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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 you know, smoking this type of cigarette is actually --
10 is not harmful to you? The government is free to take
11 out a contrary ad saying, no, it is and so you shouldn't
12 do 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 the 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? I mean -- the -- you have already
23 acknowledged that the wealthy candidate can spend as
24 much as he or she wants and the end result of this
25 scheme is that there will be more, not less, speech

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

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

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

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

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

19 MR. HERMAN: For the 2006 campaign?

20 JUSTICE SOUTER: I think that's --

21 MR. HERMAN: That is correct.

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

1 evidence that it's deterring anybody else.

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

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

9 MR. HERMAN: No, Your Honor.

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

13 MR. HERMAN: Absolutely not, Justice Scalia.

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

16 MR. HERMAN: Absolutely.

17 JUSTICE STEVENS: What is your best case for
18 that --

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

25 MR. HERMAN: Justice Souter, respect --

1 respectfully, I don't think that you can categorically
2 say that it did not deter my client when he was outspent
3 by \$3 million in that campaign. He -- as he went
4 through the campaign against his --

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

8 MR. HERMAN: Your Honor, he actually did
9 spend \$2 million.

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

14 MR. HERMAN: Potentially. Potentially.

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

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

25 JUSTICE ALITO: Is there any reason to think

1 that this statute will have any greater or different
2 effect on Mr. Davis in the upcoming election than it did
3 in the last election?

4 MR. HERMAN: There is, Justice Alito.

5 JUSTICE ALITO: Why?

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

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

20 JUSTICE SCALIA: The government says that in
21 fact more and quite a bit more incumbents went over the
22 \$350,000 personal funding limits than non-incumbents.
23 Something like -- I don't know, 14-2 or something like
24 that in the last election, is that right?

25 MR. HERMAN: First of all, the statistics

1 here are incomplete because basically the briefing in
2 this case was concluded in early September of 2006,
3 before a lot of primaries occurred for the 2006 House
4 election. And so I think referring to those numbers,
5 it -- the FEC has never -- we've never received any
6 additional numbers for the effect, but --

7 JUSTICE GINSBURG: But it was a four-year
8 record and the numbers are rather startling that -- is
9 it 110 Senators or Representatives qualified for the
10 enhanced contributions and only 6 of them were
11 incumbents?

12 JUSTICE SCALIA: Yes.

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

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

19 (Laughter.)

20 MR. HERMAN: That's certainly our argument,
21 Justice Scalia.

22 JUSTICE SCALIA: It could mean that. Right.

23 JUSTICE GINSBURG: But if it's -- if that's
24 so, one of the reasons that has been given for this
25 statute is that it encourages the parties to favor the

1 wealthier candidates; it deters people who are
2 non-affluent but highly meritorious. So -- and it gives
3 the public the perception that the seats in our Congress
4 are there to be bought by the wealthiest bidder. And if
5 there's anything to that -- well, do you reject that out
6 of hand as what the statute is all about?

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

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

25 MR. HERMAN: Well, Justice Ginsburg, I can

1 think of one off the top of my head which is not this
2 case, and that's public funding. If Congress were truly
3 concerned about providing a boost to minor party
4 candidates who may not be able to raise the \$2300 to
5 begin with, much less take advantage of the benefits of
6 319, or wanted to boost self-financed candidates who,
7 say, like Mr. DeRossett in the amicus brief -- in his
8 amicus brief, who mortgaged his house or others who have
9 encumbered their pensions and raised \$350,000 or
10 \$400,000 and then triggered the amendment, if they
11 wanted to foster all of those people of modest means to
12 participate, then the easiest way and the way sanctioned
13 by this Court in Buckley is to institute a public
14 funding system and allow them to choose. They can raise
15 private funds if they'd like; they could do it
16 personally with their own money; or they could take
17 whatever amount that the -- that the State was willing
18 to give them --

19 JUSTICE SCALIA: That wouldn't level the
20 playing field. I mean, the other side, the millionaire,
21 won't take the public funding and he'll spend his
22 millions and whoever gets the public funding -- or are
23 you saying the public funding should match whatever the
24 other side pays?

