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**

BRIEF OF CAMPAIGN LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

PAUL M. SMITH
Counsel of Record
TARA MALLOY
ADAV NOTI
ALEXANDRA COPPER
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

This brief is filed by Campaign Legal Center (CLC), a nonpartisan, nonprofit organization that works in the areas of campaign finance, ethics, and election law to ensure that government is accountable, accessible, and transparent.

CLC has participated as an *amicus curiae* or counsel to parties in numerous campaign finance cases directly relevant to this appeal, including *McConnell v. FEC*, 540 U.S. 93 (2003), and *McCutcheon v. FEC*, 572 U.S. 185 (2014).

SUMMARY OF ARGUMENT

When the Supreme Court decried the "danger of actual *quid pro quo* arrangements" in *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam), it was concerned about the possibility that private contributions would be given to candidate campaigns in exchange for eventual official favors.

In this case, however, the "quid" in question is not a typical campaign contribution made to a federal candidate's authorized committee to support an active

[1] On July 28, 2021, pursuant to Rule 37.2(a), counsel for *amicus curiae* informed the parties of its intent to file an *amicus* brief, nine days before the filing date of August 6. All parties consented in writing to CLC's participation in this case. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission.

campaign; instead, it is money solicited after the election has occurred for the sole purpose of repaying the candidate's personal campaign loans—and is thus money that goes right back into the candidate's pocket. *See* 52 U.S.C. § 30116(j) (the "loan-repayment limit").

The risk of corruption posed by what is functionally a personal "gift" to a candidate is self-evident. Indeed, the immediate personal financial benefits provided by such a post-election contribution are even *more* likely to lead to "blatant and specific attempts of those with money to influence governmental action," *Buckley*, 424 U.S. at 28, than are the more typical contributions to campaign treasuries addressed in *Buckley*.

Nonetheless, the district court reviewed the loan-repayment limit challenged here as if its anti-corruption purpose were novel, disregarding the myriad longstanding laws and rules regulating contributions and gifts to candidates and officeholders, many of which have been reviewed and upheld by this Court.

The district court's blinkered review resulted in two principal errors.

First, in laboring to wedge this unique limit into the existing taxonomy of campaign finance law, the lower court misunderstood how the limit functioned and consequently overstated the First Amendment burdens it posed. Properly understood, the limit does not regulate candidate self-financing or restrict campaign contributions; instead, it simply limits a candidate's accrual of personal financial benefits in the post-election period.

The lower court also overlooked a key fact in this case: Ted Cruz for Senate (the "Cruz campaign") did not actually use *post*-election contributions to repay Senator Cruz for his $260,000 loan to the campaign. Instead, the campaign used *pre*-election contributions to repay $250,000 of this loan, and thus was not constrained with respect to the type of contributions it could apply to the remaining $10,000 loan balance. This material error represents a clear defect in the district court's findings with respect to appellees' standing and underscores the tenuous nature of the alleged burden. Summary reversal of the district court's judgment and remand with instructions to dismiss is warranted on this ground alone.

Second, the district court erred in presuming that the anti-corruption objectives of the loan-repayment limit were somehow novel or untested—instead, the importance of this governmental interest is well-established and has been repeatedly recognized as justifying a range of analogous campaign contribution limits and gift rules. To be sure, the government still bears the burden of demonstrating that the challenged law is well-tailored to advance this "legitimate and compelling" governmental interest, *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496 (1985), but the sufficiency or weight of the interest "has never been doubted." *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788, n.26 (1978)).

As a consequence of this error, the lower court held appellant Federal Election Commission (FEC or Commission) to an unduly stringent standard in terms of the evidence needed to substantiate its governmental interest, and then rejected the FEC's proffered evidence without adequate explanation or any discernable standard governing its review. But "[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 Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). It is hardly novel or implausible to believe that a post-election contribution that effectively goes straight into a candidate's pocket may create a risk of corruption. The government's burden should have been correspondingly light.

