No. 07-320

In The
Supreme Court of the United States

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

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

Brief of Amici Curiae James Madison Center for Free Speech and Citizens United Supporting Appellant

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Questions Presented

1. Whether the reporting requirements of § 319 of the Bipartisan Campaign Act of 2002 ("BCRA"), 116 Stat. 109 (codified at 2 U.S.C. § 441a-1) ("Self-Funding Candidate Provision"), unconstitutionally burden free speech.

2. Whether the raised contribution limits of the Self-Funding Candidate Provision unconstitutionally burden free speech.

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Statement of Interest[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

Citizens United is a nonprofit (§ 501(c)(4)) Virginia

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[1]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 amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

corporation with its principal office in Washington, D.C. Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. A principal means by which Citizens United fulfills its purposes is by producing documentary films. Citizens United joins this brief to advocate for free expression.

Summary of Argument

The district court decided that "Davis's First Amendment facial challenge fails at the outset because the Millionaires' Amendment does not 'burden[] the exercise of political speech.'" JS-App. 9a (citation omitted in original). This is erroneous because this Self-Funding Candidate Provision (*see infra* at n.3) imposes cognizable burdens on core political speech that trigger strict scrutiny.

The reporting requirements by themselves create cognizable burdens on a self-funding speaker. This adversely-affected candidate is forced to suffer the burdens of *unilateral* (1) long-range, advanced disclosure of strategic campaign funding information, (2) 24-hour disclosure of strategic expenditure information, (3) heightened risk of investigation and penalties, and (4) heightened recordkeeping and reporting.

Since *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), this Court has recognized that "compelled disclosure, in itself," creates a sufficient burden to require "exacting scrutiny." In *Buckley* and subsequent precedents, this Court has made clear, including in the disclosure con-

text, that "exacting scrutiny" means strict scrutiny, under which the government must show that a First Amendment burden is narrowly tailored to a compelling interest.

The reporting requirements fail strict scrutiny because (a) no anti-corruption interest is at issue since spending one's own money is non-corrupting and since Congress *raised* contribution limits for the candidate speaking with other people's money; (b) no informational interest may be considered because reporting is unilateral, making any assertion of interest underinclusive; and (c) no equality interest is cognizable. Because the Amendment requires reporting in order to function, the unconstitutionality of the reporting requirements makes the Self-Funding Candidate Provision entirely unconstitutional.

The raised contribution limits also unconstitutionally burden the self-funding candidate. The First Amendment requires that any burdens on free speech rights be viewed from the adversely-affected person's perspective. Two candidates vying for office are in a zero-sum competition, so benefits to one adversely affect the other. The district court was wrong in saying that there was no burden on the self-funding candidate, only a benefit to his opponent. The self-funding candidate suffers a cognizable First Amendment burden where—based on his expenditures of his own money for his own speech—the government rewards his opponent with the unilateral opportunity to receive substantial additional contributions from contributors who have already contributed at the level at which the government has asserted an interest in reducing quid-pro-quo corruption or its appearance.

This burden on the adversely-affected candidate fails strict scrutiny because (a) it is unsupported by any anti-corruption interest, (b) precedent precludes the equality interest on which the Amendment relies, and (c) no compelling interest in promoting a public-funding scheme exists or is at issue.

Argument

There are burdens at issue here. The district court erroneously decided that "Davis's First Amendment facial challenge fails at the outset because the Millionaires' Amendment does not 'burden[] the exercise of political speech.'" JS-App. 9a (citation omitted in original). But the reporting requirements of the Self-Funding Candidate Provision (or "Provision") [2] impose

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[2] ***Self-Funding Candidate Provision*** is a more neutral term than *Millionaire's Amendment* for BCRA § 319. And ***self-funding candidate*** is more neutral than *millionaire* as a term for the adversely-affected candidate, although the term must be understood in a context where both candidates may self-fund up to $350,000, and only the one who self-funds above that trigger is adversely affected by the Provision. Use of *millionaire* seems designed to tap social antipathy toward persons perceived to be wealthy. And it is flawed analytically.

Millionaire *status* is not the trigger. In a race the incumbent and challenger may *both* be millionaires and self-fund up to $350,000, but one funds her speech over the trigger amount with other people's money while her opponent feels the need for some self-funding above the trigger. A candidate need not even *be* a millionaire to loan, *see* 2 U.S.C. § 441a-1(b)(1)(A)(ii), his campaign committee more than $350,000 secured by "personal funds," which include "any asset." 2 U.S.C. § 431(26). It is easy to imagine a non-

four cognizable burdens. The raised contribution limits also impose a burden when properly viewed from the adversely-affected candidate's perspective. These burdens on core political speech trigger, and fail, strict scrutiny.

I. The Reporting Requirements Unconstitutionally Burden Core Political Speech.

The Self-Funding Candidate Provision depends on unilateral, compelled disclosure of strategic campaign information in order to function. Since the reporting requirements create burdens triggering strict scrutiny, which they fail, *see infra*, the whole Provision is unconstitutional, even without considering the raised contribution limits.