25 MR. HERMAN: No, Your Honor --

1 JUSTICE SCALIA: Well then --

2 MR. HERMAN: But this Court's analysis in
3 Buckley -- the public funding analysis in Buckley does
4 not center on leveling the playing field or providing
5 equality for all candidates. The --

6 JUSTICE SCALIA: Do you think that's a valid
7 constitutional objective, to -- to level the playing
8 field?

9 MR. HERMAN: I --

10 JUSTICE SCALIA: Do you think we should
11 trust our incumbent Senators and Representatives to
12 level the playing field for us?

13 (Laughter.)

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

1 JUSTICE GINSBURG: But isn't there something
2 different between what the statute was at the time of
3 Buckley, that a lid on, you can't spend more than X
4 amount of money, and a statute that says we're going to
5 let you spend -- the sky is the limit for you, but we're
6 going to give a boost to your opponent?

7 MR. HERMAN: Justice Ginsburg, in Buckley
8 there -- there was no lid on personal expenditures. The
9 Court struck down that aspect of Buckley and upheld the
10 public funding provision. So the Court was --

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

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

1 to replace it with public funds and --

2 JUSTICE ALITO: Even if -- even if leveling
3 the playing field is not generally a compelling or maybe
4 even a permissible interest, is it a stronger interest
5 when one of the reasons why the playing field is not
6 level is other action that Congress has taken? If there
7 weren't expenditure limits, then self-financed
8 candidates wouldn't perhaps have as much of an advantage
9 as they do. So if we accept a world in which
10 contribution limits are constitutional, it -- does that
11 provide a basis for Congress to try to rectify at least
12 in part what it itself has done by imposing the
13 contribution limits?

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

23 JUSTICE SCALIA: What we're talking about in
24 leveling the playing field, I guess, is leveling the
25 amount of speech that each side has, to make sure that

1 each side has the same amount of speech. Is that -- is
2 that what's going on here?

3 MR. HERMAN: Well, it's an attempt to do
4 that. And again, in Buckley this Court said that --
5 that Congress has no interest in determining whether
6 speech is excessive or unwise or wasteful. That's --
7 that's ultimately the purview for the voters, and that's
8 really the fallacy in 319 at its heart, is there's no
9 such thing as secret self-funders. They will --
10 everything that they do is disclosed in the same way
11 that all other expenditures and contributions are
12 disclosed in quarterly and pre-election reports.
13 Certainly, in many cases, their opponents are going to
14 make the case that this wealthy person is out of touch,
15 they don't represent the district, your vote is not to
16 be bought. And then ultimately the voters will have the
17 determination on what kind of candidate they want.

18 JUSTICE SCALIA: Are we -- are we talking
19 wealthy people here? What's the average price of a home
20 in the United States? I think it's a good deal above
21 \$350,000, isn't it?

22 MR. HERMAN: It certainly is in this area
23 and in many congressional districts in the United
24 States. And that's a very good point, Justice Scalia.
25 This provision affects less -- or about a quarter of

1 what it costs to run a competitive race in 2006. So
2 certainly it's not as if Congress said, well, if you
3 spend some disproportionate amount of money to a
4 congressional race, if you go ten times over what it
5 should cost, we're going to step in. They said --

6 CHIEF JUSTICE ROBERTS: You don't think that
7 would be any more constitutional than this, do you?

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

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

16 MR. HERMAN: Tom Reynolds.

17 JUSTICE KENNEDY: Reynolds to receive -- is
18 it unlimited contributions from his own party?

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

21 JUSTICE KENNEDY: Yes.

22 MR. HERMAN: -- the purported difference in
23 funds.

24 JUSTICE KENNEDY: Suppose you had a statute
25 which either explicitly said or has the effect, as this

1 does, that the less wealthy challenger, the challenger
2 in Reynolds' position, has more access and more support
3 from his party than the challenger does from his party.
4 What is your best case to indicate that that is
5 unconstitutional, and what is your argument that that is
6 unconstitutional?

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

8 JUSTICE KENNEDY: Because that concerns me
9 in this. What is your best argument that differential
10 treatment of the candidates vis-a-vis support from their
11 respective parties is unconstitutional?

12 MR. HERMAN: Well, again, Your Honor, if
13 you're making a distinction -- when you talk about the
14 --

15 JUSTICE KENNEDY: The statute makes that
16 distinction.

17 MR. HERMAN: Well, the statute talks about
18 the less wealthy candidate.

19 JUSTICE KENNEDY: And it seems to me that
20 that distinction is somewhat questionable, and I'm
21 asking you for your best statement of the theory as to
22 why it's unconstitutional and your best case to show
23 that it's unconstitutional.

