No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

TED CRUZ FOR SENATE AND
SENATOR RAFAEL EDWARD "TED" CRUZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

When a candidate for federal office lends money to his own election campaign, federal law imposes a $250,000 limit on the amount of post-election contributions that the campaign may use to repay the debt owed to the candidate. 52 U.S.C. 30116(j). The questions presented are as follows:

1. Whether appellees have standing to challenge the statutory loan-repayment limit.

2. Whether the loan-repayment limit violates the Free Speech Clause of the First Amendment.

PARTIES TO THE PROCEEDING

The Federal Election Commission (FEC) is the appellant in this Court and was a defendant in the district court. Ted Cruz for Senate and Senator Rafael Edward "Ted" Cruz are appellees in this Court and were plaintiffs in the district court.

Ellen L. Weintraub, Matthew S. Petersen, Caroline C. Hunter, and Steven T. Walther, in their official capacities as Commissioners of the FEC, were originally named as defendants in the district court. Petersen and Hunter have since been succeeded as Commissioners of the FEC by James E. Trainor III and Allen Dickerson. The individual Commissioners have not separately appealed.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Ted Cruz for Senate v. *FEC*, No. 19-908 (June 3, 2021)

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OPINIONS BELOW

An opinion of the district court (App., *infra*, 5a-37a) is not yet reported, but is available at 2021 WL 2269415. A prior opinion and order of the district court (App., *infra*, 40a-64a) is unreported, but is available at 2019 WL 8272774.

JURISDICTION

The judgment of the district court was entered on June 3, 2021 (App., *infra*, 38a-39a). The Federal Election Commission filed a notice of appeal on June 13, 2021 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 113-114.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App., *infra*, 65a-68a.

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, regulates the financing of federal election campaigns. The Federal Election Commission (FEC or Commission) is responsible for administering those statutes. 52 U.S.C. 30106.

Under FECA, BCRA, the FEC's regulations, and this Court's First Amendment precedents, candidates may use a variety of means to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his election. *Buckley* v. *Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam). The campaign may also accept contributions from individuals and certain political committees, subject to per-election limits. 52 U.S.C. 30116(a) and (c). And the campaign may borrow money, either from a third-party lender or from the candidate himself. App., *infra*, 7a.

As relevant here, federal law imposes three restrictions on the repayment of a candidate's personal loans. App., *infra*, 8a. First, BCRA states that a candidate "shall not" use "contributions made * * * after the date of [the] election" to repay such "personal loans * * * to the extent such loans exceed $250,000." 52 U.S.C. 30116(j). Second, the Commission's regulations provide that candidate committees may use pre-election contributions to repay the portion of the loans that exceeds $250,000 only if the repayment is made within 20 days after the election. 11 C.F.R. 116.11(b)(1)

and (c)(1). Third, if a candidate loan that exceeds $250,000 remains unpaid 20 days after the election, the committee must recharacterize the portion in excess of $250,000 as a contribution rather than a loan (precluding later repayment). 11 C.F.R. 116.11(c)(2).

2. In 2018, appellee Senator Ted Cruz ran for reelection to represent Texas in the United States Senate. App., *infra*, 8a. Senator Cruz's campaign against Beto O'Rourke was at the time the most expensive in the Senate's history. FEC Statement of Undisputed Material Facts (SMF), D. Ct. Doc. 65, ¶ 52 (July 14, 2020). Appellee Ted Cruz for Senate, Senator Cruz's principal campaign committee, raised more than $35 million in 2017-2018. *Id.* ¶ 53.

The day before the general election, Senator Cruz lent his committee $260,000—$10,000 more than the maximum amount that BCRA's loan-repayment provision allows to be repaid with post-election contributions. App., *infra*, 8a. After the election, the committee had approximately $2.2 million in cash on hand. *Ibid.* The committee could have used those pre-election funds to repay Senator Cruz in whole or in part, but it chose not to do so within the 20-day deadline set by FEC regulations. *Id.* at 8a-9a. If the committee had used pre-election contributions to repay Senator Cruz $10,000 within that 20-day window, it could lawfully have used post-election funds to repay the remaining $250,000.

Once the 20-day deadline elapsed, the FEC regulation required that $10,000 of the prior $260,000 loan be recharacterized as a contribution from Senator Cruz to his campaign. 11 C.F.R. 116.11(c)(2). Senator Cruz then emailed his campaign staff: "Since more than 20 days have passed, it would be REALLY good if we could pay back at least some of the $250k now." SMF ¶ 62

(citation omitted). The committee then repaid Senator Cruz $250,000. App., *infra*, 9a. But because the committee had purposefully waited until 20 days had elapsed, it could not repay the remaining $10,000. *Ibid.*; see 11 C.F.R. 116.11(c)(2). Appellees have stipulated that "the sole and exclusive motivation behind Senator Cruz' actions in making the 2018 loan and the committee's actions in waiting to repay them was to establish the factual basis for this challenge." SMF ¶ 56.

3. On April 1, 2019, appellees sued the Commission in federal district court in the District of Columbia, alleging that BCRA's loan-repayment limit violates the First Amendment (and raising additional challenges to the FEC's regulations). Compl. 1; App., *infra*, 9a; see Compl. ¶¶ 34-51. They invoked Section 403(a) of BCRA, which authorizes a three-judge district court to hear challenges to "the constitutionality of any provision of this Act or any amendment made by this Act." BCRA § 403(a), 116 Stat. 113.

When a plaintiff files suit and requests that the case be heard by a three-judge district court, a single judge may dismiss the complaint for lack of jurisdiction without convening a three-judge court. See *Shapiro* v. *McManus*, 577 U.S. 39, 45 (2015); *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 96 n.14 (1974). Invoking that principle, the FEC moved to dismiss the claims before a three-judge court had been convened, arguing that appellees lacked standing to sue. App., *infra*, 9a. Acting through a single judge, the district court denied the motion to dismiss and granted the application to convene a three-judge court. *Id.* at 40a-64a.

The district court concluded that Senator Cruz had standing to sue because he had suffered a "$10,000 financial injury" due to BCRA's loan-repayment limit. App., *infra*, 51a. Citing appellees' complaint, the district court stated that, "[f]ollowing the 20-day repayment period, the Cruz Committee repaid Senator Cruz the $250,000 statutory maximum using post-election contributions, but BCRA foreclosed it from paying back the $10,000 balance." *Id.* at 44a. The court observed that "Senator Cruz loaned his campaign $10,000 more than he could legally be repaid using post-election contributions"; that the 20-deadline for using pre-election contributions to repay Senator Cruz had expired; and that, "[a]s a consequence of all this, Senator Cruz is still owed $10,000, * * * which is plainly a cognizable injury." *Ibid.* The FEC argued that, because the committee could easily have used pre-election contributions to repay all or part of Senator Cruz's loan during the 20-day post-election window, Senator Cruz's injury was self-inflicted. *Id.* at 52a, 53a-54a. The court rejected that contention, stating that "[t]he flaw in the FEC's argument [wa]s that it would require Senator Cruz to avoid an injury by subjecting himself to the very framework he alleges is unconstitutional." *Id.* at 54a.

The FEC took steps to renew its standing argument during discovery. See 451 F. Supp. 3d 92, 97-98. But the three-judge court "reject[ed]" the FEC's argument "outright." *Id.* at 98. The court noted that the single judge had "explained, in detail, why [the FEC's] theory that [appellees] had caused their own injury * * * is irrelevant to standing," and it "adopt[ed] that analysis in its entirety." *Ibid.*

4. The three-judge district court subsequently granted appellees' motion for summary judgment, denied the FEC's motion for summary judgment, and held that BCRA's loan-repayment limit violates the First Amendment. App., *infra*, 5a-37a. In its description of the factual background of the suit, the three-judge court stated (consistent with appellees' complaint and the prior opinion of the single-judge court) that the campaign committee had "repaid Senator Cruz the maximum $250,000 with post-election contributions but [BCRA's loan-repayment limit] prevented the campaign from paying back the final $10,000." *Id.* at 9a.

The district court first concluded that the loan-repayment limit burdens the exercise of political speech. App., *infra*, 11a-19a. The court explained that the limit "burdens candidates who wish to make * * * personal loans" to their campaigns by "constrain[ing] the repayment options available to the candidate." *Id.* at 13a-14a. The court suggested that, as a result of the limit, a candidate could be "inhibited from making a personal loan * * * out of concern that she will be left holding the bag on any unpaid campaign debt." *Id.* at 19a.

Applying heightened scrutiny, the district court then concluded that the government had not adequately justified this burden on political speech. App., *infra*, 20a-36a. The court acknowledged that, under this Court's precedents, Congress may enact campaign-finance laws to prevent the reality and appearance of *quid pro quo* corruption. *Id.* at 21a. The court concluded, however, that the FEC had "fail[ed] to demonstrate that quid pro quo corruption or its appearance arises from post-election contributions to retire a candidate's personal debt." *Id.* at 23a. The court noted that "the FEC ha[d] not identified a single case of actual quid pro quo corruption in

this context," and that "many states impose no restriction on using post-election contributions to repay candidate loans." *Ibid.*

The district court further held that the loan-repayment limit "[wa]s not 'closely drawn' to protect expressive and associational freedoms." App., *infra*, 30a (citation omitted). The court deemed the limit "over inclusive" because it "applies across the board to winning and losing candidates, although any purported anticorruption rationale applies only to winning candidates." *Id.* at 31a. The court also found the limit "substantially underinclusive" because "[a] person may contribute to retire any outstanding campaign debt, with the exception of a candidate's personal loans over $250,000." *Id.* at 32a. Finally, the court emphasized that "[t]he loan-repayment limit also imposes an additional regulatory requirement on top of the existing base [contribution] limits," which already protect "against quid pro quo corruption or its appearance." *Id.* at 34a.

REASONS FOR SUMMARY VACATUR OR FOR POSTPONING JURISDICTION

Under Section 403(a) of BCRA, a suit challenging "the constitutionality of any provision of this Act or any amendment made by this Act" may be filed in the United States District Court for the District of Columbia and heard by a three-judge court. § 403(a)(1), 116 Stat. 113-114. A separate provision makes Section 403(a) applicable to suits filed after 2006 if the plaintiffs so elect, see § 403(d)(2), 116 Stat. 114, and appellees so elected here, see App., *infra*, 9a, 43a. Section 403(a) further provides that, when a plaintiff challenging the constitutionality of a BCRA provision invokes that special review mechanism, the three-judge district court's "final decision in the action shall be reviewable only by

appeal directly to the Supreme Court of the United States." § 403(a)(3), 116 Stat. 114. "Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision." *Ibid.* Section 403(a) makes it "the duty" of the district court and this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." § 403(a)(4), 116 Stat. 114.

In a direct appeal, this Court has "no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under [its] certiorari jurisdiction." *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). The Court may address the merits either by granting plenary consideration or by summarily disposing of the appeal. *Ibid.* Here, the district court erred both by holding that appellees have standing to challenge BCRA's loan-repayment limit, and by holding that the limit violates the First Amendment. This Court should summarily vacate the district court's decision and remand the case for further consideration of standing in light of its intervening decision in *California* v. *Texas*, No. 19-840 (June 17, 2021). Otherwise, the Court should set the case for plenary consideration.

1. To establish Article III standing, a plaintiff must show that it suffered an injury-in-fact; that its injury was fairly traceable to the defendant's challenged conduct; and that a favorable judicial decision would redress the plaintiff's injury. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The standing issue in this case turns on the second of those requirements, traceability.

In this case, the district court held that Senator Cruz had standing to challenge BCRA's loan-repayment limit

because the committee still owed him $10,000 but could not repay that sum. App., *infra*, 51a. That was error. Although the loss of $10,000 constituted injury, that injury was not fairly traceable to the FEC's enforcement of the loan-repayment limit. That is so for two separate reasons: (1) that injury was not traceable to the enforcement of the specific statutory provision that the district court held unconstitutional, and (2) the injury was self-inflicted.

a. In *California*, this Court explained that, in order to establish standing, a plaintiff must show that its injury is "'fairly traceable' to enforcement of the 'allegedly unlawful' provision *of which the plaintiffs complain*." Slip op. 15 (emphasis added; citation omitted). A plaintiff does not have standing to challenge a given provision if its injury is attributable to "other provisions" of law. *Id.* at 14. In this case, the committee's inability to repay Senator Cruz is not attributable to BCRA's loan-repayment limit.

i. The loan-repayment limit prohibits a committee from using more than $250,000 in post-election funds to repay a candidate's personal loans. See 52 U.S.C. 30116(j). When the single-judge district court denied the FEC's motion to dismiss and granted appellees' request for a three-judge court, it appropriately took as true the allegations in appellees' complaint. Because appellees' complaint alleged that the committee had used *post*-election funds to repay Senator Cruz $250,000, the court decided the standing issue based on that understanding. See App., *infra*, 44a; Compl. ¶ 31 (alleging that the committee "ha[d] repaid the statutory maximum of $250,000 from money raised after the election"). If that factual understanding were correct, BCRA's loan-repayment limit would indeed prevent the

committee from using additional post-election funds to repay the remaining $10,000.

During discovery, the FEC took steps to renew its argument that appellees lacked standing. But in ruling on a discovery dispute, the three-judge court "reject[ed] outright [the Commission's] argument" and adopted the single judge's analysis of standing "in its entirety." 451 F. Supp. 3d 92, 98.

ii. In its subsequent merits ruling, the three-judge district court similarly stated that the committee had "repaid Senator Cruz the maximum $250,000 with post-election contributions." App., *infra*, 9a. That statement, however, was contrary to the summary-judgment record that had been developed since the single-judge court's ruling on the motion to dismiss. That record made clear that the committee had not yet used any *post*-election funds to repay Senator Cruz, but instead had repaid Senator Cruz $250,000 using only *pre*-election funds.

