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

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REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Unique among campaign finance laws, Section 319 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 319, 116 Stat. 109-12 (2002) (codified as amended at 2 U.S.C. § 441a-1), handicaps select candidates to promote an ill-defined governmental interest in equality. Analogies to the regulation of private contributions, corporate spending, and public financing do not validate Section 319's burden. In aim and effect, the provision violates the First and Fifth Amendment rights of self-financed candidates.

I. SECTION 319 BURDENS THE POLITICAL SPEECH OF SELF-FINANCED CANDIDATES WITHOUT REGARD TO PERSONAL WEALTH.

A. The Federal Election Commission ("FEC") propagates two canards initially offered by Congress to justify enactment of Section 319. First, the provision is not a "modest" effort to "decrease the influence of personal wealth in congressional elections." Brief of Appellee FEC (FEC Br.) 14. Rather, by affecting individuals contemplating using *any* amount of personal funds in a race for the United States House of Representatives, the broad provision attempts to deter—and failing that, penalize—any meaningful level of personal expenditures.

Section 319 regulates not just the "wealthy" trying to "buy a seat in Congress." FEC Br. 14. As the FEC's enforcement record demonstrates, the provision handicaps candidates who encumber their home equity, retirement benefits, or personal savings to participate in the political process. *See, e.g.,* Brief of *Amici* Gene DeRossett & Edgar Broyhill (DeRossett Br.) 1-2. One 2004 Congressional candidate who was penalized by the FEC for his failure to disclose personal expenditures mortgaged his house to raise $400,000 in campaign funds. *Id.* at 8 n.6. Because the $350,000 benchmark is not indexed for inflation, the statute's coverage in future elections will encompass increasingly modest personal expenditures. Meanwhile, the cost of a competitive House race continues to soar. *See* Brief of Appellant Jack Davis (Davis Br.) 23-24 (discussion of indexing); 52-53 (increasing cost of House races).

Paradoxically, Section 319 overlooks a much larger class of millionaires—the incumbents whose personal

wealth is found in "war chests" containing millions of dollars of private contributions. Because the provision does not account for the assets of these millionaires, the assertion that Section 319 diminishes the importance of *wealth* in House races must be rejected. The provision is more accurately described as regulating the use of *personal funds* to benefit candidates relying on *private contributions*.

B. The FEC also parrots Congress's claim that Section 319 fosters equality in elections "where a self-financing candidate's expenditures threaten to sever the usual link between a candidate's financial resources and the level of his actual public support." FEC Br. 17. As this Court has repeatedly stated, however, a candidate's personal spending does not "distort" the electoral process: "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (per curiam). Instead, voters "retain control over the quantity and range of debate." *Id.*; s*ee also Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (Congress has no authority to regulate speech based on the "fear that voters might make an ill-advised choice . . . in the course of a political campaign."). Even the FEC acknowledges the range of voters' potential responses to a candidate's personal expenditures. *See* FEC Br. 48 n.15. Yet, by regulating personal expenditures, Congress conveys to the electorate that this form of communication is "itself thought to be harmful." *Buckley*, 424 U.S. at 17 (citation and quotation marks omitted).

Nor does the record establish that the public actually perceives that wealthy individuals are unfairly—much less corruptly—purchasing congres-

sional seats. The only evidence provided by the FEC are Members' statements during debate expressing trepidation about the influence of personal expenditures. *See* FEC Br. 6-7; FEC's Statement of Material Facts ¶¶ 9-40, Joint Appendix (J.A.) 72-82. But the self-interest of Section 319's primary beneficiaries is hardly sufficient to demonstrate public sentiment.

Indeed, the author of the expert report submitted by the FEC has questioned the effectiveness of personal campaign expenditures: "Self-financers usually don't win. When they do, it isn't their money alone that puts them in office." Jennifer Steen, *Maybe You Can Buy an Election, But Not With Your Own Money*, WASH. POST, June 25, 2000, at B1. Given the lack of evidence that elections are won by personal spending alone, congressional misgivings about self-financed candidates usurping the voters' choice are misplaced. Data from the last few elections shows that few self-financed candidates have won their elections, and that many other factors, such as ethics scandals or other controversies, often affect the outcome. *See* DeRossett Br. 22-25.