24 MR. HERMAN: The best argument, Justice
25 Kennedy, is that money and speech are synonymous in an

1 electoral context, and it's inappropriate for the
2 government to say that you, as the purportedly wealthier
3 candidate, have too much speech; that that's enough
4 speech from you.

5 JUSTICE KENNEDY: But you make that argument
6 to the statute generally. Is there any more specific
7 argument that you can make in the context of the less
8 well-funded candidate having more support from the party
9 than the well-funded candidate had?

10 MR. HERMAN: Well --

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

15 MR. HERMAN: I --

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

24 MR. HERMAN: No, Justice Ginsburg. Of
25 course, the party would have to make a determination if

1 they felt that this person was --

2 JUSTICE KENNEDY: But the party for the less
3 well-funded candidate has the option to have much closer
4 ties, much greater involvement, than the party for the
5 other candidate; and that seems to me highly
6 problematic. And I want to know the best case that you
7 have for that proposition and the best statement of law
8 that you can give me for why that is unconstitutional.

9 MR. HERMAN: Well, Justice Kennedy, if you
10 refer to Colorado II, where this Court talked about the
11 fact that -- where this Court upheld limitations on
12 party -- unlimited party-coordinated communication,
13 because that -- allowing the party to do so would raise
14 the possibility of evading the contribution limits. And
15 so accordingly they upheld the 42 -- the \$42,000 limit
16 on coordinated communication.

17 CHIEF JUSTICE ROBERTS: Counsel, you said
18 earlier that money is -- money is speech in this area.
19 So I take it you think the restrictions -- the otherwise
20 applicable restrictions on the less wealthy candidate,
21 raise problems under the First Amendment?

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

23 CHIEF JUSTICE ROBERTS: So this law eases
24 those problematic restrictions. It's less violative of
25 the First Amendment.

1 MR. HERMAN: It is less violative of the
2 First Amendment, but, again, this Court has made the
3 distinction between contribution limits, which it found
4 was a reasonable burden on the Constitution, and
5 expenditure limits, which -- which are not. This --

6 JUSTICE SCALIA: Well, it doesn't -- it
7 doesn't limit those restrictions on your candidate.

8 MR. HERMAN: It does -- it does not limit
9 the restrictions --

10 JUSTICE SCALIA: It simply makes the
11 imposition of the restrictions uneven.

12 MR. HERMAN: That is -- that is correct.
13 But --

14 CHIEF JUSTICE ROBERTS: Well, but your
15 candidate isn't subject to any restriction at all on
16 what he can spend and his opponent is subject to less
17 restrictions. It seems to me the First Amendment comes
18 out better.

19 MR. HERMAN: He -- he is -- my candidate, my
20 client, is subject to restrictions. The statute in its
21 entirety --

22 JUSTICE STEVENS: Why can't he go out and
23 raise funds? Does the statute prohibit him from raising
24 funds from third parties?

25 MR. HERMAN: Absolutely not, Justor --

1 Justice

2 Stevens. But for many -- for many self-financed
3 candidates, the fact that --

4 JUSTICE SCALIA: Doesn't it prohibit -- I
5 thought it prohibited him from raising funds in the
6 amount from as wealthy donors as his opponent can now go
7 to? Don't those limits on contributions continue to
8 apply to him?

9 MR. HERMAN: The contribution limits apply
10 to him as they would to any other candidate except for
11 his opponent.

12 JUSTICE SCALIA: Except for his opponent.

13 MR. HERMAN: And --

14 JUSTICE KENNEDY: And he cannot have the
15 support from his party that the opponent can have from
16 the opponent's party.

17 MR. HERMAN: That -- he cannot have the same
18 level of support.

19 JUSTICE KENNEDY: Not the same level of
20 support.

21 MR. HERMAN: That's correct.

22 JUSTICE KENNEDY: And is party support
23 sometimes important in an election?

24 MR. HERMAN: Of course, it can be vital in
25 an election, and it can be vital for a candidate who may

1 be a candidate of modest means. That would be certainly
2 one way for them to generate support, would be to
3 convince their party that they were worthy of that
4 support.