In particular, that record contained deposition testimony confirming that "[t]he committee did not receive any post-election contributions at any time after * * * the general election of 2018." D. Ct. Doc. 65-9, at 95 (May 13, 2020). The deponent explained that, although the committee had continued to receive contributions after election day 2018, it had designated those contributions for use in "the primary and the general 2024 election cycle," and that none of those funds were treated as contributions to Senator Cruz's 2018 campaign. *Id.* at 96. Further, appellees expressly admitted that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." D. Ct. Doc. 67-1 ¶ 64; see *id.* ¶ 60 (admitting that, "during the

20 days after the election and later, the Committee continued receiving post-election contributions, but rather than using those contributions to pay vendors or to pay any of Senator Cruz's debt, the campaign designated the contributions for Senator Cruz's 2024 re-election effort").

Thus, by the time the three-judge district court ruled on the merits of appellees' First Amendment challenge to BCRA's loan-repayment limit, the record made clear that appellees had used pre- rather than post-election contributions to repay Senator Cruz $250,000. At that point, any continued reliance on the contrary allegation in appellees' complaint was unwarranted. "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. At the summary-judgment stage, "the plaintiff can no longer rest on * * * 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Ibid.* (citation omitted). Appellees did not submit any evidence suggesting that the committee had used *post*-election contributions to repay $250,000 of Senator Cruz's loan. And even if they had, the contrary evidence discussed above would have raised a genuine dispute of material fact that the court could not have resolved at summary judgment. See Fed. R. Civ. P. 56(a).

iii. Because the prior $250,000 repayment to Senator Cruz was made using pre-election funds, nothing in BCRA's loan-repayment provision stops the committee from raising post-election contributions and using those contributions to repay the remaining $10,000 owed to Senator Cruz. To the extent that appellees' injury is

attributable to the FEC at all, it flows from the FEC's enforcement of an agency regulation, not from its enforcement of the statutory loan-repayment limit. Once the committee allowed the 20-day post-election period to expire without repaying any portion of the $260,000 debt it owed to Senator Cruz, an FEC regulation required the committee to recharacterize $10,000 of that debt—*i.e.*, the increment above the $250,000 statutory cap—as a contribution to the campaign. See App., *infra*, 9a; 11 C.F.R. 116.11(c)(2). It is that regulation—not the statutory loan-repayment limit—that today prevents the committee from raising and using post-election funds to repay the remainder of Senator Cruz's loan. As a result, whether or not appellees had standing to challenge the regulation, see pp. 13-16, *infra* (explaining that self-inflicted injury does not give rise to Article III standing), they lacked standing to challenge the statute. See *Transunion LLC* v. *Ramirez*, No. 20-297 (June 25, 2021), slip op. 20 ("[A] plaintiff must 'demonstrate standing separately for each form of relief sought.'") (citation omitted).

iv. Based on the record evidence described above, which had been assembled after the single-judge district court denied the Commission's motion to dismiss, the FEC informed the three-judge court that the committee's $250,000 repayment to Senator Cruz had been made with pre-election funds. See SMF ¶¶ 60, 64. On the merits, the FEC relied in part on the committee's use of pre-election funds to repay that amount as evidence that appellees had suffered no burden of constitutional magnitude as a result of BCRA's loan-repayment limit. See FEC Mot. for Summ. J. 16; FEC Reply in Supp. of Mot. for Summ. J. 16, 17, 18. The Commission's motion for summary judgment did not, however, ask the

three-judge court to revisit the Article III standing analysis that had been adopted by the single judge and later embraced by the three-judge court. As noted above, despite the FEC's references to the record evidence showing that pre-election funds had been used, the three-judge district court repeated the single-judge court's earlier assertion that the $250,000 loan repayment had been made with post-election funds. See App., *infra*, 9a.

Although the FEC's motion for summary judgment did not ask the three-judge district court to revisit standing, the court had "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006). And "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004).

This Court's decision in *California*, which emphasized the need for a plaintiff to demonstrate injury from the specific provision that is alleged to be unconstitutional, was issued after the proceedings below ended. This Court therefore should vacate the district court's judgment and remand the case for further consideration of standing in light of that intervening decision. Although the Court could set the case for plenary consideration and consider the issue in the first instance, vacatur and remand would be more consistent with the Court's role as "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see, *e.g.*, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 412 (2006) (per curiam).

b. Appellees lack standing for a second reason: an injury is not fairly traceable to the defendant's conduct if it is "self-inflicted." *Clapper* v. *Amnesty International*, 568 U.S. 398, 418 (2013); see *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003); *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Here, the only injury identified by the district court—Senator Cruz's loss of $10,000—was self-inflicted.

Senator Cruz's committee had approximately $2.2 million in pre-election funds left on hand after the election. App., *infra*, 43a. If it had used those funds to pay Senator Cruz $10,000 or more in the 20 days after the election, it could lawfully have used post-election contributions to pay any remaining portion of the debt, thus ensuring that Senator Cruz was fully repaid. See p. 3, *supra*. The committee simply chose not to do so. Senator Cruz's loss of $10,000 thus was attributable to appellees' "personal choice[s]," not to any action by the FEC. *McConnell*, 540 U.S. at 228. Appellees cannot "be heard to complain about damage inflicted by [their] own hand." *Pennsylvania*, 426 U.S. at 664.

The district court suggested that using pre-election funds would have harmed appellees because "it would [have] require[d] Senator Cruz to avoid an injury by subjecting himself to the very framework he alleges is unconstitutional." App., *infra*, 54a. Under this Court's precedents, however, a plaintiff's belief that the government has violated the Constitution does not by itself give him standing. See, *e.g.*, *United States* v. *Richardson*, 418 U.S. 166, 175 (1974). "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, slip op. 11 (citation omitted); see *id.* at 1, 27 ("No

concrete harm, no standing."). And "a plaintiff cannot establish standing by asserting an abstract 'general interest common to all members of the public,' * * * 'no matter how sincere' or 'deeply committed' a plaintiff is to vindicating that general interest." *Carney* v. *Adams*, 141 S. Ct. 493, 499 (2020) (citation omitted).

To be sure, appellees could have sought to establish their standing by demonstrating that using pre-election funds to repay Senator Cruz during the 20-day post-election window would itself have injured them in some concrete way. See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *United States Food & Drug Administration*, 710 F.3d 71, 85 (2d Cir. 2013) (holding that an injury was not self-inflicted because taking the action needed to avoid that injury would have subjected the plaintiff to a different harm). Appellees, however, have not shown that they would have suffered any concrete harm from disbursing $10,000 in pre-election funds to Senator Cruz within the 20-day regulatory deadline. Appellees argued below that "the Cruz Committee had a First Amendment right to prioritize its spending of pre-election contributions by paying vendors and other creditors rather than reimbursing Senator Cruz, and the Government cannot demand that the Committee give up that right to avoid the financial injury resulting from an unconstitutional statute." D. Ct. Doc. 29, at 41 (June 28, 2019). But appellees did not identify any specific payment to a vendor or other creditor that the Committee would have been hindered from making if it had used $10,000 of pre-election funds to reduce the debt that it owed to Senator Cruz. Cf. *Defenders of Wildlife*, 504 U.S. at 563 (to establish standing, organizations that sought to challenge federal activities that allegedly harmed endangered and threatened species

outside the United States were required to show, "through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be 'directly' affected"). And because the funds with which the committee ultimately repaid the $250,000 were in the committee's possession on the date of the election, and remained in its possession until after the 20-day post-election window had expired, it is difficult to see how their use for loan-repayment purposes during that window would have impaired the committee's ability to pay other creditors.

Indeed, far from identifying any specific actual or threatened impairment of their ability to pay vendors or other creditors, appellees stipulated below that "the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loan and the committee's actions in waiting to repay them was to establish the factual basis for this challenge." SMF ¶ 56 (citation omitted). A factual stipulation is "binding and conclusive." *Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 561 U.S. 661, 677 (2010) (citation omitted). Having stipulated that the "sole and exclusive" reason for deferring any repayment of the loan until after the 20-day post-election window was "to establish the factual basis for this challenge," SMF ¶ 56 (citation omitted), appellees may not now argue that their actual motive for that decision was to make the funds available for use in repaying other creditors.

2. The three-judge district court's merits holding is also erroneous. Contrary to the court's decision, the loan-repayment limit does not violate the First Amendment.

a. The First Amendment allows Congress to regulate the financing of political campaigns. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). Under this Court's precedents, the level of scrutiny that applies to such a regulation depends on "the magnitude of the burdens imposed." *Clingman* v. *Beaver*, 544 U.S. 581, 591 (2005). "That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis* v. *FEC*, 554 U.S. 724, 744 (2008). The Court has applied a stringent standard to "expenditure limitations," which impose "severe restrictions on protected freedoms," but a less stringent standard to "contribution limitations," which impose more "marginal restriction[s]." *Buckley*, 424 U.S. at 21, 23.

The loan-repayment limit imposes at most a modest burden on First Amendment rights. It does not limit the amount of money that a candidate may spend, the amount of money that a campaign may borrow, the amount of money that a candidate may raise, or the amount of money that a donor may contribute to a campaign. It does not even impose a ceiling on a campaign's ability to repay a candidate's loans; so long as the campaign uses pre-election funds, it may repay the candidate in full no matter how large the debt. The limit instead imposes a narrow timing restriction: it affects a campaign's ability to use a pool of funds raised at a particular time (after the election) for a particular purpose (repaying personal loans made by the candidate). And even that restriction on the use of post-election funds to repay the candidate's personal loans applies only to the extent that such repayments exceed $250,000.

The district court believed that the loan-repayment limit burdens speech by "constrict[ing] candidate lending" and "discouraging the personal financing of campaign speech." App., *infra*, 15a. That assertion lacks a sound basis in the record. Most loans to election campaigns are for $250,000 or less, and thus are not affected by the loan-repayment limit. For example, during the five most recent election cycles, nearly 80% of the loans made by Senate candidates and nearly 90% of the loans made by House candidates were for $250,000 or less. See SMF ¶ 38-39. Further, "[t]he ratio of loans below $250,000 has not changed substantially from what the ratio was prior to BCRA." *Id.* ¶ 40. That pattern suggests that, contrary to the court's speculation, the loan-repayment limit has not meaningfully discouraged the financing of campaign speech.

The district court's concerns are particularly misplaced on the facts of this case. The loan at issue here was not made for the purpose of facilitating "campaign speech." App., *infra*, 15a. Senator Cruz made the loan the day before the election, and he transparently tailored the loan's $260,000 amount to facilitate this challenge to the $250,000 loan-repayment cap, while limiting (to $10,000) the personal financial loss that he might suffer if his constitutional challenge is ultimately unsuccessful. See p. 14, *supra*. Indeed, appellees have "stipulate[d] that the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loan * * * was to establish the factual basis for this challenge." SMF ¶ 56.

The statutory limit also did not have the effect of "constrict[ing] candidate lending." App., *infra*, 15a. As explained above, the committee had more than $2 million in pre-election funds left over after the election, and

it could easily have used those funds to repay Senator Cruz's loan in full or in part during the first 20 days after the election. It simply chose not to do so, again with "the sole and exclusive motivation" of "establish[ing] a factual basis for this challenge." SMF ¶ 56; see pp. 14, 16, *supra*. As applied in this case, the loan-repayment limit thus did not impose any meaningful constraint on appellees' expression.

b. The interests served by the loan-repayment limit amply justify this modest burden on speech. Congress has a "legitimate and compelling" interest in "preventing corruption or the appearance of corruption." *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496 (1985). "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27. And avoiding the *appearance* of corruption is "critical if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 27 (citation and ellipsis omitted).

For three reasons, the use of post-election contributions to repay personal loans creates a heightened risk of actual and apparent *quid pro quo* corruption. First, money that repays a personal loan after an election effectively goes into the candidate's pocket. A payment that adds to a candidate's personal wealth (and that can accordingly be used for personal purposes) poses a greater threat of *quid pro quo* corruption than a payment that merely adds to a campaign's treasury (and that can accordingly be used only for campaign purposes). Common sense suggests, for example, that the

risk of corruption is greater when an officeholder receives $2900 that he can use to pay down his mortgage than when he receives $2900 that his campaign can use to pay for more placards. Cf. 52 U.S.C. 30114(a) (identifying permissible uses of campaign contributions); 52 U.S.C. 30114(b)(1) ("A contribution or donation described in subsection (a) shall not be converted by any person to personal use."); *FEC* v. *O'Donnell*, 209 F. Supp. 3d 727, 739-740 (D. Del. 2016) (upholding prohibition on the use of campaign contributions to defray the candidate's personal expenses).

Second, a donor who contributes money before an election does not yet know whether the recipient of the contribution will prevail, but a donor who contributes after an election does. In other words, the donor can know (rather than merely hope) that the recipient will be in a position to do him official favors. That markedly increases the risk that the contribution is (or will appear to the public to be) part of a *quid pro quo* arrangement.

Third, the primary *legitimate* rationales for donating to electoral campaigns do not apply to contributions that postdate the electoral campaign to which the contributions are directed. The most obvious legitimate reasons for contributing to a political campaign are (1) pooling resources with other donors to facilitate political expression and (2) increasing, at least marginally, the likelihood that the favored candidate will prevail. A post-election contribution serves neither of those purposes. It does not facilitate additional political expression, for the campaign has already ended. And it does not increase the likelihood that the favored candidate will prevail, for the election has already occurred. A post-election contribution is thus more likely than a pre-election contribution to be motivated by an expectation

of special favors from the recipient. Cf. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (explaining that, "when all legitimate reasons" for an action "have been eliminated," one may infer that the actor "based his decision on an impermissible consideration").

The longstanding practice of regulating personal gifts to public officials supports the congressional judgment underlying the loan-repayment limit. Rules adopted by the Senate and House of Representatives restrict members' acceptance of gifts worth $50 or more. See Standing Rule of the Senate XXXV (2013); House Rule XXV.5 (2019). That limit is far smaller than the amount (currently $2900 per election) that an individual may contribute to a federal candidate's campaign. See App., *infra*, 6a n.1; 52 U.S.C. 30116(a) and (c). Regulations adopted by the Executive Branch restrict federal employees' acceptance of gifts worth $20 or more from persons whose interests may be affected by the performance of the employees' official duties. See 5 C.F.R. 2635.204. Regulations adopted by the Judicial Conference likewise restrict judges' acceptance of gifts. See Judicial Conference, Code of Conduct for United States Judges, Canon 4(D)(4) (2019). The loan-repayment limit rests on the same common-sense judgment as those rules: a payment that goes into a public official's pocket creates a serious danger of actual or apparent corruption.

