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 DEMOCRACY 21, THE CAMPAIGN LEGAL CENTER, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, AND PUBLIC CITIZEN, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEE

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INTERESTS OF AMICI CURIAE[1]

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitu-

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

tionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented. Democracy 21 has participated as counsel or amicus curiae in a number of cases before this Court involving the constitutionality of the campaign finance laws.

The Campaign Legal Center ("CLC") is a non-partisan, non-profit organization that works in the area of campaign finance, voting rights, and election law, generating public policy proposals and participating in state and federal court litigation throughout the nation. The CLC's work has focused on constitutional campaign finance disclosure and regulation, campaign finance enforcement, voting rights, and governmental integrity laws. The CLC also works with Congress to promote campaign finance and lobbying reform, and to strengthen federal ethics rules and enforcement. The CLC has served as co-counsel for parties or amici curiae in a number of cases before this Court.

The Brennan Center for Justice at NYU School of Law is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through legislative efforts and litigation, the Brennan Center actively supports strong federal campaign finance laws that meet constitutional standards and encourage broad candidate participation in federal elections.

Public Citizen, Inc., is a non-profit, membership advocacy organization that appears before Congress, administrative agencies, and the courts on a wide range

of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of our political processes that can result from unfettered infusions of private funds into political campaigns. Public Citizen therefore seeks to enact and defend workable, balanced, and constitutional campaign finance reform legislation such as the provision of the Bipartisan Campaign Reform Act ("BCRA") that is at issue here. Public Citizen has advocated, and continues to advocate, campaign finance legislation (including public funding legislation) before Congress, and Public Citizen and its attorneys have been involved in various capacities, including as amicus curiae and counsel, in a large number of litigated cases involving the constitutionality of such legislation.

Each of the amici advocated the enactment of BCRA, and each has participated in the defense of the statute in the lower courts and in cases previously before this Court involving BCRA's constitutionality. Amici therefore have a substantial interest in the issues presented by this case.

STATEMENT

This case involves a facial constitutional challenge to Section 319 of the Bipartisan Campaign Reform Act ("BCRA"), part of the so-called "Millionaires' Amendment." If certain conditions are met, Section 319 raises the usually-applicable limits on contributions a candidate for the United States House of Representatives may accept when his or her opponent contributes more than $350,000 in personal funds to his own campaign. *See* 2 U.S.C. § 441a-1(a)(1)(A)-(B). In these circumstances, Section 319 also relaxes the statutory limits on how much a political party may spend in coordination with a candidate whose opponent is self-financed above

$350,000. *See id.* § 441a-1(a)(1)(C). To implement these rules, Section 319 also establishes reporting requirements for both self-financing candidates and their opponents. *See id.* § 441a-1(b).

If a self-financing candidate chooses to spend more than $350,000 in personal funds, Section 319 requires an opposing candidate to calculate the "opposition personal funds amount" ("OPFA") for purposes of determining whether he or she is eligible to proceed under the alternative rules. *See* 2 U.S.C. § 441a-1(a)(2). The OPFA formula compares the total "expenditures from personal funds" by each candidate, which is defined to include not only each candidate's personal expenditures, but also his or her "gross receipts advantage." A candidate's gross receipts advantage is calculated, in turn, by comparing 50 percent of the aggregate contributions raised by each candidate during the year prior to the election. *Id.* An opposing candidate may qualify for the alternative rules only if, according to the OPFA formula, the self-financing candidate's expenditures from personal funds exceed his or her own by more than $350,000. *Id.* § 441a-1(a)(1). Section 319 caps the amount of increased contributions that any candidate may receive at 100 percent of the amount of the total OPFA disparity between the candidates. *Id.* § 441a-1(a)(3)(ii).

In the 2004 election cycle, following passage of Section 319, of all opponents of self-financed candidates who triggered the Millionaires' Amendment, only 13 raised more than 10 percent of their total campaign funds from increased contribution limits. J.A. 84. In addition, candidate reports filed with the Federal Election Commission ("FEC") indicate that, in total, self-financed candidates who triggered the Millionaires' Amendment spent more than $144 million of their own

funds in 2004 and 2006. J.A. 89. By comparison, their opponents collectively raised a total of only $8.6 million in increased contributions under Section 319. *Id.*

Appellant, a candidate for the House of Representatives, notified the FEC of his intent to spend $1 million in personal funds during the general election campaign in 2006 (J.A. 103) and filed suit against the FEC in federal district court. Appellant argued that, on its face, Section 319 violates both the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. In particular, Appellant—who has twice run self-financed campaigns for Congress since enactment of the challenged statute—argued that Section 319 impermissibly chilled his speech and would have the effect of deterring self-financing candidates from running for the House of Representatives because it conferred a benefit on their opponents.