Finally, Section 319's purported curative value remains unexplained. Increasing the money that candidates may receive from their wealthiest donors or national parties is an ill-considered approach to restoring the "usual link" between candidates and the general public. Nor does the FEC explain why, unlike personal expenditures, a war chest of funds raised during previous campaigns accurately represents current public sentiment about a privately financed candidate.

II. SECTION 319 INFRINGES ON SELF-FINANCED CANDIDATES' CONSTITUTIONAL RIGHTS.

A. The parties' constitutional dispute focuses on whether Section 319 infringes on a self-financed candidate's "core" political speech. In invalidating the previous limitations on personal expenditures, this Court held that the "First Amendment simply cannot tolerate [the statute's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54. Echoing the district court's rationale in upholding Section 319, *see* Appendix to the Jurisdictional Statement (J.S. App.) 13a, the FEC answers that the new regulations do not "burden political speech because they place no restrictions whatever on a candidate's ability to spend personal funds in support of his own campaign." FEC Br. 16.

This assertion is irrelevant to any principled legal analysis, as it elides this Court's contrary "compelled access" precedent. Claiming that a statute does "not amount to a restriction of appellant's right to speak because 'the statute in question here has not prevented [a party] from saying anything it wished' begs the core question." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (rejecting right of reply statute). Viewing Section 319 through this lens, it is evident that the authorization of extra-limit contributions for the opponents of a self-financed candidate imposes significant constitutional harms. "Appellant, does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co. v. Pub.*

Util. Comm'n of Cal., 475 U.S. 1, 14 (1986) (quoting *Buckley*, 424 U.S. at 49 and n.55).

The opinion in *Pacific Gas & Electric Co.*, which invalidated a statute requiring a utility company to include with its bills materials from an opposing consumer group, returns this analysis to the electoral context. That decision is derived from *Buckley's* rejection of expenditure limitations that "impose[ ] a substantial restraint on . . . protected First Amendment expression." 424 U.S. at 52. For purposes of the First Amendment, then, it is irrelevant whether the regulation imposes an absolute ceiling on electoral expenditures or creates a different type of impairment. "To the extent that a candidate's campaign is enhanced by the operation of the statute, the [opposing] political speech of the individual . . . is impaired." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). *See* Davis Br. 42-44; *see also* DeRossett Br. 12-13; Brief of *Amicus* James Madison Center (JM Br.) 25.

Section 319 expressly confers benefits on the opponents of a candidate making personal expenditures. The self-financer must ply his opponents with contemporaneous, strategic disclosures about his spending. His personal expenditures bolster his opponents' fundraising opportunities and, ultimately, may enhance his competitors' voices. The FEC never distinguishes this Court's compelled access cases nor explains why Section 319 does not similarly infringe on a self-financed candidate's First Amendment rights.

B. In lieu of direct support from precedent, the FEC likens this matter to *Buckley's* approval of public funding in presidential campaigns. As detailed in Mr. Davis's opening brief, public funding

jurisprudence does not apply to a statute that increases private contributions to candidates. Davis Br. 53-56. Nonetheless, the FEC argues that "*Buckley* establishes that a candidate's insistence on spending personal funds in amounts exceeding the statutory threshold may legitimately be treated by Congress as a ground for withholding a federal subsidy to which the candidate would otherwise be entitled." FEC Br. 30 (citing *Buckley*, 424 U.S. at 57 n.65). This claim, which represents a significant retrenchment from the district court's more expansive public funding analysis, J.S. App. 11a-13a, still misreads *Buckley*.

