buy"

elective office by spending their own money. If those interests are insufficient to support the substantive disparities in spending limits, they likewise are insufficient to support the added disclosure obligations.

D. At a Minimum, the Novel Interest Asserted here Should Trigger Genuine Strict Scrutiny.

Finally, even if this Court were to accept the possibility that the interests asserted by the government in support of § 319 were sufficiently important that they might support some abridgement of First Amendment rights, the interests are so novel that this Court should apply genuine strict scrutiny when considering whether § 319 furthers those interests and is narrowly tailored to achieving those interests. The more lenient scrutiny previously applied to contribution limits purportedly serving an anti-corruption interest have no place at all in considering the novel ends and means of the Millionaires' Amendment.

This Court's past deferential approach to Congress' assessment of the dangers of corruption has turned on what it viewed as the established acceptance of the traditional corruption rationale and the supposed expertise of Congress in assessing the danger involved. But this Court has recognized that scrutiny can be increased as well, where the alleged harm is not so well-accepted. "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. Scrutiny likewise increases where there is a danger of particular "constitutional evils as, say, permitting incumbents to insulate

themselves from effective electoral challenge" were not present. *Id.* at 402 (Breyer, J., concurring). This case is one in which the interests asserted are novel and implausible, and the danger of self-interested legislation by Congress is high.

To date, the only established "non-novel" government interests recognized by this Court in analyzing the constitutionality of campaign contribution limits are the interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982); *see also McConnell*, 540 U.S. at 291 (Kennedy J., dissenting). As discussed above, the interests alleged in this case are not of the traditional corruption sort, and are, at a minimum, novel, if not outright illegitimate.

The danger of self-protective legislation is also pronounced here. As a general matter, there is reason to suspect Congress whenever it seeks to manipulate the balance of political debate or regulate campaign finance. *See Austin*, 494 U.S. at 692 (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things – even some seemingly *desirable* things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."); *id.* at 692-93 ("with evenly balanced speech, incumbent officeholders gen-

erally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech 'for fairness' sake' simply out of bounds.").[8]

Furthermore, beyond general principle, the danger that § 319 would favor incumbents was expressly recognized by various members of Congress. *See* 147 CONG. REC. at S2544 (March 21, 2001) (Sen. Daschle) ("In my state of South Dakota, if my opponent wanted to spend over $686,000 of their own money, I could take advantage of the new limits even if I might have $5 in the bank myself. If the same forces that want to pass this amendment turn around and triple the underlying contribution limits, I would be able to go out and raise as much as $18,000 from every individual who wants to contribute to my campaign. How is that

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[8] *See also* Klarman, *Majoritarian Judicial Review: Entrenchment Problems*, 85 GEO. L.J. 491, 536-537 (1997) ("The one thing that virtually all commentators agree upon is that legislators drafting campaign finance legislation will seek to enhance the advantages of incumbency.); BeVier, 94 COLUM. L. REV. at 1279 ("a premise of distrust of campaign finance reform laws is warranted in principle on account of the context of such legislation.[] Such legislation carries significant potential to achieve incumbent protection instead of enhancing political competition. It arouses the uncomfortable suspicion that the corruption-prevention banner is an all-too-convenient subterfuge for the deliberate pursuit of less savory or less legitimate goals.") (footnote omitted); BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1080 (1985) ("contribution limitations 'impose far more serious strictures on challengers than on incumbents. * * * Research strongly suggests that anything that makes it harder to raise funds will be detrimental to challengers and correspondingly strengthen the position of incumbents.[]") (footnotes omitted).

fair? * * * Just because I might have a wealthy opponent, should I be allowed to open up the floodgates here and take whatever money I can raise? How is that limiting the influence of money? No, instead this protects incumbents."); 147 CONG. REC. at S3195 (March 30, 2001) (Sen. Dodd) (expressing concern that exempting an incumbent's war chest from the gross receipts advantage formula would create "a substantial loophole for incumbents"); 147 CONG. REC. at S2548 (March 21, 2001) (Sen. Levin) (expressing concern that "the incumbent who already has the financial advantage and the incumbency advantage is * * * also given the advantage of having the higher contribution limits"). As Senators with ample experience raising money and waging electoral campaigns, these three Senators immediately recognized what BCRA § 319 would mean for well-connected incumbents like themselves.

Such added benefits to incumbents, of course, are in addition to the recognized benefits that already attach to incumbency, and which have occasioned little concern from Congress regarding fairness for their potential challengers. *Cf. Randall v. Sorrell*, 548 U.S. 230, --, 126 S. Ct. 2479, 2496 (2006) (plurality opinion) (acknowledging the existence of a "name recognition advantage enjoyed by the incumbent."); *Shrink*, 528 U.S. at 403-404 (Breyer, J., concurring) (Court cannot defer to the legislature when a statute "significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from electoral challenges").

While the FEC claims that such incumbent-protection concerns are not supported by the evidence

because few incumbents have benefited from § 319, Appellee Motion to Dismiss or Affirm at 23-24 (only six incumbents invoked the rule in four years), its data does not actually go to the issue. Of the non-incumbent candidates that invoked the rule, there is no indication how many of them were facing an incumbent opponent and how many were in a race for an open seat with no incumbent. Given the fund-raising advantage of incumbents, it would be no surprise that few if any of them felt the need to expend their own resources and thus trigger § 319 for the benefit of their poorer opponent. Furthermore, the data says nothing about how many challengers to incumbents were deterred from spending large amounts of personal money against an incumbent, and thereby enhancing the natural advantages of incumbency even further.

More telling is the use of self-financing to challenge incumbents *before* § 319 went into effect. A data analysis performed by political scientist Jennifer Steen shows that "The Millionaire's Amendment would have benefited an incumbent member of Congress in 40% of all general elections in which it was relevant in the 2000 election." Jennifer Steen, *Life After Reform: When The Bipartisan Campaign Reform Act Meets Politics* 13 (Roman and Littlefield 2003).

Finally, there is no reason to think that Congress has any particular expertise on the supposed public perception regarding self-financed candidates. While Congressmen may have expertise on the effects of large contributions on elected officials – an indictment of their own conduct as such officials more than

anything else – their claim to know that the public finds their opponents more corrupt than them is disingenuous at best.

Because the government's interests in this case are novel, at best, and raise genuine concerns that § 319 is designed to insulate incumbents from a category of challengers that might be able to overcome the advantages of incumbency, this Court should apply genuine strict scrutiny in this case.

CONCLUSION

For the reasons above, this Court should reverse the judgment of the District Court for the District of Columbia with regard to the added disclosure requirements imposed by § 319, and should either endorse § 319's higher limit as applicable to both candidates or, as an interim measure, strike down the one-sided increase in the contribution limit as impermissibly discriminatory and remand the case back to the FEC for a potential challenge by Davis's opponent to the application of the usual lower limits insofar as the government interest purportedly justifying such lower limits is demonstrably insufficient or non-existent in light of § 319's acceptance of a higher limit as being non-corrupting.

Respectfully submitted,

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Dated: February 27, 2008