A three-judge district court rejected Appellant's argument, finding that Section 319 does not burden speech because it "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. Similarly, the district court found that Section 319 does not confer an unfair competitive advantage on the opponents of self-financing candidates, as any disadvantage the Appellant may feel he suffers "is the result of the candidate's choice to fund his campaign from one of several permissible funding sources." J.S. App. 11a. The court rejected Appellant's equal protection argument because he had failed to show that Section 319 treats similarly situated persons differently. J.S. App. 17a.

On appeal, the Appellee asserts that the case is moot and that Appellant lacks standing. *See* Mot. to Dismiss or Affirm 12-14; Appellee Br. 18-28. This amicus brief addresses only Appellant's First Amendment allegations.

SUMMARY OF ARGUMENT

Section 319 expands, and does not restrict, the opportunities for speech in the political process. On its face, the provision places no restriction on expenditures by candidates who choose to self-finance their political campaigns. Instead, Section 319 *relaxes*, in some circumstances, otherwise applicable contribution and coordinated-expenditure rules with regard to opponents of self-financing candidates who spend more than $350,000 from personal funds. Appellant's contention that Section 319 chills speech is not supported by the record.

Section 319's notification requirements also comport with the First Amendment. They are no more burdensome than other requirements under existing law, including those this Court upheld in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

Appellant wrongly criticizes the district court's analogy to lower court decisions upholding various state public funding provisions. Amici James Madison Center for Free Speech and Citizens United, however, go further, urging this Court to offer essentially advisory opinions on issues not presented in this case. This Court should reject that request. The lower courts have been consistent in their application of this Court's holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which approved of Congress's approach to providing public funding for presidential campaigns. Moreover, public

funding mechanisms involve a unique set of governmental interests that should be evaluated on their own terms and in the context of the specific statutory incentives used.

Finally, the fact that Section 319 relaxes certain contribution limits in no way impugns the general validity of the anti-corruption rationale supporting campaign contribution limits—a rationale long approved of by this Court. In enacting Section 319, Congress carefully balanced its interest in preventing corruption with its concerns that non-wealthy candidates were being driven from the political process. This Court should, as has been its custom, defer to Congress's reasoned judgment in this field.

ARGUMENT

I. SECTION 319 DOES NOT RESTRAIN SPEECH

A. Section 319 Expands The Opportunity For Speech And Does Not Limit A Candidate's Expenditures

By its terms, Section 319 expands, and does not restrict, the exercise of political speech. When one candidate for the House of Representatives spends more than $350,000 from personal funds, that candidate's opponent may, in some circumstances and subject to limits: (1) receive contributions from individuals up to three times the normal $2,300-per-election limit for each donor; (2) receive contributions from individuals who have reached the otherwise applicable statutory limit for aggregate campaign donations; and (3) coordinate expenditures with a political party above normally applicable limits. 2 U.S.C. § 441a-1. As the district court recognized, Section 319 neither deprives the self-financing candidate of funds nor divests the candidate of any other potential benefit. Rather, it *relaxes*, in

limited circumstances, restrictions placed on the self-financing candidate's opponents.

Appellant mistakenly equates Section 319 to the expenditure caps that this Court invalidated in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *See, e.g.*, Appellant Br. 21 (describing Section 319 as "Congress's second attempt to regulate personal spending"). In *Buckley*, this Court upheld the Federal Election Campaign Act's ("FECA") limits on contributions to candidates for federal office, but invalidated FECA's expenditure limits, including a cap on the amount a candidate could spend from his or her own personal funds. 424 U.S. at 13-59. The Court observed that FECA's expenditure limits represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech" and had the effect of "restrict[ing] the quantity of campaign speech by individuals, groups, and candidates." *Id.* at 19, 38. Addressing the cap on candidates' personal expenditures, the Court noted the importance of allowing candidates to have the "unfettered opportunity to make their views known," and concluded that the expenditure limits "clearly and directly" interfered with a candidate's ability to engage in protected First Amendment expression. *Id.* at 52-53.