Buckley held that presidential public funding "is a congressional 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." 424 U.S. at 92-93. *Buckley* never sanctioned withholding federal subsidies in response to a candidate's spending behavior. Instead, this Court concluded that the provision of public funds simply *replaces* the amount of private contributions that would normally be raised by participating major party candidates. *Id.* at 95 n.129. Ironically, this Court found that Congress intended to "reduce the deleterious influence of large contributions on our political process." *Id*. at 91. The FEC's use of *Buckley's* public funding analysis to bolster a statute that fosters additional private contributions is, thus, particularly misplaced.[1]

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[1] Alluding to the issue of compelled access, *Buckley* also noted that the public funding "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n.124 (citation omitted). Of course, the same cannot be said for the provision at issue here.

Section 319, unlike public financing of elections, also fails to "facilitate" or "enlarge" the public's role in the electoral process. By tripling contribution limits, Section 319 does not expand the pool of donors; it simply permits candidates to re-solicit supporters who have already provided the maximum $2,300 per election contribution. Those donors can provide an *additional* $4,600 to the candidate, for a total contribution of $6,900. Only the excess funds, however, count toward Section 319's cap on extra-limit contributions, purportedly needed to create "parity." *See* FEC Br. 41 n.14. Thus, rather than facilitating the involvement of a greater number of contributors, Section 319 increases the influence of well-heeled donors. It also diminishes the impact of those citizens who lack the resources to provide extra-limit contributions or who wish to make higher contributions to self-financers. *See* DeRossett Br. 15-17 (Section 319 "disabl[es] contributors from associating with a self-financed candidate to the same extent they may associate with his opponent." *Id.* at 15).

As for increasing the "volume of campaign-related speech," FEC Br. 16, Section 319 discourages non-wealthy candidates from borrowing against their personal assets to finance their candidacies. *See* DeRossett Br. 1-2, 8 n.6. For a candidate whose best financial option is to make a personal loan secured by, say, a home mortgage, there is no mechanism to "roll back" Section 319's calculations once that candidate repays the loan with contributions from private donors. *See* JM Br. 4-5 n.2; FEC Adv. Op. 2003-31 (Dec. 19, 2003). This may significantly chill a non-wealthy candidate's decision to enter the race.

Nor does the regime confer any benefit on minor-party or little-known candidates who are dissuaded from self-financing because they fear aiding their opponents or suffering civil and criminal penalties for reporting errors. Having forgone the option of personal expenditures, these candidates—who may lack access to large donors and be unable to raise sufficient campaign funds under any limits—receive no boost from the provision.

C. The FEC also refers to *Buckley's* public financing analysis to address Mr. Davis's equal protection claim that Section 319 treats him differently than his similarly situated opponents: "There is no reason to regard Section 319's differentials in the amounts of money that candidates may receive from private contributions as more suspect than analogous differentials in the distribution of federal funds." FEC Br. 45. This comparison is not analogous, as public funding comports with the Fifth Amendment for the precise reason that Section 319 violates the Constitution.

The appellants' equal protection challenge to the presidential funding provision in *Buckley* asserted that minor-party candidates did not receive the same financial benefits as their major-party opponents. Rejecting that claim, *Buckley* held that the provision of such funds did not "enhance" a major-party candidate's "ability to campaign," 424 U.S. at 95 n.129, and could also "be viewed as a supplement" to any private contributions raised by minor-party candidates. *Id.* at 99. In comparison, Section 319's *only* purpose is to diminish the self-financed candidate's purported competitive advantage during the campaign. In short, governmental provision of public funds operates without consideration of the

competitive balance in a campaign while Section 319 expressly aims to "level the playing field" among opposing candidates.

