No. 21-12

In the
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

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

Appellees.

**On Appeal From the
United States District Court
for the District of Columbia**

MOTION TO AFFIRM OR DISMISS

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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.

CORPORATE DISCLOSURE STATEMENT

Ted Cruz for Senate has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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Appellees in the above-captioned case, Ted Cruz for Senate ("the Committee") and Senator Rafael Edward ("Ted") Cruz ("Cruz"), move to affirm or dismiss on the ground that the questions presented are so insubstantial as not to need further argument.

INTRODUCTION

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment…." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), now codified at 52 U.S.C. § 30116(j), violates this bedrock principle by seeking to "level electoral opportunities for candidates of different personal wealth." *Davis v. FEC*, 554 U.S. 724, 741 (2008).

Section 304, by design and effect, deters candidates from loaning money to their campaigns, through the mechanism of restricting the campaign's ability to repay those loans. It caps, at $250,000, the amount of candidate loans that a committee may repay using funds raised *after* election day. To be sure, the loans may still be repaid in full with funds raised *prior to* the election, but there can be no question that Section 304's limit—by substantially increasing the risk that any candidate loan will never be fully repaid—forces a candidate to think twice before making those loans in the first place. As the three-judge district court below unanimously held, this burden on a candidate's

right to speak freely in favor of his own election "runs afoul of the First Amendment." J.S.App.6a.

Appellant briefly attempts to defend Section 304 on the merits, but it spends most of its Jurisdictional Statement arguing that Appellees lack standing to challenge it. Not so. Appellees have clearly been injured by the loan-repayment limit—they executed a loan during Cruz's 2018 reelection campaign that was *subject* to the limit, on which the Committee was forced to partially default *because of* the limit. Appellant argues that this injury is traceable only to Section 304's implementing regulations and not to Section 304 itself. This argument, which by Appellant's own admission was never raised in the court below, is based on a plain misreading of the record facts, one that runs directly counter to Appellant's *correct reading* of the facts in the court below. But the overriding point is that Appellant's new standing argument is an utterly irrelevant distraction, for even if Appellant's reconceived understanding of the record was accurate, this Court's case law clearly demonstrates that Appellees have standing to challenge both the implementing regulation directly causing them harm and the constitutional validity of the statutory provision *that the regulation implements*. After all, BCRA Section 304 is the sole and exclusive source of Appellant's authority to regulate the repayment of candidate loans in the first place—and if Section 304 is struck down, the regulations implementing it obviously must fall from the same blow. That is, if the host perishes, so also must its parasite.

Appellant's argument that Appellees' injury is "self-inflicted" fares no better. Appellees' subjective "motivation" in making and waiting more than 20 days after the election to repay the 2018 loan, J.S.16, "has no bearing on [Appellees'] standing to challenge the law" under longstanding and uniform precedent from this Court, J.S.App.53a. And FEC's insistence that the Cruz Committee could have found a way to fully repay Senator Cruz's loans using only the pre-election funds that Section 304 allows also poses no barrier to standing. For as the court below held, what this argument boils down to is that Cruz could have avoided his injury "by subjecting himself to the very framework he alleges is unconstitutional." *Id.* 54a. This Court has never suggested that a plaintiff's standing is defeated if he could have avoided all harm by *complying with the very law he challenges as contrary to the First Amendment.*

This Court should summarily affirm—or, failing that, note probable jurisdiction and set the case for plenary consideration.

STATEMENT

I. Section 304's Limit on the Repayment of Candidate Loans.

Federal law generally allows candidates to *make* loans to their authorized campaign committees without limit—loans which BCRA defines as a form of "expenditure" by the candidate. 52 U.S.C. § 30101(9)(A)(i). However, Section 304 of BCRA imposes a $250,000 limit on a committee's ability to

repay those "candidate loans" with money contributed by donors after the election:

> 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.

52 U.S.C. § 30116(j).

Appellant's regulations implementing this provision require, *inter alia*, that any repayment of over $250,000 in candidate loans be made "within 20 days of the election." 11 C.F.R. § 116.11(c)(1). Any amount of a candidate loan in excess of $250,000 that is not repaid within those first 20 days cannot be repaid at all, for it must be treated "as a contribution by the candidate." *Id.* § 116.11(c)(2).

Appellant's regulations further provide that contributors may not make any post-election contributions designed to repay over $250,000 in candidate loans—even if those post-election contributions comply with the current $2,900 contribution limit with respect to that candidate and that election. *See id.* § 110.1(b)(1); 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021); *see also* 11 C.F.R. § 110.1(b)(3)(i) (contributions designated for past election limited to the campaign's "net

debts outstanding"); *id.* § 110.1(b)(3)(ii)(C) ("net debts outstanding" excludes any candidate loans over $250,000).

II. Senator Cruz's 2018 Loans.

Prior to the November 6, 2018, election, Senator Cruz made or incurred loans totaling $260,000 to the Cruz Committee to help finance his reelection campaign for the United States Senate. J.S.App.8a. At the end of November 6, the Committee did not have sufficient funds to both repay these loans and satisfy the Committee's other creditors. In fact, while the Committee ended the election campaign with approximately $2.38 million deposited in, or in transit to, its bank accounts, it owed about $2.7 million—including the $260,000 it owed to Senator Cruz—leaving it with approximately $337,748 in "net debts outstanding," as of election day. D. Ct. Doc. 61-2, ¶¶ 36-38 (June 9, 2020). During the 20 days following the election, the Committee used its cash on hand to satisfy debts to other creditors rather than repay Senator Cruz's loans. *Id.* ¶ 40. Only in December of 2018, more than 20 days after the election, did the Committee repay Senator Cruz's loans. *Id.* ¶ 41. In compliance with the challenged limits, the Committee only repaid Senator Cruz $250,000, leaving a total of $10,000 unpaid. J.S.App.9a.