A. The Requirements Burden Free Speech.

The reporting requirements burden free speech because "compelled disclosure" is automatically a First Amendment privacy burden: "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. *Buckley* identified interests in protecting privacy

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millionaire challenger, lacking the incumbent's name recognition, who is willing to "bet the farm" as collateral to launch his campaign, expecting to regain the family farm by successful fundraising. This farmer hopes *not* to actually part with "personal funds," and might not. But he would yet be burdened by his opponent's increased contribution limits—even if that loan is quickly repaid. *See* FEC Adv. Op. 2003-31 (Dec. 19, 2003). Congress provided no provision for reducing contribution limit waivers when campaigns repay such loans—which would be required by strict-scrutiny narrow tailoring (if a compelling interest existed).

and in avoiding harassment of those associated with a group. *Id.* at 64-66.

This case also involves compelled disclosure and a First Amendment privacy right, but it is based on the candidate's free speech rights, not association. Compelled disclosure of private, strategic campaign information also violates the self-funding candidate's First Amendment right to engage in the "*effective* advocacy" that *Buckley* recognized as a candidate's right. *Id.* at 21 (emphasis added). *Cf. AFL-CIO v. FEC,* 333 F.3d 168, 177-78 (D.C. Cir. 2003) (compelled disclosure of "confidential internal materials" violates privacy right and "seriously interferes with internal group operations and effectiveness"). The fact that the disclosure is about reporting money does not alter the free-speech nature of the analysis because "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley,* 424 U.S. at 16. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19.

The reporting requirements impose four distinct burdens on a self-funding candidate's free-speech rights to privacy and effective-advocacy—whether or not they "chill" the self-funding candidate.

A "chill" is not required, although handicaps might well chill candidate contributions, loans, speech, and participation. The district court correctly "recogniz[ed] that electoral politics may be a zero-sum game in which a benefit conferred on one candidate is a disadvantage to his opponent," JS-App. 11a, but it then

erroneously declared that Davis "fails to address the only issue that might raise constitutional concerns: whether the benefit conferred chills political speech." *Id.* But handicapping burdens must be justified apart from whether a candidate is "chilled" from speaking or participation by them. For example, *Buckley* spoke of "chilling" resulting from vague laws, 424 U.S. at 40 n.47, and potential "chill and harassment" of contributors to unpopular groups resulting from compelled disclosure. *Id.* at 74. But in the relevant context of a limit on candidate expenditures, a "*handicap*" burden was cognizable, whether or not the candidate was chilled from participation: "[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." *Id.* at 56-57. A candidate might well be willing to assume the handicaps of the Provision presently at issue and run for office, as Davis did, but the willingness to assume unconstitutional handicaps does not make the burdens constitutional.[3]

The four distinct burdens imposed by the reporting requirements are unilateral. Nothing comparable is required of the opponent.

First, the Provision burdens the self-funding candidate by requiring him to provide long-range, advanced disclosure of strategic campaign receipt information.

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[3]Compare the situation of a defendant charged with illegal speech, e.g., under an obscenity statute, who may always raise a First Amendment defense even though he was obviously not chilled from speaking.

Cf. AFL-CIO, 33 F.3d at 178 ("substantial First Amendment interests in the disclosure of . . . internal materials that included "activities, strategies and tactics," *id.* at 177). Within 15 days of becoming a candidate, the candidate must file (with the FEC, the opposing candidate, and the opposing candidate's national party) a Declaration of Intent "stating the total amount of expenditures from personal funds that the candidate intends to make . . . that will exceed $350,000." 2 U.S.C. § 441a-1(b)(1)(B). The Declaration is filed on FEC Form 2 and signed under the penalties in 2 U.S.C. § 437g (investigations, enforcement actions, and fines and imprisonment for violations, including the submission of false, erroneous, or incomplete information)—a point that the Provision specially points out by including an atypical reference to the enforcement and penalty provision. *See* 2 U.S.C. § 441a-1(b)(3).

Only the self-funding candidate must disclose this strategic planning information about his campaign budget. Other candidates simply state "$0" on Form 2, revealing nothing about projected levels of spending (and nothing about their possible self-funding up to $350,000). Strategic information about projected resources and spending is closely protected by campaigns, which would never voluntarily disclose such information in advance because it would help the opposition. Candidates normally disclose receipts and expenditures (on FEC Form 3) in quarterly reports that can permit disclosure to occur up to 4 months *after* these transactions occur,[4] so that opposing campaigns

[4]Campaign committee receipts (or expenditures) on

must try to figure out an opponent's financial strength based on past (never projected) receipts. This requirement imposes a clear handicap on the self-funding candidate and also provides a disincentive to using his own money to speak.

Second, the self-funding candidate is burdened by the 24-hour expenditure disclosure requirements. Within 24 hours after he "makes or obligates to make," more than the trigger amount, he must file an "initial notification." 2 U.S.C. § 441a-1(b)(1)(C). Within 24 hours of each additional $10,000 of expenditures or obligations, another notification must be filed. 2 U.S.C. § 441a-1(b)(1)(D). These notifications (on FEC Form 10) must be filed with the FEC, the opposing candidate(s), and the opposing political party, and they require the strategic information of the "date and amount of each expenditure." 2 U.S.C. § 441a-1(b)(1)(E).