In sum, the loan-repayment limit imposes at most a marginal restriction on speech to promote an interest of the highest order. Because "the strength of the governmental interest" outweighs "the seriousness of the actual burden on First Amendment rights," the limit complies with the Constitution. *Davis*, 554 U.S. at 744.

c. The district court's contrary rationales lack merit. The court faulted the FEC for failing to produce empirical evidence that the loan-repayment limit prevents the reality or appearance of corruption. App., *infra*, 21a-30a. This Court has explained, however, that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). The judgment underlying the loan-repayment limit—that payments that go directly into a candidate's pocket raise a particularly serious risk of corruption—is neither novel nor implausible, but instead underlies conflict-of-interest rules that apply to officials in all three Branches of the federal government. And because the loan-repayment limit has now been in place for 20 years, the district court should have "recogniz[ed] that no data can be marshaled to capture perfectly the counterfactual world in which [such] limits do not exist." *McCutcheon* v. *FEC*, 572 U.S. 185, 219 (2014) (opinion of Roberts, C.J.).

In any event, the Commission presented extensive empirical evidence that the loan-repayment limit helps to prevent the reality and appearance of corruption. For instance, the FEC cited a study showing that "indebted politicians, relative to their debt-free counterparts, are significantly more likely to switch their votes if they receive contributions from * * * special interests between the votes." SMF ¶ 67 (citation omitted). The FEC identified numerous episodes in which officeholders had awarded government contracts and other special favors after receiving contributions designed to pay down personal debt. *Id.* ¶¶ 69-81. And it cited opinion polling showing that more than 80% of respondents

believed that individuals who donate money to a campaign after an election expect political favors in return. *Id.* ¶ 90.

The district court also concluded that the limit is "over inclusive" because it "applies across the board to winning and losing candidates, although any purported anticorruption rationale applies only to winning candidates." App., *infra*, 31a. That rationale, too, is mistaken. First, as a general matter, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). Senator Cruz won the 2018 election, and the government's anticorruption rationale applies to winning candidates with full force. Whether the loan-repayment limit would be constitutional as applied to a losing candidate is a separate question not presented in this case.

Second, to the extent that First Amendment overbreadth doctrine allows a litigant vicariously to assert the rights of third parties, the litigant must still show that the challenged law is "substantially overbroad" "in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Appellees have not satisfied that standard here; evidence in the record showed that post-election contributions generally flow to winning candidates and that the loan-repayment limit has little effect on losing candidates. SMF ¶ 42. Third, establishing separate rules for winning and losing candidates would have risked creating the kind of "asymmetrical contribution scheme" that this Court has previously found unconstitutional. *Davis*, 554 U.S. at 735.

After concluding that the loan-repayment limit restricts too much speech, the district court concluded that it restricts too little. App., *infra*, 32a-33a. The court found the limit "substantially underinclusive" because it applies to candidate loans but not to "other types of campaign debt"; because it applies to post-election contributions but not to contributions made "before the election"; and because it permits "post-election contributions to retire pre-election debt * * * up to the $250,000 cap." *Ibid.* That analysis is misconceived.

Contributions that repay candidate loans differ fundamentally from contributions that repay third-party loans, since the former personally enrich the candidates while the latter do not. Pre-election contributions likewise differ fundamentally from post-election contributions, since the latter are made after the winner of the election is known and are particularly likely to reflect an expectation of special favors. See p. 20, *supra*. And although Congress could have prohibited all uses of post-election contributions to repay personal loans made by candidates to their campaigns, its decision to permit such repayments up to the $250,000 cap reflects an effort to accommodate candidates who wish to use personal loans as a method of campaign financing. In all events, "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 449 (2015) (citation omitted). This Court should not "punish [Congress] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive." *Id.* at 452.

Finally, the district court found the loan-repayment limit unconstitutional because it was "[l]ayered on top"

of base limits on campaign contributions—limits that, in the court's view, already adequately combated corruption and its appearance. App., *infra*, 34a. But as shown above, a contribution made after an election to repay a candidate's personal loan poses a heightened risk of corruption, over and above the risk posed by a pre-election contribution in the same amount. See pp. 19-21, *supra*. The First Amendment permits Congress to adopt "an additional restriction," App., *infra*, 34a, to address that additional danger.

3. The district court thus erred both in holding that appellees have standing to challenge BCRA's loan-repayment limit, and in declaring unconstitutional a provision of an Act of Congress. This Court should summarily vacate the district court's judgment and remand the case for further consideration of standing in light of the Court's intervening decision in *California*. Alternatively, the Court should set the case for plenary consideration.*

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* This Court may set a direct appeal for plenary consideration through either an order noting probable jurisdiction or an order postponing consideration of jurisdiction. See Sup. Ct. R. 18.12. Because the FEC has advanced a substantial argument that appellees lack standing, the appropriate course here—if the Court declines to vacate the judgment below—would be to postpone consideration of jurisdiction. See, *e.g.*, *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787, 793 (2015).

CONCLUSION

This Court should summarily vacate the judgment of the district court and remand the case for further consideration of standing in light of *California* v. *Texas*, No. 19-840 (June 17, 2021). Alternatively, the Court should postpone jurisdiction.

Respectfully submitted.

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JULY 2021

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 19-908 (NJR, APM, TJK)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 13, 2021

NOTICE OF APPEAL

DEFENDANT FEDERAL ELECTION COMMISSION'S AMENDED NOTICE OF APPEAL

Notice is hereby given that the Federal Election Commission, defendant in this case, appeals to the Supreme Court of the United States, pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 114, from the judgment of this Court entered in this action on June 3, 2021.

Respectfully submitted,

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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 19-908 (NJR, APM, TJK)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 11, 2021

NOTICE OF APPEAL

DEFENDANT FEDERAL ELECTION COMMISSION'S NOTICE OF APPEAL

Notice is hereby given that the Federal Election Commission, defendant in this case, appeals to the Supreme Court of the United States from the decision and order of this Court entered in this action on June 3, 2021.

Respectfully submitted,

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 19-cv-908 (NJR) (APM) (TJK)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 3, 2021

MEMORANDUM OPINION

Before: RAO, *Circuit Judge*, MEHTA and KELLY, *District Judges*.

RAO, *Circuit Judge*:

In our constitutional democracy, elections are the primary way for the people to express their political will. Political speech promotes the free exchange of ideas about principles of government, pressing policy matters, and the relative merits of candidates for office. In recognition of the centrality of free speech to our democracy, the Supreme Court has consistently held that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Fran. Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Protections for political speech extend to campaign financing because effective

speech requires spending money. *See Buckley v. Valeo*, 424 U.S. 1, 19-23 (1976) (per curiam).

This case raises a constitutional challenge to a somewhat obscure campaign finance restriction that limits the amount of post-election contributions that may be used to repay a candidate's pre-election loans. Section 304 of the Bipartisan Campaign Reform Act of 2002 prohibits candidates from using post-election contributions to repay personal loans over $250,000. *See* 52 U.S.C. § 30116(j) (the "loan-repayment limit"). Senator Rafael Edward "Ted" Cruz and his campaign committee Ted Cruz for Senate brought this suit to invalidate and enjoin the enforcement of Section 304 and its implementing regulation. We find that the loan-repayment limit burdens political speech and thus implicates the protection of the First Amendment. Because the government has failed to demonstrate that the loan-repayment limit serves an interest in preventing quid pro quo corruption, or that the limit is sufficiently tailored to serve this purpose, the loan-repayment limit runs afoul of the First Amendment. We therefore grant summary judgment for Senator Cruz and his campaign.

I.

A.

Candidates for federal office require substantial funds to support their campaigns. Funding may come from individual contributions, which are subject to a per-election cap.[1] *See* Federal Election Campaign Act of

[1] The current base limit is set at $2,900 per election. *See* 86 Fed. Reg. 7,867, 7,869 (Feb. 2, 2021). A primary election, general election, runoff election, and special election are treated as separate elections. *See* 52 U.S.C. § 30101(1)(A).

1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30116); *see also* 52 U.S.C. § 30116(a)(1)(A) & (c). Candidates may also self-finance their campaigns without monetary limits. *See* 11 C.F.R. § 110.10; *see also Buckley*, 424 U.S. at 51-54. Self-financing often takes the form of loans, either from a candidate's personal funds or through a third-party lender. A campaign may repay a candidate's loans using contributions received both before and after the election. Under Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), however, a campaign may repay only $250,000 of a candidate's pre-election loans with post-election contributions. *See* Pub. L. No. 107-155, § 304, 116 Stat. 81 (codified at 52 U.S.C. § 30116(j)).

The loan-repayment limit intersects with other restrictions on the use of campaign contributions promulgated by the Federal Election Commission ("FEC" or "Commission"). For instance, an individual may designate a contribution for a particular election, including a previous election. *See* 11 C.F.R. § 110.1(b)(2)(i). If designated for a previous election, a contribution may be accepted "only to the extent that [it] does not exceed net debts outstanding" from that election. *See id.* § 110.1(b)(3)(i). A campaign's "net debts outstanding" for an election equals the "total amount of unpaid debts and obligations" minus its total available resources. *Id.* § 110.1(b)(3)(ii)(A)-(C). A campaign may accept postelection contributions only to the extent necessary to pay down a net shortfall. To effectuate the loan-repayment limit in Section 304, the calculation of "net debts outstanding" excludes the amount of any candidate loans "that in the aggregate exceed $250,000 per

election." *Id.* § 110.1(b)(3)(ii)(C). The $250,000 limit applies to third-party loans secured by the candidate and also to loans from the candidate's personal funds. *See id.* § 116.11(a).

A campaign has two options to pay back a candidate's personal loans. First, a campaign "[m]ay repay the entire amount of the personal loans using contributions" made before the election. *Id.* § 116.11(b)(1). If the campaign chooses to use pre-election contributions, "it must do so within 20 days of the election." *Id.* § 116.11(c)(1). Second, pursuant to Section 304, a campaign may repay up to $250,000 of the personal loans with post-election contributions. After the election, any balance of the personal loan that exceeds $250,000 will be treated "as a contribution by the candidate." *Id.* § 116.11(c)(2).

B.

This case arose from Senator Cruz's 2018 campaign for reelection to the United States Senate. The day before the general election, Senator Cruz made two loans totaling $260,000 to his campaign: $5,000 from his personal bank account and $255,000 from a third-party lender secured with his personal assets. Senator Cruz won reelection.

After the election, Senator Cruz's campaign had almost $2.5 million in debt against approximately $2.2 million in cash on hand. The campaign "used the funds it had on hand to pay vendors and meet other obligations instead of repaying [Senator Cruz's] loans." Compl. ¶ 29, ECF No. 1. The campaign did not use any pre-election funds within twenty days of the election to repay the Senator's loans, as Section 304's implementing

regulation would have permitted. Instead, the campaign repaid Senator Cruz the maximum $250,000 with post-election contributions but Section 304 prevented the campaign from paying back the final $10,000. The $10,000 balance of those loans was subsequently deemed a campaign contribution from Senator Cruz.

Senator Cruz and his campaign (collectively, the "Cruz campaign") brought suit against the FEC, alleging that Section 304 of BCRA and its implementing regulation, 11 C.F.R. § 116.11, violate the First Amendment. The complaint contends that the loan-repayment limit unconstitutionally infringes the First Amendment rights of Senator Cruz, his campaign, other candidates, and any individuals who might seek to make post-election contributions. Because the complaint concerned a constitutional challenge to a provision of BCRA, the Cruz campaign also applied for a three-judge district court pursuant to Section 403 of BCRA and 28 U.S.C. § 2284. The FEC moved to dismiss for lack of standing and also argued that a three-judge court would not have subject matter jurisdiction. The one-judge district court denied the FEC's motion to dismiss, held the Cruz campaign had standing to challenge the loan-repayment limit, and granted the Cruz campaign's application for a three-judge district court. *See Ted Cruz for Senate v. FEC*, 2019 WL 8272774, at *5-8 (D.D.C. Dec. 24, 2019). We convened to hear and decide the case. Following additional preliminary proceedings,[2] the Cruz campaign and the FEC both moved for summary judgment.

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[2] We assumed supplemental jurisdiction over the Cruz campaign's constitutional and Administrative Procedure Act claims against the implementing regulation. *See Ted Cruz for Senate v. FEC*, 451

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[I]n ruling on cross-motions for summary judgment, the court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." *Shays v. FEC*, 424 F. Supp. 2d 100, 109 (D.D.C. 2006). Because the Cruz campaign and the FEC agree that there is no genuine dispute of material fact, we resolve this case by summary judgment.

II.

To determine whether the loan-repayment limit abridges First Amendment rights we follow the approach taken in *McCutcheon v. FEC*, the Supreme Court's most recent foray into the constitutionality of a campaign finance regulation. 572 U.S. 185 (2014) (plurality opinion). First, we assess whether the loan-repayment limit burdens political speech and thus implicates the protection of the First Amendment. Second, because we conclude that the limit burdens political speech, we must carefully scrutinize the government's interests and the fit between that interest and the regulatory means chosen to effectuate it. Even under the less exacting test of closely drawn scrutiny, we find the government fails to demonstrate that the loan-repayment

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F. Supp. 3d 92, 100 (D.D.C. 2020). We held these claims in abeyance pending resolution of the constitutional challenge to Section 304. Order, *Ted Cruz for Senate v. FEC*, No. 1:19-cv-00908 (D.D.C. Apr. 15, 2020), ECF No. 49. Our holding that Section 304 cannot pass constitutional muster moots the Cruz campaign's regulatory challenges.

limit serves an interest in preventing quid pro quo corruption or its appearance. Moreover, the loan-repayment limit has only a tenuous connection to the asserted government interest in preventing corruption and thus lacks the close tailoring necessary under the First Amendment.

A.