REASONS FOR SUMMARY AFFIRMANCE OR DISMISSAL

Appellant contends that Senator Cruz and his Committee lack standing to challenge Section 304's

loan-repayment limit and that the district court erred in striking it down under the First Amendment. Both arguments are plainly contrary to this Court's precedent.

I. The District Court Correctly Held that Appellees Have Standing.

It is undisputed that Senator Cruz loaned the Cruz Committee $260,000 before the 2018 election. J.S.3. At that moment, Appellees became subject to Section 304's limits on the "pool[s] of funds" that could be used to repay Senator Cruz's loans. J.S.17. And because in the 20 days after the election the Cruz Committee used its limited cash on hand to repay its other creditors rather than Cruz, "Senator Cruz is still owed $10,000"—a sum that, under Appellant's regulatory 20-day-rule, can no longer lawfully be repaid. J.S.App.51a.

Appellant does not dispute that the unpaid $10,000 debt "is plainly a cognizable injury," *id.,* nor that Appellees' injury is redressed by the decision in their favor. Instead, Appellant's standing argument is limited to the requirement of causation or traceability, J.S.8, which it challenges based on two distinct arguments. Neither is persuasive.

A. Appellees' Injuries Are Traceable to BCRA Section 304.

First, Appellant argues that Senator Cruz's financial injury is traceable to the FEC regulations *implementing* Section 304, but not Section 304 itself, depriving Appellees of standing to challenge Section 304

under this Court's recent decision in *California v. Texas*, 593 U.S. ---, 141 S. Ct. 2104 (2021). According to Appellant, because the $250,000 the Cruz Campaign repaid to Cruz beginning in December of 2018 came solely from "pre-election funds, nothing in BCRA's loan-repayment provision stops the committee from using contributions raised after the election to repay the remaining $10,000 owed to Senator Cruz." J.S.11. Instead, Appellant says, what prevents the repayment of the $10,000 balance is 11 C.F.R. Section 116.11(c)(2)'s requirement that once 20 days after election day have passed, the Committee "must treat the … outstanding balance [of the loan] … as a contribution by the candidate," rendering it un-reimbursable. Appellant thus concludes that "[i]t is that regulation—not the statutory loan-repayment limit—that" is the source of Cruz's $10,000 injury. J.S.12.

As Appellant admits, it chose not to raise this argument before the district court. *Id.* at 13. That was the better choice, because the argument is completely without merit, both as a matter of fact and as a matter of law. As to facts, Appellant's claim that the Committee "repaid Senator Cruz using only *pre*-election funds," *id.* at 10, is flat-out false. It is based on a misreading of the record below and a misunderstanding of federal election law. But Appellant's errors are ultimately irrelevant (although we will return to them, and correct them, below), for even if one accepts Appellant's inaccurate account of the record facts, Appellees' $10,000 financial injury is, as a matter of law, directly traceable to the constitutional infirmity in

Section 304. That conclusion is evident from bedrock principles of administrative law and is confirmed by decades' worth of landmark constitutional decisions. We turn first to this dispositive point.

1. Because "an administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), "an agency literally has no power to act … unless and until Congress confers power upon it," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). And given the black-letter rule that "[a]n unconstitutional law is void, and is as no law," *Ex parte Siebold*, 100 U.S. 371, 376 (1879), it necessarily follows that where a statutory provision is invalid and unenforceable, any implementing regulations that were promulgated under its authority are likewise invalid and unenforceable. *See Chicago, Indianapolis, & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913) (unconstitutional law is "as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law"); 5 U.S.C. § 706(2)(C) (courts shall "hold unlawful and set aside agency action … in excess of statutory jurisdiction, authority, or limitations").

The application of these settled principles in this case is clear. Appellant's regulation is wholly parasitic upon Section 304 itself; it was promulgated under its authority, *see* 68 Fed. Reg. 3970, 2973 (Jan. 27, 2003), and Appellant quite obviously *could not* have

promulgated it were Section 304 not on the books. There can thus be no dispute that under the district court's ruling that Section 304 is unconstitutional, 11 C.F.R. Section 116.11, Appellant's 20-day limit, cannot be enforced any longer. Indeed, that is why the district court, upon holding Section 304 unconstitutional, dismissed Appellees' separate claims challenging Section 116.11 *as moot*. J.S.App.38a.

Accordingly, the causal link between the $10,000 injury inflicted by Appellant's regulatory 20-day rule and the unconstitutionality of Section 304 is clear and direct. It is only because Section 304 was enacted that Appellant had authority to promulgate the regulatory 20-day limit at all. The only intermediate link in the chain of causation between Appellees' injury and Section 304 is a parasitic regulatory provision that derived all of its legal authority from the statute that it implements—and that, with the statute held unconstitutional, can no longer be enforced.

This Court's cases have long held that plaintiffs in exactly this profile have standing to challenge not just the regulation or agency action that immediately caused their injury but the statutory provision that authorized it. Just last Term in *Collins v. Yellen*, for example, the Court held that shareholders injured by agency action taken by the Federal Housing Finance Agency had standing to challenge the constitutionality of the agency's structure, expressly concluding that "the traceability requirement is satisfied" even though "the shareholder's concrete injury flows directly from [the agency action]" rather than "the [statutory]

removal restriction." 594 U.S. ---, 141 S. Ct. 1761, 1779 (2021).