This reporting, both as to actual and planned expenditures (obligations), provides valuable information to an opposing candidate as to when major media buys and other readily-identifiable, big-ticket expenses are in the works—all long before they would be known under the regular reporting required of every candi-

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October 1 of a non-election year would not be disclosed until January 31, keeping the opposition in the dark as to available funds for four months. *See Instructions for FEC Form 3 and Related Schedules* at 3 (available at www.fec.gov). Other quarterly reports are due April 15, July 15, and October 15. *Id.* A 12-Day Pre-Election Report provides additional disclosure before primaries and general elections. *Id.* And a 48-Hour Notice of Last-Minute Contributions within 20 days of the election is required (FEC Form 6).

date. The self-funding candidate must make disclosures that might not have to be made otherwise for up to 4 months—the time that he will have to await information as to the date and amount of his opponent's expenditures. Information on spending is strategic information that a candidate would ordinarily keep private until all candidates are equally required to disclose their activities. These ongoing, unilateral disclosures of strategic information impose a clear handicap, and also disincentives, to self-funded speech.

Third, the self-funding candidate is burdened by a unilateral, heightened risk of investigation[5] and penalties triggered by the requirement of declaring how much a candidate intends to spend for the primary

[5]The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). This is particularly true with FEC investigations because "[t]he sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection." *FEC v. Florida For Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). *See also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (Because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the Commission's investigative authority is subject to "extra-careful scrutiny from the court."); *AFL-CIO,* 333 F.3d at 170 ("Commission investigations . . . frequently involve subpoenaing materials...'represent[ing] the very heart of the organism which the first amendment was intended to nurture and protect'. . . .").

and general elections. As noted above, the Provision atypically includes a specific reference to the penalties. *See* 2 U.S.C. § 441a-1(b)(3). FEC Form 2 includes the following caveat under the Declaration of Intent to Expend Personal Funds: "**NOTE:** Submission of false, erroneous, or incomplete information may subject the person signing this Statement to penalties of 2 U.S.C. §437g."

If the self-funding candidate ends up using more personal funds than he declared that he intended to spend many months ago, there will be questions as to whether he should be subjected to penalties for filing a false report. His opponent will want to know whether the self-financing candidate was trying to keep that strategic information from her, even though she has no parallel advanced disclosure obligation. A complaint and investigation are highly likely, in which the FEC will seek more private campaign information in the form of strategic plans and internal correspondence to determine if there is evidence to counter the declared intent. Dealing with all the requests made in an FEC investigation is time-consuming and costly, imposing a serious burden on the ability of a campaign to function. *See, e.g., AFL-CIO,* 333 F.3d at 172 (three-year investigation).

Yet given the vicissitudes of political campaigns, how can a self-funding candidate project, months in advance, how much money his campaign might need? Experience might help inform such a projection, but that would favor incumbents, not newcomer challengers. A candidate making a low projection might have simply been optimistic that more contributions from others would be forthcoming, but is at the same height-

ened risk for a complaint and investigation as if he had sandbagged his opponent. Only the self-funding speaker is forced to assume the burden of this risk.

Fourth, the self-funding candidate is burdened, not just by the disclosure of strategic information as described above, but also by doing heightened record-keeping and reporting not required of his opponent. While all campaigns must keep records of receipts and expenditures and disclose them in generally-applicable reports, the self-funding candidate must do more. The requirement to file another 24-hour report every time $10,000 is expended is especially problematic (apart from the compelled disclosure of strategic information discussed *supra*) because the too-low (and so not narrowly tailored) threshold requires continuous, contemporaneous reporting. In a race that runs to $2 million dollars in expenditures for a candidate, the repeat-reporting trigger would be just .5% of expenditures. Staff must be hired to do this burdensome compliance, which requires a substantial amount of time, and for which there are penalties for late or missing reports.[6]

These are four distinct burdens—in addition to the more general burden of compelled disclosure itself, with the concomitant loss of privacy rights—on the self-funding candidate's efforts to get his campaign

[6]The $10,000 expenditure reports do require the opposing candidate to file a 24-Hour Notice of Opposition Personal Funds Amount (FEC Form 11), calculating and reporting the extra funds that the candidate may receive. But this lesser reporting burden is offset for this candidate by the benefit of the raised contribution limits. Nothing provides compensation for the self-funding candidate's handicaps.

message out. These handicaps make it clear that the Self-Funding Candidate Provision burdens his First Amendment rights to free speech and effective advocacy. They are handicaps that might also chill candidate speech and participation, although the handicaps alone are enough to establish a burden regardless of whether the candidate is chilled, and a chill is unnecessary to trigger strict scrutiny. As shown next, these burdens trigger strict scrutiny.

B. Strict Scrutiny Is Required.

The reporting requirements are "compelled disclosure," which, "*in itself*, can seriously infringe on" First Amendment rights. *Buckley*, 424 U.S. at 64 (emphasis added) (collecting cases). Since the First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech," and this "'guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" *id.* at 15 (citation omitted), how may government violate one candidate's First Amendment privacy and effective-campaign rights to be free from burdensome compelled speech disclosing campaign plans and activities? An election-related disclosure requirement must clear two hurdles to escape the First Amendment's prohibition.

First, it must be "unambiguously campaign related." *Id.* at 81.[7]

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[7] *Buckley* established this Court's "unambiguously campaign related" requirement as a separate test *in addition to* "exacting scrutiny": "We *also* have insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 64 (emphasis added; footnotes and cita-

Second, an election-related disclosure requirement must survive strict scrutiny. *Id.* at 64, 66. *Buckley* used "*exacting scrutiny*" as a synonym for "strict scrutiny":

> We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. [*Id.* at 64 (footnote and citations omitted).]

