

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JACK DAVIS, :

4 Appellant :

5 v. : No. 07-320

6 FEDERAL ELECTION :

7 COMMISSION :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, April 22, 2008

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:02 a.m.

15 APPEARANCES:

16 ANDREW D. HERMAN, ESQ., Washington, D.C.; on behalf
17 of the Appellant.

18 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf
20 of the Appellee.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-320, Davis v. The Federal Election Commission.

Mr. Herman.

ORAL ARGUMENT OF ANDREW D. HERMAN

ON BEHALF OF THE APPELLANT

MR. HERMAN: Mr. Chief Justice and may it please the Court:

This case involves the constitutional question of whether the government may regulate the personal spending of a candidate on behalf of his own campaign. This is an activity that constitutes political expression at the core of the First Amendment, yet BCRA Section 319 seeks to deter and, failing that, penalizes such protected political expression. Even if this Court finds that the harms upon speech of Section 319 are modest, the provision still fails to satisfy any constitutional standard. It furthers no legitimate governmental purpose and conversely increases the undue influence of contributions upon Federal candidates.

CHIEF JUSTICE ROBERTS: There is no restriction whatsoever on the wealthier candidate. He can spend as much of his money as he wants.

1 MR. HERMAN: That's correct, Your Honor.
2 The harm from Section 319 is that he is burdened from
3 the beginning of his campaign throughout every step with
4 the knowledge that any time he spends money he is going
5 to be providing his opponent with an advantage; he is
6 going to be enhancing his opponent's speech.

7 CHIEF JUSTICE ROBERTS: Well, what if, for
8 example, somebody takes out a television ad that says
9 smoking this type of cigarette is actually, is not
10 harmful to you. The government is free to take out a
11 contrary ad saying, no, it is and so you shouldn't do
12 it, right?

13 MR. HERMAN: Of course, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: So governmental
15 responses to the exercise of free speech are not
16 automatically -- don't automatically burden the exercise
17 of that speech.

18 MR. HERMAN: That is absolutely correct,
19 Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: Well then, why does
21 it burden it for the government to make it easier for
22 private citizens to respond to that speech.

23 MR. HERMAN: Well, Mr. Chief Justice, it's
24 making it easier for a self-financed candidate's
25 opponent to respond to that speech. In essence, what

1 Section 319 says is, we are going to make it easier for
2 your opponent to beat you.

3 JUSTICE SCALIA: Mr. Herman, can the
4 government respond to political speech? The government
5 can have a position on smoking cigarettes, it can have a
6 position on a lot of things, but can it have a position
7 on whether the Republican Party or the Democratic Party
8 should win the next election?

9 MR. HERMAN: Absolutely not, Justice Scalia.

10 JUSTICE SCALIA: Isn't that a distinction
11 here?

12 MR. HERMAN: Yes.

13 CHIEF JUSTICE ROBERTS: What case supports
14 that proposition?

15 MR. HERMAN: That the government cannot
16 take --

17 CHIEF JUSTICE ROBERTS: Government can't
18 engage in political speech.

19 MR. HERMAN: Your Honor, Buckley is on --
20 there is not anything --

21 JUSTICE GINSBURG: How is the government
22 speaking? You have already acknowledged that the
23 wealthy candidate can spend as much as he or she wants
24 and the end result of this scheme is that there will be
25 more, not less, speech because the non-affluent opponent

1 will now have money to spend that he didn't have before.
2 So I think you have to concede that overall the scheme
3 will produce more political speech, not less.

4 MR. HERMAN: Well, Justice Ginsburg, I can't
5 concede that, and this is the reason why. If Section
6 319 operates as it's intended to, it will deter
7 self-financed candidates from ever reaching that
8 \$350,000 threshold and triggering the, quote unquote,
9 "more speech." What it is really designed to do at
10 every single step --

11 JUSTICE GINSBURG: Has it done it? I mean,
12 we do have some experience under the statute now.

13 MR. HERMAN: We have very little experience
14 under the statute, Justice --

15 JUSTICE SOUTER: Well your clients -- wasn't
16 your client's latest filing that he intended to spend a
17 million dollars.

18 MR. HERMAN: For the 2006 campaign?

19 JUSTICE SOUTER: I think that's --

20 MR. HERMAN: That is correct.

21 JUSTICE SOUTER: So it didn't deter him.
22 You're in the position in which it clearly didn't deter
23 your client. He says, I'm going to spend three times as
24 much as the threshold figure, and there is no empirical
25 evidence that it's deterring anybody else.

1 MR. HERMAN: Well, Justice Souter, in fact
2 it did deter my client. If you look at his election in
3 its totality, his opponent spent over \$5 million.

4 JUSTICE SCALIA: Do we usually evaluate
5 restrictions on First Amendment rights on the basis of
6 whether the chill that was imposed by the government was
7 actually effective in stifling the right?

8 MR. HERMAN: No, Your Honor.

9 JUSTICE SCALIA: If the person goes ahead
10 and speaks anyway, is he estopped from saying that the
11 government was chilling his speech nonetheless?

12 MR. HERMAN: Absolutely not, Justice Scalia.

13 JUSTICE SCALIA: Isn't that's what's going
14 on here?

15 MR. HERMAN: Absolutely.

16 JUSTICE SOUTER: Don't we expect a chill
17 argument to at least have a ring of plausibility? And
18 your chill argument is that it is deterring. It didn't
19 deter your client. There is no indication that it would
20 deter anybody else and I have to say I don't see why it
21 would.

22 MR. HERMAN: Justice Souter, respectfully, I
23 don't think that you can categorically say that it did
24 not deter my client when he was outspent by \$3 million
25 in that campaign. As he went through the campaign

1 against his --

2 JUSTICE SOUTER: You mean if the -- if the
3 other side had not had an enhanced spending capacity,
4 your client would then have spent \$2 million?

5 MR. HERMAN: Your Honor, he actually did
6 spend \$2 million.

7 JUSTICE SOUTER: Whatever it is, I mean are
8 you saying that if the -- if the client -- if the
9 opposing party had not had an enhanced spending capacity
10 your client would have spent even more?

11 MR. HERMAN: Potentially. Potentially.

12 JUSTICE SOUTER: That seems to substantiate
13 the, at least the ostensible basis for this statute.

14 MR. HERMAN: Your Honor, if the basis for
15 the statute is to, quote unquote, "level the playing
16 field," to equalize the candidates, I haven't received
17 an explanation from the government or from the district
18 court that explains how a statute designed to do that
19 would have allowed my client's opponent to have raised
20 another \$1.4 million even though he had already outspent
21 my opponent by \$3 million.

22 JUSTICE ALITO: Is there any reason to think
23 that this statute will have any greater or different
24 effect of Mr. Davis in the upcoming election than it did
25 in the last election?

1 MR. HERMAN: There is, Justice Alito.

2 JUSTICE ALITO: Why?

3 MR. HERMAN: Because his incumbent opponent
4 from the last two elections has announced his retirement
5 and so Mr. Davis will now be facing very likely primary
6 challengers, and then if he were to prevail in the
7 primary he'll be meeting a non-incumbent challenger in
8 the general election as well. So it's an open seat.

9 And again, one of the great deficiencies of
10 319 is that it fails to take into account any of the
11 advantages of incumbency, not just the financial
12 advantages but the inherent advantage that each and
13 every incumbent brings to an election when he or she
14 runs for re-election, the fact that the incumbent has
15 much greater status as --

16 JUSTICE SCALIA: The government says that in
17 fact more and quite a bit more incumbents went over the
18 \$350,000 personal funding limits than non-incumbents.
19 Something like -- I don't know, 14-2 or something like
20 that in the last election, is that right?