5 JUSTICE KENNEDY: Does anything in Colorado
6 indicate that there can be a differential between the
7 party support given to one candidate and the party
8 support given to the other?

9 MR. HERMAN: Not -- only as determined by
10 the party's decision as to how they feel about the
11 candidate's position.

12 JUSTICE STEVENS: Well, but they certainly
13 can allocate funds more generously to one candidate than
14 another; can't they?

15 MR. HERMAN: They certainly have that
16 opportunity, but under -- under a limit, under the 40 --
17 \$42,000 limit, as opposed to essentially an infinite
18 limit when you're dealing with a self-funded candidate.

19 And incidentally, Justice Stevens, to
20 address something else that you just brought up, for
21 many self-financed candidates the fact that they don't
22 take money from their party or from donors or from PACs
23 is -- is a significant issue for them in their campaign.
24 I mean certainly for Mr. Davis, the fact that he is
25 independent and can make his own determination --

1 JUSTICE SCALIA: Who is more incorruptible
2 than the millionaire, right?

3 MR. HERMAN: He is the ultimate independent.

4 JUSTICE SCALIA: The ultimate incorruptible.

5 (Laughter.)

6 MR. HERMAN: He -- you cannot corrupt
7 yourself. And, again, the voters will get to decide
8 whether they want someone who is like that or they want
9 someone who is more in tune with, say, what the party
10 wants or what -- with what his donors want. I mean,
11 that's -- that's really the essence of our -- of our
12 electoral system. I --

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

19 MR. HERMAN: Mr. Chief Justice, they are
20 interested in those candidates only inasmuch as they get
21 elected. The moment that the -- the public turns on
22 them, they won't be interested. And certainly the
23 public was not particularly interested in Mitt Romney,
24 who spent a significant amount of money on his own
25 behalf, and many other spectacular flameouts. And

1 indeed the --

2 CHIEF JUSTICE ROBERTS: I'm not sure --

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: I'm not sure we need
5 characterizations of political candidates in this --

6 (Laughter.)

7 MR. HERMAN: I apologize.

8 CHIEF JUSTICE ROBERTS: -- in this forum.

9 MR. HERMAN: And let me just add -- let me
10 just add one other thing. The government's own expert,
11 all of their information is derived from an individual
12 who is quoted as saying that self-financed candidates
13 rarely win, and when they do, it's usually for some
14 other reason. The fact of the matter is they don't
15 always make great candidates because they're not within
16 the mainstream.

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

18 CHIEF JUSTICE ROBERTS: Thank you,

19 Mr. Herman.

20 General Clement.

21 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

22 ON BEHALF OF THE APPELLEE

23 GENERAL CLEMENT: Mr. Chief Justice, and may
24 it please the Court:

25 Appellant's claim here is an odd sort of

1 First Amendment complaint. He does not suggest that
2 319 -- section 319 has limited his own spending at all.
3 In fact, he has twice spent a substantial amount of his
4 own money in excess of the statutory triggers and that
5 now --

6 JUSTICE SCALIA: He claims that it has
7 penalized his own spending.

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

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

18 GENERAL CLEMENT: Well, Justice Scalia --

19 JUSTICE SCALIA: It doesn't prove that it
20 isn't a penalty.

21 GENERAL CLEMENT: Well, I don't think in any
22 way it's a penalty. And I think in order to understand
23 it as a penalty you have to accept the proposition that
24 you start out with a constitutional entitlement to speak
25 freely without the opportunity for the other side to

1 respond, and I don't think the Constitution recognizes
2 this.

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

9 JUSTICE SCALIA: It was --

10 JUSTICE ALITO: Well, isn't there something
11 very -- isn't there something very strange about having
12 different contribution limits for candidates in an
13 election? Do you think it would be constitutional for
14 Congress to say that the -- the consti -- the
15 contribution limits for incumbents is X, but for
16 challengers it's 2X or one-half X?

17 GENERAL CLEMENT: Well, I think 2X would be
18 constitutional. And I think most people would be
19 surprised if Congress passed a statute that gave more
20 generous contribution limits to challengers, but I think
21 it would be a perfectly appropriate regime because it
22 would recognize that incumbents have certainly built-in
23 advantages such that the relatively low hard-money
24 contribution caps have a greater influence, greater
25 impact on a --

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

7 (Laughter.)