Buckley and subsequent precedent make clear that "exacting scrutiny" means "strict scrutiny."

In *Buckley*, it was clear, by the term "exacting" and the rejection of mere "legitimate" interests, that strict scrutiny was intended. *Id.* This Court expressly described "exacting scrutiny" as "[t]he strict test." *Id.* at 66. And it included a discussion of "least restrictive means," *id.* at 68, a hallmark of strict scrutiny. *See*,

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tions omitted). In applying the unambiguously-campaign-related requirement, this Court held that disclosure must be "unambiguously related to the campaign of a particular federal candidate," *id.* at 80, so that "the relation of the information sought to the purpose of the Act [is not] too remote" and "impermissibly broad." *Id.* at 80. This Court said that the requirement assures that the compelled disclosure is properly related to "[t]he constitutional power of Congress to regulate federal elections." *Id.* at 13 (footnote omitted). A law that survives this threshold test (as does the one at issue here) must yet be narrowly tailored to a compelling governmental interest, such as preventing quid-pro-quo corruption.

e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Moreover, this "exacting scrutiny" is stricter than *Buckley*'s scrutiny for contribution limits, in which the government must show "a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25.

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (dealing with disclosure), this Court expressly equated "exacting scrutiny" with strict scrutiny: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). *McIntyre* termed this "the strictest standard of review." *Id.* at 348. Note the further use of synonyms when *McIntyre* equated "overriding state interest" with compelling interest. *Id.* at 347.

The *Bellotti* decision to which *McIntyre* referred also plainly equated "exacting scrutiny" with strict scrutiny:

> [E]xacting scrutiny [is] necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," "and the burden is on the Government to show the existence of such an interest." Even then, the State must employ means "closely drawn to avoid unnecessary abridgment."

Id. at 786 (citations omitted). Note the further use of synonyms as *Bellotti* equated "subordinating interest" with compelling interest, and "closely drawn" with narrowly tailored, *id.*, and then proceeded to equate "critical scrutiny" with strict scrutiny. *Id.*[8]

McConnell v. FEC, 540 U.S. 93 (2003), neither addressed nor altered the precedential standard of review. It did speak of the "important" interests identified in *Buckley*:

> We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA. [*Id.* at 196.]

But, given the facts that (1) *McConnell* was not addressing or deciding the standard of review, (2) the cited *Buckley* decision was applying strict scrutiny, and (3) this Court often uses synonyms for analytical terms, nothing can properly be read into *McConnell*'s use of "important."

Nor can a new standard of review be properly read into *McConnell*'s statement that "disclosure require-

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[8]Lower courts have concluded that compelled disclosure requires strict scrutiny. *See AFL-CIO,* 333 F.3d at 176 (*Buckley* "conclud[ed] that the disclosure requirements . . . survived strict scrutiny"); *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) ("we subject California's disclosure requirements to strict scrutiny").

ments are constitutional because they "'d[o] not prevent anyone from speaking.'" 540 U.S. at 201 (citations omitted). The statement was not in the context of discussing the applicable scrutiny. *McConnell* was not purporting to alter the controlling standard of review. And such language could not constitute a test because it would grant Congress carte blanche for *any* disclosure scheme—regardless of interest, tailoring, or burden—so long as it does not "prevent" speech. If mere non-prohibition were the test, then *McConnell*'s own identification of "important state interests," *id.* at 196, was an unnecessary, meaningless analysis.

In sum, the reporting requirements impose distinct, constitutionally-cognizable burdens in the form of violations of a candidate's First Amendment rights to free speech, informational privacy, and effective campaigning. These are unconstitutional handicaps, which might also chill speech and participation, that are cognizable burdens regardless of whether the candidate is chilled. Strict scrutiny of the reporting requirements is required. As shall be shown next, those requirements fail strict scrutiny.

C. The Requirements Fail Strict Scrutiny.

Strict scrutiny requires a compelling interest to justify the First Amendment burdens. The three possible interests, i.e., anti-corruption, informational, and equality,[9] are examined next and found lacking.

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[9]The assertion that the reporting requirements are necessary to implement the Provision fails strict scrutiny. Both means and ends must be constitutionally permissible or else any means could be imposed to achieve some arguably permissible end. While the end sought here (purported

1. No Anti-Corruption Interest Applies.

No interest in limiting corruption justifies the reporting requirements. *Buckley* upheld $1,000 limits on contributions to candidates, deciding that an interest in "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions," 424 U.S. at 26, was "a sufficiently important interest," *id.* at 25, to justify the "abridgement of associational freedoms." *Id.* But no anti-corruption interest is cognizable in the present strict-scrutiny, free-expression context.

There is no quid-pro-quo corruption as to the self-funding candidate's speaking with his own money because *Buckley* held that a candidate cannot corrupt himself. *Buckley* expressly recognized this in striking down limits on a candidate's expenditures: "[T]he prevention of actual and apparent corruption of the political process . . . does not support the limitation on the candidate's expenditure of his own personal funds." *Id.* at 53. "Indeed," the Court added, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks to which the Act's contribution limits are directed." *Id.*

As to the raised contribution limits that the self-

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equality) is itself unconstitutional, *see infra*, the burdens imposed by the means must also be independently justified by the government under strict scrutiny.