21 MR. HERMAN: First of all, the statistics
22 here are incomplete because basically the briefing in
23 this case was concluded in early September of 2006,
24 before a lot of primaries occurred for the 2006 House
25 election. And so I think referring to those numbers --

1 the FEC has never -- we've never received any additional
2 numbers for the effect, but --

3 JUSTICE GINSBURG: But it was a four-year
4 record and the numbers are rather startling that -- is
5 it 110 senators or representatives qualified for the
6 enhanced contributions and only 6 of them were
7 incumbents?

8 JUSTICE SCALIA: Yes.

9 MR. HERMAN: The other number that was cited
10 is that only 2 of 60 incumbents actually triggered the
11 Millionaires' Amendment in those --

12 JUSTICE SCALIA: Of course, that could mean
13 that the millionaires have already been elected and are
14 now pulling up the ladder after them.

15 (Laughter.)

16 MR. HERMAN: That's certainly our argument,
17 Justice Scalia.

18 JUSTICE SCALIA: Right.

19 JUSTICE GINSBURG: Well, if that's so, one
20 of the reasons that has been given for this statute is
21 that it encourages the parties to favor the wealthier
22 candidates; it deters people who are non-affluent but
23 highly meritorious. So -- and it gives the public the
24 perception that the seats in our Congress are there to
25 be bought by the wealthiest bidder. And if there's

1 anything to that -- well, do you reject that out of hand
2 as what the statute is all about?

3 MR. HERMAN: Justice Ginsburg, I believe
4 that the -- the fact that the statute expands the
5 supposedly anti-corruptive \$2300 to \$6900 and allows a
6 national party to make coordinated communications of an
7 unlimited amount in response to the, what Buckley called
8 "ameliorative speech" by a self-financer, would also
9 increase the perception that -- that our candidates are
10 there to be bought. It seems to me that if Mr. Davis
11 had sat down and read all of this Court's jurisprudence
12 before he decided to run, he wouldn't have seen a word
13 in there about leveling the playing field.

14 JUSTICE GINSBURG: But I thought -- I
15 thought your brief -- and correct me if I'm wrong --
16 said at one stage that there is -- what Congress was
17 driving at is a valid concern, but there are less
18 restrictive alternatives. And I was trying to find what
19 those less restrictive alternatives were.

20 MR. HERMAN: Well, Justice Ginsburg, I can
21 think of one off the top of my head which is not this
22 case, and that's public funding. If Congress were truly
23 concerned about providing a boost to minor party
24 candidates who may not be able to raise the \$2300 to
25 begin with, much less take advantage of the benefits of

1 319, or wanted to boost self-financed candidates who,
2 say, like Mr. DeRossett in the amicus brief, in his
3 amicus brief, who mortgaged his house or others who have
4 encumbered their pensions and raised \$350,000 or
5 \$400,000 and then triggered the amendment, if they
6 wanted to foster all of those people of modest means to
7 participate, then the easiest way and the way sanctioned
8 by this Court in Buckley is to institute a public
9 funding system and allow them to choose. They can raise
10 private funds if they'd like; they could do it
11 personally with their own money; or they could take
12 whatever amount that the -- that the State was willing
13 to give them --

14 JUSTICE SCALIA: But that wouldn't level the
15 playing field. I mean, the other side, the millionaire,
16 won't take the public funding and he'll spend his
17 millions and whoever gets the public funding -- or are
18 you saying the public funding should match whatever the
19 other side pays?

20 MR. HERMAN: No, Your Honor --

21 JUSTICE SCALIA: Well then --

22 MR. HERMAN: But this Court's analysis in
23 Buckley -- the public funding analysis in Buckley does
24 not center on leveling the playing field or providing
25 equality for all candidates. It --

1 JUSTICE SCALIA: Do you think that's a valid
2 constitutional objective, to level the playing field?

3 MR. HERMAN: I --

4 JUSTICE SCALIA: Do you think we should
5 trust our incumbent senators and representatives to
6 level the playing field for us?

7 (Laughter.)

8 MR. HERMAN: Absolutely not, Justice Scalia.
9 And there's a reason why there's a distinction between
10 an anti-corruptive purpose and a
11 leveling-the-playing-field purpose. When Congress
12 legislates to deal with the actuality or appearance of
13 corruption, they are legislating uniformly and they're
14 not taking an interest in the outcome, in the
15 competitiveness. When they are talking about leveling
16 the playing field, one of the players on that playing
17 field are incumbent members of Congress. It's like
18 saying that we're going to trust basketball players not
19 -- to call their own out-of-bounds plays.

20 JUSTICE GINSBURG: But isn't there something
21 different between what the statute was at the time of
22 Buckley, that a lid on, you can't spend more than X
23 amount of money, and a statute that says we're going to
24 let you spend, the sky is the limit for you, but we're
25 going to give a boost to your opponent?

1 MR. HERMAN: Justice Ginsburg, in Buckley
2 there -- there was no lid on personal expenditures. The
3 Court struck down that aspect of Buckley and upheld the
4 public funding provision. So the Court was --

5 JUSTICE GINSBURG: I'm talking about the
6 statute as it was originally enacted by Congress did
7 have expenditure limits and this Court said that was no
8 good. This statute doesn't have that problem because it
9 doesn't put a lid on the candidates self-financing.

10 MR. HERMAN: That's correct, Your Honor.
11 But -- but again, if you're going to make a comparison
12 to the public funding system in Buckley that was
13 approved by this Court, that system was indifferent to
14 the -- the source or the amount of funds. All the Court
15 said there -- or the equality -- that that statute was
16 indifferent to whether the playing field was level. All
17 -- all Buckley said and all Congress said in enacting
18 the public funding was we want to take the allegedly
19 corruptive private funds out of the system, and we want
20 to replace it with public funds and --

21 JUSTICE ALITO: Even if -- even if leveling
22 the playing field is not generally a compelling or maybe
23 even a permissible interest, is it a stronger interest
24 when one of the reasons why the playing field is not
25 level is other action that Congress has taken? If there

1 weren't expenditure limits, then self-financed
2 candidates wouldn't perhaps have as much of an advantage
3 as they do. So if we accept the world in which
4 contribution limits are constitutional, it -- does that
5 provide a basis for Congress to try to rectify at least
6 in part what it itself has done by imposing the
7 contribution limits?

8 MR. HERMAN: Justice Alito, leveling the
9 playing field is -- I'm not quite sure how Congress
10 would start to do that without implicating their own
11 interest. When you say that you're going to level the
12 playing field, Congress has to look at the whole playing
13 field. They can't just carve out a section that applies
14 to other people and not talk about their interest in
15 leveling the playing field. I think it's a very
16 difficult road to go down.

17 JUSTICE SCALIA: What we're talking about in
18 leveling the playing field, I guess, is leveling the
19 amount of speech that each side has, to make sure that
20 each side has the same amount of speech. Is that -- is
21 that what's going on here?

22 MR. HERMAN: Well, it's an attempt to do
23 that. And again, in Buckley this Court said that --
24 that Congress has no interest in determining whether
25 speech is excessive or unwise or wasteful. That's --

1 that's ultimately the purview for the voters, and that's
2 really the fallacy in 319 at its heart, is there's no
3 such thing as secret self-funders. They will --
4 everything that they do is disclosed in the same way
5 that all other expenditures and contributions are
6 disclosed in quarterly and pre-election reports.
7 Certainly, in many cases, their opponents are going to
8 make the case that this wealthy person is out of touch,
9 they don't represent the district, your vote is not to
10 be bought. And then ultimately the voters will have the
11 determination on what kind of candidate they want.