Section 319 operates in precisely the opposite manner. Rather than imposing a ceiling on the amount a candidate (or anyone else) may spend, Section 319 *relaxes* certain contribution and coordinated-expenditure limits that would otherwise apply to the opponent of a candidate who self-finances beyond the $350,000 threshold. Every candidate remains free to spend as much as he or she pleases, without limit. The framework that Congress has created thus allows each candidate the "unfettered opportunity" to make his or her views known according to whatever fundraising strat-

egy the candidate deems most advantageous. *Buckley*, 424 U.S. at 52.

Appellant contends that Section 319 nevertheless has the *effect* of limiting personal expenditures to less than $350,000 because self-financing candidates will not want to confer a benefit on their opponents. But there is no proof in the record that Section 319 has chilled *any* candidate expenditures or speech—much less the "substantial" quantity of speech required to sustain a facial challenge. *See Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002). In fact, as Appellant readily acknowledges, his own past practices show that candidates can—and do—choose to exceed the $350,000 threshold. Appellant Br. 43 n.17. Following the enactment of The Bipartisan Campaign Reform Act ("BCRA"), Appellant had three choices going into the 2004 and 2006 elections: 1) forgo self-financing altogether and rely exclusively on contributions; 2) supplement such contributions with up to $350,000 of his own money; or 3) spend more than $350,000 of his own money with the knowledge that his opponent could benefit from alternative rules as a result. Appellant chose the third option on both occasions (s*ee* J.S. App. 13a), revealing that, whatever the benefits conferred on his opponent, Section 319 neither deterred Appellant from self-financing above $350,000 nor had the effect of capping his own expenditures on his speech.

There is no evidence in the record to support a finding of any chilling effect on other similarly situated candidates. Amici Gene DeRossett and J. Edgar Broyhill II, both candidates for the House of Representatives in 2004, speculate that Section 319 "may well" have had an impact on the number of self-financing candidates, *see* Br. of Amici DeRossett and Broyhill 13, but both exceeded the $350,000 threshold in their own respective

congressional races. *See* Def. FEC's Exs. Submitted In Supp. Of Its Mot. For Summ. J. & In Opp. To Pl.'s Mot. For Summ. J., Ex. 9, Attach. 1, at 1. Indeed, the lone study these candidates cite for this proposition undercuts their assertion. *See* Jennifer A. Steen, *Self-Financed Candidates and the "Millionaires' Amendment,"* in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* 204, 205 (Michael J. Malbin ed., 2006) (concluding there is "no way to know exactly how the Millionaires' Amendment changed the course of the 2004 elections" given the multiple variables involved and that at best it had a "limited" impact).

What evidence does exist supports the opposite conclusion. Public sources show, for example, that the number of candidates who used more than $1,000,000 of their own funds increased from 2002 to 2006.[2]

Appellant and his amici contend that Section 319 burdens candidate speech in the same manner as the "right-of-reply" provision struck down in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). *See* Appellant Br. 42-43; Br. of Amici DeRossett and Broy-

[2] *See* Center for Responsive Politics, Millionaire Candidates, http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002; http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2004; http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2006. Furthermore, in many cases a candidate who trips Section 319's trigger may not even face increased spending in response. In the 2004 congressional election, 93 candidates between the primary and general elections were eligible to raise money under increased contribution limits; 37 of them did not report a single contribution in excess of $2,000. Steen, *Self-Financed Candidates*, 210-211.

hill 10-11. But *Tornillo*, a "compelled access" case,[3] is inapposite. The statute there provided that if a newspaper assailed a candidate's character or record, the candidate could require the newspaper to print a reply of equal prominence. This Court held that, by compelling newspapers to disseminate the views of speakers with whom they did not agree, the statute deterred newspapers from speaking in the first instance. 418 U.S. at 257-258. The Court also concluded that the statute directly interfered with "editorial control and judgment" by forcing a newspaper to tailor its speech to opposing agendas, and to respond to candidates' arguments where the newspaper might prefer to remain silent. *Id.* at 258.