A corporate-form interest has been found compelling in some campaign-finance contexts, *see, e.g.*, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), but that interest is inapplicable in this context.

funding candidate's opponent receives (which could not corrupt the self-funding candidate), there is also no cognizable corruption interest because the contribution limits are being *raised*. Waiving is not asserting.[10] Permitting liberty of contribution is not in itself corrupting.

The reporting requirements are not about third-party contributions, which are the source of potential corruption. They have nothing to do with a quid-pro-quo corruption interest on either side of the election contest. So the corruption interest cannot justify the First Amendment burdens that the reporting requirements impose.

2. No Informational Interest Applies.

The burdens of the reporting requirements cannot be justified with an informational interest. The general

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[10]The setting of a contribution limit is the government's assertion that candidates might be "bought" above this price. Since the government has raised the contribution limits, it has necessarily decided that the opponents of self-funding candidates can't be "bought" at the usual rate that it believes to apply. Unlike usual candidates, these moral paragons won't exchange financial quids for legislative quos, so the usual anti-corruption interest is waived. The government does not explain why these candidates are less susceptible to corruption by the sole reason of having an opponent who is spending inherently non-corrupting funds. One might rather expect that these candidates would be extra-grateful to those who came to their aid at a rate much beyond the usual going rate for contributions. In any event, for present purpose, raised contributions are a clear indication that the government perceives little or no risk of quid-pro-quo corruption in such situations.

disclosure requirements that apply to all candidates, e.g., quarterly reports of contributions and expenditures and special pre-election reports, were approved in *Buckley* on the basis of three interests advanced by disclosure: (1) informing the electorate, (2) preventing corruption, and (3) collecting data to detect violations of contribution limits. 424 U.S. at 66-68. None of these is applicable to support the special reporting imposed on a self-financing candidate. The second and third interests can be immediately dismissed because no anti-corruption interest applies, *see supra*, and none of the data required to be reported has any application to detecting circumvention of contribution limits.

The first interest, the informational interest, is not cognizable because the required reporting is underinclusive as to that interest. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose.") While the self-funding candidate must provide long-range, private, strategic information about his campaign's funding, his opponent need not reveal anything about the planned level of her campaign funding. While the self-funding candidate must report within 24 hours of expending over $350,000, and each $10,000 thereafter, his opponent can sit back and wait to disclose her spending at the next quarterly (or other scheduled) report, keeping him in the dark about her activities. If Congress really had an interest in providing the public with the infor-

mation that these reporting requirements provide, then it would also require the non-self-funding candidate to disclose long-term, advanced information about her campaign's intended funding level along with 24-hour reporting of expenditures aggregating $10,000. The government's failure to do so means that it is not really asserting an interest in informing the public. Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly." *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

In any event, the public will receive full information about campaign contributions and receipts in the less-restrictive quarterly and pre-election reports that both candidates must file, so the special, unilateral disclosure requirements are redundant as to any public informational interest. Any asserted informational interest would be "insubstantial because voters may identify [the relevant information] under [other] provisions. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981). "It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

3. No Equality Interest Applies.

The burdens of the reporting requirements cannot be justified with an equality interest. This Court rejected such an interest in *Buckley*: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amend-

ment . . . ." 424 U.S. at 48-49. This principle was stated in the context of striking down a statutory limit on independent expenditures by persons or groups in support of, or opposition to, candidates. The Court repeated its rejection of an equality principle: "The First Amendment's protection against government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. Again the Court declared that "[n]either the voting rights cases nor the Court's decision upholding the . . . fairness doctrine support [the] position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." *Id.* at 49 n.55.

Buckley again rejected an equality interest when it struck down an expenditure limit on a candidate's use of his own money to campaign: "[T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. The Court provided an additional rationale that should guide the present analysis: "[T]he limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts." *Id.* "Indeed," the Court concluded, "a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign." *Id.*

In short, the people—potential contributors and

voters—are the ones to evaluate and possibly act on equality principles, not Congress. "[G]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791 n.31. "The First Amendment rejects the 'highly paternalistic' approach," *id.* (citation omitted), which the assertion of an equality interest constitutes. And the people receive the information they need for their consideration of equality factors from the ordinary quarterly and near-election candidate reports required of all candidates. And only the people may take into account all of the myriad factors that must be considered to even attempt to level the playing field for candidates—factors that extend far beyond personal financial resources, or incumbents' war chests to such intangibles as name recognition, fame, family history, connections, appearance (overly or inadequately photogenic), communication skills, endorsements, etc.

If there is any doubt left that equality may not be considered, note that this Court again rejected the equality rationale in *McConnell*. The Court noted that "equal resources," or "equalizing," is "not . . . a legally cognizable right." 540 U.S. 227. And it cited, inter alia, *Buckley*. *Id.* (citing 424 U.S. at 48).

As may be seen from the foregoing Part I analysis, the reporting requirements impose distinct burdens, so strict scrutiny is required, which the requirements fail. The Court need go no further because without the reporting requirements the Self-Funding Candidate Provision cannot function and should be struck in its entirety.

II. The Raised Contribution Limits Unconstitutionally Burden Core Political Speech.

The Self-Funding Candidate Provision allows the opposing candidate's contribution limits to be tripled if her opponent's personal funds for his campaign exceed $350,000. 2 U.S.C. § 441a-1(a)(1).[11] Should her "aggregate amount of contributions previously accepted and party expenditures previously made under the increased limits . . . exceed[ ] 100 percent of the opposition personal fund amount," she ceases to enjoy the raised limits. 2 U.S.C. § 441a-1(a)(3)(A). Likewise, if his opponent withdraws from the race, the limits return to the original $2,300. 2 U.S.C. § 441a-1(a)(3)(B).