When presented with a less familiar type of campaign finance regulation, we must determine at the outset whether the restriction burdens the exercise of political speech. *See id.* at 203-06; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736-47 (2011); *Davis v. FEC*, 554 U.S. 724, 738-40 (2008). The Cruz campaign argues the loan-repayment limit burdens speech by limiting campaign expenditures and contributions. The FEC maintains the limit does not burden speech at all. We find the loan-repayment limit burdens political speech and thus implicates the protection of the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *McCutcheon*, 572 U.S. at 203 (cleaned up). Robust and free political discussion is essential to the republican form of government established by our Constitution. Given the fundamental interests at stake, the First Amendment "safeguards an individual's right to participate in the public debate

through political expression and political association." *Id.* Because financing for political campaigns implicates the freedom to speak and to associate, the Supreme Court has long recognized that limitations on campaign spending "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19.

Since *Buckley*, the Court's decisions have focused on identifying whether a restriction on campaign finance burdens expenditures or contributions, in part because the distinction can affect the standard of review.[3] *See id.* at 25, 44-45. But it is well established that both expenditures and contributions implicate "fundamental First Amendment activities." *Id.* at 14. When a candidate makes expenditures on behalf of her campaign, she exercises her right to speak; and when a contributor donates to that campaign, he exercises the right to associate with the candidate and to express his support. The contributions to a campaign in turn promote more expenditures and political speech by the candidate.

In recent decisions, the Court has declined to eliminate the distinction between expenditures and contributions even as it has focused on speech interests more generally. *See, e.g.*, *McCutcheon*, 572 U.S. at 199; *id.* at 228 (Thomas, J., concurring in the judgment) (suggesting that the distinction between expenditures and

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[3] While burdens on expenditures must withstand strict scrutiny, the Court has assessed burdens on contributions under a less demanding, "but still 'rigorous standard of review.'" *McCutcheon*, 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 29).

contributions "has only continued to erode in the intervening years") (cleaned up). The Court has emphasized the central question of whether and how a challenged regulation burdens political speech. For example, in *McCutcheon*, the Court explained that *Buckley*'s distinction between expenditure and contribution limits stemmed from the "the degree to which each encroaches upon protected First Amendment interests." *Id.* at 197. The Court assessed the burden on expressive and associational rights imposed by the aggregate contribution limits challenged in that case. *See id.* at 204-05. In *Davis*, the Court found that a regulation burdened a candidate's expenditures because it raised contribution limits asymmetrically, that is, only for the opponents of a candidate who spent over a certain amount of his own money. *See* 554 U.S. at 738-40. The Court focused on how the regulation functioned to analyze the burden that it imposed. *See id.*; *see also Bennett*, 564 U.S. at 736-47 (evaluating the specific operation of Arizona's matching funds provision and holding that it substantially burdened speech). In a political campaign, expenditures and contributions are part of a connected cycle of speech and association protected by the First Amendment.

We find that the loan-repayment limit restricts political expression and association for candidates and their contributors. To begin with, the loan-repayment limit burdens candidates who wish to make expenditures through personal loans because the limit constrains the

repayment options available to the candidate.[4] Whereas other campaign debts may be repaid by post-election contributions, candidate loans above $250,000 do not receive the same treatment. That the candidate makes a choice to finance his campaign with personal loans, rather than through other forms of debt, does not minimize the First Amendment harm. *Cf. Davis*, 554 U.S. at 739 ("The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice."). Candidate loans comprise the majority of campaign debt, and personal loans will sometimes be the only way for a candidate to raise enough money for an effective campaign in the short term. The limit places a particular burden on relatively unknown challengers who may require more financing up front in order to wage an effective campaign against a better funded incumbent. *See Anderson v. Spear*, 356 F.3d 651, 673 (6th Cir. 2004) ("[A] candidate may need to speak early in order to establish her position and garner contributions.").

We also note that since the enactment of BCRA and the loan-repayment limit, "there is a clear clustering of

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[4] In general, a loan from a candidate to his campaign is treated as an expenditure. Both FECA and its regulations define the term "expenditure" to include loans. *See* 52 U.S.C. § 30101(9)(A)(i) ("The term 'expenditure' includes . . . any . . . loan, . . . made by any person for the purpose of influencing any election for Federal office[.]"); 11 C.F.R. § 100.111(a) ("A . . . loan . . . made by any person for the purpose of influencing any election for Federal office is an expenditure."); 11 C.F.R. § 100.111(b) ("For purposes of this section, the term *payment* includes . . . any guarantee or endorsement of a loan by a candidate or a political committee."); *see also Anderson v. Spear*, 356 F.3d 651, 672 (6th Cir. 2004) ("[L]oans are candidate expenditures, unless and until they are repaid.").

loans right at the $250,000 threshold." Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* 24 (HEC Paris Research Paper No. FIN-2016-1165, May 2020). During this same time period, the percentage of candidate loans above $250,000 has remained roughly the same while spending on Senate and House campaigns has more than doubled, indicating that the loan-repayment limit constricts candidate lending.

We find the burden imposed by Section 304 "is evident and inherent in the choice that confronts" candidates who wish to use personal loans to finance their campaigns. *Bennett*, 564 U.S. at 745 (citing *Davis*, 554 U.S. at 738-40). The limit imposes a "drag" on the candidate's First Amendment activity by discouraging the personal financing of campaign speech. *Davis*, 554 U.S. at 739.

The FEC defends the constitutionality of the loan-repayment limit by maintaining that it does not burden political speech at all, because "[m]oney that repays a candidate's personal loan after an election effectively goes into the candidate's pocket, and not to fund speech or speech-related activities." FEC Mem. in Supp. of Mot. for Summ. J. ("FEC Mot.") 20, ECF No. 65. The Commission highlights that the loan-repayment limit does not cap the amount of candidate financing or *prohibit* a candidate from loaning his campaign more than $250,000, and the candidate remains free to repay the full amount of the loan with pre-election contributions.

While it is true that the loan-repayment limit is not a ban on personal financing, the First Amendment's protection has never been limited to direct restrictions on expenditures, because "[t]he First Amendment would . . . be a hollow promise if it left government free to

destroy or erode its guarantees by indirect restraints." *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). Laws that regulate in the First Amendment arena must be scrutinized even when the "deterrent effect on [speech] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." *Buckley*, 424 U.S. at 65.

Even indirect regulations of speech may run afoul of the First Amendment, because they can "abridg[e] the freedom of speech." U.S. CONST. amend. I. The word "abridge" means "to contract, to diminish, to cut short." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); *see also* OXFORD ENGLISH DICTIONARY 43 (2d ed. 1989) ("abridge": "To curtail, to lessen, to diminish (rights, privileges, advantages, or authority)"). At the time of the enactment of the First Amendment, as well as today, the plain meaning of "abridge" is to diminish or to curtail the freedom of speech. Consistent with this meaning, the First Amendment protects individuals not only from direct and outright bans on speech, but also indirect actions the government might take to "abridge" the central freedom to speak freely in the democratic process.

Following these general principles, the Supreme Court has found a First Amendment burden even absent an outright ban or cap, when the regulation acted as a "drag" on speech—which is to say an "abridgment" of speech. *Davis*, 554 U.S. at 739-40. In *Davis*, the Supreme Court held unconstitutional a provision of BCRA that relaxed the base contribution limits for a candidate's opponents if the candidate spent more than $350,000 of his own funds. The provision burdened

free speech rights even though it "d[id] not impose a cap on a candidate's expenditure of personal funds." *Id.* at 738-39. Instead, the challenged provision "impose[d] an unprecedented penalty" on candidates who chose to "robustly exercise[] [their] First Amendment right[s]." *Id.* at 739. Similarly, in *Bennett*, the Court held unconstitutional an Arizona law that gave matching funds to publicly financed candidates if privately financed candidates—or independent expenditure groups—spent over a set amount. *See* 564 U.S. at 728. The Court concluded that the Arizona law "plainly force[d] the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy." *Id.* at 737 (quoting *Davis*, 554 U.S. at 739). If the law curtails a candidate's ability to speak on his behalf, it runs afoul of the First Amendment even when the law is not an outright ban.

The FEC seeks to distinguish *Davis* and *Bennett* because those cases involved a penalty for candidate speech above a certain threshold, whereas the loan-repayment limit has no similar penalty—by loaning his campaign more than $250,000 a candidate does not indirectly fund his opponent through either liberalized, asymmetrical contribution limits (*Davis*) or matching funds (*Bennett*). First Amendment burdens, however, are not limited to prescribed forms. Our review must scrutinize regulatory burdens in order to vigorously protect the freedom of speech. While not identical to previously challenged

regulations, the loan-repayment limit restricts a candidate's campaign expenditures by circumscribing the repayment options for candidate loans over $250,000.[5]

The FEC's insistence that the loan-repayment limit does not burden political speech overlooks the reality of how the limit functions. The FEC narrowly focuses on the repayment of the loan and through this lens notes that the loan-repayment limit does not restrict expenditures because the candidate remains free to loan or contribute as much money as he wishes to his campaign.[6] The FEC's cramped understanding of the First Amendment fails to provide adequate protection to the important free speech interests at stake. The FEC would isolate the transactions at issue until they no longer resemble campaign expenditures or contributions.

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[5] On the flip side, the loan-repayment limit may also impact contributors. Candidate loans over $250,000 are singled out and excluded from the "net debts outstanding" that a campaign may pay off with post-election contributions. The FEC's regulations permit contributors to designate their contributions for a prior election. An individual who wanted to contribute to Senator Cruz after the 2018 election could not have contributed to—and thus expressed his support for—Senator Cruz's 2018 election campaign if the only debt remaining was the Senator's loan in excess of $250,000.

[6] The FEC suggests there is no restriction on political speech in this case, relying on *FEC v. O'Donnell*, 209 F. Supp. 3d 727 (D. Del. 2016). That case is inapposite, however, because it concerned FECA's ban on the use of contributions to pay a candidate's *personal* expenses. The court held such contributions did not "facilitate political expression." *Id.* at 739. By contrast, the loan-repayment limit restricts political expression and implicates the First Amendment in a way that personal expenses for a new outfit and a gym membership arguably do not. *See* 52 U.S.C. § 30114(b)(2)(B) & (I).

In determining whether First Amendment interests are implicated, however, we must focus on whether a statute burdens political speech, not whether a particular regulatory label is a perfect fit. The relative novelty of a campaign finance regulation cannot insulate it from judicial scrutiny because "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Legislators may try different regulatory approaches to protect against quid pro quo corruption; however, any such regulation of campaigns must comport with the First Amendment.

The loan-repayment limit implicates First Amendment interests. A candidate's loan to his campaign is an expenditure that may be used for expressive acts. Such expressive acts are burdened when a candidate is inhibited from making a personal loan, or incurring one, out of concern that she will be left holding the bag on any unpaid campaign debt.

This case illustrates the reality that contributions and expenditures are often "two sides of the same First Amendment coin." *Buckley*, 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part). Contributions allow a candidate to make further expenditures, reflecting the practical link between the associational and expressive activity of the candidate and contributor. By limiting the amount of post-election contributions that can be used to retire candidate loans, the loan-repayment limit abridges political speech and implicates the protection of the First Amendment.

B.

Because the loan-repayment limit encumbers political speech, the government has "the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210 (cleaned up). The parties dispute the relevant standard of review. The Cruz campaign maintains we should apply either the strict scrutiny applicable to expenditure limits or the closely drawn scrutiny applied to contribution limits. By contrast, the FEC suggests the loan-repayment limit must be analyzed under deferential rational basis review because the limit burdens no First Amendment interests. Because we find the loan-repayment limit restricts expressive and associational interests in political campaigns, we must apply a form of heightened scrutiny, either strict or closely drawn.

Under either form of heightened scrutiny, we assess the government's asserted interest in restricting speech and the fit between that interest and the means the government has chosen to fulfill it. *See id.* at 199. Applying strict scrutiny, a regulation will be upheld only if it furthers a compelling government interest and the government uses the least restrictive means of furthering that interest; whereas under closely drawn scrutiny a regulation will be upheld "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid" abridging First Amendment freedoms. *See id.* at 197.

The loan-repayment limit fails under even the less exacting test of closely drawn scrutiny and so, as in *McCutcheon*, we have no need to "parse the differences" between the standards of scrutiny. *Id.* at 199. The government fails to demonstrate that the loan-repayment

limit serves an interest in addressing quid pro quo corruption. In addition, we find "a substantial mismatch," *id.*, between the government's asserted interest and the loan-repayment limit.

1.

The government bears the burden of demonstrating that the loan-repayment limit serves a sufficiently important interest that justifies the burden on political speech. The Supreme Court has made clear that the only recognized government interest in restraining political speech is "preventing corruption or the appearance of corruption." *Id.* at 206-07. The Court has considered—and rejected—other government justifications such as "reduc[ing] the amount of money in politics," *id.* at 191; "level[ing] electoral opportunities by equalizing candidate resources and influence," *Bennett*, 564 U.S. at 748 (cleaned up); reducing "[i]ngratiation and access," *Citizens United*, 558 U.S. at 360; or equalizing viewpoints among individuals and groups, *Buckley*, 424 U.S. at 48-49. The government's interest in eliminating corruption is limited to quid pro quo corruption, in other words, "dollars for political favors." *McCutcheon*, 572 U.S. at 192 (quoting *FEC v. Nat'l Conserv. PAC*, 470 U.S. 480, 497 (1985)). To comport with the First Amendment, a regulation of political speech must target only this particular form of corruption, which means "the Government may not seek to limit the appearance of mere influence or access." *Id.* at 208.

In addition, it is not sufficient for the FEC merely to *assert* an interest in preventing quid pro quo corruption. The government must demonstrate the validity of its interest by more than "mere conjecture." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

"When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Colo. Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (cleaned up). Moreover, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo.*, 528 U.S. at 391; *see also Zimmerman v. City of Austin*, 881 F.3d 378, 392-93 (5th Cir. 2018) (discussing cases). We assess the FEC's asserted interests in light of these standards.

The FEC maintains that the loan-repayment limit addresses the heightened risk and appearance of quid pro quo corruption that results from elected officeholders soliciting contributions that will be used to repay their personal loans. The Commission posits that "[m]oney given after the election . . . provides the contributor with even more influence over the candidate since the candidate is benefiting personally from the contribution." FEC Statement of Material Facts ("FEC SMF") ¶ 73, ECF No. 65 (cleaned up). The Commission repeatedly characterizes post-election contributions used to repay candidate loans as going into the candidate's pocket. The FEC also points to media reports of debt retirement parties as giving rise "to at least the appearance of federal candidates trading dollars for favors in the context of repayment of candidate loans." FEC Mot. 33. The Commission maintains there is a public perception that individuals who contribute to candidates after an election are likely to expect a political favor in return.