Section 319 is altogether different. Section 319 does not compel a self-financing candidate to say—or not say—anything; nor does it require a self-financing candidate to spend his or her own resources to accommodate the speech of an opponent. Decisions about whether and how much to self-finance are within the complete control of each individual candidate based on a choice about what strategy will be most advantageous. Unlike the newspaper editor facing a right-of-reply mandate, a candidate considering whether to spend more than $350,000 in personal funds faces no prospect of having to provide (and pay for) a forum for an opponent's message or to compromise his or her own message. Finally, as discussed, there is no evidence

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[3] *See also, e.g., Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 13-15 (1986) (invalidating a statute requiring a utility company to include with its monthly bills a newsletter published by a consumer group that had been critical of the utility's ratemaking practices because the regulation provided benefits to speakers on the basis of their viewpoint).

demonstrating that Appellant, his amici, or others have been chilled by operation of Section 319.

In the end, Appellant's challenge is not about a limit on his speech, but rather about his concern that an opponent might have funds available to engage in *more* speech by taking advantage of Section 319. But there is no constitutional right to outspend an opponent or to engage in more speech relative to another speaker. *See Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 14 (1986) (observing that there is no "right to be free from vigorous debate"). Where the Court has encountered direct expenditure limits, such as those at issue in *Buckley*, the Court has struck them down not to preserve or strengthen a candidate's relative position in a political race, but to protect the candidate's "right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 424 U.S. at 52. Section 319 protects that right by leaving a self-financing candidate unfettered while expanding the overall opportunities for speech in the electoral process.

Section 319, moreover, is tailored to reduce any risk that it would give an opponent of a self-financing candidate an unfair advantage. For example, Section 319 requires a candidate seeking to take advantage of its alternative rules to calculate his or her "opposition personal funds amount" ("OPFA"). That formula incorporates 50 percent of the aggregate receipts raised by each candidate during the year prior to an election, 2 U.S.C. § 441a-1(a)(2), thereby reducing the relative advantages of incumbents, who are less likely to self-finance. *See, e.g.*, Def. FEC's Exs., Ex. 9, Attach. 1, at 1-2 (indicating that of the more than 60 candidates for congressional office who self-financed above the Millionaires' Amendment's thresholds in 2004 and 2006,

only 2 were incumbents). Moreover, Section 319 caps the amount of increased contributions a candidate may receive at 100 percent of the OPFA disparity between the candidates. *Id.* § 441a-1(a)(3)(ii).

In sum, Section 319 *expands* the overall opportunities for speech while preserving the ability of candidates who choose to fund their own campaigns to spend as much money as they like and to choose the financing avenues that best serve their interests. As Senator DeWine explained during the debate over the provision: "This amendment is truly about the [F]irst [A]mendment—it is about free speech—and it is about allowing candidates to have the opportunity to take their ideas into the marketplace, to broadcast them, to be able to pay for the commercials, and to have their exchange of ideas in that political marketplace that our Founding Fathers deemed so very important." 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001); *see also id.* at S2538 ("[T]he wealthy candidate, again, is not punished, is not inhibited, is not discouraged from putting in his or her own money."); *id.* at S2540 (statement of Sen. Durbin) ("[Without the Millionaires' Amendment, t]he voters lose. If the system works as it is supposed to, you have a choice on election day. In order to have a choice, you have information about all candidates. That means you have an information source not only from a wealthy candidate but from someone who is not so wealthy."). Section 319 therefore, in the tradition of other campaign finance laws, serves to promote "open public political discussion" and participation in the political process.[4]

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[4] Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002) (explaining that campaign finance laws

B. Section 319's Notification Requirements Do Not Burden Speech

Section 319 requires self-financing candidates for the House of Representatives to file: (1) a declaration of intent within 15 days of becoming a candidate that discloses the amount in personal funds in excess of $350,000 that the candidate intends to spend; (2) an initial notification within 24 hours of spending more than $350,000 of personal funds; and (3) additional notifications within 24 hours following each aggregate expenditure over $10,000. 2 U.S.C. § 441a-1(b). These notification requirements, which are essential to the implementation and enforcement of Section 319's substantive requirements, operate in tandem with other, similar provisions in FECA.