Similarly, the Court found standing in *Clinton v. City of New York* to challenge the Line Item Veto Act even though the plaintiffs were immediately injured by the President's cancellation of certain tax benefits to which they were otherwise entitled, not the Act's general provision *authorizing* that cancellation, explaining that "traceability" was "easily satisfied" since their "injury is traceable to the President's cancellation of [the benefits]." 524 U.S. 417, 433 n.22 (1998). And in *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, the Court allowed homeowners near Washington National Airport who alleged injury from the risk of "increased noise, pollution, and danger of accidents" posed by the "increased air traffic" that would result from a master plan imposed by the Metropolitan Washington Airports Authority ("MWAA") to challenge the constitutionality of the MWAA's composition, specifically rejecting the argument that the plaintiffs' "injuries are caused by factors independent of" the alleged constitutional violation. 501 U.S. 252, 264-65 (1991); *see also Seila Law v. CFPB*, 591 U.S. ---, 140 S. Ct. 2183, 2195-96 (2020); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *INS v. Chadha*, 462 U.S. 919, 936 (1983); *Buckley v. Valeo*, 424 U.S. 1, 12, 118 (1976).

Indeed, separation-of-powers challenges to the constitutionality of agency actions commonly bear this host-parasite character. In the typical Appointments Clause challenge, for example, where a party injured

by agency action challenges the appointment of the official who promulgated it, the causal link is *more attenuated* than here. For in those cases, it is the general statutory provision governing the official's appointment, rather than the specific statutory provision being implemented, that is alleged to be invalid. Yet in countless of these types of cases the Court has proceeded directly to the merits of the constitutional challenge, because no one *even dreamed* of arguing that the plaintiff's injury was not fairly traceable to the alleged constitutional violation. *See, e.g.*, *Financial Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. ---, 140 S. Ct. 1649 (2020); *Gundy v. United States*, 588 U.S. ---, 139 S. Ct. 2116 (2019); *DOT v. Association of Am. R.R.s*, 575 U.S. 43 (2015); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Mistretta v. United States*, 488 U.S. 361 (1989); *Schneider v. Smith*, 390 U.S. 17 (1968); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). These decisions illustrate the sea change that acceptance of Appellant's argument would cause in the standard model of constitutional litigation.

2. Appellant does not address any of the decisions from this Court finding standing in materially identical circumstances. Instead, the only authority Appellant cites for its argument is this Court's recent decision in *California v. Texas*. *California* has no application here.

In *California*, several States (alongside two individuals) challenged Section 5000A(a) of the Affordable Care Act—the "minimum essential coverage requirement," colloquially known as the "individual mandate"—as unconstitutional. But the alleged injuries that gave rise to their standing (as relevant here) were inflicted by "other provisions of the Act, not the minimum essential coverage provision." 141 S. Ct. at 2108, 2119. And as the Court repeatedly explained, the statutory provisions that had injured the State plaintiffs "*operate independently* of § 5000A(a)," and "[n]othing in the text" of those provisions "suggests that they would not operate without § 5000A(a)." *Id.* at 2119, 2120 (emphasis added). Accordingly, "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions violates the Constitution," and the States' injuries were thus "not fairly traceable to enforcement of the allegedly unlawful provision of which the plaintiffs complain—§ 5000A(a)." *Id.* at 2119 (quotation marks omitted).

Appellees' claims in this case are crucially different from the claims in *California*—and they differ for *precisely* the reasons that the Court singled out as *depriving the State plaintiffs of standing* in that case.

While *California* emphasized that the statutory provisions that had injured the State plaintiffs "operate independently" of the separate provision they challenged as unconstitutional, *id.* at 2120, here the regulatory 20-day rule that has harmed Senator Cruz to the tune of $10,000 *cannot operate at all* without the statutory provision it implements, BCRA Section 304. The key problem for the States in *California*, then, was that "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions [causing the States' injuries] violates the Constitution." 141 S. Ct. at 2119. But here the unconstitutionality of BCRA Section 304 obviously renders Appellant's 20-day regulation unconstitutional and unenforceable as well.

The inapplicability of *California* here is underscored by the debate in that case between the Majority and Justice Alito concerning the States' severability argument. Justice Alito's dissenting opinion argued that the States' injuries *were* "traceable to the individual mandate" because the separate provisions that inflicted those injuries "cannot be severed from the mandate." *Id.* at 2131 (Alito, J., dissenting). The Majority "decline[d] to consider" that "novel" argument on the ground that it had been forfeited. *Id.* at 2116 (majority); *see also id.* at 2122 (Thomas, J., concurring) (concluding that the severability argument "might well support standing in some circumstances" but had not been adequately presented). Here, of course, Appellees have argued from the beginning that "[b]ecause

the challenged statute is unconstitutional, the FEC's regulation implementing that statute, 11 C.F.R. § 116.11, is likewise unconstitutional." D. Ct. Doc. 1, ¶ 46 (Apr. 1, 2019). And importantly, rather than depending on some "novel" severability theory, Appellees' standing is grounded on the bedrock principle that where an authorizing statute is unconstitutional and invalid, the implementing regulations that it authorized *are also* unconstitutional and invalid.

Countless cases have been decided by this Court either explicitly or implicitly based on materially identical logic. *See supra*, pp. 9-11. Appellant's attempt to extend *California* into this dispositively different context would thus upend the practice of constitutional litigation.

3. Appellant's belated standing argument thus plainly fails as a matter of law, and the Court may dispose of it without reading any further. But the argument is also wrong on its own factual premise, for it is based on Appellant's new and suspect understanding of the record below. Because Appellant's decision to spring the argument for the first time on appeal deprived Appellees of the opportunity to address it below, we feel bound here to clarify what the record facts *actually* show despite their ultimate irrelevance to the question of Appellees' standing.

Appellant's argument is premised on the claim that the Committee "repaid Senator Cruz $250,000 using only pre-election funds." J.S.10. Appellant explains that this assertion is based on Appellees'

> deposition testimony confirming that "[t]he committee did not receive any post-election contributions at any time after … the general election of 2018." … 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 is 2018 campaign.