D. The FEC offers two additional rationales for Section 319. First, the government cites the district court, J.S. App. 14a, in maintaining that Mr. Davis's campaign expenditures preclude a claim that he was "chilled" by operation of the statute. FEC Br. 26. *Buckley's* rejection of expenditure limitations, however, establishes that a complete chill is not required to demonstrate harm to core political speech. "[T]he equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." 424 U.S. at 56-57; *see also* JM Br. 6-7. As Mr. Davis detailed in his opening brief, his campaign suffered significant handicaps due to Section 319's operation. Davis Br. 34-44.[2] Given his very public reliance on personal funds, the simple existence of Section 319 provides

[2] The FEC ignores two related issues. First, this is a facial First Amendment challenge under which a law may be overturned as impermissibly overbroad because a "substantial number" of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 770 and n.25 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Thus, while Mr. Davis's experience is instructive, it is not determinative. Because Section 319 operates by virtue of statutorily-defined formulae aiding one class of candidates, it *always* benefits the opponents of a self-financer, regardless of any specific evidence of chilling of that candidate. Second, as illustrated by *amicus* Gene DeRossett and others cited in his brief, Section 319's $350,000 threshold regulates decidedly non-wealthy candidates whose electoral decisions will be particularly susceptible to chill. *See* DeRossett Br. 12-13.

Mr. Davis's opponents with a substantial sword to wield in their race. They may ask, "If self-funding is not corrupting, why is there a law curbing its impact?" *See Buckley*, 424 U.S. at 17 (congressional regulation conveys message that communication is harmful).

The FEC also contends, without support of precedent, that by preserving the "status quo" limits for candidates who spend less than $350,000, Section 319 actually benefits such candidates. FEC Br. 31-33. Similarly, it maintains that any self-financed candidate is "clearly better off . . . than he would be if campaign fundraising were unregulated." *Id.* at 33 n.9. Setting aside the significant tailoring concerns about Section 319, these assertions ignore this Court's bar on placing unconstitutional conditions on the receipt of a government-conferred benefit. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Id*. (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *See also* Brief of *Amicus* The Cato Institute (Cato Br.) 6-7.

Given that the Constitution protects a candidate's right to make personal expenditures without ceiling, *Buckley*, 424 U.S. at 52, Congress may not condition the "benefit" of lower contribution limits for a candidate's opponents in return for his agreement to

cabin his protected speech. As such, Section 319's extra-limit contribution regime would violate the First Amendment even if, as the FEC proffers, the "default contribution limit [were] higher" and were "reduced only if an opposing candidate certified that he would not self-finance beyond a certain limit." FEC Br. 32 n.8. From either perspective the practical and legal effects are the same; the government may not penalize a self-financed candidate's refusal to limit his personal expenditures advocating his own election.

III. THE GOVERNMENT HAS NO COMPELLING INTEREST IN "LEVELING THE PLAYING FIELD."

The asserted governmental interest in "leveling the playing field" in congressional campaigns is both novel and legally unsustainable. Although the FEC attempts to distinguish *Buckley* on this issue, it ignores significant legal impediments to its claim. FEC Br. 34-39 and 35 n.10.

A. In *McConnell v. FEC*, this Court described some appellants' asserted equality interest as a "broad and diffuse injury" insufficient even to establish standing to challenge, *inter alia,* Section 319. 540 U.S. 93, 227 (2003). *McConnell* addressed claims that higher contribution limits deprived some voters of "an equal ability to participate in the election process based on their economic status" and imposed a "competitive injury" on their ability to raise funds for their candidates. *Id.* at 227-28. This Court held, however, that a party's claim of "curtailment of the scope of their participation in the electoral process" was "not [ ] a legally cognizable right." *Id.* at 227 (citing, *inter alia*, *Buckley*, 424 U.S.

at 48). If an asserted equality goal is insufficient for purposes of standing it certainly cannot establish a compelling interest for constitutional purposes. *See McConnell*, 540 U.S. at 227. ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal.").

B. Because no precedent supports this equality interest, the FEC relies on case law addressing corporate electoral activities. FEC Br. 35-37 (citing *FEC v. Beaumont*, 539 U.S. 146 (2003) and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). According to the FEC, the public perception that House seats are available only to the wealthy would raise "analogous concerns" to those relating to the "corrosive and distorting effects" of corporate aggregations of wealth. FEC Br. 36 (citation omitted). However, this Court has never extended this analysis to the activities of individual candidates or donors. Nor does the FEC explain how a candidate's personal expenditures on his own behalf resemble a corporation's political activities.