8 GENERAL CLEMENT: No, Justice Scalia, I
9 think there's an important distinction that was
10 suggested in one of Justice Alito's question, between
11 the government trying to level the playing field in the
12 abstract and the government looking out, not at the
13 eloquence of candidates, but at its own campaign finance
14 regime after this Court's decision --

15 JUSTICE SCALIA: Yes, but --

16 GENERAL CLEMENT: -- and recognizing that,
17 look, the differential --

18 JUSTICE SCALIA: But the -- the campaign
19 finance regimes we've -- we've approved up to now, the
20 significant limitations, have had an anti-corruption
21 rationale. There is no anti-corruption rationale here.
22 The only purpose of this is to level the playing field.
23 And I am deeply suspicious of allowing elections to be
24 conducted under a regime whereby Congress levels the
25 playing field. That seems to be very dangerous.

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

11 JUSTICE KENNEDY: It's not just money. It's
12 not just money. It's the quality and kind of speech.
13 You're saying, the government is saying, the statute
14 says, that the underfunded candidate has less access to
15 coordinated expenditures with the party than -- than the
16 other party -- than the other candidate. And the cases
17 have acknowledged, the statute acknowledged --
18 acknowledges, that coordinated expenditures have a
19 particularly potent force, and you are saying candidates
20 are treated differently in the access to this kind of
21 speech.

22 And I know of no precedent of this Court
23 that says one party is entitled to assistance from a
24 certain segment and another party is not, based on
25 the -- the content of the speech. And that's exactly

1 what this is.

2 GENERAL CLEMENT: Well, Justice Kennedy,
3 what I would say is, if you analogize to a system where
4 Congress decided that because of the advantage that
5 incumbents have, there is a greater scope for
6 coordination of the party with the challengers, I would
7 certainly be here defending that statute.

8 I would like to make clear, though, Justice
9 Kennedy, in fairness, that this focus on the coordinated
10 expenditures of the parties has really not been the
11 focus of Appellant's challenge in this case.

12 JUSTICE KENNEDY: But it's in the statute
13 and it's part of the challenge. I -- I agree that it's
14 been given a relatively minor position, but it's of
15 great concern to me because it puts this Court, it puts
16 this statute, in -- in the position of preferring one
17 kind of speech over another. And we simply do not do
18 that.

19 GENERAL CLEMENT: Well, Justice Kennedy, let
20 me say two things about the fact that this was not the
21 gravamen of the challenge here, because one reason I
22 think that's clear is if you look at the record here, at
23 the point that the record closed in this case no party
24 had taken advantage of that coordinated expenditures
25 provision.

1 JUSTICE KENNEDY: Are you saying that
2 argument is not properly before us when we are judging
3 the validity of this statute that's been challenged?

4 GENERAL CLEMENT: I'm saying that this
5 record would not allow you to invalidate the statute on
6 that ground. The record at the time that it closed
7 showed that there was no time that a party had taken
8 advantage of that. Now, I understand that it's outside
9 the record, but I understand after the record closed
10 there were some coordinated expenditures.

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

18 JUSTICE KENNEDY: But the provisions --

19 GENERAL CLEMENT: -- some and not others.

20 JUSTICE KENNEDY: The provisions of the law
21 which prefers one candidate over the other with respect
22 to coordinated expend -- expenditures has an impact on
23 campaign strategy.

24 GENERAL CLEMENT: Well, again, Justice
25 Kennedy, in fairness, though, I mean, you know, one

1 would expect if that were the nature of the claim, that
2 at a minimum we would know two facts that I don't know,
3 and aren't in the record. One is whether or not his
4 candidate reached the cap from his party's coordinated
5 expenditures, because if he didn't I don't see why that
6 individual would have standing. I also --

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

9 GENERAL CLEMENT: Well, I am defending --

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

12 GENERAL CLEMENT: Well, Justice Kennedy, I
13 always thought it was harder to bring a facial
14 challenge, not easier to bring a facial challenge. And
15 I realized that we relaxed the normal rules about
16 as-applied challenges in the First Amendment context,
17 but I think there has to be a limit to that, too. And I
18 think in a case where we don't know the fundamental
19 facts that at least I'd want to know before even
20 evaluating that challenge, I think it would be bad for
21 us to invalidate the statute, it would be wrong for us
22 to invalidate the statute on those grounds. And I think
23 I would still be here defending it though.