Id. Appellant's newly conceived understanding of these facts is based on a critical category mistake: it confuses the general category of money raised after election day with the *subset* of such funds that are both raised after the election and *specifically designated* as contributions for the previous election. As noted above, Appellant's regulations allow a contributor to donate money *after* an election that is designated to repay debts still outstanding from *that* election (subject to the contribution limits of *that* election)—what are known in the argot of campaign-finance law as "post-election contributions." But a committee can *also* repay debt outstanding from one election with funds raised after that election and designated for the candidate's *next upcoming election*. *See* 52 U.S.C. § 30114(a); 11 C.F.R. § 116.12(a). And because these contributions, no less than contributions expressly (and retroactively) designated to the previous election, are "made to [the] candidate … after the

date of [the relevant] election," they too are subject to Section 304's $250,000 cap. 52 U.S.C. § 30116(j).

Thus, when the Committee's deponent said that "the Committee did not receive any post-election contributions after the general election of 2018," J.S.10, he was using "post-election contributions" as a term of art, to refer *only* to contributions raised after the election and designated retroactively *for the 2018 election*. Indeed, the Committee's deponent further explained that "the committee *had continued to receive contributions* after election day 2018," but it "designated those contributions for use in 'the primary and the general 2024 election cycle.' " *Id.* (emphasis added); *see also* D. Ct. Doc. 65-9, 96 (July 14, 2020) ("the committee received collections that went toward both the primary and the general 2024 election cycle after Election Day"). Again, these funds could be and were used to pay 2018 election debts.

Appellant fully understood this below. Appellant's own trial counsel, in response to the deponent's quoted statements, remarked that "the public record" shows "that there are individuals who did make contributions to the Ted Cruz for Senate Campaign after the general election of 2018," which went "towards the 2024 election" and could "have been used to repay debt from the 2018 campaign." *Id.* at 95-97, 146.

Appellant also quotes the undisputed Statement of Fact ("SOF") that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." J.S.10. But Appellant only quotes half of

the SOF, omitting the following deposition testimony on which it was expressly based: "(30(b)(6) Dep. at 95 (FEC Exh. 9) ('the committee did not receive any *general 2018 contributions* after Election Day 2018.')." D. Ct. Doc. 67-1, ¶ 64 (Aug. 11, 2020) (emphasis added). The cited SOF must be read, of course, in conjunction with the *expressly quoted* deposition testimony on which it was based, and it is only in that qualified context that Appellees admitted it. Again, the same deposition testimony establishes that the Committee *did receive* contributions after the 2018 election, that those contributions were *designated for the 2024 election*, and that those contributions were available to pay 2018 election debts—facts that, again, Appellant's own trial counsel affirmatively acknowledged during the deposition. D. Ct. Doc. 65-9, 96.

That Appellant's trial counsel correctly understood these facts—that the Committee had raised 2024 money after the election and properly used it to pay off its $337,748 of net 2018 debt—likely accounts for Appellant's decision not to raise its newfound standing argument below. But whatever the reason, Appellant's stratagem here, asking this Court not only to *consider* its new standing argument but also to needlessly prolong this case with a pointless *immediate remand*, should be firmly rebuffed. It is one thing for this Court to consider a standing argument presented for the first time on appeal. It is quite another not only to allow a party to spring a new standing argument on appeal, but then also to hand the party a

vacatur and remand back to the court where the party *should have presented the argument in the first place*.

In short, the record shows that the Committee *did* in fact raise contributions "after the date of [the 2018] election," 52 U.S.C. § 30116(j), and that these contributions were available to and substantial enough to repay all of the Committee's 2018 debts including $250,000 of Senator Cruz's loans. Appellant's assertion that the $250,000 repayment was made with pre-election money is thus simply wrong, and so is its newly concocted standing argument.

B. Appellees' Unpaid Loan, whether "Self-Inflicted" or Not, Is an Injury-In-Fact.

Appellant also argues that Senator Cruz's $10,000 financial injury is not traceable to the loan-repayment limit because it "was self-inflicted." J.S.14. This argument fails too. Where the defendant is engaged in an ongoing violation of constitutional or statutory rights and a would-be plaintiff simply exercises the right that exposes himself to that violation, the injury is caused by the defendant, not the plaintiff.

1. Appellant repeatedly cites our stipulation before the district court that "the sole and exclusive motivation" behind Appellees' loans "was to establish the factual basis for this challenge." J.S.16. As the district court correctly held, this reliance on Appellees' subjective intent "is easily disposed of." J.S.App.52a. The reason Appellees stipulated to the FEC's account of their subjective motives is that under this Court's case-law, these motives are utterly irrelevant.

For example, in *Havens Realty Corp. v. Coleman*, two plaintiffs—one black and one white—inquired of the defendant landlord about the availability of apartments. 455 U.S. 363, 368 (1982). The black plaintiff did so "fully expecting that he would receive false information" and had no "intention of buying or renting a home." *Id.* at 374. The defendant, in violation of the Fair Housing Act, consistently told the black plaintiff that there were no apartments available and told the white plaintiff that there were vacancies. *Id.* at 368. Despite the fact that the black plaintiff was a "tester" who merely "pose[d] as [a] renter[ ]," this Court held that he had standing. *Id.* at 373.

Similarly, in *Evers v. Dwyer*, the Court held that an African-American plaintiff had standing to challenge Memphis, Tennessee's segregated bus system even though he was only exposed to the challenged discrimination because he purposefully boarded a bus and sat in the whites-only section "for the purpose of instituting this litigation." 358 U.S. 202, 203 (1958). The district court dismissed the challenge for lack of an "actual controversy," but this Court reversed, holding that the fact that the plaintiff "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.* at 204.