Despite these assertions, the Commission fails to demonstrate that quid pro quo corruption or its appearance arises from post-election contributions to retire a candidate's personal debt. We first observe that the FEC has not identified a single case of actual quid pro quo corruption in this context. This is particularly notable given that many states impose no restriction on using post-election contributions to repay candidate loans,[7] and the Commission fails to identify any problems with quid pro corruption or its appearance in these states. *Cf. Citizens United*, 558 U.S. at 357 (finding it significant that the government failed to claim that "independent expenditures by for-profit corporations . . . corrupted the political process" in the twenty-six states that did not restrict such expenditures). Here the FEC's few state examples involve only concerns that

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[7] The Cruz campaign identifies ten states that cap candidate loans or restrict candidate loan repayment in some fashion. *See* Cruz Mem. in Supp. of Mot. for Summ. J. 28 & n.4, ECF No. 61-1. Georgia and South Carolina cap the repayment of candidate loans with postelection contributions, similar to BCRA's loan-repayment limit. *See* GA. CODE ANN. § 21-5-41(h); S.C. CODE ANN. § 8-13-1328. Although Florida permits candidate loans and their repayment with pre-election contributions, it bans all post-election contributions. *See* FLA. STAT. § 106.08(3)(b). Alaska, Rhode Island, Texas, and Washington cap the repayment of candidate loans with either pre- or post-election contributions. *See* ALASKA STAT. § 15.13.078(b)(1); 17 R.I. GEN. LAWS § 17-25-7.4; TEX. ELEC. CODE § 253.042(A); WASH. REV. CODE § 42.17A.445(3). California, Massachusetts, and Nebraska place no limit on the repayment of candidate loans but instead cap the amount that candidates may loan their campaigns. *See* CAL. GOV'T CODE § 85307(B); MASS. GEN. LAWS ch. 55, § 7; NEB. REV. STAT. § 49-1446.04; 4 NEB. ADMIN. CODE ch. 10, § 004(02). The Commission does not contest that "only a minority of states" restrict candidate campaign loans in some way. FEC Mot. 34.

candidates will be too responsive to the influence of special interests or concerns about contributions unrelated to the repayment of candidate loans. *See, e.g.*, FEC SMF ¶¶ 76, 79.

By contrast, in cases that have found a sufficient anticorruption interest, the record has been robust. In *Buckley*, the Court cited "the deeply disturbing examples surfacing after the 1972 election" as demonstrating that the problem of quid pro quo corruption was "not an illusory one." 424 U.S. at 27 & n.28; s*ee also Buckley v. Valeo*, 519 F.2d 821, 838-40 & nn.26-38 (D.C. Cir. 1975) (en banc) (describing extensive factual record before Congress). In *McConnell v. FEC*, the omnibus challenge to BCRA, the record before the court consisted of more than 100,000 pages, including "576 pages of proposed findings of fact" and "the testimony and declarations of over 200 fact and expert witnesses." 251 F. Supp. 2d 176, 208-09 (D.D.C. 2003). In *Bluman v. FEC*, the court pointed to "public controversy and an extensive investigation by the Senate Committee on Governmental Affairs," including specific examples of foreign governments attempting "to 'influence U.S. policies and elections through, among other means, financing election campaigns,'" as justification for BCRA's ban on expenditures and contributions by foreign nationals. 800 F. Supp. 2d 281, 283 (D.D.C. 2011) (quoting S. REP. NO. 105-67, at 47 (1998)).

A lengthy record may not be sufficient to demonstrate corruption, but the absence of *any* record of such corruption undermines the government's proffered interest. The FEC cannot carry its substantial burden by simply asserting that post-election contributions to

repay a candidate's loans may come with expectations of a political favor.

In the absence of any evidence of actual corruption, the FEC turns elsewhere. For instance, the Commission relies heavily on an academic article that concluded "[i]ndebted politicians . . . exhibit a heightened sensitivity in their voting decisions to political contributions received from special interest groups." Ovtchinnikov & Valta, *Debt in Political Campaigns* 29. The article, however, does not distinguish between voting pattern changes as a consequence of donor influence or access and voting pattern changes as part of quid pro quo corruption. In a representative democracy, mere influence or access is not the type of quid pro quo corruption that justifies infringements on political speech. A "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *McConnell v. FEC*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). "The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *McCutcheon*, 572 U.S. at 209.

The Commission also places great weight on a selective legislative history of the loan-repayment limit, arguing that lawmakers intended to "mitigate the heightened risk of quid pro quo corruption and its appearance resulting from already-elected officeholders soliciting

contributions for their own personal benefit."[8] FEC Mot. 6. Even on the doubtful proposition that assertions in legislative debates could carry the government's burden, these statements from the legislative history amount to mere suppositions about the appearance of corruption. Moreover, the Cruz campaign proffers other tidbits of legislative history, including numerous statements suggesting that some legislators thought the loan-repayment limit would protect incumbents from wealthy challengers.[9] The competing statements in

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[8] *See, e.g.*, 147 CONG. REC. S2,462 (Mar. 19, 2001) (statement of Sen. Domenici) ("In fact, it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents under fundraising events that you would hold and then ask them: How would you like me to vote now that I am a Senator?"); 147 CONG. REC. S2,541 (Mar. 20, 2001) (statement of Sen. Hutchison) ("[Candidates] have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it.").

[9] *See, e.g.*, 147 CONG. REC. S2,541 (Mar. 20, 2001) (statement of Sen. Hutchison) ("Our purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field."); 147 CONG. REC. S2,465 (Mar. 19, 2001) (statement of Sen. Sessions) ("It also prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate. . . . I know there were large contributions in this last Senate campaign from candidates of $10 million, $60 million, and other amounts of money that the winning candidates in this body contributed from their own funds. I tell you, I am glad I didn't face a person who could write a check for $60 million, $10 million—or $5 million, for that matter. If so, I would like to be able to have a level playing field so I could stay in the ball game.").

the legislative history of BCRA establish no clear emphasis on eradicating quid pro quo corruption as opposed to the impermissible purpose of leveling the playing field.

In addition, the loan-repayment limit, Section 304 of BCRA, was enacted at the same time as Section 319, the so-called "Millionaire's Amendment," which the Supreme Court held unconstitutional in part because it was intended to "level electoral opportunities for candidates of different personal wealth." *Davis*, 554 U.S. at 741 (cleaned up). While Section 304 may serve a different purpose from Section 319, the text of BCRA, as well as the legislative debates, linked the two provisions, which suggests that the loan-repayment limit may also "further the impermissible objective of simply limiting the amount of money in political campaigns." *McCutcheon*, 572 U.S. at 218. At a minimum, the connection between the provisions casts further doubt on the government's asserted anticorruption interest.

Finally, the FEC relies on media reports and a YouGov poll, but these similarly fail to establish that restrictions like the loan-repayment limit serve the purpose of preventing quid pro quo corruption. The media reports merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate. Yet this is not evidence of quid pro quo corruption, and minimizing influence and access is not a proper goal for campaign finance regulation. The YouGov poll was conducted at the FEC's behest for this litigation to demonstrate that the loan-repayment limit addresses the appearance of corruption. The poll first

asked respondents whether they were aware that candidates could loan their campaigns money and then be paid back with post-election contributions. FEC Mot. Ex. 16, ECF No. 65-16 (Decl. of Ashley Grosse, Ex. A). In the poll's only two follow-up questions, 81 percent of respondents thought it "very likely" or "likely" that individuals who donate money to a federal candidate's campaign after an election "expect a political favor in return," and 67 percent of respondents thought donors would "be more likely to expect political favors" if there were no limit on repaying a candidate loan with post-election contributions. *Id.* The FEC relies on these responses as evidence that the loan-repayment limit addresses "at least the appearance of quid pro quo corruption." FEC Mot. 32.

We disagree. Such generic questions do not get at the specific problem of quid pro quo corruption the government asserts this statute combats. On the government's reasoning, the poll answers would raise doubts about any contributions to incumbents (i.e. winning candidates) who use post-election contributions to retire any type of campaign debt. Even if contributors who donate to retire a candidate's debt expect political favors, that hardly demonstrates that the (now elected) official is more likely to grant such political favors. Moreover, the poll did not define the term "political favor," so the poll's responses are not evidence that the public associates such contributions with quid pro quo corruption, which Congress may regulate, or simply increased influence and access, which Congress may not. *See McCutcheon*, 572 U.S. at 208. Finally, the poll failed to mention that the individual contribution limit applies to post-election contributions just as it does to pre-election

contributions. That omission renders the poll an ineffective measure of public perception of possible corruption in this context. At most, the poll suggests that some members of the public distrust or are skeptical about using contributions to repay candidate loans, but the "tendency to demonstrate distrust" is insufficient to establish corruption or its appearance. *Nat'l Conserv. PAC*, 470 U.S. at 499. We conclude the FEC fails to demonstrate that the loan-repayment limit serves an interest in preventing quid pro quo corruption.

The FEC also maintains that the loan-repayment limit prevents the circumvention of base contribution limits because without the limit a candidate could keep outstanding loans from past campaigns, which would allow individuals to stack up maximum contributions for each election for which the candidate had open loans. The problem with the FEC's position, however, is that contributors are permitted to make multiple contributions at a single time—they can contribute to retire debt from a previous election (subject to the loan-repayment limit) and they can contribute to any ongoing campaign for a future election. Each of these separate per-election contributions, however, is limited by the base contribution limit. Nothing about the potential for stacking circumvents the base limits. What the FEC terms "circumvention" is in fact a lawful contribution under existing campaign finance laws.

The government suggests it is dissatisfied with the possibility of large one-time contributions, which the FEC treats as a kind of legal loophole. Yet the loan-repayment limit does little to close the ostensible loophole, because the limit applies only to a candidate's personal loans, not to other campaign debt. Also, the FEC

fails to identify a plausible financial incentive for a candidate to carry significant personal campaign debt over many years simply to keep open the possibility of soliciting larger stacked donations in the future.

In sum, the FEC's position amounts to speculation that contributions to pay off a candidate's personal loans carry a danger of quid pro quo corruption, but the Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Shrink Mo.*, 528 U.S. at 392. The government has failed to demonstrate that its interest in the loan-repayment limit is sufficiently important, because the limit serves no additional purpose in preventing quid pro quo corruption or the circumvention of base contribution limits. With little connection to any actual or perceived quid pro quo corruption interest, the FEC's asserted rationale boils down to a general concern about money in politics and campaign contributions to incumbents—but such general concerns about influence or access cannot justify government regulation in the vital area of political speech.

2.

Even if the government had shown that the limit was justified by an important government interest, the loan-repayment limit is not "closely drawn" to protect expressive and associational freedoms. *McCutcheon*, 572 U.S. at 218 (quoting *Buckley*, 424 U.S. at 25). "In the First Amendment context, fit matters." *Id.* The government's rationale for the loan-repayment limit fits about as well as a pair of pandemic sweatpants. The First Amendment requires a better fit than that.

When assessing fit even under standards short of strict scrutiny, we "require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Id.* (cleaned up). As part of the inquiry we consider "whether experience under the present law confirms a serious threat of abuse," and whether there are less burdensome alternatives available to the government in securing its interests. *Id.* at 219 (quoting *FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001)).

In arguing for a close fit, the FEC maintains "[t]he Loan Repayment Limit is tailored to apply in situations when the strength of the government's important anti-corruption interests are at their peak," because "the candidate will be in a position to grant political favors to [post-election] contributors." FEC Mot. 40. Moreover, the FEC asserts, the limit is well tailored because it applies only to situations in which "the candidate or officeholder is directly, personally benefiting from the contributions," and it does not prevent campaigns from repaying the loans in full with pre-election funds. *Id.* at 41.

Contrary to the government's assertions, the loan-repayment limit is not sufficiently tailored to achieve the objective of preventing quid pro quo corruption or its appearance. To begin with, the loan-repayment limit is over inclusive. It applies across the board to winning and losing candidates, although any purported anticorruption rationale applies only to winning candidates. The FEC's primary defense of the regulation is that

post-election contributions used to retire a candidate's personal campaign loans are particularly susceptible to quid pro quo corruption or its appearance. This justification, however, does not apply to candidates who lose an election and therefore have no way to provide improper benefits to contributors who donate to retire election debt. Losing candidates are less likely to receive post-election contributions and, in any event, contributions made to a losing candidate pose essentially no risk of corruption or its appearance. *See Anderson*, 356 F.3d at 673 (invalidating a state cap on candidate loans and explaining that "the risk of *quid pro quo* is virtually non-existent where the contribution is made to a losing candidate who seeks to recoup some of his debt"). When a campaign finance regulation sweeps in conduct well beyond the government's asserted rationale, it does not provide the close fit required by the First Amendment.

The loan-repayment limit is also substantially underinclusive as to the government's asserted interests. Although "the First Amendment imposes no freestanding underinclusiveness limitation," a law's underinclusiveness can indicate a poor fit and can raise doubts about whether the law advances the interests invoked by the government. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (cleaned up). Here, aside from the loan-repayment and base contribution limits, there are no restrictions on post-election contributions made to retire other types of campaign debt. A person may contribute to retire any outstanding campaign debt, with the exception of a candidate's personal loans over $250,000. The FEC argues that a candidate who

makes a loan to his campaign that he expects will be repaid is more dependent on outside contributions than a candidate who simply gives the money to his campaign. Yet not all candidates can afford to just give money to their campaigns—and there is nothing inherently corrupting about receiving campaign contributions after an election.

The FEC's concerns regarding post-election contributions to retire candidate loans seem to apply equally to any contribution made to an incumbent, because all incumbents are in a position to grant favors. But Congress does not restrict pre-election contributions to incumbents except through the base contribution limit. The government has advanced no reason why a contribution made to an incumbent before the election poses no risk of corruption, but the same contribution made after the election to a winning candidate (now incumbent) and applied to pre-election debt poses a unique and heightened concern of quid pro quo corruption.