As the FEC asserts repeatedly, Section 319 is aimed at reducing the influence of "wealth" to "level the playing field." *See, e.g.*, FEC Br. 37 (Section 319's "core rationale" is "diminishing the importance of personal wealth as a criterion for election to federal office"). Conversely, *Austin* expressly stated that the accumulation of "large amounts of wealth" was not the justification for imposing limitations on corporate political expenditures and that such regulation "does not attempt to 'equalize the relative influence of speakers on elections.'" 494 U.S. at 660. The corporate cases cited by the FEC do not inform this matter.

IV. SECTION 319 IS NOT SUFFICIENTLY TAILORED TO SATISFY ANY APPLICABLE LEVEL OF SCRUTINY.

A. The FEC disputes Mr. Davis's assertion that strict scrutiny should be applied to Section 319. FEC Br. 37 n.11 (citing *Randall v. Sorrell*¸ 126 S. Ct. 2479, 2492 (2006) (plurality opinion)); *contra* Davis Br. 44-46. Even under the standard applied in *Randall*, however, this Court must "review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Randall*, 126 S. Ct. at 2492.

In response to Mr. Davis's explication of Section 319's infirmities, Davis Br. 47-53, the FEC simply defers to congressional platitudes, astonishingly describing the provision as "carefully crafted." FEC Br. 41-42 n.14. The FEC's only defense for Section 319's failure to account for war chests is that the "choice was Congress's to make." *Id.* at 39 n.12. This response is insufficient, particularly in light of this Court's skeptical eye toward provisions affecting the competitiveness of elections. *See, e.g., Randall*, 126 S. Ct. at 2494-501 ("examination of the record" reveals that "contribution limits are too restrictive"); *see also* Davis Br. 32-34 (courts need not defer when Congress legislates in its own interest). An independent review of the record in this matter reveals that Section 319 is not tailored to achieve the asserted equality aims.

B. As detailed in Mr. Davis's brief, Section 319 does not equitably account for all funds in a campaign. Davis Br. 8-12. The FEC argues that "by taking account of the funds raised prior to the election year, Congress sought to ensure that incumbents do

not unduly benefit from 'war chests' they may have built up in advance." FEC Br. 39 n.12. However, this statement misstates the effect of the Opposition Personal Funds Amount ("OPFA") calculation, 2 U.S.C. § 441a-1(a)(2). That formula recognizes only funds raised in the year *before* the general election, although it discounts that total by one-half. The OPFA calculation ignores all war chest funds raised in previous elections cycles and all contributions made during the election year. For example, prior to the 2006 election cycle, Mr. Davis's opponent wielded a $1.1 million war chest. *See* Davis Br. 13. Yet, the OPFA calculation ignored this bounty in authorizing Mr. Reynolds to collect an additional $1.4 million in extra-limit funds.

Addressing these higher limits, the FEC cites *Buckley* for the proposition that a "court has no scalpel to probe" marginal differences in contribution limits. 424 U.S. at 30. *Buckley* continued, however, that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* Tripled individual contribution limits, with the $4,600 excess exempted from individuals' aggregate contribution ceilings, create just such a qualitative difference. Similarly, Section 319's authorization of *unlimited* party coordinated communications—expenditures that are the functional equivalent of candidate contributions—eviscerates the normal limit on such spending.

The FEC also assures this Court that Section 319 operates to "level the playing field." FEC Br. 8, 38. Yet the government never addresses Mr. Davis's personal experience to the contrary. Davis Br. 12-13. As the record reveals, during the 2006 campaign Section 319 authorized Mr. Davis's opponent to

receive about $1.4 million in extra-limit funds. The formula authorized the provision of these funds to Mr. Reynolds despite his sizable war chest and his $2.8 million spending advantage at the conclusion of the campaign. *See id.* Mr. Davis's experience is not anomalous, as the statutory formulae for extra-limit contributions always undercount private donations. *See id*. at 11-12. The FEC never explains how the authorization of $1.4 million in extra-limit contributions to the highest spending candidate in the race levels the playing field.