24 JUSTICE SCALIA: I thought that that's what
25 a facial challenge essentially consists of. You don't

1 look to see whether in fact the -- the harmful First
2 Amendment effect has occurred; you look to whether it
3 opens up the -- the possibility for that to occur.

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

18 JUSTICE SCALIA: You -- you can't go in
19 before the election and say: Look, I'm about to be
20 terribly disadvantaged; my opponent is able to have all
21 of these coordinated expenses and I'm -- and I'm not
22 able to. And -- and you're going to say: Oh, we have
23 to wait until the election is over --

24 GENERAL CLEMENT: No, Justice --

25 JUSTICE SCALIA: -- to see whether in fact

1 that happens. It seems to me this is precisely the kind
2 of a situation a facial challenge is designed for.

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

9 But those allegations weren't made here.
10 The focus of this case has always been on the
11 contribution levels and the contribution provisions of
12 this statute. I'll tell you at the end of the day the
13 analysis is quite similar, so I'm not --

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

21 GENERAL CLEMENT: I think all that's right,
22 Justice Stevens. And as you suggest, it's an unlikely
23 challenge to be brought because often times the
24 self-financer is advertising his independence from party
25 and contributors here.

1 JUSTICE KENNEDY: So you want us to write an
2 opinion which says that independently wealthy candidates
3 generally have different sorts of views than other
4 people?

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

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

16 CHIEF JUSTICE ROBERTS: General, we haven't
17 talked yet about the disclosure, the special disclosure
18 requirements in that money is speech, and in a First
19 Amendment area it strikes me as very problematic that
20 the government requires you to disclose in a
21 differential way how you intend -- when you're spending
22 a particular amount of money and on such precise
23 day-by-day requirements.

24 I mean, is there any other area -- if you're
25 writing a book, you don't have to disclose to the

1 government when you're going to publish it and how far
2 along you're getting in the draft. And yet, it just
3 seems this is the same sort of thing in the election
4 context.

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

11 CHIEF JUSTICE ROBERTS: But those are
12 applicable across the board. These are special
13 disclosure requirements for people who are going to
14 engage in additional speech.

15 GENERAL CLEMENT: Well, I mean, I'm not --
16 I'm not sure that's right in a sense that these are
17 disclosure requirements that apply across the board.
18 The timing is triggered particularly by a candidate's
19 contribution to their own campaign. So that's the way
20 in which they're different. But I think it's worth
21 focusing on that, because I actually think the
22 constitutional issues that are implicated by a
23 disclosure of a candidate's contribution to his or her
24 own campaign are actually less significant than
25 generally is true of campaign finance disclosure,

1 because what this Court talked about in Buckley as the
2 primary concern in the disclosure context was the
3 associational rights that are reflected when somebody
4 contributes to a candidate or an organization makes an
5 electioneering communication on behalf of a candidate.

6 I think those associational interests are
7 -- are obviously not implicated when all you're forcing
8 someone to disclose is the amount that they spent on
9 their own campaign.

10 CHIEF JUSTICE ROBERTS: So wouldn't you
11 think they would require more detailed and more
12 expeditious disclosure of the associational link than of
13 the self-funding? And yet it's the exact opposite.

14 GENERAL CLEMENT: No. I would think -- I
15 mean, I would think the Constitution would be more
16 concerned about the disclosing the associational link
17 because there is more than one constitutional issue --
18 interest at issue. And I think if you look at this as a
19 whole there really isn't a differential regime. Every
20 electioneering communication from the first \$10,000 has
21 to be disclosed. If anything, the complaint should be
22 the electioneering communication people should come in
23 here complaining about the fact that these self-
24 financing candidates get a free pass for the first
25 \$350,000 of their financing, before the disclosure

1 requirements kick in.

2 So I mean, I really think this is a
3 relatively modest disclosure provision and it arises in
4 a context where there aren't associational interests --

5 JUSTICE GINSBURG: The problem is it's every
6 \$10,000. It's -- as you pointed out, it doesn't require
7 more disclosure. All of this information would be
8 disclosed under the system without this 24-hour -- and
9 that I think is the complaint, the burden of having
10 every time you spend \$10,000 to file something.