For the raised limits to violate the First Amendment, they must unconstitutionally burden speech. *Buckley,* 424 U.S. at 44. Because Davis is adversely affected by the raised contribution limits that impose a cognizable burden on core political speech, the limits must satisfy strict scrutiny. Because they do not, the limits should be declared facially unconstitutional.

A. The Adversely-Affected Person's Perspective Is Paramount.

The First Amendment protects the free-speech rights of citizens from governmental restriction "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). At its core it protects those whose free-speech rights are adversely affected by the law and requires

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[11] Coordinated expenditure limits are also waived. 2 U.S.C. § 441a-1(a)(1)(C).

that any analysis of its violation be viewed from the perspective of the adversely-affected party.

This Court's decisions have recognized this requirement. *Buckley* upheld contributions limits because they did not have "any dramatic adverse effect on the funding of campaigns and political associations," that is, those who sought to have their rights protected. *Id.* at 21. Likewise, this Court struck down as unconstitutional compelled disclosures in *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) because they "adversely affected" the NAACP and its members' ability to "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. *See also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73-74 (1990) (determining that employment promotion, transfer, recall, or hiring decisions adversely affected employees such that they burdened free speech and were subject to strict scrutiny).

Adhering to the requirement of employing the adversely-affected party's perspective is of particular importance in the context of elections and campaigns. As discussed above, *supra* Part I.A., campaigns involve core political speech in a closed environment that is fundamentally a zero sum game. As the Eighth Circuit has aptly stated, "to the extent that a candidate's campaign is enhanced by the operation of the statute, the [opposing] political speech of the individual or group who made the independent expenditure . . . is impaired." *Day v. Holahan,* 34 F.3d 1356, 1360 (8th Cir. 1994). Because fundamental speech rights are at stake, the proper evaluation of those rights is critical to a just and proper result.

The district court below relied on public-funding

cases that disregard the First Amendment's core requirement. *See* JA-9a-13a. Those cases involve similar triggers with correlating disclosure requirements that modify either the spending or contribution limits of a class of candidates. But those cases are inconsistent with the First Amendment's requirement and this Court's jurisprudence regarding the proper perspective from which to review a purported speech injury—that of the adversely-affected party.

In *VoteChoice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993), the court reviewed Rhode Island's contribution "cap gap" that doubled the contributions a public-funding participant could receive from a person or PAC in a given year if triggered. *Id.* at 30. The court held that the cap gap was merely a part of Rhode Island's voluntary public-funding scheme and neither penalized nor coerced candidates into participating. *Id.* at 39. The court disregarded the effect the scheme has on the nonparticipating candidate, noting in passing that the "non-complying candidate suffers no more than a countervailing denial" of a benefit and focusing instead on the "rough proportionality" of burdens and benefits on those who participate in the scheme. *Id.*

The First Circuit affirmed its *VoteChoice* rationale in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), upholding Maine's public-funding scheme. *Id.* at 472. The scheme provided matching funds to participants (made possible by reporting requirements of independent expenditures in excess of $50) and reduced contribution limits for nonparticipants to between $250 and $500, depending on the office sought. *Id.* at 451-52. The court was dismissive of any adverse affect on the

complaining party, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s] censure or penalty," *id.* at 464, and focuses on the voluntary nature of the scheme. *Id.* at 466-67.

Daggett expressly discounts the rationale of *Day v. Holahan,* 34 F.3d 1356, notably omitted by the present district court below. *Daggett,* 205 F.3d at 464. In *Day*, a public-funding scheme that afforded matching funds based on the independent expenditures of both the nonparticipating candidate and third parties supporting that candidate was challenged. The Eighth Circuit struck down the scheme as a content-based burden that chilled speech and failed strict scrutiny. *Id.* at 1360-61.

In a subsequent Eighth Circuit decision, *Rosenthiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), the court held that Minnesota's public-funding scheme, with its $50 contribution refund to taxpayers giving to candidates participating in the scheme, was not coercive and, thus, did not burden First Amendment rights. *Id.* at 1552-53. It distinguished *Day* on factual grounds and adopted the rationale of *VoteChoice*, contending that because the public-funding scheme involved an exchange of voluntary restrictions for a benefit, it was not coercive. *Id.* at 1550-51.

Similarly, the Sixth Circuit in *Gable v. Patton,* 142 F.3d 940 (6th Cir. 1998) adopted *VoteChoice*'s rationale to uphold Kentucky's $2-for-$1 matching provision for public-funding participants because the court could not determine whether the scheme clearly was coercive. *Id.* at 948-49.

These decisions, with the exception of *Day*, adopt an approach that is fundamentally flawed in two ways:

They do not properly evaluate the First Amendment burden from the perspective of the adversely-affected party, and they improperly assume that the nonparticipant can only be burdened if he or she is effectively coerced to participate.[12]

Instead of evaluating the specific circumstances of the challenged provision's adverse effects on a party, these courts have instead opted to generally evaluate the voluntariness of the scheme. In doing so, they dismiss these adverse effects as mere benefits to a participating opponent, even though it is clear that the benefits participating candidates receive are to the clear detriment to the nonparticipant. *See VoteChoice,* 4 F.3d at 38 ("whether Rhode Island's system . . . imposes a penalty . . . [or] confers a benefit . . . [is] comparable to bickering over whether a glass is half full or half empty.") Yet by doing so, they release free speech analysis from its foundational moorings to unnecessarily develop a novel jurisprudence for a deeply-rooted right. Only in such a circumstance could the district court conclude that raised limits "place[d] no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth" but instead "provides a benefit to his opponent." JS-9a.