12 JUSTICE SCALIA: Are we -- are we talking
13 wealthy people here? What's the average price of a home
14 in the United States? I think it's a good deal above
15 \$350,000, isn't it?

16 MR. HERMAN: It certainly is in this area
17 and in many congressional districts in the United
18 States. And that's a very good point, Justice Scalia.
19 This provision affects less -- about a quarter of what
20 it costs to run a competitive race in 2006. So
21 certainly it's not as if Congress said, well, if you
22 spend some disproportionate amount of money to a
23 congressional race, if you go ten times over what it
24 should cost, we're going to step in. They said --

25 CHIEF JUSTICE ROBERTS: You don't think that

1 would be any more constitutional than this, do you?

2 MR. HERMAN: I think it would be equally
3 unconstitutional, Mr. Chief Justice. But if you're
4 talking about the tailoring of the statute, I think that
5 that is certainly something that's relevant.

6 JUSTICE KENNEDY: I'd like to ask about the
7 provisions of the statute which allow the candidate who
8 doesn't have the personal funds -- what was the name of
9 the challenger in this case? Not Davis -- Reynolds?

10 MR. HERMAN: Tom Reynolds.

11 JUSTICE KENNEDY: Reynolds -- - to receive,
12 is it, unlimited contributions from his own party?

13 MR. HERMAN: He can receive up to 100
14 percent of whatever that OPFA number is -- the --

15 JUSTICE KENNEDY: Yes.

16 MR. HERMAN: -- the purported difference in
17 funds.

18 JUSTICE KENNEDY: Suppose you had a statute
19 which either explicitly said or has the effect, as this
20 does, that the less wealthy challenger, the challenger
21 in Reynolds' position, has more access and more support
22 from his party than the challenger does from his party?
23 What is your best case that indicates that that is
24 unconstitutional, and what is your argument that that is
25 unconstitutional?

1 MR. HERMAN: I'm sorry, Justice Kennedy?

2 JUSTICE KENNEDY: That concerns me in this.
3 What is your best argument that differential treatment
4 of the candidates vis-a-vis support from their
5 respective parties is unconstitutional?

6 MR. HERMAN: Well, again, Your Honor, if
7 you're making a distinction -- when you talk about the
8 --

9 JUSTICE KENNEDY: The statute makes that
10 distinction.

11 MR. HERMAN: Well, the statute talks about
12 the less wealthy candidate.

13 JUSTICE KENNEDY: And it seems to me that
14 that distinction is somewhat questionable, and I'm
15 asking you for your best statement of the theory as to
16 why it's unconstitutional and your best case to show
17 that it's unconstitutional.

18 MR. HERMAN: The best argument, Justice
19 Kennedy, is that money and speech are synonymous in an
20 electoral context, and it's inappropriate for the
21 government to say that you, as the purportedly wealthier
22 candidate, have too much speech; that that's enough
23 speech from you.

24 JUSTICE KENNEDY: But you make that argument
25 to the statute generally. Is there any more specific

1 argument that you can make in the context of the less
2 well-funded candidate having more support from the party
3 than the well-funded candidate had?

4 MR. HERMAN: Well --

5 JUSTICE KENNEDY: It seems to me that that's
6 a particular vice of the statute, and I want to know if
7 there is a formulation that's more precise than the
8 general attack that you made -- that you make.

9 MR. HERMAN: I --

10 JUSTICE GINSBURG: Could you clarify with
11 respect to that question two things: The party is not
12 at liberty to give anything it wants. You explained
13 that it would be -- it's tied to that formula. So the
14 wealthy person could still have a lot more to spend.
15 But the party also is -- there's no obligation of the
16 party to give one cent to anybody that it doesn't choose
17 to give money to; is that right?

18 MR. HERMAN: No, Justice Ginsburg. Of
19 course, the party would have to make a determination if
20 they felt that this person was --

21 JUSTICE KENNEDY: But the party for the less
22 well-funded candidate has the option to have much closer
23 ties, much greater involvement, than the party for the
24 other candidate; and that seems to me highly
25 problematic. And I want to know the best case that you

1 have for that proposition and the best statement of law
2 that can you give me for why that is unconstitutional.

3 MR. HERMAN: Well, Justice Kennedy, if you
4 refer to Colorado II, where this Court talked about the
5 facts that -- where this Court upheld limitations on
6 party, unlimited party- coordinated communications,
7 because that -- allowing the party to do so would raise
8 the possibility of evading the contribution limits. And
9 so accordingly they upheld the 42 -- the \$42,000 limit
10 on coordinated communication.

11 CHIEF JUSTICE ROBERTS: Counsel, you said
12 earlier that money is -- money is speech in this area.
13 So I take it you think that the restrictions, otherwise
14 applicable restrictions on the less wealthy candidate,
15 raise problems under the First Amendment?

16 MR. HERMAN: Yes, Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: So this law eases
18 those problematic restrictions. It's less violative of
19 the First Amendment.

20 MR. HERMAN: It is less violative of the
21 First Amendment, but, again, this Court has made the
22 distinction between contribution limits, which it found
23 was a reasonable burden on the Constitution, and
24 expenditure limits, which -- which are not. This --

25 JUSTICE SCALIA: It doesn't limit those

1 restrictions on your candidate.

2 MR. HERMAN: It does not limit the
3 restrictions.

4 JUSTICE SCALIA: It simply makes the
5 imposition of the restrictions uneven.

6 MR. HERMAN: That is, that is correct. But
7 --

8 CHIEF JUSTICE ROBERTS: Well, but your
9 candidate isn't subject to any restriction at all on
10 what he can spend and his opponent is subject to less
11 restrictions. It seems to me the First Amendment comes
12 out better.

13 MR. HERMAN: He is -- my candidate, my
14 client, is subject to restrictions. The statute in its
15 entirety --

16 JUSTICE STEVENS: Why can't he go out and
17 raise funds? Does the statute prohibit him from raising
18 funds from third parties?

19 MR. HERMAN: Absolutely not, Justice
20 Stevens. But for many -- for many self-financed
21 candidates, the fact that --

22 JUSTICE SCALIA: Doesn't it prohibit -- I
23 thought it prohibited him from raising funds in the
24 amount from as wealthy donors as his opponent can now go
25 to? Don't those limits on contributions continue to

1 apply to him?

2 MR. HERMAN: The contribution limits apply
3 to him as they would to any other candidate except for
4 his opponent.

5 JUSTICE KENNEDY: And he cannot have the
6 support from his party that the opponent can have from
7 the opponent's party.

8 MR. HERMAN: He cannot have the same level
9 of support.

10 JUSTICE KENNEDY: Not the same level of
11 support.

12 MR. HERMAN: That's correct.

13 JUSTICE KENNEDY: And is party support
14 sometimes important in an election?

15 MR. HERMAN: Of course, it can be vital in
16 an election, and it can be vital for a candidate who may
17 be a candidate of modest means. That would be certainly
18 one way for them to generate support. Did he convince
19 their party that they were worthy of that support?

20 JUSTICE KENNEDY: Does anything in Colorado
21 indicate that there can be a differential between the
22 party support given to one candidate and the party
23 support given to the other?

24 MR. HERMAN: Not -- only as determined by
25 the party's decision as to how they feel about the

1 candidate's positions.

2 JUSTICE STEVENS: Well, but they certainly
3 can allocate funds more generously to one candidate than
4 another; can't they?