The government's fit rationale also cannot explain why post-election contributions to retire pre-election debt are permissible up to the $250,000 cap. This cap means that in the current election cycle, a campaign committee can accept just over eighty-six maximum contributions after the election to repay a candidate loan (eighty-six contributions of $2,900 aggregates to $249,400, just shy of the $250,000 ceiling). It is hardly clear why the eighty-seventh or eighty-eighth contributor poses a particular danger of quid pro corruption. *Cf. McCutcheon*, 572 U.S. at 210. Instead, the $250,000 cap operates to limit or disincentivize the total amount of campaign expenditure a candidate makes through personal loans.

The loan-repayment limit also imposes an additional regulatory requirement on top of the existing base limits. The loan-repayment limit is exactly the sort of "prophylaxis-upon-prophylaxis approach" that demands "we be particularly diligent in scrutinizing the law's fit." *Id.* at 221 (cleaned up). As the D.C. Circuit has explained, "an additional constraint layered on top of the base limits . . . separately need[s] to serve the interest in preventing the appearance or actuality of corruption."[10] *Holmes v. FEC*, 875 F.3d 1153, 1161 (D.C. Cir. 2017) (en banc) (cleaned up). Post-election contributions, like contributions made before an election, are subject to the base limits, which serve to prevent the dangers of quid pro quo corruption. Layered on top of the base limits, the loan-repayment limit places an additional restriction on pre-election expenditures and post-election contributions, but the government has failed to demonstrate that the limit provides additional protection against quid pro quo corruption or its appearance.

The Commission next tries to demonstrate fit by minimizing the burden of the loan-repayment limit. For instance, the Commission maintains that the loan-

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[10] Other circuit courts have similarly interpreted *McCutcheon* as requiring the government to make an additional showing to justify campaign finance restrictions that operate on top of base limits. *See, e.g.*, *Jones v. Jegley*, 947 F.3d 1100, 1106 (8th Cir. 2020) ("Just as in *McCutcheon*, Arkansas's failure here to provide any evidence that its blackout period accomplishes anything more than the $2,700 base limits alone means that it cannot survive exacting scrutiny."); *Zimmerman v. City of Austin*, 881 F.3d 378, 392 (5th Cir. 2018) (holding restrictions in addition to the base limit "must be justified by evidence that the additional limit serves a distinct interest in preventing corruption that is not already served by the base limit").

repayment limit "increase[s] the funds available to campaign committees," and so does not "prevent[] campaigns from 'amassing the resources necessary for effective advocacy.'" FEC Mot. 41 (quoting *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion)). The FEC overreads *Randall*, which noted that if a contribution limit prevents a campaign from amassing the necessary resources, it cannot survive under the First Amendment. *See Randall*, 548 U.S. at 248. It does not logically follow, however, that if a campaign can manage to amass necessary resources, the regulation survives First Amendment scrutiny. Preventing candidates from amassing resources is only one of the reasons a regulation of political speech may fail under the First Amendment, and therefore it cannot serve as an independent basis for upholding a regulation. *Cf. Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 558-59 (D.C. Cir. 2019) (en banc) (Katsas, J., concurring in part, concurring in the judgment, and dissenting in part). Moreover, the determination of what resources are "necessary" for effective speech must be left to individual speakers, not the FEC.

Finally, the Commission urges this court to defer to Congress's judgment that the loan-repayment limit is necessary for combatting corruption. While we must respect the legislative choices of Congress acting within its constitutional sphere, we cannot defer on the question of whether a particular legislative choice is in fact constitutional. "We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of [corruptive] influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that

more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361; *see also Schneider v. State*, 308 U.S. 147, 161 (1939) (explaining that legislative judgments may be "insufficient to justify" a restriction that "diminishes the exercise of rights so vital to the maintenance of democratic institutions"). Courts cannot rubber stamp congressional preferences when important First Amendment interests are at stake.

In sum, we hold that the government failed to meet its burden of demonstrating that the loan-repayment limit serves an interest in combatting quid pro quo corruption or its appearance and that in any event the loan-repayment limit is insufficiently tailored to meet this objective.

* * *

When it comes to campaign finance regulation, the foxes are effectively in charge of the political henhouse, because elected officials set the rules for future elections. The Constitution, however, does not leave our liberties to the foxes. Laws regulating political speech implicate First Amendment rights essential to a free democracy, and courts have an independent duty to scrutinize the government's interest as well as the means chosen to realize it. To protect "the political responsiveness at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, Congress may regulate political speech only to prevent the specific problem of quid pro quo corruption. The loan-repayment limit does not serve that interest, and the government's arguments to the contrary boil down to hypothetical concerns about influence and access to incumbents. Such justifications are not sufficient under the First Amendment to uphold a statute that burdens political speech.

The loan-repayment limit intrudes on fundamental rights of speech and association without serving a substantial government interest.

For the foregoing reasons, we hold that the loan-repayment limit, Section 304 of BCRA, is unconstitutional because it violates the First Amendment. Thus, the court denies the Commission's motion for summary judgment and grants the Cruz campaign's motion for summary judgment. A separate order accompanies this memorandum opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 319-cv-908 (NJR, APM, TJK)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 3, 2021

ORDER

For the reasons set forth in the court's Memorandum Opinion, ECF No. 71, the court grants Plaintiffs' Motion for Summary Judgment and denies Defendants' Cross-Motion for Summary Judgment. It is further ordered that Plaintiffs' regulatory claims, previously held in abeyance, are dismissed as moot.

This is a final, appealable Order.

Dated: June 3, 2021

/s/ NEOMI J. RAO
NEOMI J. RAO
United States Circuit Court Judge

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Court Judge

/s/ TIMOTHY J. KELLY
TIMOTHY J. KELLY
United States District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 19-cv-908 (APM)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, ET AL, DEFENDANTS

Filed: Dec. 24, 2019

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiffs, Senator Rafael Edward Cruz ("Senator Cruz") and Ted Cruz for Senate ("Cruz Committee" or "Committee"), seek declaratory and injunctive relief invalidating and enjoining the enforcement of Section 304 of the Bipartisan Campaign Reform Act ("BCRA") and its implementing regulations, which place limits on the amount of post-election contributions that may be used to pay back a candidate's pre-election loans. They have asked the court to convene a three-judge district court to hear their challenges in accordance with BCRA's judicial review provision. Defendants, the Federal Election Commission and its four current Commissioners (collectively the "FEC"), oppose that request and have moved to dismiss the Complaint for lack of jurisdiction. For the reasons that follow, the court grants Plaintiffs'

motion to convene a three-judge court and denies the FEC's motion to dismiss.

II. BACKGROUND

A. Legal Background

1. The Loan Repayment Limit

In 2002, Congress enacted the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, which amended the Federal Election Campaign Act of 1971 ("FECA"). One provision of BCRA states that a "candidate who incurs personal loans . . . in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election." 52 U.S.C. § 30116(j). The FEC's implementing regulations clarify that BCRA's $250,000 limit applies both to loans secured by the candidate for the benefit of his campaign and to loans made to the campaign from the candidate's personal funds. 11 C.F.R. § 116.11(a).

BCRA and its implementing regulations (collectively the "Loan Repayment Limit") thus give a campaign committee two options for paying back a candidate's personal loans after an election. First, the committee may repay up to "the entire amount of the personal loans using contributions to the candidate or the candidate's authorized committee provided that those contributions were made on the day of the election or before." *Id.* § 116.11(b)(1). If the committee elects to use pre-election contributions to repay all or part of the loan, "it must do so within 20 days of the election." *Id.* ¶ 116.11(c)(1).

Alternatively, the committee "[m]ay repay up to $250,000 of the personal loans from contributions made to the candidate or the candidate's authorized committee after the date of the election." *Id.* § 116.11(b)(2). There is no time limit on when the campaign may repay the $250,000 using post-election contributions; however, the committee "[m]ust not repay . . . the aggregate amount of the personal loans that exceeds $250,000, from contributions to the candidate or the candidate's authorized committee if those contributions were made after the date of the election." *Id.* § 116.11(b)(3). After the 20-day post-election period has elapsed, the committee must "treat the remaining balance of the candidate's personal loan that exceeds $250,000 as a contribution from the candidate." *See* Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003); *see also* 11 C.F.R. § 116.11(c)(2).

2. Judicial Review of Constitutional Challenges to BCRA

Section 403 of BCRA provides that "[i]f any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act[,] . . . [t]he action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to [28 U.S.C.] section 2284." *See* Pub. L. No. 107-155, § 403(a) (codified at 52 U.S.C. § 30110 note (hereinafter BCRA § 403)). The party seeking to convene a three-judge court must file a request, whereupon "the judge to whom the request is presented shall" initiate the process, "unless he determines that three judges are not required." 28 U.S.C. § 2284(b)(1). A three-judge court's final decision on

such an action "shall be reviewable only by appeal directly to the Supreme Court of the United States." BCRA § 403(a)(3).

B. Factual Background

This case arises from Senator Cruz's 2018 reelection campaign for the United States Senate. On the day before the November 6, 2018 general election, Senator Cruz made two loans totaling $260,000 to the Cruz Committee to help finance his campaign. *See* Compl., ECF No. 1 [hereinafter Compl.], ¶ 28; Ted Cruz for Senate, FEC Form 3 at 401-02 (Jan. 31, 2019).[1] Of the $260,000 lent to the Committee, $5,000 originated from Senator Cruz's personal bank accounts and $255,000 originated from a margin loan secured with Senator Cruz's personal assets. Compl. ¶ 28.

At the close of election day, the Cruz Committee had approximately $2.2 million on hand and nearly $2.5 million in debts associated with the 2018 general election. *Id.* ¶ 29. The Committee then "used the funds it had on hand to pay vendors and meet other obligations instead of repaying [Senator Cruz's] loans." *Id.* The Committee did not use any of the funds it had on hand to pay off Senator Cruz's loans during the 20-day period, meaning that after that period elapsed, the balance of those loans that exceeded BCRA's $250,000 statutory cap on post-election contributions—$10,000—converted into a campaign contribution. *See id.* ¶¶ 30-31; 11 C.F.R. § 116.11(c)(2).

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[1] Available at https://docqueryfec.gov/pdf/325/201901319145235325/201901319145235325.pdf.

Following the 20-day repayment period, the Cruz Committee repaid Senator Cruz the $250,000 statutory maximum using post-election contributions, but BCRA foreclosed it from paying back the $10,000 balance. Compl. ¶¶ 31-32. Plaintiffs allege that, "[a]bsent the restrictions of [BCRA] and the Commission's corresponding regulation[s]," they "would solicit debt-retirement funds from potential donors and would use post-election contributions to defray the remaining $10,000 loan balance." *Id.* ¶ 33.

C. Procedural History

In April 2019, Plaintiffs filed suit against the FEC, contending that: (1) the Loan Repayment Limit unconstitutionally infringes on their First Amendment rights to freedom of speech; (2) the limit also infringes on the First Amendment free speech rights of potential post-election donors; and (3) the implementing regulation, 11 C.F.R. § 116.11, is contrary to law and arbitrary and capricious. *See* Compl. ¶¶ 5, 34-51. On the same day, Plaintiffs filed a request to convene a three-judge district court pursuant to BCRA § 403 and 28 U.S.C. § 2284. *See* Appl. For a Three-Judge Court, ECF No. 2.

The FEC opposes Plaintiffs' motion to appoint a three-judge court and seeks dismissal of Plaintiffs' Complaint for lack of jurisdiction. *See* Defs.' Opp'n to Pls.' Appl. for a Three-Judge Court and Mot. to Dismiss for Lack of Subject-Matter Jurisdiction, ECF No. 25 [hereinafter Defs.' Mot.]. The FEC argues that this case is not justiciable because Plaintiffs lack standing, *see id.* at 13-24, and that the three-judge court lacks subject-matter jurisdiction over the case because Plaintiffs' constitutional claims are "wholly insubstantial," *see id.* at 25-44. The FEC also contends this court should

deny Plaintiffs' request to convene a three-judge court with respect to their challenges to the implementing regulations because the three-judge court would lack authority to rule on those challenges. *Id.* at 44-45. Plaintiffs retort that (1) the FEC's standing argument must be resolved by a three-judge court, and that in any event Plaintiffs do have standing; (2) their challenges are constitutionally substantial; and (3) a three-judge court has, at a minimum, supplemental jurisdiction to adjudicate Plaintiffs' challenges to the FEC's implementing regulations. *See generally* Pls.' Reply in Supp. of Their Appl. For a Three-Judge Court & Resp. to Defs.' Mot. to Dismiss, ECF No. 29 [hereinafter Pls.' Reply].

III. DISCUSSION

A. Plaintiffs' Standing

1. This Court Has Jurisdiction to Decide the Standing Question

Plaintiffs contend that BCRA's requirement that a three-judge court be convened to hear any "action" challenging BCRA's constitutionality precludes a single-judge court from ruling on a motion to dismiss for lack of standing in such an action. Plaintiffs' rigid reading of the word "action," however, is foreclosed by binding Supreme Court precedent.

Section 403 of BCRA provides that a three-judge district court shall adjudicate any "action . . . brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act." BCRA § 403(a)(3). Though framed in mandatory terms, the provision cross-references 28 U.S.C. § 2284, which provides that a single judge need not convene a three-judge

panel if she "determines that three judges are not required." § 2284(b)(2). The Supreme Court has held that a "three-judge court is not required where the district court itself lacks jurisdiction [over] the complaint or the complaint is not justiciable in the federal courts." *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (quoting *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974)). A case is not justiciable in federal courts when the plaintiff lacks standing, and therefore the absence of standing is a "ground upon which a single judge [may] decline[] to convene a three-judge court." *See Gonzalez*, 419 U.S. at 100.