Nor did the lower court pay appropriate deference to Congress's judgment about the dangers of post-election fundraising—although this subject is uniquely within the legislature's expertise. "We 'must accord substantial deference to the predictive judgments of Congress,' particularly when, as here, those predictions are so firmly rooted in relevant history and common sense." *McConnell*, 540 U.S. at 165 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion)). Here, Congress's "prediction" that post-election contributions that directly and personally enrich candidates pose a particularly acute threat of corruption aligns both with common sense and the record in this case. The lower court's judgment should be summarily reversed.

ARGUMENT

I. The Lower Court Misconstrued and Overstated the First Amendment Burdens Presented by the Loan-Repayment Limit.

A. The challenged law functions as a limit on personal gifts aggregating over $250,000, not as a limit on candidate campaign spending.

At issue here is Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which provides that a federal candidate may use up to $250,000 in contributions raised after the date of an election to repay the candidate's outstanding personal loans incurred during the campaign. 52 U.S.C. § 30116(j). The law places no limit on the amount of funds raised prior to the election that can be used to repay the candidate's loans. 11 C.F.R. § 116.11(b)(1). FEC regulations further provide that a campaign committee has 20 days after the election during which it can use pre-election funds to pay back the candidate's personal loans without limitation. *Id.* § 116.11(c)(1).

The district court held that the loan-repayment limit "imposes a 'drag' on the candidate's First Amendment activity by discouraging the personal financing of campaign speech." App. 15a (citing *Davis v. FEC*, 554 U.S. 724, 739 (2008)). But that ignores how the provision actually operates—it limits post-election personal gifts, not a candidate's ability to self-finance or speak.

When the Court in *McConnell* analyzed BCRA's ban on *spending* so-called "soft money," the Court recognized that this "mechanism" functioned no differently from a *contribution* limit, and therefore subjected what appeared to be a spending limit to the same level of scrutiny as that applied to contribution limits. 540 U.S. at 138-39. Here, however, the lower court failed to appreciate that the loan-repayment limit actually functions as a *gift* limit, thus misconstruing the burden it imposes and the evidence necessary to sustain it.

The repayment limit does not even indirectly limit the amount of personal funds a candidate can spend or loan to his campaign. It limits neither the expenditures a campaign committee may make, *contra Buckley*, 424 U.S. at 54 (striking down "limitations on overall campaign expenditures" by federal candidates), nor the amount of personal funds a candidate can spend or loan to his campaign, *contra id*. at 51-52 (striking down limits on expenditures by a candidate "from his personal funds"). It also imposes no limit on the amount of the candidate's personal loans that a campaign can repay using contributions made on or before election day, *see* 11 C.F.R. § 116.11(b)(1). Functionally, the provision just prescribes *when* funds must be raised by the campaign committee for the purposes of loan repayment—if they are raised *after* the election, the provision acts as a $250,000 "gift" limit on contributions that candidates receive for their personal use.

Nor is the loan-repayment limit analogous to the laws considered in *Davis v. FEC*, 554 U.S. 724 (2008), or *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). The statutes at issue there provided for an immediate and asymmetric change in the operative campaign rules and imposed concrete fundraising disadvantages on self-financing candidates when their spending exceeded certain amounts. For example, the Millionaire's Amendment reviewed in *Davis* tripled the base contribution limits for a candidate's opponent if the candidate spent over a threshold amount of personal funds on the campaign. 554 U.S. at 728. This imposition of "asymmetrical" limits represented "an unprecedented penalty on any candidate who robustly exercises [the] First Amendment right" to self-finance. *Id*. at 739, 741. Here, by contrast, the loan-repayment limit is a provision of general applicability, creating a single regime governing the repayment of candidate campaign loans to which all candidates are equally subject, regardless of the actions of their opponents.

The district court's fundamental mistake was to analyze the loan-repayment limit only in terms of the purpose for which the candidate ostensibly made the initial loan—to finance an election campaign, an action that indisputably receives First Amendment protection. *See* App. 11a-12a. But the limit does not restrict the amount or timing of candidate loans in an election; it merely regulates how much candidates can repay themselves with contributions made *after* the election, when there is no longer any imperative to raise funds for that campaign.