5 MR. HERMAN: They certainly have that
6 opportunity, but under -- under a limit, under the
7 \$42,000 limit, as opposed to essentially an infinite
8 limit when you're dealing with a self-funded candidate.

9 And incidentally, Justice Stevens, to
10 address something else that you just brought up, for
11 many self-financed candidates the fact that they don't
12 take money from their party or from donors or from PACs
13 is a significant issue for them in their campaign. I
14 mean certainly for Mr. Davis, the fact that he is
15 independent and can make his own determinations --

16 JUSTICE SCALIA: Who is more incorruptible
17 than the millionaire, right?

18 MR. HERMAN: He is the ultimate independent.

19 JUSTICE SCALIA: The ultimate incorruptible.

20 (Laughter.)

21 MR. HERMAN: You cannot corrupt yourself.

22 And, again, the voters will get to decide whether they
23 want someone who is like that or they want someone who
24 is more in tune with, say, what the party wants or with
25 what his donors want. I mean, that's really the essence

1 of our -- of our electoral system.

2 CHIEF JUSTICE ROBERTS: I think -- I mean,
3 obviously you're correct that this system benefits
4 incumbents, but it benefits your client in a particular
5 way as well. The parties are certainly interested in
6 candidates who will fund themselves because that
7 presents less strain on the party's resources.

8 MR. HERMAN: Mr. Chief Justice, they are
9 interested in those candidates only inasmuch as they get
10 elected. The moment that the public turns on them, they
11 won't be interested. And certainly the public was not
12 particularly interested in Mitt Romney, who spent a
13 significant amount of money on his own behalf, and many
14 other spectacular flameouts.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: I'm not sure we need
17 characterizations of the political candidates --

18 (Laughter.)

19 MR. HERMAN: I apologize.

20 CHIEF JUSTICE ROBERTS: -- in this forum.

21 MR. HERMAN: Let me just add -- let me just
22 add one other thing. The government's own experts, all
23 of their information is derived from an individual who
24 is quoted as saying that self- financed candidates
25 rarely win, and when they do, it's usually for some

1 other reason. The fact of the matter is they don't
2 always make great candidates because they're not within
3 the mainstream.

4 I'd like to reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Herman.

7 General Clement.

8 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

9 ON BEHALF OF THE APPELLEE

10 GENERAL CLEMENT: Mr. Chief Justice, and may
11 it please the Court:

12 Appellant's claim here is an odd sort of
13 First Amendment complaint. He does not suggest that
14 Section 319 has limited his own spending at all. In
15 fact, he has twice spent a substantial amount of his own
16 money in excess of the statutory triggers.

17 JUSTICE SCALIA: It has penalized his own
18 spending.

19 GENERAL CLEMENT: Well -- and we can talk
20 about that as well, but I think it's worth recognizing
21 that his own spending is unlimited both in theory and in
22 fact. And, if anything, he has announced his intent
23 this next time around to spend even more of his own
24 money. And the other thing that I think is relevant is
25 his experience is not atypical in this regard.

1 JUSTICE SCALIA: That just means he is
2 willing to accept the penalty in the next election even
3 if this case doesn't come out in his favor.

4 GENERAL CLEMENT: Well, Justice Scalia --

5 JUSTICE SCALIA: It doesn't prove that it
6 isn't a penalty.

7 GENERAL CLEMENT: Well, I don't think in any
8 way it's a penalty. And I think in order to understand
9 it as a penalty you have to accept the proposition that
10 you start out with a constitutional entitlement to speak
11 freely without the opportunity for the other side to
12 respond, and I don't think the Constitution recognizes
13 this.

14 This isn't a context where they forced the
15 Appellant to pay for the other side's speech, as in
16 Tornillo, or carry the speech, as in PG&E. And I don't
17 think it's fair to look at the record here and suggest
18 that what Congress was trying to do here was actually
19 limit or deter self-financing.

20 JUSTICE ALITO: Well, isn't there something
21 very -- isn't there something very strange about having
22 different contribution limits for candidates in an
23 election? Do you think it would be constitutional for
24 Congress to say that the -- the contribution limits for
25 incumbents is X, but for challengers it's 2X or one-half

1 X?

2 GENERAL CLEMENT: Well, I think 2X would be
3 constitutional. And I think most people would be
4 surprised if Congress passed the statute that gave more
5 generous contribution limits to challengers, but I think
6 it would be a perfectly appropriate regime because it
7 would recognize that incumbents have certainly built-in
8 advantages such that the relatively low hard money
9 contribution caps have a greater influence, greater
10 impact on a --

11 JUSTICE SCALIA: You think that's really a
12 proper function of government, to look out over there
13 and say, we're going to even the playing field in this
14 election? What if some -- one candidate is more
15 eloquent than the other one? You make him talk with
16 pebbles in his mouth or what?

17 (Laughter.)

18 GENERAL CLEMENT: Justice Scalia, I think
19 there's an important distinction that was suggested in
20 one of Justice Alito's question, between the government
21 trying to level the playing field in the abstract and
22 the government looking out, not at the eloquence of
23 candidates, but at its own campaign finance regime after
24 this Court's decision and recognizing that, look, the
25 differential --

1 JUSTICE SCALIA: But the campaign finance
2 regimes we've approved up to now, the significant
3 limitations, have had an anti-corruption rationale.
4 There is no anti-corruption rationale here. The only
5 purpose of this is to level the playing field. And I am
6 deeply suspicious of allowing elections to be conducted
7 under a regime whereby Congress levels the playing
8 field. That seems to be very dangerous.

9 GENERAL CLEMENT: Well, again, Justice
10 Scalia, though, you start with the anti-corruption
11 rationale that underlies the hard money contribution
12 caps. And what Congress has recognized is that after
13 Buckley and after this Court said that a candidate's
14 ability to self-finance is unlimited, it's recognized
15 that in a subset of elections where somebody is going to
16 spend an awful lot of their own money to self-finance,
17 the ordinary hard money contribution caps are going to
18 have a potentially skewing effect.

19 JUSTICE KENNEDY: It's not just money. It's
20 not just money. It's the quality and kind of speech.
21 You're saying, the government is saying, the statute
22 says, that the underfunded candidate has less access to
23 coordinated expenditures with the party than -- than the
24 other party -- than the other candidate. And the cases
25 have acknowledge, the statute acknowledges, that

1 coordinated expenditures have a particularly potent
2 force, and you are saying candidates are treated
3 differently in the access to this kind of speech.

4 And I know of no precedent of this Court
5 that says one party is entitled to assistance from a
6 certain segment and another party is not, based on
7 the -- the content of the speech. And that's exactly
8 what this is.

9 GENERAL CLEMENT: Well, Justice Kennedy,
10 what I would say is, if you analogize to a system where
11 Congress decided that because of the advantage that
12 incumbents have, there is a greater scope for
13 coordination of the party with the challengers, I would
14 certainly be here defending that statute.

15 I would like to make clear, though, Justice
16 Kennedy, in fairness, that this focus on the coordinated
17 expenditures of the parties has really not been the
18 focus of Appellant's challenge in this case.

19 JUSTICE KENNEDY: But it's in the statute
20 and it's part of the challenge. I agree that it's been
21 given a relatively minor position, but it's of great
22 concern to me because it puts this Court, it puts this
23 statute, in the position of preferring one kind of
24 speech over another. And we simply do not do that.

25 GENERAL CLEMENT: Well, Justice Kennedy, let

1 me say two things about the fact that this was not the
2 gravamen of the challenge here, because one reason I
3 think that's clear is if you look at the record here, at
4 the point that the record closed in this case no party
5 had taken advantage of that coordinated expenditures
6 provision.