Plaintiffs object that *Gonzalez* and *Shapiro* are inapposite because they did not involve a challenge to BCRA. They contend that BRCA is unique among other three-judge judicial review provisions because it requires a three-judge court to "adjudicate the entire 'action'—which includes . . . a pre-trial motion to dismiss for lack of jurisdiction." Pls.' Reply at 13. BCRA's use of the word "action" is not unique, however. Like BCRA, the statute at issue in *Shapiro* similarly requires the convening of a three-judge court to adjudicate the entire "action," 28 U.S.C. § 2284(a), and yet the Supreme Court had no difficulty concluding that "a district judge need not unthinkingly initiate the procedures to convene a three-judge court without first examining the allegations in the complaint" and determining whether it "lacks jurisdiction [over] the complaint," *Shapiro*, 136 S. Ct. at 452; *see also Wertheimer v. FEC*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) (finding that "an individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel" under the Presidential Campaign Fund Act, which, like BCRA,

requires three-judge courts to hear applicable "actions"). The D.C. Circuit has specifically applied *Shapiro*'s reasoning in the context of BCRA, explaining that "a three-judge court is not required" to hear a constitutional challenge to BCRA "where the district court itself lacks jurisdiction [over] the complaint or the complaint is not justiciable in the federal courts." *Indep. Inst. v. FEC*, 816 F.3d 113, 116 (D.C. Cir. 2016) (quoting *Shapiro*, 136 S. Ct. at 455).[2] Consistent with this precedent, a host of district courts have held that a single judge may dismiss a constitutional challenge to BCRA for lack of standing. *See, e.g.*, *Republican Party of La. v. FEC*, 146 F. Supp. 3d 1, 8 (D.D.C. 2015); *Rufer v. FEC*, 64 F. Supp. 3d 195, 202 (D.D.C. 2014); *Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011).

To be sure, *Shapiro* was focused on a separate jurisdictional issue—whether a claim was too "constitutionally insubstantial" to implicate the court's federal subject-matter jurisdiction—but there is no basis to distinguish between Article III jurisdiction (standing) and federal subject-matter jurisdiction (constitutional substantiality) for purposes of convening a three-judge court. As with Article III standing, the court's power to dismiss a constitutionally insubstantial question does not hinge on any "interpretation of statutory text" of BCRA or 28 U.S.C. § 2284, but on the familiar proposition that the "essential" jurisdictional prerequisites must be met before a single-judge court will exercise its jurisdiction to convene a three-judge panel. *See*

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[2] Plaintiffs argue that *Independent Institute*'s statement is dicta. *See* Pls.' Reply at 14. Even if it is, the issue is still controlled by *Shapiro* and *Gonzalez*; therefore, the court does not consider this argument further.

Shapiro, 136 S. Ct. at 455 (quoting *Ex parte Poresky*, 290 U.S. 30, 31(1933) (per curiam)); *see also O'Hair v. United States*, 281 F. Supp. 815, 818 (D.D.C. 1968) ("The first duty of the sole judge is to pass on the sufficiency of the complaint specifically as to whether or not a justiciable controversy is presented over which he has adjudicatory powers, and if he determines that the Court lacks jurisdiction, he must dismiss the suit."). As discussed below, Plaintiffs freely concede that a single judge may dismiss a constitutionally insubstantial challenge to BCRA for lack of jurisdiction, *see* Pls.' Reply at 14; it follows that the same is true of a case where jurisdiction is lacking for want of standing.

At oral argument, Plaintiffs sought to draw a line between these two jurisdictional inquiries, urging that the question of constitutional substantiality is within the single-judge court's jurisdiction because it goes to whether a constitutional question is raised at all—a necessary prerequisite to trigger BCRA § 403's judicial review requirement—whereas questions regarding a litigant's standing fall under the broad umbrella of an "action" challenging BCRA, and therefore must go to a three-judge court. That reading, however, is irreconcilable with *Gonzalez*, in which the Supreme Court held that it did not have mandatory jurisdiction over a three-judge court's dismissal of a claim for lack of standing because the lower court's dismissal was "not merely short of the ultimate merits; it was also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court." 419 U.S. at 100. The Court acknowledged that, under the statute at issue, a "single

judge is literally forbidden to 'dismiss the action, or enter a summary or final judgment' in any case required to be heard by three judges," but it eschewed such a literalist reading, noting that "we have always recognized a single judge's power to dismiss a complaint for want of . . . jurisdiction." *Id.* at 96 n. 14 (quoting 28 U.S.C. § 2284(5)). Thus, *Gonzalez* confirms that a single judge's power to dismiss a case on jurisdictional grounds does not turn on the type of jurisdictional question presented, even when, as here, the statute requires three-judge review of an entire "action."

The single-judge court's power to dispose of non-justiciable challenges to BCRA finds further support from its important role as a gatekeeper. *See Republican Party of La.*, 146 F. Supp. 3d at 8 (explaining that "the [single judge's] role at this stage of the proceedings is to determine how and by whom this case will be heard"). It is the single-judge court's responsibility to weed out jurisdictionally lacking cases that would otherwise "triple[] the normal cost of a case for the district court," *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1312 (D.D.C. 1992), and burden the Supreme Court's docket with mandatory review, *see Gonzalez*, 419 U.S. at 98 (explaining that three-judge judicial review statutes should be construed narrowly consistent with the Court's "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of [the Supreme Court] in the interests of sound judicial administration").

Plaintiffs' unyielding interpretation of the word "action" would upend this court's important gatekeeping role. For instance, because any "action" challenging BCRA's constitutionality is reviewable "only by appeal

directly to the Supreme Court," *see* BCRA § 403(a)(3), Plaintiffs' reading would require that the Supreme Court assume "mandatory, direct appellate jurisdiction in this case" even if this court were to dismiss Plaintiffs' Complaint for lack of standing, *see* Pls.' Reply at 10. That cannot be squared with the "well settled" rule that the "refusal to request the convention of a three-judge court, dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders reviewable in the court of appeals," not in the Supreme Court. *Gonzalez*, 419 U.S. at 100; *see also Turner*, 810 F. Supp. at 1312 (rejecting an identical construction of the word "action" due to the "considerable burdens" it would place "on the federal judicial system").

In short, Plaintiffs seek to pile more weight on the word "action" as it is used in BCRA § 403 than it can bear. This court has authority to consider the question of Plaintiffs' standing, which it turns to now.

2. Plaintiffs' Standing

A plaintiff in federal court bears the burden of showing that she meets the "irreducible constitutional minimum" of Article III standing: (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish standing at the motion to dismiss stage, the plaintiff "must state a plausible claim that [she has] suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (quoting *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015)); *see also Republican Party of La.*, 146 F. Supp. 3d at 9.

Plaintiffs allege a variety of injuries, but the most clear-cut is Senator Cruz's $10,000 financial injury. To recap, Senator Cruz loaned his campaign $10,000 more than he could legally be repaid using post-election contributions. Compl. ¶ 28. Believing that he had a right be repaid with such funds, he declined to pay himself back with available pre-election funds and instead used those funds to pay back other creditors. *Id.* ¶ 29. After the 20-day period had elapsed, Senator Cruz's campaign repaid him the $250,000 maximum using post-election contributions, but it is legally barred from paying him back the $10,000 balance. *Id.* ¶¶ 30-32.

As a consequence of all this, Senator Cruz is still owed $10,000, *id.* ¶ 32, which is plainly a cognizable injury. Indeed, any financial loss—even if only a "dollar or two"—is ordinarily a cognizable injury for standing purposes. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008). That injury is caused by the Loan Repayment Limit, because the Cruz Committee's inability to repay the $10,000 balance is due to the law's restrictions on the amount of post-election contributions a campaign can use to repay a candidate's loans. And the injury would be redressed by a favorable court decision, because, if a three-judge court were to strike down the Loan Repayment Limit, the Cruz Committee would solicit additional post-election contributions to pay off Senator Cruz's loans. *See* Compl. ¶¶ 32-33. Senator Cruz has therefore met his burden of plausibly alleging each of the three elements of standing.[3]

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[3] Because Senator Cruz has standing due to his financial injury, the court does not address Plaintiffs' other theories of standing. *See Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 443

The FEC nevertheless argues that Senator Cruz lacks standing because, it says, the Senator's injury is self-inflicted. A self-inflicted harm is neither a "cognizable" Article III injury, nor "fairly traceable to the defendant's challenged conduct." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). However, to be self-inflicted, an injury must be "so completely due to the [plaintiff's] own fault as to break the causal chain." *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (quoting Wright & Miller, 13A Fed. Prac. & Proc. Juris. § 3531.5 (2d ed. 1984)). Plaintiffs' role in Senator Cruz's injury does not rise to that level.

The FEC's primary self-infliction argument—that Senator Cruz caused his own injury by "transparently tailor[ing]" the $260,000 loans to bring a challenge to the Loan Repayment Limit, Defs.' Mot. at 15, is easily disposed of. It has "long been settled . . . that an individual does not forfeit his standing for jurisdictional purposes merely because he is a 'test' plaintiff." *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979) (collecting cases). That is because, "if actual[] adversary interests are involved, deliberate provocation of litigation does not defeat the existence of a controversy." Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3530 (3d ed. 2019). So long as there is "concrete adverseness" between the parties, *see Granfield v. Catholic Univ. of Am.*, 530 F.2d 1035, 1045 (D.C. Cir. 1976), a test case brought by a litigant who has been injured by a law he seeks to challenge is no less justiciable than any

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(D.C. Cir. 2013) (explaining that "to proceed to the merits" of a group of petitioners' claims, the court "need only find one party withstanding").

other, *see Kuehl v. Sellner*, 887 F.3d 845, 851 (8th Cir. 2018) ("[W]hen an individual searches for and finds a violation of the law, it is the violation itself—not the search—that causes the plaintiff injury.").[4] Because the parties' interests here are plainly adverse, the fact that Senator Cruz may have made the two loans fully expecting that the Loan Repayment Limit would inhibit his ability to be fully repaid has no bearing on his standing to challenge the law.

The FEC's second argument—that Plaintiffs could have easily "taken legally available steps to avoid" Senator Cruz's injury, Defs.' Mot. at 16—is equally unavailing. Recall that the Loan Repayment Limit gives a campaign committee two options for paying back a candidate's personal loans after an election. The committee may either (1) repay up to "the entire amount of the personal loans using" pre-election contributions, so long as it makes the payment within 20 days of the election, 11 C.F.R. § 116.11(b)(1), (c)(1), or (2) "repay up to $250,000 of the personal loans from" post-election contributions at any time, with any outstanding balance above $250,000 converting to a contribution from the candidate after the 20-day period expires, *id.* § 116.11(b)(2), (c)(2). The FEC argues that Senator Cruz could have repaid himself with a minimum of

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[4] The only case cited by the FEC in support of its position, *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600 (D.C. Cir. 1996), is not to the contrary. That case did not discuss the plaintiffs' subjective motivations in bringing the lawsuit, and the only alleged harm—the risk to privacy associated with the public release of the plaintiffs' information—was exclusively the fault of the plaintiffs, who voluntarily chose to make that information public. *Id.* at 606. Unlike that case, Senator Cruz's harm is indisputably caused by the Loan Repayment Limit's restrictions on how his loans can be repaid.

$10,000 in pre-election contributions under Option 1, which would have enabled him to make himself whole with a maximum $250,000 payment using post-election funds. By choosing not to make a modest loan payment of $10,000 using pre-election funds, the FEC contends, Plaintiffs voluntarily chose to subject Senator Cruz to an injury under Option 2. Defs.' Mot. at 16-17.

The flaw in the FEC's argument is that it would require Senator Cruz to avoid an injury by subjecting himself to the very framework he alleges is unconstitutional. For standing purposes, the court must accept as valid the merits of Plaintiffs' claim, *see re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54 (D.C. Cir. 2019), meaning the court must assume that the Loan Repayment Limit's restriction on the amount of post-election contributions a campaign committee can use to repay a candidate's pre-election loans unconstitutionally burdens free speech, *see* Compl. ¶¶ 3, 35-41. The corollary of this is that Plaintiffs would have the right to repay Senator Cruz's loans in full using post-election contributions. Obligating Plaintiffs to avoid the Senator's injury by repaying at least a portion of the loans using pre-election contributions would therefore require Senator Cruz to forego exercising a right that the court must assume he has, and subject him to the very framework that ostensibly unconstitutionally burdens his free speech.

This principle animated the D.C. Circuit's recent decision in *Libertarian National Committee, Inc. v. FEC*, where the court rejected an argument that a political committee had caused its own injury by refusing to subject itself to the statutory requirement it was challenging. 924 F.3d 533, 536 (D.C. Cir. 2019). In that case,

a deceased member of the Libertarian Party had bequeathed more than $200,000 to the Libertarian National Committee ("LNC")—well above the annual contribution limit of $33,400. *Id.* at 536. The LNC could have accepted the bequest all at once by placing $33,400 in its general treasury and the rest in segregated accounts that limited the purposes for which the funds could be spent, but the committee believed it had a First Amendment right to receive the full bequest with no strings attached. *Id.* at 538. Rather than accept the money into spending-limited accounts, the LNC deposited the money into escrow, which limited its ability to use the money for expressive purposes. *See id.* at 538-39. The court rejected the FEC's argument that the LNC inflicted its own injury by failing to accept the entire bequest into segregated accounts, reasoning that "the LNC's injury stems not from its inability to accept the entire bequest immediately (which it could have done), but rather from the committee's inability to accept immediately the entire bequest for *general expressive purposes* (which FECA prohibits)." *Id.* at 538 (cleaned up). Thus, as with this case, the LNC had no obligation to avoid its injury by subjecting itself to the very statutory requirement it claimed to be unconstitutional.

None of the cases the FEC cites supports the notion that to avoid causing her own injury a plaintiff must do the very thing she claims she has a right not to do. For instance, in *Gonzalez*, the D.C. Circuit held that a plaintiff lacked standing where its purported injury—uncertainty as to how to comply with a purportedly conflicting statute and regulation—could have easily been

resolved by asking the relevant agency to clarify its regulations. 468 F.3d at 831. The plaintiff was not challenging the requirement that it seek clarification, however. Thus, unlike Plaintiffs' injury here, the *Gonzalez* plaintiff's "easy means for alleviating the alleged [injury]," *id.*, did not require it to comply with a legal requirement it was challenging. Likewise, in *Huron v. Berry*, the court held that a family lacked standing to challenge the federal government's approval of certain health insurance plans for federal employees after the family switched to a plan that lacked medical coverage the father needed. 12 F. Supp. 3d 46, 47 (D.D.C. 2013). The family's injury was self-inflicted, the court held, because they had chosen to enroll in a plan that lacked the needed coverage notwithstanding the fact that there were at least seven other federal plans that offered such coverage. *Id.* at 52-53. The family's decision not to enroll in those other plans was based purely on their "own economic self-interest," *id.* at 53; the family did not allege, as Plaintiffs allege here, that they had a constitutional right to enroll in the plan that lacked coverage, or that enrolling in any of the other plans would violate their rights.