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

17 In any event, I think it's a fair point here
18 that the fact that you trigger additional disclosures
19 with each \$10,000 I think is useful in informing the
20 electorate; but I also think is -- it's fair to say is
21 necessary in order for the substantive provisions of the
22 statute to operate, because they -- what they want to do
23 is they want to enable as a self-financed candidate
24 spends additional money as the election date approaches,
25 they want to put the opponent, if they have otherwise

1 reached the cap of what they can raise in additional
2 funds, in a position to continue to raise additional
3 funds. So --

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

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

21 JUSTICE SCALIA: What if one party has more
22 time on his hands? He's -- he's unemployed, so he --
23 you know, he can go around and -- whereas the other party
24 has to -- has to hire people to speak for him. He
25 has -- he has a job most of the time. Are you going to

1 even that disparity, too?

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

6 JUSTICE SCALIA: I can understand
7 leveling -- leveling contribution limits when you're
8 worried about corruption. I can understand that. But
9 doing it just to -- to make sure that -- that there is
10 an even playing field, I -- there's just no end to that.
11 And it just isn't money that makes it an even playing
12 field. A lot of other factors -- incumbency, the war
13 chest that incumbents have which -- money from the last
14 election, that isn't counted for -- for the
15 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 against Sorrell. I know you didn't join that opinion,
24 but in that opinion this Court said, the plurality said,
25 that contribution limits can in some ways be too low

1 because 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: What if Congress
18 decided that a debate on a particular issue was
19 distorted by the wealth of the owners of newspapers?
20 And so it passed a law saying that people who are
21 responding to that are relieved of the tax burden they
22 would otherwise have to pay, on whatever their -- you
23 know, sales tax on pamphlets that they want to sell.
24 Would that be all 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 mean, I think it might
4 be and it's not that radically different than what this
5 Court approved in Regan 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, this Court --

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

14 GENERAL CLEMENT: I mean, 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 -- that the Court has recognized
3 that the government has a fair amount of flexibility in
4 what its --

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

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

23 But I think that's the way to approach this
24 issue, which is to basically say if what Congress is
25 doing is really trying to effectively cap

1 self-expenditures, then Congress cannot do that; but if
2 what Congress is doing is giving candidates choice and
3 is trying to react to the regulatory environment created
4 by self-financing --

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

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

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

1 this statute kicks in and somebody gives \$6,900 to a
2 candidate?

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

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

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

1 GENERAL CLEMENT: No. But I think you're
2 talking about Congress using a mechanism that is equally
3 effective in identifying races that are likely to be
4 more expensive. When one party is spending more than
5 \$350,000 of their own money, that's every bit as likely
6 to be a more expensive race than the race for governor
7 or State treasurer or a local representative. And
8 that's why I think this is so responsive to the problem
9 that Congress recognized with the combination --

10 JUSTICE ALITO: But it applies different
11 limits to different -- to the same -- to candidates in
12 the same race. So why would Mr. Davis be subject to
13 potential corruption if he got \$2,300 -- \$2,301 from a
14 -- from a contributor, but his opponent in exactly the
15 same race would not be exposed to corruption if he got
16 \$6,900?

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

1 zero contribution limit; whereas, their opponent, a minor
2 party opponent for -- for example, would be subject to
3 higher contribution level.

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

8 GENERAL CLEMENT: But one --

9 JUSTICE SCALIA: -- for speech.

10 GENERAL CLEMENT: But one of the prices of
11 accepting the government subsidy in Buckley was to agree
12 to limit your own financing of your own campaign to
13 \$50,000.

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

20 JUSTICE BREYER: Can you go back to Justice
21 Kennedy's question, and where -- where as I took it he
22 identifies a problem that he sees in that portion of
23 this Act which, should the limit be exceeded by our
24 opponent, then we can go to the party and the party can
25 give us more? Now, assume for the sake of argument that

1 he has correctly identified a problem with that. Now,
2 my understanding is that once the limit is exceeded and
3 you have this extra amount, three things happen: One,
4 an individual could contribute two or three times the
5 amount to the party directly. A second possibility is
6 an individual who has exceeded the global amount now
7 gets a bump up and can contribute. And the third thing
8 is the party thing.

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

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

23 And I think there would be no problem
24 effectively leaving the statute with the disclosure
25 requirements in place and two of the three means of

1 taking advantage of the additional opportunities that
2 the statute affords challengers.