In narrowly focusing on the pre-election dimensions of the transaction, the district court ignored the actual purpose of the loan-repayment limit: regulating the solicitation and receipt of post-election contributions that will directly accrue to the financial benefit of the candidate. If, for instance, a campaign raises $500,000 after the election to repay personal loans received from the candidate, that half-million dollars will be pocketed by the candidate.

The loan-repayment limit therefore does not operate as a restriction on candidates' freedom to self-finance their campaigns, including through personal loans. Instead, the limit serves simply as a gift rule, restricting a particular type of fundraising that directly and personally enriches candidates.

B. The district court's standing analysis relied on a material error.

The negligible burdens implicated by the loan-repayment limit are borne out in the facts of this case. Indeed, as the Commission explains, the district court greatly overstated the law's effects on Senator Cruz because its analysis relied on a factual misapprehension concerning the repayment of his loan.

As the Commission highlights, the single-judge district court denied the FEC's motion to dismiss and found that appellees had established standing only after crediting the allegation in their complaint that the Cruz campaign had used *post*-election funds to repay $250,000 of Senator Cruz's $260,000 loan to his campaign. Jurisdictional Statement (J.S.) 9-10. But this understanding of the facts was incorrect. Discovery preceding summary judgment revealed that the $250,000 had instead been repaid with *pre*-election contributions. *Id*. The loan-repayment limit thus did not restrict the type of contributions that could be used to repay the outstanding $10,000 or impose any other "constraint on appellees' expression." *Id*. at 19. This clear material error warrants reversal and remand with instructions to dismiss.

This error also underscores the insubstantial and hypothetical nature of the "burden" posited here. It was pure speculation to suppose, as the district court did, that candidates will make decisions about self-financing based upon their options for post-election loan repayment, particularly given that they have no way of ascertaining *ex ante* how much they will raise either before or after the election. Indeed, post-election fundraising is well-known to be extremely challenging, *see* FEC Statement of Undisputed Material Facts (SMF), D. Ct. Doc. 65, ¶ 42 (July 14, 2020); even high-profile presidential campaigns often fail to raise sufficient funds post-election to retire all of their outstanding debt. *See* Kitty Eisele, *Presidential Campaign Debt Can Linger For Decades*, NPR (July 5, 2011), https://www.npr.org/2011/07/05/137615746/presidential-campaign-debt-can-linger-for-decades; Dave Levinthal, *14 presidential candidates who still owe campaign debt*, Salon (May 2, 2013), https://www.salon.com/2013/05/02/14_presidential_candidates_who_havent_paid_for_their_campaigns_partner. The lower court had no basis to hypothesize that a candidate would reduce a pre-election loan to his campaign because of a $250,000 limit on the use of post-election funds for repayment—instead of a candidate's very reasonable concern that he would not be guaranteed to raise anything close to this amount after the election.

Indeed, Senator Cruz's actions were not even consistent with the district court's theory. He loaned his campaign $260,000 on the eve of the election because he could confidently predict that his campaign would have more than sufficient *pre*-election funds on hand to repay the loan in full. He did not entrust the repayment of his loan to the vagaries of post-election fundraising. Indeed, Cruz and his campaign admitted that they only refrained from paying back the $10,000 balance with pre- or post-election contributions to preserve a test challenge to the loan-repayment limit. J.S. 10-11, 16. In short, appellees have yet to identify any candidates who have been deterred from self-financing their campaigns due to the loan-repayment limit; Senator Cruz himself does not even count as one such candidate.

II. Limiting Post-Election Payments that Personally Enrich Candidates Serves Demonstrated Anti-Corruption Interests that the District Court Failed to Credit.

The loan-repayment limit, like other campaign finance and ethics laws, is designed to prevent *quid pro quo* corruption and its appearance. The intent of the law is a matter of common sense; after an election, the typical rationales for contributing to a political campaign—to support a candidate's election and campaign speech—do not apply. Instead, as explained by the FEC below, "[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 Summ. J. Mot., D. Ct. Doc. 65, at 20 (July 14, 2020). At a minimum, post-election fundraising to retire campaign debts gives rise to "the appearance of federal candidates trading dollars for favors in the context of repayment of candidate loans." *Id.* at 33.