Indeed, a contrary view would call into question several landmark cases striking down racial segregation and other forms of unconstitutional discrimination. The plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), would not have had standing to challenge racial segregation unless they had been

"personally denied equal treatment by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quotation marks omitted); *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975). They therefore voluntarily sought, and were denied, "admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown*, 347 U.S. at 488. Contrary to the FEC's logic, the fact that the *Brown* plaintiffs willfully exposed themselves to their constitutional injury by voluntarily seeking admission to a segregated school did not *defeat* their standing; it *created* their standing.

For the same reasons, Appellees' subjective motivations in making and repaying the 2018 loan are completely irrelevant to the standing analysis.

2. The foregoing discussion also answers Appellant's related argument that Appellees' $10,000 injury is "self-inflicted" because they could have avoided that injury by "us[ing] [the $2.2 million pre-election funds on hand] to pay Senator Cruz $10,000 or more in the 20 days after the election" but "simply chose not to do so." J.S.14. The district court correctly explained why this argument fails: "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." J.S.App.54a. A plaintiff, like the black "tester" in *Havens Realty*, does not forfeit standing merely because he refuses to abide by or otherwise conform his conduct to *the very restriction he challenges as unlawful.*

Nor is the notion that a plaintiff must avoid, if possible, a constitutional injury by refusing to "do the very thing she claims she has a right not to do," *id.* at 55a, supported by the three cases Appellant cites. The plaintiffs in *Clapper v. Amnesty International* challenged the constitutionality of provisions of the Foreign Intelligence Surveillance Act authorizing government surveillance of certain international electronic communications. 568 U.S. 398 (2013). They sought to ground their standing on costly measures (e.g., travel costs for in-person meetings) they had taken to avoid making international electronic communications and thus to eliminate the risk of government interception. Because the threat of any particular government interception was highly speculative rather than "certainly impending," the self-imposed costs they incurred *to avoid exercising* their claimed constitutional right to engage in confidential international electronic communications were "simply the product of their fear of surveillance, and … such a fear is insufficient to create standing." *Id.* at 417.

This case would at least be parallel to *Clapper* if Cruz had limited his campaign loan to $250,000 to avoid the risk of nonpayment created by Section 304, and then had sought to ground his standing to challenge Section 304 on the theory that he had been injured because he had refused to exercise his constitutional right to loan his campaign more than $250,000. But even in that circumstance, *Clapper* would be beside the point given that FEC's enforcement of Section 304 against any given violation is not speculative at

all, let alone in the multiple ways that FISA surveillance of any given international communication is. *See Davis*, 554 U.S. at 734 (finding standing in preenforcement challenge). Appellees' constitutional claim is that Cruz has a First Amendment right to loan money to his campaign free from governmental restrictions as to amount and time of repayment. That Cruz could have avoided his $10,000 loss by refusing to loan his campaign more than $250,000, or by requiring repayment in full within 20 days, does not change the fact that he suffered a $10,000 injury by exercising his constitutional right to make the loan that he did.

McConnell v. FEC, 540 U.S. 93 (2013), is also distinguishable. *McConnell* held that plaintiffs could not challenge BCRA's contribution limits as being set *too high* based on the supposed "competitive injury" they suffered because they did not "wish to solicit or accept large campaign contributions as permitted by BCRA." *Id.* at 228. The plaintiffs made no claim that they had a *constitutional right* not to accept large donations, merely that this was "their own personal 'wish,' " *id.*, so *McConnell* is completely irrelevant here.

The per curiam decision in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), is irrelevant too, and for the same reason. There, several States challenged taxes that New Jersey and New Hampshire imposed on income earned within their borders by residents of the plaintiff States, arguing that the taxes violated the Privileges and Immunities Clause. But the plaintiff States (as opposed to their residents) were injured

by the challenged taxes only because of their choice "to extend a tax credit to their residents for income taxes paid" to the defendant States, which (combined with the challenged taxes) resulted in tax income being "diverted from their respective treasuries." *Id.* at 663-64. And critically, none of the plaintiff States claimed a constitutional right to extend such tax credits. Here, by contrast, the whole point of Appellees' First Amendment claim is that *they do* have a constitutional right to repay candidate loans with post-election contributions.

Appellant points to the settled rule that "a plaintiff cannot establish standing by asserting an abstract general interest common to all members of the public." J.S.15 (quotation marks omitted). But the interest asserted by Appellees is not the general one of "seeing that the law is obeyed." *FEC v. Akins*, 524 U.S. 11, 24 (1998). It is the concrete First Amendment interest in repaying in full *a specific loan* in a manner free of unconstitutional restrictions that have resulted in Senator Cruz bearing the loss of a *specific $10,000 sum*.

Appellant next argues that under *Lujan v. Defenders of Wildlife*, Appellees needed to "identify a[ ] specific payment to a vendor or other creditor that the Committee would have been hindered from making," J.S.15, in order to justify their refusal to repay the loan with pre-election funds. But the problem in *Lujan*—that the "some day" intentions alleged by the plaintiffs failed to establish any " 'actual or imminent' injury," 504 U.S. 55, 564 (1992)—plainly does not apply in this case, which concerns a loan that has

already been made. Undisputed declaration testimony below establishes that "the Cruz Committee did not have sufficient funds in its bank account on November 6, 2018, to repay Senator Cruz's loans in full and also to satisfy all of the Committee's other creditors" and that in the first 20 days "the Committee paid some creditors but did not repay any portion of Senator Cruz's loans." D. Ct. Doc. 65, Statement of Genuine Issues, ¶¶ 35, 40 (July 14, 2020). Under this Court's precedent, that plainly suffices. *See, e.g.*, *Davis*, 554 U.S. at 734 (finding standing without specific allegations concerning what activities candidate wished to fund).