When framed properly, it is clear that Davis is adversely affected by the raised limits. His opponent enjoys higher contribution limits than Davis merely because Davis decided to spend in excess of $350,000 of his own funds on his campaign. This disadvantages his ability to advocate on his own behalf as a candi-

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[12]A discussion of burden analysis can be found *infra* Part II.B.

date—an adverse effect on his political speech.

B. The Raised Limits Burden Core Political Speech.

Of course, an adverse effect of a law must also be a cognizable burden on free speech. *See Berkeley,* 454 U.S. at 295-96. Here, the adverse effects on self-funding candidates are a burden on core political speech.

The right to self-fund has been afforded substantial protection by this Court:

> [I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Buckley, 424 U.S. at 52-53. Candidates can be chilled from either self-funding their own campaign from the outset or from funding their campaigns beyond the $350,000 trigger amount. Crucially, this makes the raised limits' burden involuntary: a candidate can (1) self-fund, and either be chilled from spending more than $350,000 or trigger the raised limits, benefitting his opponent and burdening his own campaign, or (2) forego self-funding completely and effectively self-censor to avoid the raised limits matter entirely.

Given that Davis would either forfeit or substantially encumber his free-speech rights regardless of the option he chose, one can hardly criticize him for self-funding his campaign. Yet the district court used this decision to conclude that Davis suffered no burden, stating that "[Davis] has failed to show that his speech has been limited in any way because of the benefits the

Amendment provides his opponent. In fact, Davis himself has *twice* elected to self-finance." JS-13a.[13] This myopic burden analysis mirrors the public-funding cases on which the district court relied, which required coercion in order for a recognized burden to exist.

The public-funding cases all held that non-participants are only unconstitutionally burdened by a public-funding scheme when the benefits and burdens that their participating opponent is subject to are so disparate as to have coerced them to participate. *See Gable,* 142 F.3d at 949; *Rosenthiel,* 101 F.3d at 1552-53; *Daggett,* 205 F.3d at 470-71; *VoteChoice,* 4 F.3d at 38-39. While it is true that such a circumstance would amount to a burden—a particularly egregious form of chill on those who might want to self-fund or raise their own funding—nothing in First Amendment jurisprudence suggests that coercion is the only legitimate burden. Moreover, these cases focus on whether there is a broadly coercive nature to the scheme, instead of evaluating the legitimacy of the specific claimed burdens placed upon the adversely-affected person before it.

This analytical shift substitutes for the preliminary question of whether an adversely-affected individual suffers a cognizable burden to his free speech rights a required generalized showing that the burdens and benefits of a scheme are so disproportionate as to be

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[13]The district court also concluded that because any burden Davis experienced is justified by legitimate interests, he suffered no burden. JS-12a-13a. This analysis confuses determining whether a burden exists with strict scrutiny itself.

coercive. This shifts the burden of proof away from those advancing the law, who traditionally must justify the infringement of a constitutional right, to the adversely-affected party, who must now show that his right is completely subverted by the scheme so that he is forced to become part of it. This is a particularly difficult task if the adversely-affected party is not part of that scheme, and it is contrary to this Court's jurisprudence.

Each of these public-funding cases purports to derive its analysis from *Buckley*. *Buckley* upheld a public-financing scheme that encouraged participation by giving free money to qualified participants in exchange for adherence to certain restrictions. 424 U.S. at 95. *Buckley* found public-funding to be constitutional because the trade-off that participating candidates made was voluntary. *Id*. In other words, the burden on the *participating candidate* was voluntarily agreed upon in exchange for a benefit.

By relying on *Buckley* as they did, the public-funding cases illogically extend this Court's consideration of a voluntary relinquishment of a right to more elaborate schemes that involve matching funds and impose disclosure requirements on those not participating in the scheme. These cases all involve public-funding schemes that have matching funds contingent on the amount spent by their nonparticipating opponent. They also place additional burdens on non-participants and, in some cases, those making independent expenditures, through elaborate reporting requirements in a purported effort to ensure the success of the public-funding scheme. *See, e.g., Daggett,* 205 F.3d at 465 (discussing Maine's $50 reporting

requirements). *See also Jackson v. Leake,* 476 F. Supp. 2d 515, 523-24 (E.D.N.C. 2006), *on appeal sub nom. Duke v. Leake,* No. 07-1454 (4th Cir. 2007). Yet these cases neglect to adequately weigh these additional burdens placed upon nonparticipants, burdens that were not part of the *Buckley* court's analysis in upholding the public-financing scheme before it. They emphasize the purported voluntariness of participation in the fund in an effort to tie their analysis to *Buckley*, all the while imposing a coerciveness standard that affords all but the most egregious burdens on free speech a free pass.