A. The interests advanced by the challenged law are neither novel nor implausible.

The loan-repayment limit here regulates a kind of transaction that forms the heartland of most public corruption and conflict-of-interest laws—federal candidates accepting money that they can pocket for their own personal benefit. Nevertheless, the lower court deemed the FEC's asserted anti-corruption interest novel and unfounded, and concluded that the Commission had failed to meet its "burden of demonstrating that the loan-repayment limit serves a sufficiently important interest." App. 22a.

This ruling is contrary to longstanding precedent. As the district court acknowledged, "[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." App. 22a (quoting *Nixon*, 528 U.S. at 391). The notion that a contribution that personally enriches a candidate might give rise to actual or apparent corruption is neither "novel nor implausible." *Nixon*, 528 U.S. at 391. The government's evidentiary burden accordingly should have been light. Yet the lower court required the government to substantiate its anti-corruption interest as if working from a blank slate, divorced from four decades of campaign finance precedents repeatedly establishing that contribution restrictions further a bona fide interest in combatting *quid pro quo* corruption and the appearance of corruption.

First, *Buckley* itself recognized as a matter of law that a campaign finance system reliant on private contributions created an "*inherent*" problem of real or apparent corruption. 424 U.S. at 28 (emphasis added). If contributions to a candidate's campaign treasury present an inherent risk, then it is beyond dispute that contributions to a candidate's personal funds present an even greater inherent risk. Thus, there is nothing novel or implausible about setting a limit of $250,000 on contributions given to reimburse candidates for their loans.

Second, the lower court erred in demanding that the FEC show current instances of *quid pro quo* corruption attributable to the use of post-election contributions to pay back personal loans. *See*, *e.g*., App. 23a ("We first observe that the FEC has not identified a single case of actual *quid pro quo* corruption" arising "from post-election contributions to retire a candidate's personal debt"). This practice has been restricted at the federal level for almost 20 years. And as this Court has recognized, the government need not produce specific "counterfactual" evidence of *quid pro quo* corruption where, as here, a campaign finance restriction has been in place for decades and its objectives are well-established and not "implausible." *McCutcheon*, 572 U.S. at 219 ("We recognize that no data can be marshaled to capture perfectly the counterfactual world in which aggregate [contribution] limits do not exist."); *see also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (recognizing the "difficulty of mustering evidence to support long-enforced statutes").

Lower courts of appeals have likewise rejected the "argument that only recent scandals justify a contribution ban," especially given that this "Court views contribution limits as preventative measures." *Schickel v. Dilger*, 925 F.3d 858, 874 (6th Cir. 2019); *accord Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) ("Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale *quid pro quo* corruption or coercion involving federal contractor contributions because such contributions have been banned since 1940.").

This demand for evidence of corruption arising from an activity that has long been restricted demonstrates a broader disregard for the principle that contribution limits are designed to be "preventative." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). The validity of contribution limits does not rest on a factual showing that all or even most contributions will give rise to corruption; on the contrary, "few if any contributions to candidates will involve *quid pro quo* arrangements." *Id*. But the Court has nevertheless repeatedly accepted Congress's determination, based on "common sense" and the "ample record" compiled over time, that contribution limits are a necessary prophylactic to prevent corruption and its appearance. *McConnell*, 540 U.S. at 145.

Third, the lower court ignored that the loan-repayment limit operates in a broader network of campaign finance and ethics laws that collectively aim to avert the potential for corruption and self-dealing in connection with contributions, loans, and gifts given to officeholders and candidates. The notion that transferring money or other items of value to candidates and officeholders for their personal benefit poses corruption risks and should be regulated is hardly unique to this provision. The same rationale animates a range of laws, from ethics rules regulating gifts and loans to officeholders, to FECA's personal-use prohibition—reflecting the strength of Congress's determination that providing direct financial benefits to a candidate or officeholder creates a serious and inherent risk of abuse.