Appellant claims that Section 319's notification requirements impose a "substantial burden" on his political expression. But these requirements are no more burdensome than similar requirements that have been upheld by this Court. In particular, as the district court recognized, the 24-hour notification requirements

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"further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy"); *see also Buckley*, 424 U.S. at 92-93 & n.127 (noting that "[l]egislation to enhance . . . First Amendment values is the rule, not the exception" and Congress's establishment of taxpayer funding of presidential campaigns was an "effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people"); *McConnell* v. *FEC*, 540 U.S. 93, 140 (2003) (upholding BCRA's primary soft money restrictions and noting that "the restriction . . . tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors").

for spending over $350,000 and additional aggregate expenditures over $10,000 resemble the 24-hour reporting requirements in BCRA Section 201 that this Court upheld in *McConnell* v. *FEC*. *See* 540 U.S. 93, 194-195 (2003) (upholding BCRA Section 201 reporting requirements, which impose a 24-hour deadline for disclosure of expenditures relating to "electioneering communications" totaling more than $10,000 in a calendar year); *id.* at 321 (Kennedy, J., joined by Rehnquist, C.J., and Scalia, J., concurring on the constitutionality of BCRA's basic disclosure provision).[5]

Appellant asserts that Section 319's primary flaw lies not in the timing but rather in the "unilateral disclosure of sensitive campaign strategy." Appellant Br. 40. But neither Appellant nor his amici can point to any such "sensitive" information that would not otherwise be disclosed under existing law by *every* candidate.[6]

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[5] Amici James Madison Center for Free Speech and Citizens United mistakenly claim that strict scrutiny applies to Section 319's disclosure provisions, despite their acknowledgment that such a standard was not applied to the more detailed disclosure provisions at issue in *McConnell*. *See* Br. of Amici James Madison Center for Free Speech and Citizens United 16 (arguing that strict scrutiny should apply and that "nothing can properly be read into *McConnell*'s use of 'important'" when describing the state interests that led the *Buckley* Court to uphold FECA's disclosure requirements). Nothing here requires this Court to apply a different level of scrutiny in this case than it did in reviewing other disclosure provisions of BCRA.

[6] Indeed, the expenditure information required by a self-financing candidate under the 24-hour reporting rules is no more "sensitive" or "strategic" than the information required of his opponent. *See* 11 C.F.R. § 400.31(e)(1)(ii) (requiring opposing candidate to notify his political party and the FEC of OPFA within 24 hours if he has received increased individual contributions and in-

See 2 U.S.C. § 434(b); 11 C.F.R. § 104.3 (requiring periodic, detailed reports of expenditures). Indeed, given that Section 319 requires disclosure only of the amount of money spent by the candidate himself, and not the names of supporters or the uses of such funds, the information required is less "sensitive" and less likely to curb or influence a candidate's political speech than other provisions this Court has upheld. *See, e.g.*, *McConnell*, 540 U.S. at 194-195 (explaining that Section 201 requires disclosure of "*all persons* sharing the costs of the [electioneering communications] disbursements" and, where applicable, "*all persons who contributed $1,000 or more*" to a segregated account or individual making the disbursement (emphasis added)).

Appellant describes Section 319's declaration of intent requirement, which must be filed within 15 days of announcing one's candidacy, as "particularly burdensome." But advance filings are nothing new to candidates. *See, e.g.*, 2 U.S.C. § 432(e)(1) (imposing 15-day deadline for candidates to designate campaign committee). In *McConnell*, this Court upheld an advance notice provision that was, if anything, more revealing of a candidate's strategy than Section 319. Section 201 of BCRA, the amendment to FECA Section 304, requires disclosure of executory contracts for communications that have not necessarily aired, which has the effect of revealing information such as where political ads will be run and by whom. *See McConnell*, 540 U.S. at 199-201. Section 319, by contrast, reveals only an early intention by a self-financing candidate to spend more than $350,000 of personal funds. It says nothing else

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creased coordinated party expenditures equal to 100 percent of OPFA).

about a candidate's strategy or the content of his or her message. Thus, there is no reason to believe that Section 319 imposes a greater burden on speech than Section 201, which this Court concluded does "not prevent anyone from speaking." *Id.* at 201 (internal quotation marks omitted).

II. Any Attack On Public Funding In This Case Is Misplaced

In concluding that Section 319 does not impermissibly burden speech, the district court drew an analogy to lower court decisions that reviewed various state public funding schemes. J.S. App. 9a-13a. Although Appellant contends that the district court's analogy does not fit, he does not take issue with public funding in general, nor does he argue against the public funding provisions in those cases, which trigger higher expenditure and contribution limits or higher funding amounts when a non-participating candidate spends above a threshold amount; to the contrary, he *acknowledges* their constitutionality. Appellant Br. 54-55; J.S. 11-12.