7 JUSTICE KENNEDY: Are you saying that
8 argument is not properly before us when we are judging
9 the validity of the statute that's been challenged?

10 GENERAL CLEMENT: I'm saying that this
11 record would not allow you to invalidate the statute on
12 that ground. The record at the time that it closed
13 should -- there was no time that a party had taken
14 advantage of that. Now, I understand that it's outside
15 the record, but I understand after the record closed
16 there were some coordinated expenditures.

17 But another thing I would certainly want to
18 know before I considered that challenge, Justice
19 Kennedy, is whether this particular Appellant had
20 coordinated expenditures from his own party up to the
21 limit, because we know as a general matter that there
22 is -- parties will fund different candidates differently
23 or may fund --

24 JUSTICE KENNEDY: But the provisions --

25 GENERAL CLEMENT: -- some and not others.

1 JUSTICE KENNEDY: The provisions of the law
2 which prefers one candidate over the other with respect
3 to coordinated expenditures has an impact on campaign
4 strategy.

5 GENERAL CLEMENT: Well, again, Justice
6 Kennedy, in fairness, though, I mean, one would expect
7 if that were the nature of the claim, that at a minimum
8 we would know two facts that I don't know, aren't in the
9 record. One is whether or not his candidate reached the
10 cap from his party's coordinated expenditures, because
11 if he didn't I don't see why that individual would have
12 standing.

13 JUSTICE KENNEDY: Mr. Solicitor General,
14 you're defending this statute on its face, I take it.

15 GENERAL CLEMENT: Well, I am defending --

16 JUSTICE KENNEDY: And it seems to me that
17 this is a facial invalidity of substantial proportions.

18 GENERAL CLEMENT: Well, Justice Kennedy, I
19 always thought it was harder to bring a facial
20 challenge, not easier to bring a facial challenge. And
21 I realized that we relaxed the normal rules about
22 as-applied challenges in the First Amendment context,
23 but I think there has to be a limit to that, too. And I
24 think in a case where we don't know the fundamental
25 facts that at least I'd want to know before even

1 evaluating that challenge, I think it would be bad for
2 us to invalidate the statute, it would be wrong for us
3 to invalidate the statute on those grounds. And I think
4 I would still be here defending it. --

5 JUSTICE SCALIA: I thought that that's what
6 a facial challenge essentially consists of. You don't
7 look to see whether in fact the harmful First Amendment
8 effect has occurred; you look to whether it opens up the
9 possibility for that to occur.

10 GENERAL CLEMENT: But I don't think mere
11 theoretical possibility is enough, even in the First
12 Amendment context. And I still think you ask the
13 question: Does this individual even have standing to
14 bring the First Amendment challenge? And I would think
15 an element of standing to bring the First Amendment
16 challenge Justice Kennedy has in mind would be a
17 candidate who, first of all, his opposing candidate took
18 substantial amounts of excess contributions. But at a
19 bare minimum, I would think that the plaintiff would
20 have to say that, look, I took up to the cap of the
21 coordinated contributions from my party and I would have
22 loved to have gotten more, the party was willing to give
23 me more, but I wasn't able --

24 JUSTICE SCALIA: You can't go in before the
25 election and say: Look, I'm about to be terribly

1 disadvantaged; my opponent is about to have all of these
2 coordinated expenses and I'm not able to. And you're
3 going to say: Oh, we have to wait until the election is
4 over to see whether in fact that happens. It seems to
5 me this is precisely the kind of a situation a facial
6 challenge is designed for.

7 GENERAL CLEMENT: With respect, Justice
8 Scalia, there is two things. There is whether you can
9 bring a facial challenge or not and there's when you can
10 you bring it. And I think if you go in and allege that
11 all of those things are likely, then you probably have
12 standing at the outset.

13 But those allegations weren't made here.
14 The focus of this case has always been on the
15 contribution levels and the contribution provisions of
16 this statute. At the end of the day the analysis is
17 quite similar, so I'm not --

18 JUSTICE STEVENS: Isn't one of the virtues
19 of the independent self-financed candidate is he can
20 emphasize his independence? So he very rarely is going
21 to complain about not being able to get too much money,
22 enough money from outside sources. And isn't it a fact
23 that most of them do finance a very significant
24 percentage of their total campaign costs?

25 GENERAL CLEMENT: I think all that's right,

1 Justice Stevens. And as you suggest, it's an unlikely
2 challenge to be brought because often times the
3 self-financer is advertising his independence from party
4 and contributors here.

5 JUSTICE KENNEDY: Do you want us to write an
6 opinion which says that independently wealthy candidates
7 generally have different sorts of views than other
8 people?

9 GENERAL CLEMENT: No, I don't think that's
10 true. But I think that they do have different ways of
11 raising the funds necessary to mount their campaigns.

12 And I think -- to get back to the focus of
13 this, I think all that the Court needs to recognize is
14 that the Buckley decision itself has created a potential
15 anomaly, because if you want to think about
16 self-financing, you can think about it as being the
17 ultimate form of soft money, because the Constitution
18 itself precludes Congress from limiting the amount of
19 self-funding.

20 CHIEF JUSTICE ROBERTS: General, we haven't
21 talked yet about the disclosure, the special disclosure
22 requirements in that money is speech, and in a First
23 Amendment area it strikes me as very problematic that
24 the government requires you to disclose in a
25 differential way how you intend -- when you're spending

1 a particular amount of money and on such precise
2 day-by-day requirements.

3 I mean, is there any other area -- if you're
4 writing a book, you don't have to disclose to the
5 government when you're going to publish it and how far
6 along you're getting in the draft. And yet, it just
7 seems this is the same sort of thing in the election
8 context.

9 GENERAL CLEMENT: Well, Mr. Chief Justice,
10 there are other contexts within the election area where
11 there are comparable disclosure requirements. And I
12 think I would point you to the McConnell case and the
13 fact that this Court approved a 24-hour disclosure
14 requirement for electioneering communications.

15 CHIEF JUSTICE ROBERTS: But those are
16 applicable across the board. These are special
17 disclosure requirements for people who are going to
18 engage in additional speech.

19 GENERAL CLEMENT: Well, I mean, I'm not --
20 I'm not sure that's right in a sense that these are
21 disclosure requirements that apply across the board.
22 The timing is triggered particularly by a candidate's
23 contribution to their own campaign. So that's the way
24 in which they're different. But I think it's worth
25 focusing on that, because I actually think the

1 constitutional issues that are implicated by a
2 disclosure of a candidate's contribution to his or her
3 own campaign are actually less significant than
4 generally is true of campaign finance disclosure,
5 because what this Court talked about in Buckley as the
6 primary concern in the disclosure context was the
7 associational rights that are reflected when somebody
8 contributes to a candidate or an organization makes an
9 electioneering communication on behalf of a candidate.

10 I think those associational interests are
11 obviously not implicated when all you're forcing someone
12 to disclose is the amount that they spent on their own
13 campaign.

14 CHIEF JUSTICE ROBERTS: So wouldn't you
15 think they would require more detailed and more
16 expeditious disclosure of the associational link than of
17 the self-funding? And yet it's the exact opposite?

18 GENERAL CLEMENT: No. I would think the
19 Constitution would be more concerned about the
20 disclosing the associational link because there is more
21 than one constitutional interest at issue. And I think
22 if you look at this as a whole there really isn't a
23 differential regime. Every electioneering communication
24 from the first \$10,000 has to be disclosed. If
25 anything, the complaint should be the electioneering

1 communication should come in here complaining about the
2 fact that these self-financing candidates get a free
3 pass for the first \$350,000 of their financing, before
4 the disclosure requirements kick in.