For example, concerns about corruption and its appearance are the basis for the federal government's strict rules limiting officials in all three branches of government from accepting gifts. *See*, *e.g.*, 5 U.S.C. § 7353(a) (prohibiting members of Congress and federal officers and employees from soliciting or accepting anything of value from persons doing business with the individual's employing entity or whose interests may be affected by the performance of the employees' official duties); 5 C.F.R. § 2635.204 (restricting federal executive employees' acceptance of gifts of $20 or more from persons whose interests may be affected by the performance of the employees' official duties); Judicial Conference, Code of Conduct for United States Judges, Canon 4(D)(4) (restricting federal judges' and judicial employees' acceptance of gifts of any value from persons with business before the court or whose interests may be substantially affected by the court's duties). Indeed, legislative gift and conflict of interest rules are a "long-established tradition" at both the federal and state level. *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011); *see also*, *e.g.*, Standing Rule of the Senate 35 (restricting members' acceptance of gifts worth $50 or more); House Rule 25.5 (same for House members).

Specific concerns about the conversion of a loan or campaign contribution into a personal benefit underlie not only the loan-repayment limit, but other provisions of ethics and campaign finance laws. Federal ethics guidance specifies that loans constitute impermissible gifts to officeholders when those loans are characterized by "special terms in unusual cases" giving rise to corruption or its appearance. *See* U.S. Office of Gov't Ethics, Conflicts of Interest Considerations: Liabilities 2 (last updated June 22, 2018), https://www.oge.gov/web/OGE.nsf/0/2063F6A1854A65E3852585B6005A2275/$FILE/Liabilities.pdf. A similar concern about potential self-dealing underlies FECA's prohibition on federal candidates using campaign funds for their own personal benefit. 52 U.S.C. § 30114(b) ("A [campaign] contribution . . . shall not be converted by any person to personal use."); *see also* 11 C.F.R. § 113.1(g).

These provisions directly advance the important governmental interest in combatting corruption and self-dealing by elected officials. So too does the loan-repayment limit. That the financial benefit here takes the form of a campaign contribution to repay a candidate's loans does not render it less potentially corruptive. As the FEC explains, "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)." J.S. 19. The loan-repayment limit seeks to eliminate this risk of heightened corruption.

The concerns underlying the loan-repayment limit are neither "novel" nor "implausible," but well-established and in line with those animating numerous other laws designed to ferret out corruption and its appearance in federal government. The district court failed to credit these concerns or accord the appropriate weight to anti-corruption interests long recognized by this Court as both "legitimate and compelling." *See Nat'l Conservative PAC*, 470 U.S. at 496; *see also Buckley*, 424 U.S. at 26-27.

B. The FEC provided ample evidence to substantiate the anti-corruption objective of the loan-repayment limit.

The lower court not only defined the universe of relevant evidence too narrowly, it also disregarded, without justification, the ample legislative record and other evidence offered by the FEC to substantiate the law's anti-corruption purposes. *See* App. 21a-30a.

For instance, the lower court disregarded the legislative record materials presented by the FEC demonstrating the intent of the loan-repayment limit. *See* SMF ¶¶ 23-27. As the FEC pointed out, the loan-repayment limit was discussed by multiple lawmakers in the deliberations on BCRA who explained that the limit was meant to address the acute risk of *quid pro quo* corruption arising from candidates' post-election solicitation of contributions that directly benefit them financially. *See*, *e.g.*, *id.* ¶ 27 ("[Candidates] have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it. . . . [A] candidate can spend his or her own money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back.") (quoting 147 Cong. Rec. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison)); *id.* ¶ 24 ("[A] candidate who incurred personal loans for his campaign should not be able 'to get it back from [his or her] constituents. . . . [by] ask[ing] them: How would you like me to vote now that I am a Senator?' ") (quoting 147 Cong. Rec. at S2462 (statement of Sen. Domenici)).

Instead, without explanation, the lower court focused on the background to Section 319 of BCRA, the "Millionaire's Amendment," a wholly different provision of the legislation with no identified link to the provision challenged here. App. 27a. Questioning the legislative intent behind one statutory provision by examining the history of an entirely different provision constitutes clear error.