Amici James Madison Center for Free Speech and Citizens United, on the other hand, depart from Appellant's position and encourage this Court to take the extraordinary step of addressing in this case the constitutional foundation of these lower court decisions. *See* Br. of Amici James Madison Center for Free Speech and Citizens United 26-28. This Court should reject the extraordinary request to comment on cases that are not before the Court and that involve statutes substantively different from Section 319. Whatever the value of the district court's analogy, no party here has asked the Court to delve into an area of the law where the lower courts are in substantial agreement.

In *Buckley*, this Court approved of conditioning acceptance of public funds for presidential campaigns on an agreement by the candidate to abide by specified expenditure limits. The Court reasoned 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." 424 U.S. at 57 n.65.[7]

Relying on *Buckley*, a decision that Appellant does not challenge,[8] lower courts have overwhelmingly sustained state public funding provisions that contain various incentives for candidates to accept public funding,[9]

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[7] *See also Republican Nat'l Comm.* v. *FEC*, 487 F. Supp. 280, 283-284 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980) (holding Presidential Election Campaign Funding Act was constitutional because "[e]ach candidate remains free" to choose the method of campaign financing most advantageous to speech).

[8] *See, e.g.*, Appellant Br. 54 (acknowledging that the district court, relying on *Buckley*, "correctly noted that a public funding system does not pose 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" (internal quotation marks omitted)).

[9] Public funding legislation takes a number of forms. Under some schemes, candidates are provided additional public funds in the event a high-spending non-participating opponent exceeds certain expenditure or contribution amounts, or when independent expenditures occur. *See, e.g.*, Me. Rev. Stat. Ann. tit. 21-A § 1125(9). In other variations, expenditure and contribution limits are relaxed or eliminated when the spending of non-participating candidates passes a threshold amount. Thus, rather than providing participating candidates with more public money, this model simply allows a publicly-financed candidate greater opportunity to raise and spend private money. *See, e.g.*, Minn. Stat. Ann. § 10A.25(10).

concluding that those provisions do not coerce candidates into sacrificing their First Amendment rights to free expression. *See Daggett* v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 451, 464 (1st Cir. 2000) (upholding Maine Clean Election Act, which contains a triggering provision providing increased public funding to participating candidates when spending of non-participating candidates exceeds threshold); *Gable* v. *Patton*, 142 F.3d 940, 948-949 (6th Cir. 1998) (upholding Kentucky public funding law that provided participating candidates with two-for-one matching funds and lifted the applicable expenditure and contribution limits in the event the spending of a non-participating candidate exceeded a triggering amount); *Rosenstiel* v. *Rodriguez*, 101 F.3d 1544, 1549-1552 (8th Cir. 1996) (upholding Minnesota public funding law waiving expenditure limits for publicly-financed candidates when a non-participating candidate exceeds a triggering amount of contributions and expenditures);[10] *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 30, 39 (1st Cir. 1993) (upholding Rhode Island's "contribution

[10] In *Day* v. *Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994), the Eighth Circuit invalidated a Minnesota provision that increased spending limits and the amount of public funds available to a candidate opposing a non-publicly-financed candidate when an independent expenditure was made on behalf of the non-financed candidate. The Eighth Circuit in *Rosenstiel* attempted to distinguish this earlier, seemingly contradictory holding. 101 F.3d at 1555. At most, *Day*'s holding is limited to public financing schemes that provide candidates with additional public funds based on independent expenditures not within the candidate's control. *See, e.g.*, *Daggett*, 205 F.3d at 464 n.25 ("We recognize that there may be a difference between expenditures by a candidate and those by a non-candidate, but nonetheless agree that the continuing vitality of *Day* is open to question.").

cap gap" provisions, which entitle publicly-financed candidates to contribution limits double those of non-financed candidates); Order, *Green Party of Conn.* v. *Garfield*, No. 06-cv-1030, at 56-58 (D.Conn. Mar. 20, 2008) (dismissing challenge to triggering provisions of Connecticut public funding law, which provide for the release of additional public funds if a participating candidate is outspent by a non-participating candidate or by any other non-candidate or organization); *Jackson* v. *Leake*, 476 F. Supp. 2d 515, 519, 530 (E.D.N.C. 2006), *argued on appeal sub nom. Duke* v. *Leake*, No. 07-1454 (4th Cir. Dec. 7, 2007) (upholding a North Carolina public funding law for judicial elections that provides public "rescue funds" for participating candidates in the event contributions or expenditures of a non-participating candidate, independent or otherwise, exceed a specified triggering amount).[11] These cases are instructive for