5 So I mean, I really think this is a
6 relatively modest disclosure provision and it arises in
7 a context where there aren't associational interests.

8 JUSTICE GINSBURG: The problem is it's every
9 \$10,000. As you pointed out, it doesn't require more
10 disclosure. All of this information would be disclosed
11 under the system without this 24-hour, and that I think
12 is the complaint, the burden of having every time you
13 spend \$10,000 to file something.

14 GENERAL CLEMENT: But Justice Ginsburg, I
15 think that's the same in the electioneering
16 communications, which is it's triggered for \$10,000 but
17 I think it continues to be triggered. Now, it isn't the
18 nature of the challenge, so I may be wrong about that,
19 but I think that's the way that that works.

20 In any event, I think it's a fair point here
21 that the fact that you trigger additional disclosures
22 with each \$10,000 I think is useful in informing the
23 electorate; but I also think it's fair to say is
24 necessary in order for the substantive provisions of the
25 statute to operate, because what they want to do is they

1 want to enable as a self-financed candidate spends
2 additional money as the election date approaches, they
3 want to put the opponent, if they have otherwise reached
4 the cap of what they can raise in additional funds in a
5 position to continue to raise additional funds.

6 CHIEF JUSTICE ROBERTS: What if the -- what
7 if the restriction were more tailored, if Congress
8 decided the one area where the wealthy really have an
9 advantage is buying television time, so that's what
10 we're going to restrict. If the wealthy individual buys
11 a certain amount of television time, we're going to
12 allow contributions to the less wealthy candidate to buy
13 television time. They think the money is not as big a
14 deal in the other areas. Would that be all right?

15 GENERAL CLEMENT: I think it would be
16 constitutional, Mr. Chief Justice. I think it's
17 reacting to the same basic phenomenon, which is one
18 aspect of the campaign finance regime gives self-
19 financiers an ability to spend a tremendous amount of
20 money and creates a potential disparity. What creates
21 the disparity is the fact that you have relatively low
22 hard money contribution caps, and Congress recognized --

23 JUSTICE SCALIA: What if one party has more
24 time on his hands? He's -- he's unemployed, so he --
25 you know, he can go around, whereas the other party has

1 to -- has to hire people to speak for him. He has -- he
2 has a job most of the time. Are you going to even that
3 disparity, too?

4 GENERAL CLEMENT: No, Justice Scalia, and
5 again I think there's an important distinction between
6 trying to level the playing field in every respect --

7 JUSTICE SCALIA: I can understand leveling,
8 leveling contribution limits when you're worried about
9 corruption, I can understand that. But doing it just to
10 -- to make sure that there is an even playing field, I
11 -- there's just no end to that. And it just isn't money
12 that makes it an even playing feed. A lot of other
13 factors -- incumbency, the war chest that incumbents
14 have which -- money from the last election, that isn't
15 counted for -- for the millionaires' provision.

16 There are so many factors that -- that go to
17 making the even playing field that I -- I'm just very
18 reluctant to acknowledge a congressional power to -- to
19 sit in judgment of our elections that way.

20 GENERAL CLEMENT: Well, Justice Scalia, I
21 mean, in an odd way I think this principle is actually
22 implicit in the plurality opinion against -- in *Randall*
23 *v. Sorrell*. I know you didn't join that opinion, but in
24 that opinion this Court said, the plurality said, that
25 contribution limits can in some ways be too low because

1 if they're too low they preclude the ability for
2 somebody to raise enough money and that exaggerates the
3 advantages that incumbents have. And I think Congress
4 really made an analogous judgment here. I'm not
5 suggesting it was constitutionally compelled, but they
6 made an analogous judgment, which is there is more than
7 one source of advantage; one source of advantage is the
8 self-financing candidate's ability to spend unlimited
9 amounts of their own money. They respected the fact
10 that that's a constitutional entitlement, but they said
11 it's not that in the abstract that's the problem; it's
12 the combination of unlimited self-financing and
13 relatively low hard money contribution caps --

14 JUSTICE SCALIA: But --

15 GENERAL CLEMENT: -- and they relaxed the
16 one thing that they could control, which was the cap.

17 CHIEF JUSTICE ROBERTS: So what if Congress
18 decided that a debate on a particular issue was
19 distorted by the wealth of owners of newspapers? And so
20 it passed a law saying that people who are responding to
21 that are relieved of the tax burden they would otherwise
22 have to pay, on whatever their -- you know, sales tax on
23 pamphlets that they want to sell. Would that be all
24 right?

25 GENERAL CLEMENT: I --

1 CHIEF JUSTICE ROBERTS: To level the playing
2 field on the debate on that particular issue?

3 GENERAL CLEMENT: I think it might be and
4 it's not that radically different than what this Court
5 approved in Ragan against Taxation Without
6 Representation.

7 CHIEF JUSTICE ROBERTS: No -- so you can tax
8 -- you can tax a newspaper, but you cannot -- you don't
9 have to tax people who are responding to the newspaper?

10 GENERAL CLEMENT: Well --

11 CHIEF JUSTICE ROBERTS: The taxing power is
12 an -- is a limit on the exercise of First Amendment
13 rights?

14 GENERAL CLEMENT: Maybe there are
15 differences in that particular context. Maybe the
16 Freedom of Press clause informs the analysis. But this
17 Court has upheld the regime that withheld tax benefits
18 to an organization if it engaged in lobbying; and at the
19 same time this Court said that it was okay to give those
20 tax benefits --

21 CHIEF JUSTICE ROBERTS: But that's any --
22 any organization that engaged in lobbying.

23 GENERAL CLEMENT: Yes, but the next couple
24 of lines of the opinion said: And it's okay if we give
25 those tax benefits back to a veterans organization, but

1 only veterans organizations. So I just think what that
2 case shows up is that the Court has recognized that the
3 government has a fair amount of flexibility.

4 CHIEF JUSTICE ROBERTS: So is there no
5 limitation on the rationale of leveling the playing
6 field throughout the First Amendment?

7 GENERAL CLEMENT: No, there is -- there is a
8 limiting principle, and I think that, importantly, there
9 is a limiting principle that's very applicable to this
10 very context, which is I think if Congress went to the
11 point where they weren't doing what I think they're
12 doing here, which is not trying to limit the amount of
13 self-financing, but using it as a mechanism here to
14 identify particularly costly races where they should
15 raise the contribution limits, if they went further and
16 basically said we're going to give you public financing
17 if your opponent self-finances, and we're going to give
18 you two dollars for every dollar that your opponent
19 self-finances, I think at that point as a practical
20 matter the regime would operate as a ban on -- as a cap,
21 just like this Court held in Buckley.

22 But I think that's the way to approach this
23 issue, which is to basically say if what Congress is
24 doing is really trying to effectively cap
25 self-expenditures, then Congress cannot do that; but if

1 what Congress is doing is giving candidates choice and
2 is trying to react to the regulatory environment created
3 by self-financing --

4 CHIEF JUSTICE ROBERTS: Well, it's trying --
5 it's certainly trying to chill self-financing by
6 burdening it when it reaches a certain level.

7 GENERAL CLEMENT: I mean, I really don't
8 think that's an accurate description of what happened
9 here, because if you look at the legislative record here
10 -- I know not everybody likes to do that -- but if you
11 look at the legislative record here, you will see that
12 both parties in this, the opponents and the proponents
13 of this amendment, realize that they couldn't limit
14 self-financing and that they were unlikely to limit
15 self-financing because it's such an attractive option
16 for parties and for candidates. And both parties took
17 it as a given that the effect of Section 319 and its
18 Senate counterpart would be to put more money, not less
19 money, into electoral speech.