The premise of both of Appellant's lines of attack appears to be that a plaintiff can avoid the charge of "self-inflicted" injury only if *all* of the options available to him would have resulted in *giving him standing to bring the exact same challenge*. Appellant cites no authority in support of such a proposition, and it makes no sense. A plaintiff faced with an unconstitutional fine for speaking at a particular occasion can plainly choose to speak, pay the fine, and then sue under the First Amendment without having to show that if he had avoided the fine by *declining* to speak, he could have *sued anyway*. *Compare, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (publisher that paid discriminatory tax on the press had standing); *with Laird v. Tatum*, 408 U.S. 1, 13 (1972) (no standing based on "subjective chill" alone). Similarly here, Appellees have alleged and established that they have suffered a concrete $10,000

injury fairly traceable to the challenged restrictions and that they could have avoided that injury only by complying with the very restrictions they are challenging as unconstitutional. Article III requires no more.

Appellant's standing arguments are thus completely meritless, and this Court can and should dispose of them, along with the appeal as a whole, without further briefing by summarily affirming the district court's decision. *See* this Court's Rule 16.1.

II. The District Court Correctly Held that the Loan-Repayment Limit Is Unconstitutional.

Appellant's challenge to the district court's decision on the merits also fails.

A. Because the Loan-Repayment Limit Burdens Core Political Speech, It Is Subject to Strict Scrutiny.

The loan-repayment limit burdens the core First Amendment rights of candidates, committees, and contributors, so it must be subject to strict—or, at a minimum, "closely drawn"—scrutiny.

1. The First Amendment protects the right of a candidate "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Davis*, 554 U.S. at 738. A candidate who loans money to his campaign is exercising this core First Amendment freedom both as a matter of common sense and of BCRA's own definition of "expenditure," which explicitly includes loans. 52 U.S.C.

§ 30101(9)(A)(i). And Section 304 imposes a direct and significant burden on the exercise of this First Amendment right. By limiting the "pool of funds" committees may draw on to repay candidate loans, J.S.17, the $250,000 cap necessarily increases the risk that these loans will not be repaid in full, or perhaps at all. Appellant now describes this limit as "narrow," *id.*, but in briefing before the district court it acknowledged that when Section 304 applies, "a candidate deciding to loan his or her campaign money in advance of the election [will] not be able to accurately determine the likelihood he or she might be repaid." D. Ct. Doc. 26, 44 (June 7, 2019).

True, Section 304 does not directly "impose a ceiling on a campaign's ability to repay a candidate's loans," J.S.17, but that does not negate the First Amendment violation. *Davis* is directly controlling on this point. While the "asymmetrical contribution scheme" portion of the Millionaire's Amendment at issue in *Davis* did "not impose a cap on a candidate's expenditure of personal funds, it impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right." 554 U.S. at 738-39, 740. And that "special and potentially significant burden" on core First Amendment rights, the Court concluded, could be upheld only if it satisfied strict scrutiny. *Id.* at 739, 740. The portion of the Millionaire's Amendment challenged here triggers strict scrutiny under this same reasoning. *See also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 737, 740, 742 (2011).

Appellant argues that as a factual matter "[m]ost loans to election campaigns are for $250,000 or less" and "[t]he ratio of loans below $250,000 has not changed substantially from what the ratio was prior to BCRA." J.S.18. That would be irrelevant even if it painted an accurate picture of Section 304's effect (and as the district court found, it does not, *see* J.S.App.14a-15a). For the economic burden imposed on candidate spending by the loan-repayment limit is plain as a matter of law, not to mention common sense, and the Court need not pause to consider *how many people it successfully deters* from freely exercising their First Amendment rights. That is the clear holding of *Bennett*, which squarely rejected the approach advocated by Appellant:

> [T]he burden imposed by the [challenged] provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups.... As in *Davis,* we do not need empirical evidence to determine that the law at issue is burdensome. See 554 U.S., at 738-40 (requiring no evidence of a burden whatsoever).

564 U.S. at 745-46 (citations and quotation marks omitted). So too here.

2. In addition to candidates, the loan-repayment limit also burdens the rights of committees and contributors. By limiting a committee's ability to repay candidate loans with post-election funds, the loan-

repayment limit effectively forces it to choose between using its limited cash on hand to: (1) repay the over-$250,000 balance of candidate loans (thereby foregoing, or at least delaying, funding First Amendment expression), or (2) repay other vendors (thereby *deterring* the candidate from loaning money in the future). Section 304 "does not provide any way in which a [committee] can exercise [its First Amendment rights] without abridgment." *Davis*, 554 U.S. at 740. And the loan-repayment limit also burdens the rights of contributors, by effectively creating a ceiling on overall post-election contributions. *See* 11 C.F.R. § 110.1 (b)(3)(ii)(C). At a minimum, the limit thus must be subjected to *Buckley*'s "closely drawn" scrutiny. 424 U.S. at 25.[1]

3. Finally, Appellant urges that "[a]s applied in this case, the loan-repayment limit … did not impose any meaningful constraint on appellees' expression." J.S.19. That point, even if true, is completely irrelevant, since Appellees challenged the limit as substantially overbroad on its face. It is black-letter law in the First Amendment context that a party may "challenge a statute not because their own rights of free expression are violated," but rather because "the statute's very existence may cause others not before the court

[1] Should the Court conclude that plenary consideration is necessary, Appellees reserve the right to argue that *Buckley*'s "closely drawn" scrutiny for contribution limits either is tantamount to strict scrutiny or is inconsistent with the First Amendment. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635-44 (1996) (Thomas, J., dissenting).

to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 613 (1973). That is the case here: because "the government has failed to demonstrate that the loan-repayment limit serves an interest in preventing quid pro quo corruption," J.S.App.6a, the loan-repayment limit is unconstitutional *every time it applies*.