3 JUSTICE GINSBURG: It --

4 GENERAL CLEMENT: So I certainly think it
5 would be severable.

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

8 GENERAL CLEMENT: No.

9 JUSTICE SCALIA: -- we can chop it up this
10 way?

11 GENERAL CLEMENT: No. To the contrary, on
12 the theory that this statute operates on this record
13 without that provision being implicated at all. I mean,
14 in the first applications of this, the entirety of the
15 2004 election cycle, no party took advantage of the
16 coordinated --

17 JUSTICE GINSBURG: But I thought that --

18 GENERAL CLEMENT: -- contributions.

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

1 vis-a-vis the contributors to the other candidate.

2 GENERAL CLEMENT: I mean, I would concede
3 that there will be these differential limits, but it's
4 based on the choice of the candidate to engage or not in
5 self-financing, and -- I mean, the restriction there is
6 much more substantial in the public financing scheme
7 approved by this Court in Buckley, because in the
8 general election if the candidate decides that it's
9 going to -- that a candidate is going to take the public
10 financing scheme then in the general presidential
11 election I can't give even a dollar to that candidate.

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

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

1 wants to keep the yoke of relatively low contribution
2 limits on his opponents. And that's why I think this is
3 such an odd First Amendment challenge.

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

11 GENERAL CLEMENT: I mean, I'm not sure I
12 have the hypo. He can spend twice as much --

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

20 GENERAL CLEMENT: If I'm understanding the
21 hypo which we were just talking about contribution
22 limits, because there are no expenditure limits, if I'm
23 understanding the hypo right, I think that would still
24 be okay. I mean, I think if Congress had decided here
25 that if a self-financer spends beyond a certain amount,

1 then what is important is that then the contribution
2 limits would be lifted entirely. I suppose Congress
3 could do that, as long as they maintained what they
4 called the "parity principle" or the "proportionality
5 principle," which is in no circumstance will the
6 opponent be able to raise more than the amount of the
7 additional spending. And if your hypo is suggesting
8 that that would be relaxed so that they could raise
9 twice as much, I think that would raise more difficult
10 constitutional questions.

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

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

1 absolute cap, rather than the way it operates here,
2 which is not as a cap. And I think if you look at the
3 numbers in the record, joint appendix page 89 --

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

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

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

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

25 JUSTICE SCALIA: Suppose -- suppose we

1 found -- we were of the view that all of the provisions,
2 that the benefits given to the other side here are bad.
3 I suppose we could even -- re-even the playing field by
4 either denying those benefits to the candidate opposing
5 the Appellant -- the Petitioner here, or we could do the
6 opposite and eliminate similar restrictions upon -- upon
7 the Petitioner. Do you have any idea which way we ought
8 to go?

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

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

22 The only other thing that I would say about
23 this choice between leveling up and leveling down is I
24 would say that the statute that would have relaxed the
25 caps for both candidates would pose the same First

1 Amendment issue as this statute. And so it really is,
2 at bottom, an equal protection claim that you have
3 before you.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, General
6 Clement.

7 Mr. Herman, you may take five minutes.

8 REBUTTAL ARGUMENT OF ANDREW D. HERMAN

9 ON BEHALF OF THE APPELLANT

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

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

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

22 MR. HERMAN: For -- for his opponent?

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

1 MR. HERMAN: He -- he went into the election,
2 Justice Ginsburg, with about a \$1.15 million war chest.
3 And then he --

4 JUSTICE GINSBURG: Then he was just a good
5 fundraiser? That --

6 MR. HERMAN: He was the chairman of the
7 NRCC. He was an excellent fundraiser.

8 (Laughter.)

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

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

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

23 What the -- what the statute requires is
24 that a self-financed candidate declare, at the very
25 start of his campaign, whether he intends to spend more

1 than \$350,000. That, as the -- as the government's
2 brief acknowledges, has no analogue in any other
3 disclosure provision, and it serves -- it serves no
4 purpose. It doesn't -- it doesn't inform the electorate
5 of anything other than that this gentleman is going to
6 be self-financing.

7 It certainly doesn't address corruption.
8 It's simply -- simply harassment of a self-financer
9 requiring them to -- to go on the record --

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

12 MR. HERMAN: That's exactly right.

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

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

1 If there are no further questions --

2 CHIEF JUSTICE ROBERTS: Thank you

3 Mr. Herman.

4 The case is submitted.

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

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