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[11] These represent only some of the many state public funding schemes on the books. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 16-952 (providing increased public funds to participating candidates when the expenditures of a non-participating candidate exceed a certain triggering amount); Fla. Stat. Ann. § 106.355 (relieving a participating candidate from expenditure limits if non-participating opponent exceeds expenditure limits applicable to publicly-financed candidates, and continuing to provide matching funds to participating candidates); Neb. Rev. Stat. Ann.. § 32-1604 (conditioning the receipt of public funds by participating candidate on required expenditure minimums by non-participating candidate); Wis. Stat. Ann. § 11.50(2)(i) (providing that participating candidate who accepts a public grant is not bound by contribution and disbursement limits if he faces an opponent who has not accepted a grant, unless the opponent files an affidavit of compliance with the limitations).

While not yet law, Congress is also considering bills to reform the existing presidential public financing laws in order to increase the speech of presidential candidates through public financing mechanisms that provide additional incentives for candidates to

the reason given by the district court: they hold that as long as candidates can *choose* how to fund their campaigns and a government benefit does not force a candidate to curtail his or her speech, triggering provisions like those reviewed in these cases are constitutional.

But public funding mechanisms also involve a unique set of governmental interests that must be evaluated on their own terms and in the context of the specific statutory incentives used. In *Buckley*, this Court explained several of the core values served by public funding. Reviewing Congress's effort to provide optional funding for presidential elections, the Court observed that FECA's public funding scheme represented an effort "to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. The Court further recognized that public funding helps "eliminat[e] the improper influence of large private contributions" and "reliev[es] . . . candidates from the rigors of soliciting private contributions."[12] *Id.* at 96. Taking into account these varying

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participate. The "Presidential Funding Act of 2007" provides additional public funds and increases the expenditure limit for presidential candidates participating in public funding who are opposed by non-participating candidates when the non-participating candidate receives contributions or makes expenditures in an aggregate amount greater than 120 percent of the applicable expenditure limit. *See* S. 2412, 110th Cong. (2007); H.R. 776, 110th Cong. (2007).

[12] The lower courts have echoed the importance of these values in upholding state public financing laws. *See, e.g. Daggett*, 205 F.3d at 450 (noting the "state's interest in curbing the power of money in politics"); *Rosenstiel*, 101 F.3d at 1553 (noting the "compelling" governmental interest of "promot[ing] a reduction in the possibility for corruption that may arise from large campaign contributions and a

compelling governmental interests, courts have reviewed public funding laws with an eye toward ensuring that the incentives used involve "a roughly proportionate mix of benefits and detriments." *Daggett*, 205 F.3d at 472.

Accordingly, this case presents no occasion for the Court to consider or to address a remarkably consistent set of lower court decisions rejecting challenges to state public financing schemes that differ from Section 319.

III. CONGRESS'S DECISION TO ADJUST CONTRIBUTION LIMITS FOR OPPONENTS OF CANDIDATES WHO CHOOSE TO SPEND LARGE SUMS OF PERSONAL WEALTH IS CONSISTENT WITH THE VALUES SERVED BY BCRA'S CONTRIBUTION LIMITS

A. This Court Has Consistently Upheld Congressional Judgment Regarding Contribution Limit Levels

This Court has consistently sustained the prevention of corruption and the appearance of corruption as constitutionally sufficient justifications for contribution

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diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice*, 4 F.3d at 39 (noting that "the state possesses a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption") (citing *Buckley*, 424 U.S. at 91). This Court also identified in *Buckley* two interests specific to public financing schemes that distinguish between major and minor party candidates: protecting the public fisc by "not funding hopeless candidates with large sums of public money" and protecting the electoral process by not providing "artificial incentives to splintered parties and unrestrained factionalism." *Buckley*, 424 U.S. at 95-96 (internal quotation marks omitted).

limits. Appellant acknowledges as much, stating in his brief, "Congress originally imposed contribution limits in election campaigns to address concerns about the appearance and actuality that large campaign donations could unduly influence politicians." Appellant Br. 24 (citing *Buckley*, 424 U.S. at 26-28). In *Buckley*, this Court concluded: "It is unnecessary to look beyond [FECA]'s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." 424 U.S. at 26; *see also Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000) ("[T]he prevention of corruption and the appearance of corruption [is] . . . a constitutionally sufficient justification" for contribution limits. (internal quotation marks omitted)).