20 JUSTICE ALITO: How is it that there is a
21 serious corruption problem in most instances if a
22 contributor gives more than \$2,300 to a candidate, but
23 there is no serious -- presumably Congress doesn't think
24 there is a serious corruption problem when this statute
25 kicks in and somebody gives \$6,900 to a candidate?

1 GENERAL CLEMENT: Well, Justice Alito, what
2 I would say is that what the relaxation of the
3 contribution limits reflects is an adjustment of other
4 interests; and I don't think in principle what Congress
5 has done here is different from what a number of States
6 do, which is they say for the race for governor the
7 contribution cap limit is going to be 2,000; for State
8 auditor it will be a little less; and for local
9 representative it will be substantially less.

10 Now, I suppose somebody could have come in
11 and said, look, you know, the race for governor you can
12 give \$2,000; you can only give a 1,000 for this
13 representative race, so surely that's irrational because
14 the State has recognized that a contribution of \$2,000
15 is noncorrupting. It's not the way it's ever proceeded
16 and I think this Court's --

17 JUSTICE ALITO: Isn't there a difference,
18 because it may take -- it may take more money to
19 campaign for a particular office, and so the -- it might
20 take a greater amount to have a corrupting influence on
21 -- on that particular race than on a race where the
22 total amount spent is -- is lower. But here you're not
23 talking about different offices.

24 GENERAL CLEMENT: No. But I think you're
25 talking about Congress using a mechanism that is equally

1 effective in identifying races that are likely to be
2 more expensive. When one party is spending more than
3 \$350,000 of their own money, that's every bit as likely
4 to be a more expensive race than the race for governor
5 or State treasurer or a local representative. And
6 that's why I think this is so responsive to the problem
7 that Congress recognized with the combination --

8 JUSTICE ALITO: But it applies different
9 limits to different in the same -- to candidates in the
10 same race. So why would Mr. Davis be subject to
11 potential corruption if he got \$2,300 -- \$2,301 from a
12 -- from a contributor, but his opponent in exactly the
13 same race would not be exposed to corruption if he got
14 \$6,900?

15 GENERAL CLEMENT: Well, can I say two things
16 in response to that? One is it would not be
17 unprecedented for this Court to approve a regime where
18 the choices of the candidates led to different
19 contribution levels in the exact same race for the exact
20 same office, because that's what happens in Buckley in
21 the public financing scheme that this Court approved.
22 If somebody accepts public financing for the general
23 election for presidency, they are effectively agree to a
24 zero contribution limit; whereas, their opponent, minor
25 party opponent for example, would be subject to higher

1 contribution level.

2 JUSTICE SCALIA: That's the price of
3 accepting the government subsidy. They're -- nobody is
4 accepting a government subsidy here. The man is
5 spending his own money --

6 GENERAL CLEMENT: But one --

7 JUSTICE SCALIA: -- for a speech.

8 GENERAL CLEMENT: But one of the prices of
9 accepting the government subsidy in Buckley was to agree
10 to limit your own financing of your own campaign to
11 \$50,000.

12 Now, their whole theory of this case is that
13 somehow a benefit to their opponent is the same thing as
14 a detriment to themselves. And it seems to me that -- I
15 mean, the base lines here are sufficiently manipulable;
16 the analogy is exactly the same.

17 JUSTICE BREYER: Can you back to Justice
18 Kennedy's question, where as I took it he identifies a
19 problem that he sees in this portion of this act which,
20 should the limit be exceeded by our opponent, then we
21 can go to the party and the party can give us more?
22 Now, assume for the sake of argument that he has
23 correctly identified a problem with that. Now, my
24 understanding is that once the limit is exceeded and you
25 have this extra amount, three things happen: One, an

1 individual could contribute two or three times the
2 amount to the party directly. A second possibility is
3 an individual who has exceeded the global amount now
4 gets a bump up and can contribute. And the third thing
5 is the party thing.

6 So focus on that statute where this is
7 written. In your opinion, if, for the sake of argument,
8 there were a problem with the party, would that
9 particular form of words in the statute be severable
10 from the rest of it?

11 GENERAL CLEMENT: It certainly would,
12 Justice Breyer, and one thing to keep in mind in
13 interpreting the statute is that it has Section 401 of
14 the original BCRA -- I think we have it at page 28 of
15 our brief -- is what I would describe, I think, as a
16 "super-severability" clause, because it says not only
17 are unconstitutional provisions severable, but even
18 unconstitutional applications of the same provision are
19 severable.

20 And I think there would be no problem
21 effectively leaving the statute with the disclosure
22 requirements in place and two of the three means of
23 taking advantage of additional opportunities that the
24 statute affords challengers.

25 JUSTICE GINSBURG: It --

1 GENERAL CLEMENT: So I certainly think it
2 would be severable.

3 JUSTICE SCALIA: On the theory that it
4 doesn't make much sense anyway? Is that why --

5 GENERAL CLEMENT: No.

6 JUSTICE SCALIA: -- we can chop it up this
7 way?

8 GENERAL CLEMENT: No. To the contrary, on
9 the theory that this statute operates on this record
10 without that provision being implicated at all. I mean,
11 in the first applications of this, the entirety of the
12 2004 election cycle, no party took advantage of the
13 coordinated --

14 JUSTICE GINSBURG: But I thought that --

15 GENERAL CLEMENT: -- contributions.

16 JUSTICE GINSBURG: -- that Justice Breyer's
17 question, General Clement, was he asked you to assume
18 that that was unconstitutional, and you were answering
19 if it was unconstitutional. But there is one person
20 whose speech is being discouraged in the picture, and
21 that's the contributor to the self-financed candidate.
22 You have to recognize that that one can't speak as much
23 vis-a-vis the contributors to the other candidate.

24 GENERAL CLEMENT: I mean, I would concede
25 that there will be these differential limits, but it's

1 based on the choice of the candidate to engage or not in
2 self-financing, and -- I mean, the restriction there is
3 much more substantial than the public financing scheme
4 approved by this Court in Buckley, because in the
5 general election if the candidate decides that it's
6 going to -- that a candidate is going to take the public
7 financing scheme then in the general presidential
8 election I can't give even a dollar to that candidate.

9 And it's also I think worth recognizing that
10 in Buckley this Court recognized that, for
11 constitutional and associational rights purposes, it's
12 really the ability to associate with the candidate by
13 giving any contribution, rather than the amount of the
14 contribution, that satisfies that limit.

15 In all events, this is not a challenge
16 that's being brought by contributors. And I think it's
17 worth recognizing that Appellant, even though some of
18 its challenge, and I would say the gravamen of the
19 challenge, sounds -- his challenge sounds in equal
20 protection terms, he doesn't really want a leveling-up
21 where the opportunity would be for contributors to both
22 candidates to make triple the \$2300 limits. He really
23 wants to keep the yoke of relatively low contribution
24 limits on his opponents. And that's why I think this is
25 such an odd First Amendment challenge.

1 CHIEF JUSTICE ROBERTS: What if the law
2 expressed a displeasure at the introduction of
3 self-financing and said that, as you have these very
4 rapid disclosures, that the less wealthy candidate can
5 accept contributions whatever, twice the amount of
6 whatever the self-financed candidate is spending on his
7 campaign? Is that all right?