Yet the logical extension of *Buckley* is that any public-financing scheme (and any similar provisions) that involuntarily deprives a candidate of his right or unburdened ability to speak, regardless of his decision to participate, is unconstitutional or, at minimum, creates a cognizable burden subject to scrutiny. *See Buckley,* 424 U.S. at 95. Because the raised contribution limits substantially undermine Davis' right to speak, regardless of whether he self-finances, the raised limits burden core political speech.

C. The Raised Limits Fail Strict Scrutiny.

Unlike *Buckley*, which held that contribution limits restrict "one aspect of the contributor's freedom of political association," *Buckley,* 424 U.S. at 24-25, the present raised limits directly affect core political speech—the candidate's self-funded speech. So strict scrutiny applies.

Three possible interests might be served by the raised contribution limits: (a) an interest in equality, (b) an interest in promoting a public-funding scheme, and (c) an anti-corruption interest. The raised limits

serve none of these interests.

1. No Equality Interest Applies.

As discussed above, this Court has rejected an interest in equality as being compelling. *See supra* Part I.C.3. Even if such an interest were recognized as compelling, the raised limits do not legitimately serve this interest. First, the funds used to calculate when the raised limits are triggered include only those funds raised through December 31 of the prior year. 2 U.S.C. § 441a-1(a)(2)(B)(ii)(I). This inherently advantages incumbents, who, because they have run before and have significant connections, can raise money after that time with greater ease than a self-funding challenger, who lacks those advantages.

If the interest supporting this provision were truly in equality, the advantages incumbents enjoy would be included in the equation. It would take into account the advantages of holding office—an established staff, paid travel, franking privileges, media access—along with the benefits derived from having run for office before. But instead, the raised limits are underinclusive, targeting the one thing that is not necessarily inherent to incumbents and quite possibly the only advantage a challenger might have over an incumbent: wealth.

Moreover, in assessing whether a candidate is entitled to raised limits under the Self-Funding Candidate Provision, the provision fails to consider the circumstances surrounding a candidate's intent to spend in excess of $350,000. Raised limits are offered even in the circumstance where a candidate loans his campaign money with the hope of being reimbursed through fundraising at some later date. Non-millionaires, such as a farmer who puts up his farm as collat-

eral to run for office, or a candidate who, like Hillary Clinton, loans her campaign $5 million,[14] can trigger the increased limits through such a loan, even though not a penny of their own money may ultimately be spent towards their campaign. If the intent in providing raised limits was to only reach independently wealthy candidates, this oversight renders the raised limits overinclusive. The raised limits do not serve an equality interest.

2. No Public-Financing Interest Applies.

Despite the public-funding cases on which the district court relies, no public-financing scheme is involved in this matter that might serve to justify the raised limits. And public financing is only a legitimate, not a compelling, interest.

Buckley acknowledged a legitimate interest in public-financing because it was designed to avoid quid-pro-quo corruption. 424 U.S. at 96. Recognizing that the lower contribution limits asserted as necessary to minimize corruption were a burden, Congress sought to give the money directly to candidates who qualified for the funds. *Id.* The public-financing scheme before the *Buckley* court involved a voluntary bargain between the candidate and the government. *Buckley,* 424 U.S. at 95. No First Amendment burdens were in play, so a rational basis for the scheme was sufficient. First Amendment burdens are in play here. So only a

[14]The congressional decision to protect only senators and representatives and not presidential candidates indicates both an incumbent-protective motive and a lack of seriousness about the asserted equality interest, due to underinclusiveness.

compelling governmental interest would suffice.

While the creation of a public-financing scheme might be motivated to minimize quid-pro-quo corruption, the matching funds aspect of public-funding schemes shift the interest from corruption to equality, which is illegitimate. The same can be said of the raised limits here.

3. No Anti-Corruption Interest Applies.

Given that the raised limits are triggered by the exercise of a candidate's decision to self-fund his or her own campaign, any suggestion of quid-pro-quo corruption is unfounded. *See id.* at 96 ("the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving . . . candidates from the rigors of *soliciting private contributions*") (emphasis added). But the FEC has asserted below and the Congressional Record reflects that the raised limits oppose the perceived corruption of self-funding. *See* 148 Cong. Rec. S2153 (Mar. 20, 2002) (Sen. Domenici) ("The large number of extremely wealthy candidates who spend large amounts of their own money to finance their campaigns reinforces this perception. Many people believe that candidates are attempting to buy their way into office"). In other words, there is allegedly something inherently corrupt about self-funding that warrants its regulation.

This Court addressed the infusion of large sums of money into election campaigns in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990). The *Austin* court expressed concern with large amounts of corporate money being spent supporting a candidate and recognized that "[c]orporate wealth can unfairly in-

fluence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660. This was particularly troubling to the Court because the corporate form, as a creature of the state, was created in such a way that large sums of money could be amassed and then expended on campaigns in a manner not indicative of popular support. *Id.* While these effects might be of concern in the corporate context, such is not the case for self-funding candidates.

Self-funding candidates are not creatures of the state, but individuals. And because "the First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion," *Berkeley,* 454 U.S. at 296, self-funding candidates are entitled to the same protections as any other candidate.

Further, public support is not only measured by financial support, but ultimately through voter support. It is up to the people to weigh and balance personal wealth when voting for the most qualified candidate. *Austin*'s analysis should not be extended.

Conclusion

The Self-Funding Candidate Provision, with its reporting requirements and raised limits, adversely affects Davis and burdens core political speech. It does not serve a compelling interest and should be struck down.

Respectfully submitted,

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