The FEC makes much of the D.C. Circuit's decision in *Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10 (D.C. Cir. 2014), but, as the agency conceded at oral argument, that case was not about standing. Instead, the court held "on the merits" that a corporation that sought to use a functionally obsolete type of political action committee to solicit contributions and make independent expenditures had no First Amendment right to be free of restrictions on that type of committee when the corporation itself could have engaged

in the same activity free of any such restrictions. *Id.* at 12-14. The court could not have reached the merits if the plaintiffs lacked standing, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998), which suggests that, as here, a plaintiff does not lack an injury simply because there are "*less* burdensome" and "more robust option[s]" to accomplish her desired goals, *see Stop This Insanity*, 761 F.3d at 14.

In sum, Senator Cruz has plausibly alleged a cognizable, redressable injury that is caused by the Loan Repayment Limit, not by Plaintiffs.

B. The Constitutional Substantiality of Plaintiff's BCRA Challenges

The FEC argues that the court should also deny Plaintiffs' application for a three-judge court "for the separate and independent reason that plaintiffs have failed to 'present a substantial [constitutional] claim.'" Defs.' Mot. at 25 (quoting *Republican Party of La.*, 146 F. Supp. 3d at 8). The court disagrees.

"[A] district judge need not unthinkingly initiate the procedures to convene a three-judge court without first examining the allegations in the complaint" and determining whether it has jurisdiction over the action. *Shapiro*, 136 S. Ct. at 455. A challenge to BCRA fails to implicate federal subject-matter jurisdiction, thereby precluding federal judicial review, when the constitutional claim is "wholly insubstantial and frivolous." *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682-683 (1946)). "[T]he exception for insubstantial claims is narrow," however. *Independence Institute*, 816 F.3d at 116. "It applies only when the case is 'essentially fictitious, wholly insubstantial, obviously frivolous, and obviously

without merit.'" *Id.* (quoting *Shapiro*, 136 S. Ct. at 456). Plaintiffs' constitutional challenges to BCRA are not so lacking as to fail to clear this low bar.

Plaintiffs' main constitutional concern with the Loan Repayment Limit is straightforward: "[B]y bar[r]ing the repayment of candidate loans greater than $250,000 from money raised after the election," they argue, "the [Loan Repayment Limit] necessarily increases the risk that these loans will not be repaid in full, or perhaps at all." Pls.' Reply at 15-16. This has the effect, Plaintiffs continue, of "deterring a candidate from making loans in excess of $250,000," thereby "directly burdening his First Amendment right 'to speak without legislative limit on behalf of his own candidacy.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 54 (1976)). The FEC responds that Plaintiffs' constitutional argument is "wholly insubstantial" because the Loan Repayment Limit "merely sets conditions on a candidate having his or her loans repaid, which is not a constitutional right at all," and that even if the Limit did burden a candidate's free speech, it would be justified by the government's compelling interest in preventing corruption. *See* Defs.' Mot. at 26-27.

The FEC has not shown that Plaintiffs' argument is "frivolous or . . . so settled by precedent as to be beyond controversy." *Republican Party of La.*, 146 F. Supp. 3d at 13. Indeed, the FEC has not identified any case law specifically holding that the type of indirect burden on a candidate's ability to freely loan to his campaign identified by Plaintiffs does not implicate the First Amendment's protections on political speech. Nor has the FEC shown that any speech burdens that the Loan

Repayment Limit places on candidates would unequivocally survive constitutional scrutiny. Thus, while the argument "may or may not prevail on the merits," Plaintiffs are entitled to make that case before a three-judge court. *Independence Institute*, 816 F.3d at 117.

Plaintiffs also argue that the Loan Repayment Limit unconstitutionally burdens the First Amendment rights of committees and potential contributors, Pls.' Reply at 20-23, and the FEC contends that these claims are similarly insubstantial, Defs.' Mot. at 33-35. The court need not address these arguments, however. Since Plaintiffs have advanced "at least one argument . . . that is not essentially fictitious, wholly insubstantial, obviously frivolous, and obviously without merit, the case must proceed to a three-judge court." *Independence Institute*, 816 F.3d at 117 (internal quotation marks omitted).

C. Whether Plaintiffs' Challenges to the FEC's Implementing Regulations May Be Heard by a Three-Judge Court

Finally, the FEC argues that the court should decline Plaintiffs' request to convene a three-judge court with respect to Plaintiffs' claims challenging the FEC's implementing regulations because, it insists, a three-judge court would have no authority to rule on those claims. That is incorrect; if appropriate, a three-judge court could exercise supplemental jurisdiction over Plaintiffs' challenges to the FEC's regulations.

It has long been understood that in cases involving a claim that must be heard by a three-judge court, that court "has power to decide other claims in the case that, standing alone, would require only a single judge." *See*

Wright & Miller, 17A Fed. Prac. & Proc. Juris. § 4235 (3d ed. 2019) (collecting cases); *see also* 28 U.S.C. § 1367(a) (granting district courts supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"). In *Zemel v. Rusk*, for instance, the Supreme Court held that a three-judge court properly exercised jurisdiction over a claim that the Secretary of State was acting in excess of his statutory authority because the complaint also included a substantial constitutional challenge to the enabling statutes themselves. 381 U.S. 1, 5 (1965). The Court rejected the government's argument that the three-judge court was improperly convened, holding that the "joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene [a three-judge] court." *Id.* at 6 (quoting *Fla. Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80 (1960)). Likewise, in *Allee v. Medrano*, the court reiterated that a three-judge court "could properly consider" a challenge that raised claims not covered by the three-judge statute because it had "jurisdiction ancillary to that conferred by the constitutional attack . . . which plainly required a three-judge court." 416 U.S. 802, 812 (1974).

The FEC argues that the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), compels a different result, *see* Defs.' Reply in Supp. of its Mot. to Dismiss for Lack of Subject-Matter Jurisdiction, ECF No. 32 [hereinafter Defs.' Reply], at 9-10, but the agency misreads that case. The *McConnell* plaintiffs had raised vagueness and overbreadth challenges to a new provision of BCRA that directed the FEC to issue new

regulations regarding non-candidates' expenditures in support of a candidate. 540 U.S. at 220. The FEC issued its regulations only after oral argument and briefing had completed, however, and the plaintiffs never amended their complaints to challenge the regulations themselves. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 261-62 (D.D.C. 2003); *see generally* Docket Nos. 1:02-cv-00583-CKK-RJL; 1:02-cv-00751-CKK-RJL; 1:02-cv-00754-CKK; 1:02-cv-00754-CKK-RJL. The three-judge district court held that the challenge was unripe because the plaintiffs had not directly challenged the regulations, and the court did "not know to what extent the regulations have clarified the vagueness Plaintiffs contend would chill their rights." *McConnell*, 251 F. Supp. at 262.[5] On appeal, "portions of plaintiffs' challenge . . . focus[ed] on the regulations" themselves, and the Supreme Court rejected those arguments, explaining that "issues concerning the regulations are not appropriately raised in this facial challenge to BCRA, but must be pursued in a separate proceeding." *McConnell*, 540 U.S. at 223. Accordingly, the Court agreed with the district court that, "to the extent that the alleged constitutional infirmities are found in the implementing regulations rather than the statute itself," plaintiffs' challenge to the provision was unripe. *Id.*

The FEC seizes on the Supreme Court's statement that "issues concerning the regulations . . . must be

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[5] The district court also noted that BCRA's jurisdictional grant "does not extend to the consideration of FEC regulations," *McConnell*, 251 F. Supp. 2d at 258, but that statement was dicta because the court was not confronted with a challenge to an FEC regulation.

pursued in a separate proceeding," *see* Defs.' Reply at 10 (alterations in FEC's brief), but it omits the Court's clarification that those issues were not appropriately raised "in *this* facial challenge"—not *all* facial challenges to BCRA. *McConnell*, 540 U.S. at 223 (emphasis added). Any challenges to the regulations were not appropriately raised in *McConnell* for the simple reason that the plaintiffs had not challenged the regulations in their complaints. The Supreme Court thus could not have been overruling its decades-old rule that a three-judge court may assume jurisdiction over a supplemental claim, nor creating an exception to that rule under BCRA, when there was no such supplemental claim to begin with.[6]

The FEC responds that supplemental jurisdiction under BCRA § 403 would be incompatible with 52 U.S.C. § 30110, another special judicial review provision in FECA. *See* Defs.' Reply at 10. Because that provision requires that constitutional challenges to non-BCRA provisions of FECA be certified directly to the *en banc* D.C. Circuit, the FEC fears that allowing supplemental jurisdiction in a BCRA challenge would mean

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[6] The district court in *Bluman v. FEC*—cited by the FEC in support of its position—also read *McConnell* as holding that regulatory challenges are "not appropriately raised in [a] facial challenge to BCRA." 766 F. Supp. 2d 1,4 (D.D.C. 2011) (alterations in original). This court is not, of course, bound by that decision. As discussed, *McConnell*'s holding that the back door regulatory challenges raised by the plaintiffs on appeal were not appropriately raised in "*this* facial challenge to BCRA" was confined to the facts of that case; the statement had nothing to do with whether a three-judge court has supplemental jurisdiction to hear non-constitutional claims alongside a BCRA claim.

that a constitutional challenge to FECA, brought alongside a constitutional challenge to BCRA, would have to be heard simultaneously by the D.C. Circuit and a three-judge district court. The FEC misconstrues the nature of supplemental jurisdiction, however. Supplemental jurisdiction is not required when "expressly provided otherwise by Federal statute," or when "there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(a), (c)(4). These exceptions would surely excuse a three-judge court from exercising supplemental jurisdiction over claims for which the D.C. Circuit had exclusive jurisdiction.[7]

Finally, the FEC argues that supplemental jurisdiction is inappropriate because Plaintiffs' regulatory claims are insufficiently related to their constitutional claims. *See* Defs.' Reply at 10-11. That argument is dubious, as the challenged regulations implement Section 304 of BCRA. In any event, the issue is one better left for the three-judge panel to resolve in the discretionary exercise of its supplemental jurisdiction.

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[7] That said, this potential statutory conflict illuminates why Plaintiffs' alternate theory—that any claim that is part of an "action" that includes a constitutional challenge to BCRA challenge *must* be heard by the three-judge court, *see* Pls.' Reply at 29-32—is incorrect. Such mandatory three-judge jurisdiction over all claims accompanying a BCRA constitutional claim—even claims utterly unrelated to BCRA—would directly conflict with 52 U.S.C. § 30110, *see Wagner v. FEC*, 717 F.3d 1007, 1011-12 (D.C. Cir. 2013) (explaining that section 30110 "deprive[s] both the district court and panels of the court of appeals of authority to hear the merits of constitutional challenges to the provisions of FECA"), and would impose untenable burdens on the courts, *see Turner*, 810 F. Supp. at 1312 (rejecting a similar argument due to its potential "burdens on both lower federal courts and the Supreme Court").

IV. CONCLUSION AND ORDER

For the foregoing reasons, the court grants Plaintiffs' Application for a Three-Judge Court, ECF No. 2, and denies the FEC's Motion to Dismiss, ECF No. 25. As required under 28 U.S.C. § 2284(b)(1), the Clerk of Court shall, on behalf of this court, notify the Chief Judge of the D.C. Circuit for assignment of this matter to a three-judge district court.

Dated: Dec. 24, 2019

/s/ AMIT P. MEHTA
AMIT P. MEHTA
United States District Court Judge

APPENDIX F

1. 52 U.S.C. 30116(j) provides:

Limitations on contributions and expenditures

(j) Limitation on repayment of personal loans

Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election.

2. Section 403(a) and (d), Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 113-114 provides:

SEC. 403. JUDICIAL REVIEW.

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

* * * * *

(d) APPLICABILITY.—

(1) INITIAL CLAIMS.—With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to each action described in such section.

(2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

3. 11 C.F.R. 116.11 provides:

Restriction on an authorized committee's repayment of personal loans exceeding $250,000 made by the candidate to the authorized committee.

(a) For purposes of this part, personal loans mean a loan or loans, including advances, made by a candidate, using personal funds, as defined in 11 CFR 100.33, to his or her authorized committee where the proceeds of the loan were used in connection with the candidate's campaign for election. Personal loans also include loans made to a candidate's authorized committee that are endorsed or guaranteed by the candidate or that are secured by the candidate's personal funds.

(b) For personal loans that, in the aggregate, exceed $250,000 in connection with an election, the authorized committee:

(1) May repay the entire amount of the personal loans using contributions to the candidate or the candidate's authorized committee provided that those contributions were made on the day of the election or before;

(2) May repay up to $250,000 of the personal loans from contributions made to the candidate or the candidate's authorized committee after the date of the election; and

(3) Must not repay, directly or indirectly, the aggregate amount of the personal loans that exceeds $250,000, from contributions to the candidate or the candidate's authorized committee if those contributions were made after the date of the election.

(c) If the aggregate outstanding balance of the personal loans exceeds $250,000 after the election, the authorized political committee must comply with the following conditions:

(1) If the authorized committee uses the amount of cash on hand as of the day after the election to repay all or part of the personal loans, it must do so within 20 days of the election.

(2) Within 20 days of the election date, the authorized committee must treat the portion of the aggregate outstanding balance of the personal loans that exceeds $250,000 minus the amount of cash on hand as of the day after the election used to repay the loan as a contribution by the candidate.

(3) The candidate's principal campaign committee must report the transactions in paragraphs (c)(1) and (c)(2) of this section in the first report scheduled to be filed after the election pursuant to 11 CFR 104.5(a) or (b).

(d) This section applies separately to each election.