This Court has also consistently deferred to Congress's expert judgment in the crafting of these provisions, concluding, "[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." *Buckley*, 424 U.S. at 30 (internal quotation marks omitted); *accord Shrink Mo.*, 528 U.S. at 397 ("[T]he issue in later [contribution limit] cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming. [T]he dictates of the First Amendment are not mere functions of the Consumer Price Index.").

B. Congress's Decision To Adjust Contribution Limits For Opponents Of Millionaire Candidates Does Not Impugn The General Validity Of Contribution Limits, And This Court Has Not Been Asked To Hold Otherwise

Appellant contends that Section 319 is inconsistent with the anti-corruption rationale, arguing that "Section 319 [is] an avenue for more private money to enter the system" and that it "likely increases the amount and influence of contributed funds in an election." Appellant Br. 54. But Appellant ignores the fact that in enacting Section 319, Congress *balanced* the need to combat corruption and its appearance with concerns that wealthy, self-financing candidates were driving candidates with fewer personal resources from the political arena. As Senator McCain explained on the floor of the Senate:

> 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. S2142 (daily ed. Mar. 20, 2002); *see also* 144 Cong. Rec. H3780 (daily ed. May 22, 1998) (statement of Rep. Bennett) ("[T]his year, we have the lowest interest among 18 and 19-year old people in this country in government, in politics, and in public policy

than we have had in the last 30 years. There is a reason for that. The reason for that is that young people, in particular, feel disconnected from the system. They feel that this is a pay-as-you-go system. Unless they have money to get involved in this political process, they cannot be part of it.").

This Court has never suggested that Congress is foreclosed from adjusting statutory contribution limits for particular elections in order to accommodate competing governmental interests. *See McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."); *see also Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) ("[N]o 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."). Indeed, in areas where legislators possess particular expertise, this Court has time and again provided Congress and the states' legislatures with leeway to balance competing interests. *See Shrink Mo.*, 528 U.S. at 402-403 (Breyer, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments.") (citing, *inter alia*, *Frisby* v. *Schultz*, 487 U.S. 474, 485-488 (1988) (balancing rights of privacy and expression); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 192-194 (1997) (recognizing the speech interests of both viewers

and cable operators); *Burson* v. *Freeman*, 504 U.S. 191, 198-211 (1992) (plurality opinion) (weighing First Amendment rights against electoral integrity necessary for right to vote)). For example, in *Buckley*, this Court considered a requirement that candidates achieve 5 percent of the popular vote to qualify for general election public funding. In crafting this percentage requirement, Congress balanced the competing interests of "protect[ing] the public fisc and not foster[ing] factionalism." *Buckley*, 424 U.S. at 103. "[T]he choice of the percentage requirement that best accommodates the[se] competing interests," this Court held, "was for Congress to make." *Id.*

Appellant further argues that Congress's willingness to raise contribution limits in this context indicates that Section 319 is an incumbent-protection provision that provides "informational and financial benefits to the opponents of candidates who personally spend more than $350,000 on their campaign." Appellant Br. 22. This argument is not borne out by the statute itself or by the record. The statute addresses the fundraising advantage an incumbent might have through the calculation of OPFA. Indeed, available data from the 2004 election shows that in a substantial number of races where an incumbent faced a millionaire candidate whose spending surpassed the trigger amount, the trigger was not actually activated because the incumbent's OPFA amounts offset the self-financing. Steen, *Self-Financed Candidates*, 209.

Finally, Appellant contends that Congress raised contribution limits in Section 319 based on an impermissible rationale, that of "level[ing] the playing field" between millionaire and non-millionaire candidates. *See* Appellant Br. 34-36. While it is true that leveling the playing field is not a constitutionally sufficient in-

terest in the context of expenditure limits, *Buckley*, 424 U.S. at 48-49, it *is* legitimate for Congress to take steps to ensure that its anti-corruption measures do not have the unintended effect of *tilting* the field even more in favor of wealthy candidates. In particular, Section 319 is a legitimate effort to balance the ability of candidates to compete under special and uncommon circumstances with a general interest in reducing corruption and the appearance of corruption.

Section 319 therefore exemplifies Congress's proper use of its expertise to devise a system of campaign financing that best serves multiple public policy goals.

CONCLUSION

The judgment of the three-judge district court, accordingly, should be affirmed.

Respectfully submitted.

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