In any event, the loan-repayment limit *did* burden Appellees as applied in this case. It is undisputed that Senator Cruz loaned his Committee $260,000 before the 2018 election—thereby exercising "his First Amendment right to spend his own money for campaign speech." *Davis*, 554 U.S. at 738. And Appellees were indisputably burdened by the challenged loan-repayment limit: the limit barred the Cruz Committee from repaying $10,000 of Cruz's $260,000 loans with any post-election contributions, and $10,000 of the loans remain unpaid. Appellant again trots out its arguments about the motivations behind the loan, J.S.18-19, but this Court's precedent holds that a plaintiff's subjective motivations are irrelevant to the merits of his constitutional challenge. *See Pierson v. Ray*, 386 U.S. 547, 558 (1967).

B. The Loan-Repayment Limit Fails even "Closely-Drawn" Scrutiny Because It Does Not Further any Anti-Corruption Interest.

Because Section 304 burdens First Amendment expression, it is subject to strict scrutiny—or, at a minimum, to *Buckley*'s "closely drawn" scrutiny. It

flunks either standard, because it does not further any interest in preventing *quid pro quo* corruption or its appearance.

1. Section 304 was never *designed* as an anti-corruption measure, so if it *did* serve that interest, it would be pure happenstance. Instead, the provision's legislative history leaves no doubt about the purposes it was *actually* designed to serve: "level[ling] the playing field" between competing candidates. 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine). Section 304 was enacted as part of the "Millionaire's Amendment," which this Court has already held was designed to "level electoral opportunities for candidates of different personal wealth." *Davis*, 554 U.S. at 741. And the legislative history makes clear that this was also the specific purpose of the loan-repayment limit in particular: as the Senator who principally drafted the loan-repayment limit repeatedly and explicitly explained, it had "the same purpose" as the rest of the amendment, and this "purpose is to level the playing field." 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison).

Moreover, Section 304 also had an even more self-serving design—it "protects incumbents." 147 CONG. REC. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle). After all, while challengers often need to spend significant amounts of seed money to raise name recognition even *before* they start to receive significant contributions, *see Anderson v. Spear*, 356 F.3d 651, 673 (6th Cir. 2004), incumbents "have a

lot of advantages that do not come out of our personal checkbooks," 147 CONG. REC. S2465 (daily ed. Mar. 19, 2001) (statement of Sen. Dodd). Both of these purposes are plainly illegitimate. *See Bennett*, 564 U.S. at 749-50; *Randall v. Sorrell*, 548 U.S. 230, 248, 249 (2006) (opinion of Breyer, J).

2. Moreover, Section 304 *cannot* be justified as an anti-corruption measure because the federal contribution limits *already* serve to adequately address any corruption risk. The base limit of $2,900 per contributor (as adjusted for inflation) applies to all contributions "with respect to any election," 52 U.S.C. § 30116(a)—so it governs post-election contributions in the same measure as pre-election contributions. That eliminates any anti-corruption justification under *McCutcheon v. FEC*'s holding that "Congress's selection of a [$2,900] base limit indicates its belief that contributions of that amount or less *do not create a cognizable risk of corruption*." 572 U.S. 185, 209, 210 (2014) (emphasis added). After all, the only effect of striking down the loan-repayment limit would be to place *post-election* contributions on equal footing with *pre-election* contributions—limited to the non-corrupting amount of $2,900 or less. *See* J.S.App.34a; *Anderson*, 356 F.3d 672-73 (striking down Kentucky limit on candidate loans for this reason).

3. Appellant attempts to get around this difficulty by arguing that the loan-repayments restricted by Section 304 "pose[ ] a heightened risk of corruption." J.S.25. That contention fails for multiple independent reasons.

Appellant first argues that the contributions limited by Section 304 are especially corrupting because they supposedly go "into the candidate's pocket." *Id.* at 19. This argument fundamentally misunderstands what happens when contributions are used to repay a candidate's loan. Such payments do not go into the candidate's "pocket," *id.*, they go to reimburse the candidate for money he spent *on political speech furthering his election campaign*. Of course, the repayment allows the candidate to spend *his own money* for purposes unrelated to the campaign—in precisely the same manner as a *pre-election contribution* that obviates any need for the candidate to loan his own money *in the first place*. But that hardly means that the candidate has pocketed the contribution, whether made before or after the election, for his "personal purposes." *Id.* While Appellant gestures towards the congressional restrictions on "personal gifts," *id.* at 21, and the federal prohibition on using campaign funds for "personal use," *id.* at 20, it does not even try to argue that the repayment of a candidate loan *actually violates those limits*. It plainly does not, and that is the end of this argument.

Appellant next argues that the loan-repayment limit is justified by the special corruption risks posed by contributions made *post-election*, when "the donor can know … that the recipient will be in a position to do him official favors." *Id.* But apart from Section 304 itself, Congress has placed *no limits* on an individual's ability to contribute up to $2,900 "with respect to any election for Federal office" after election day has

passed. 52 U.S.C. § 30116(a)(1)(A); *see* 11 C.F.R. § 110.1(b)(3)(i). By the FEC's lights, *any* post-election contribution must pose a "heightened risk of corruption." J.S.25. Yet federal law generally *allows* those contributions, up to $2,900—so this supposedly heightened risk of corruption *cannot* justify Section 304's limit on a small, arbitrary subset of them.

Even more fundamentally, Appellant's argument would also doom *all contributions, pre- or post-election, to incumbent officeholders*. As the district court held, "[t]he FEC's concerns … 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." J.S.App.33a. There is no dispute that any given contributor could have given Senator Cruz $2,800 (the prevailing limit then) on November 7, 2018, if he had designated it for the *upcoming* election cycle. The notion that the same contribution would have suddenly become corrupting if it were instead designated for *the 2018* election is farcical.