V. THIS COURT HAS JURISDICTION TO DECIDE THIS CONTROVERSY.

A. Mr. Davis has standing because he retains a personal stake in the resolution of this matter. The FEC argues that because this controversy arose in the context of the 2006 congressional election no live dispute remains. After much discussion of the mootness of Mr. Davis's claims, the FEC concedes that should Mr. Davis "make[] his intent to run a future self-financed House campaign clear in his reply brief or elsewhere, it will effectively moot this mootness discussion." FEC Br. 20-21 n.5. Although he has not filed an official declaration of his candidacy, Mr. Davis has stated publicly that he intends to use personal funds to pursue New York's 26th District seat in the United States Congress in the 2008 election cycle. Jill Terreri, *Democrat Davis Confirms He'll Run Again for Congress*, ROCHESTER DEMOCRAT & CHRONICLE, Mar. 27, 2008, at 5B (reporting that Mr. Davis is planning to announce formally his self-financed candidacy on April 15). By the FEC's admission, then, this matter is not moot.

Even without evidence of his intent to pursue federal office, however, Mr. Davis's claims regarding Section 319's impact on his campaign during the 2004 and 2006 election cycles remain live. The FEC misstates the mootness test for claims that arise during an election cycle but conclude before litigation can reach this Court. For example, *Storer v. Brown*, 415 U.S. 724 (1974), considered a constitutional challenge to a California ballot access law originally filed in advance of the 1972 election. Although the case did not reach this Court until 1973, this Court applied the "capable of repetition, yet evading review" doctrine, noting that "this case is not moot, since the issues . . . will persist as the California statutes are applied in future elections." *Id.* at 737 n.8.

In claiming this exception to mootness, a party must show that "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wisconsin Right to Life, Inc. ("WRTL"),* 127 S. Ct. 2652, 2663 (2007) (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998)). This Court has repeatedly determined that an election cycle is too short a period in which litigation can be reasonably expected to be resolved. *See Storer,* 415 U.S. at 737 n.8; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978) (same). As for the second prong, the recurring injury test, the FEC relies on *WRTL* to assert that a reasonable expectation of the same future injury is manifested where "the same controversy will recur involving the same complaining party." FEC Br. 20 (citing *WRTL,* 127 S. Ct. at 2663 (citation omitted)). In *WRTL*, however, this Court found that the FEC

requested "too much" when it argued that the WRTL organization "must establish that it will run ads in the future sharing all 'the characteristics that the district court deemed legally relevant.'" 127 S. Ct. at 2663 (citation omitted). Thus, Mr. Davis need not declare that he will conduct future campaigns in exactly the same manner as in previous election cycles to counter the FEC's assertion of mootness.

The FEC also omits the alternate recurring injury test articulated in *WRTL*, which permits a party to show that she is "subject to the threat of prosecution under the challenged law." *Id.* (citation omitted). Even absent his stated intent to run again, Mr. Davis faces potential prosecution and penalties under Section 319 for his alleged failure to comply with the law's disclosure requirements during the 2004 election. Obviously, this Court's favorable resolution of his claims would remove the threat of prosecution.

Finally, the FEC's mootness claim ignores Mr. Davis's attempt to expedite litigation of this case pursuant to BCRA § 403(a)(4). *See* Davis Br. 4-5. The FEC's opposition to the motion to expedite, the district court's denial of that motion, and the 14 month delay between filing and the district court's decision thwarted this effort. Indeed, the FEC actively pursued its action relating to the 2004 campaign until Mr. Davis filed his notice of appeal with this Court. *See* Davis Br. App. 10a (agreement to hold claim in abeyance pending final resolution). Both BCRA § 403(a)(4) and the opinion in *WRTL* recognize the need for claims to be "expedited 'to the greatest possible extent.'" *WRTL,* 127 S. Ct. at 2662 (citation omitted). To punish Mr. Davis for the district court's failure to follow this mandate would undermine BCRA's command for swift adjudication.