8 GENERAL CLEMENT: I mean, I'm not sure I
9 have the hypo. If he can spend twice as much?

10 CHIEF JUSTICE ROBERTS: Well, he -- you
11 know, the millionaire, as we are talking about, spends
12 -- discloses that he has spent \$500,000. Then the
13 contribution limits are off the table for the less
14 wealthy candidate to the tune of a million dollars, in
15 other words twice as much as the self-financed
16 candidate.

17 GENERAL CLEMENT: If I'm understanding the
18 hypo which we were just talking about contribution
19 limits, because there are no expenditure limits, if I'm
20 understanding the hypo right, I think that would still
21 be okay. I mean, I think if Congress had decided here
22 that if a self-financer spends beyond a certain amount,
23 then what is important is that then the contribution
24 limits would be lifted entirely. I suppose Congress
25 could do that, as long as they maintained what they

1 called the "parity principle" or the "proportionality
2 principle," which is in no circumstance will the
3 opponent be able to raise more than the amount of the
4 additional spending. And if your hypo is suggesting
5 that that would be relaxed so that they could raise
6 twice as much, I think that would raise more difficult
7 constitutional questions.

8 CHIEF JUSTICE ROBERTS: Well, why not?
9 Because as -- your point in this case, rather than the
10 hypothetical, is that the self-financed candidate is not
11 burdened in any way, but simply that his opponent has
12 benefited. And it seems to me that would be true in the
13 case of my hypothetical as well.

14 GENERAL CLEMENT: Again, if I'm
15 understanding the hypo right, I think you would say
16 there that the candidate is effectively burdened because
17 if you get to the point where you're past what I would
18 call "parity" and you actually -- by spending an
19 additional dollar, you're allowing your opponent to
20 spend \$2 additional additionally, I think at that point
21 a rational candidate is not going to engage in
22 self-finance. And so in practice, the provision would
23 operate as an absolute cap, rather than the way it
24 operates here, which is not as a cap. And I think if
25 you look at the numbers in the record, joint appendix

1 page 89 --

2 CHIEF JUSTICE ROBERTS: I would have thought
3 all the arguments that you gave before, like the
4 self-financed candidate wants to be able to say he
5 doesn't rely on contributions and so on, those would
6 still be equally applicable.

7 GENERAL CLEMENT: They would, but I do think
8 the statute in practice would operate quite differently.
9 And that's why I think it's very helpful that we have a
10 record here in this case that we can cite to.

11 CHIEF JUSTICE ROBERTS: So it's not a --
12 it's not a qualitative argument you're making but a
13 quantitative. At some point, the benefit to the
14 opponent gets to be too much of a chill on the
15 self-financed candidate, but under this system you think
16 it's below the line.

17 GENERAL CLEMENT: I would put it differently
18 and say we're not arguing for a principle without
19 limits, but what I would say is that we really benefit
20 here from the fact that this Court found no standing for
21 the challenge to the Millionaires' Provision in
22 McConnell, and we have a record of actual experience.

23 JUSTICE SCALIA: Suppose we found -- we were
24 of the view that all of the provisions, that the
25 benefits given to the other side here are bad. I

1 suppose we could even -- re-even the playing field by
2 either denying those benefits to the candidate opposing
3 the Appellant, the Petitioner here, or we could do the
4 opposite and eliminate similar restrictions upon -- upon
5 the Petitioner. Do you have any idea which way we ought
6 to go?

7 GENERAL CLEMENT: May I answer the question?
8 I mean, you're right that to the extent that this says
9 this really sounds as an equal protection case more than
10 a First Amendment case, at the remedial stage you'd ask
11 the question: Should we level up and have both
12 candidates have a larger cap or should we level down and
13 hold them both to the \$2300 level?

14 I would say two things, if I may. One is
15 it's no accident that Appellant isn't asking you to
16 level up because what -- they're not interested in doing
17 additional financing; they're really taking --
18 interested in taking advantage of keeping the opponent
19 down to the \$2300 level.

20 The only other thing that I would say about
21 this choice between leveling up and leveling down is I
22 would say that the statute that would have relaxed the
23 caps for both candidates would pose the same First
24 Amendment issue as this statute. And so it really is,
25 at bottom, an equal protection claim that you have

1 before you.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, General
4 Clement.

5 Mr. Herman, you may take five minutes.

6 REBUTTAL ARGUMENT OF ANDREW D. HERMAN

7 ON BEHALF OF THE APPELLANT

8 MR. HERMAN: Thank you, Mr. Chief Justice.

9 First of all, let me answer this -- the
10 discussion about the quote "parity principle." In this
11 case, Mr. Davis was outspent by \$3 million, yet the
12 parity principle would have allowed his opponent to
13 raise another \$1.4 million. The district court has
14 never answered-- never answered that flaw in the
15 statute. I haven't seen any explanation of how that
16 creates parity when the higher fund --

17 JUSTICE GINSBURG: Where did the money come
18 from? Was it a war chest left over from prior
19 campaigns?

20 MR. HERMAN: For his opponent?

21 JUSTICE GINSBURG: Yes, because he didn't --
22 his opponent did not take advantage of the relaxed
23 contribution limits.

24 MR. HERMAN: He went into the election,
25 Justice Ginsburg, with about a \$1.15 million war chest.

1 And then he --

2 JUSTICE GINSBURG: Because he was just a
3 good fundraiser? That --

4 MR. HERMAN: He was a chairman of the NRCC.
5 He was an excellent fundraiser.

6 (Laughter.)

7 JUSTICE ALITO: Can you address Justice
8 Scalia's question about leveling up and leveling down?

9 MR. HERMAN: I would agree with -- with my
10 friend that we have no interest in leveling up. That's
11 -- that's -- as an independent candidate, Mr. Davis is
12 forgoing, for the vast, vast majority of his funding,
13 contributions from private sources, and he has no
14 interest in fostering higher contribution limits for
15 anyone.

16 Let me also discuss the intent -- excuse me
17 -- the disclosure very briefly. There has been some
18 discussion about how this is -- it's very similar to
19 independent-expenditure disclosure. It's really not.

20 What the -- what the statute requires is
21 that a self-financed candidate declare, at the very
22 start of his campaign, whether he intends to spend more
23 than \$350,000. That, as the government's brief
24 acknowledges, has no analogue in any other disclosure
25 provision, and it serves -- it serves no purpose. It

1 doesn't -- it doesn't inform the electorate of anything
2 other than that this gentleman is going to be
3 self-financing.

4 It certainly doesn't address corruption.
5 It's simply -- simply harassment of a self-financer
6 requiring them to go on the record --

7 JUSTICE SCALIA: Well, it advises the other
8 side that they should get ready to raise more money.

9 MR. HERMAN: That's exactly right.

10 JUSTICE SCALIA: Well -- I mean if you say
11 all of the rest of the statute is okay, that's certainly
12 reasonable. If you're going to let the guy go above the
13 limits that would otherwise apply, it's useful to let
14 him know in advance so he can start, you know, beating
15 the bushes, right?

16 MR. HERMAN: Certainly. And then, finally,
17 there is a reference to this -- this is the ultimate
18 soft money. We would submit this is the ultimate hard
19 money. This is money that was raised by Mr. Davis. He
20 earned it. He is entitled to spend it as he wishes, and
21 he is certainly entitled to spend it furthering his
22 candidacy.

23 Now, if there are no further questions --

24 CHIEF JUSTICE ROBERTS: Thank you
25 Mr. Herman.

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The case is submitted.

(Whereupon, at 11:01 a.m., the case in the
above-entitled matter was submitted.)

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