Appellant also suggests that post-election contributions are suspicious because "the primary legitimate rationales for donating to electoral campaigns"—"pooling resources with other donors to facilitate political expression" and "increasing … the likelihood that the favored candidate will prevail"—"do not apply" to post-election contributions. J.S.20-21. Appellant neglects to mention the *primary* "rationale" that *Buckley* identified for contributions—that they

"serve[ ] as a general expression of support for the candidate and his views," 424 U.S. at 21—which *does* apply equally after the election. And besides, Appellant is wrong that the two "rationales" it identifies do not apply to post-election contributions. For at least with respect to candidates who may run again, contributors surely understand that helping repay debts from a *prior* campaign will free up money that the candidate can spend on *the next* campaign.

Nor can there be any argument that the supposedly "heightened risk of corruption" is only present where contributions *both* (1) are received "after the winner of the election is known" *and* (2) go to "personally enrich" the candidate. J.S.24, 25. For *both* of these factors are present *to exactly the same degree* whenever an incumbent officeholder loans money to his reelection campaign and those loans are repaid with contributions received before election day. Yet Section 304 allows such pre-election contributions to be used to repay an incumbent's loans *without limit*.

4. In addition to these fatal analytical problems, Appellant has failed to provide "any evidence" that post-election contributions used to repay candidate loans have given rise to any "actual corruption." J.S.App.25a. Appellant puts forward three pieces of supposed evidence, but none is persuasive.

First, Appellant points to "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." J.S.22 (alteration and quotation marks omitted). But as the district court found, the unpublished paper Appellant cites "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." J.S.App.25a. That fact completely deprives it of probative value, given that "mere influence or access is not the type of quid pro quo corruption that justifies infringements on political speech." *Id.*

Moreover, the paper *does not even purport* to analyze the sole question that is relevant in this litigation: whether post-election contributions used to repay candidate loans in excess of $250,000 pose some heightened risk of corruption. To the contrary, the paper (1) is *not* limited to *candidate* loans; (2) is also *not* limited to *post-election* contributions; and (3) also *does not* distinguish between the first $250,000 of candidate loan-repayment contributions and the two-hundred, fifty-thousand-and-first dollar. *See* D. Ct. Doc. 67-1, ¶ 67.

Second, Appellant asserts that it "identified numerous episodes" of "special favors" granted after the receipt of "contributions designed to pay down personal debt." J.S.22. But as the district court found, all of Appellant's anecdotes "involve only concerns that candidates will be too responsive to the influence of special interests or concerns about contributions unrelated to the repayment of candidate loans." J.S.App.23a-24a; *see, e.g.*, D. Ct. Doc. 67-1, ¶ 69 (former FEC employee simply asserting "that lobbyists

make debt-retirement contributions … because they believe the contribution will benefit the Member who receives it"); *id.* at ¶ 76 (simply reporting contributions "funded by industries or special interests" to repay candidate loans); ¶ 79 (raising concerns about *pre*-election contributions). Appellant's failure to identify any meaningful evidence of *quid quo pro* corruption is highly significant: as the district court noted, "many states impose no restriction on using post-election contributions to repay candidate loans, and the Commission fails to identify any problems with quid pro quo corruption or its appearance in these states." J.S.App.23a (footnote omitted).

Third, Appellant points to "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." J.S.22-23. But the poll in question—which "was conducted at the FEC's behest for this litigation," J.S.App.27a— falls risibly short. The poll misleadingly asked respondents how they would feel "[i]f there were *no limit* on how much money a federal campaign could raise after Election Day to repay a candidate," D. Ct. Doc. 67-1, ¶ 95 (emphasis added), without mentioning that federal base contribution limits *still apply*. Moreover, because the survey failed to ask about post-election fundraising for the repayment of *other* types of campaign debt, it cannot show that the respondents viewed the specific payments limited by Section 304 as specially corrupting. J.S.App.28a. And "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." *Id.*[2]

C. The Loan-Repayment Limit Is Not Sufficiently Tailored.

Even if the loan-repayment limit *did* somehow further the interest in curbing *quid pro quo* corruption, it is not "narrowly tailored to achieve [that] objective." *McCutcheon*, 572 U.S. at 218. Appellant's justification for the limit—that post-election donors know "that the recipient will be in a position to do him official favors," J.S.20—obviously has *no* purchase with respect to *losing* candidates. J.S.App.32a; *see also Anderson*, 356 F.3d at 673. Appellant notes that "post-election contributions generally flow to winning candidates," J.S.23, but there are far more losing candidates than winning ones, so even if a smaller fraction of them are able to raise debt-retirement money, Section 304's overbreadth remains substantial. And "establishing separate rules for winning and losing candidates" would not create an unconstitutional "asymmetrical contribution scheme," J.S.23, since unlike the scheme struck down in *Davis* this asymmetry would not "impermissibly burden[ ] [a candidate's] First Amendment right to spend his own money for campaign speech," 554 U.S. at 738.

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[2] Indeed, the political scientist who supervised the poll admitted that *she herself understood the phrase "political favor" to include access*. D. Ct. Doc. 67-1, ¶ 95.

Finally, as discussed repeatedly above, the loan-repayment limit is also dramatically *underinclusive*, given that post-election loan-repayment contributions are *indistinguishable* from many other types of contributions that are subject only to general base-contribution limits. *See supra*, pp. 31-34. To be sure, the First Amendment does not impose a "freestanding 'under-inclusiveness' limitation," J.S.24, but as the district court recognized, Section 304's underinclusiveness "raise[s] doubts about whether the law advances the interests invoked by the government," J.S.App.32a. Moreover, the loan-repayment limit's underinclusiveness also dooms it under *McCutcheon*, by demonstrating that the specific activity targeted by Section 304 in fact *does not* give rise to any risk of corruption distinct from the ordinary $2,900 contributions that, in Congress's judgment, "do not create a cognizable risk of corruption." 572 U.S. at 210.

CONCLUSION

For the foregoing reasons, the Court should summarily affirm the judgment of the district court or, at a minimum, set the case for plenary consideration.

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