B. Both the imminent threat of prosecution by the FEC and the harm imposed by Section 319 confer standing on Mr. Davis. His decision to personally finance his 2008 federal campaign will, of course, expose him to Section 319's regulations, burdening his speech and providing his opponents with significant financial and informational benefits. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), this Court held that the possibility that protected speech could be chilled by a particular statute in the future was enough to confer standing on a party to challenge the law: "We have fashioned this exception to the usual rules governing standing . . . because of the ' . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper calculation.'" *Id.* at 486-87 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (citation omitted).

Moreover, the FEC has demanded a $251,000 civil penalty in its enforcement action against Mr. Davis. Davis Br. App. 8a. *Dombrowski* states that a chilling effect on the exercise of protected speech "may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. The FEC's pending action and the attendant threat of prosecution is sufficient to confer standing on Mr. Davis for his current claims and to rebut any charge that his claims are moot. *See WRTL,* 127 S. Ct. at 2662 (citation omitted).

VI. SECTION 319'S DISCLOSURE AND CONTRIBUTION PROVISIONS ARE PART OF AN INTEGRATED REGIME THAT IS NOT SUSCEPTIBLE TO SEVERANCE.

Congress enacted Section 319 as an integrated provision designed to stymie personal expenditures in House elections. The FEC rests both its constitutional analysis and its claim that Mr. Davis lacks standing on its bisection of Section 319 into separate disclosure and contribution provisions. That neither part can function separately, however, indicates that Congress intended Section 319's disclosure and extra-limit contribution provisions to operate as one. *See generally Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent.").

This inquiry is "well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley*, 424 U.S. at 108). *See also Rita v. United States*, 127 S. Ct. 2456, 2483 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment) ("The judicial role when conducting severability analysis is limited to determining whether the balance of a statute that contains an unconstitutional provision is capable 'of functioning independently.'") (citation omitted).

The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended in 1974, Pub. L. No. 93-443, 88 Stat. 1263 ("FECA") does contain a severability clause affirming the continued

validity of the Act should any particular *provision* be struck down. *See* 2 U.S.C. § 454; *see also* BCRA § 401. However, no other provision intertwines disclosure requirements with contribution limits. Compare 2 U.S.C. § 432 (general political committee organization and recordkeeping) and § 434 (reporting requirements) with the contribution limitations set forth in 2 U.S.C. § 441a. Section 319, by contrast, is codified in a single provision of the United States Code at 2 U.S.C. § 441a-1. Subsection (a) of that provision details the availability of the extra-limit contributions and subsection (b) addresses the notification of personal expenditures triggering those benefits.

Moreover, invalidation of either subsection would prevent Section 319 from achieving Congress's intended effect. The disclosure regime facilitates a candidate's receipt of benefits under the increased limits. This reporting requirement has no independent informational value to the electorate because, as the FEC repeatedly acknowledges, candidates "ultimately" report the same information about personal expenditures and loans on regular quarterly and pre- and post-election reports. *See* FEC Br. 5, 49, 50, 52. Similarly, without access to contemporaneous data about personal spending, candidates could not take prompt advantage of any extra-limit contributions available under the statutory formulae. In fact, Section 319 authorizes receipt of these contributions only after the "candidate has received notification of the opposition personal funds amount." 2 U.S.C. § 441a-1(a)(3)(A)(i). Thus, the legislative construction of Section 319 indicates that the two subsections of the statute function as a whole, and any constitutional or standing analysis should reflect that structure.

CONCLUSION

For the foregoing reasons and those stated in Mr. Davis's opening brief, this Court should find that Section 319 violates the Constitution and remand the case for appropriate declaratory and injunctive relief consistent with this Court's decision.

Respectfully submitted,

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