The FEC also adduced evidence of problems at the state level resulting from post-election contributions to indebted candidates, pointing to investigations and corruption concerns in Ohio, Oklahoma, Kentucky, and Alaska. SMF ¶¶ 73-81. In Ohio, former attorney general and now governor Mike DeWine repeatedly loaned his campaign money and then raised millions of dollars in post-election contributions to pay off that debt, including from entities seeking—and ultimately obtaining—state contracts. *See id.* ¶¶ 73-75. The particular largesse of contributors with something to gain from state contracting decisions under DeWine led to concerns that his debt-retirement fundraising was breeding corruption, or certainly its appearance. *See*, *e.g.*, *id.* ¶ 73 (noting media reports that raised questions about the propriety of accepting large post-election contributions from lawyers that "hold special counsel contracts awarded by the attorney general's office to represent public pensions, colleges, state agencies and more") (citation omitted); *id.* ¶ 75 (reporting that debt collection firms "whose contracts were not renewed during the DeWine years were skeptical about the political purity of the contracting process") (citation omitted).

Such has been the pattern in other states, too, where candidates have made millions of dollars in personal loans to their campaigns, then reimbursed themselves using post-election contributions, many of which have come from entities and individuals seeking business and favor from the government. *See id.* ¶ 76 (noting that, in 2018, Oklahoma Governor Kevin Stitt raised over $800,000 in post-election contributions, with "more than $100,000 from political action committees funded by industries or special interests") (citation omitted); *id.* ¶¶ 77, 79 (in 1994, the Kentucky Registry of Election Finance observed that, "[i]n the last fifteen years, Kentuckians have endured the consequences of millionaires 'loaning' their campaigns millions of dollars, only to be repaid by contributors seeking no-bid contracts") (citation omitted); *id.* ¶¶ 80-81 (noting that "a majority of the [Alaska Public Offices] commissioners stated strong support for barring post-election contributions, and hoped such a ban would curtail contributions 'intended to influence a successful candidate rather than the outcome of an election'").

Further, despite the federal loan-repayment limit being in effect for almost two decades, the FEC adduced evidence of federal candidates using personal loans in a manner that circumvents contribution limits and raises corruption concerns. *See id.* ¶ 71 ("Senate candidate Matt Rosendale's 2014 campaign debt was repaid in 2018 by 'nine wealthy donors,' eight of whom had already given the maximum to his 2018 campaign . . . Rosendale then loaned his 2018 campaign more money, 'effectively creating a cycle of loans and repayments that bypasses traditional contribution limits.'") (citation omitted); *id.* ¶ 72 ("Senator Mike Braun also allegedly used the tactic in 2018 by 'taking contributions for the purpose of paying down his personal campaign debts from the Republican primary' and then 'loan[ing] his general election campaign the exact same sums, effectively allowing his donors to bypass contribution limits.'") (citation omitted); *id.* ¶ 69 ("One retired campaign finance specialist noted that lobbyists assist with debt retirement fundraisers because they know it is really of benefit to the member.") (citation omitted).

The lower court offered little explanation for its refusal to credit this evidence, some of which it mistakenly believed was "unrelated to the repayment of candidate loans." *See* App. 23a-24a (citing SMF ¶¶ 76, 79). But it is well-settled that a jurisdiction may defend its contribution restrictions both by relying on the "evidence and findings accepted in *Buckley*," *Nixon*, 528 U.S. at 393, and by pointing to the "experience of states with and without similar laws." *Wagner*, 793 F.3d at 14. "The First Amendment does not require . . . conduct[ing] new studies or produc[ing] evidence independent of that already generated by other [jurisdictions]." *Nixon*, 528 U.S. at 393, n.6 (citation omitted).

The lower court likewise disregarded an empirical study showing that self-*lending* candidates—as compared to both self-financed candidates with no expectation of repayment and candidates reliant on outside funds—exhibit a systematically greater likelihood to "sell" legislative votes to special-interest contributors, *see* SMF ¶¶ 67-68 (describing 2020 study finding 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") (citation omitted). The district court, however, dismissed the study for failing to show that the systematic "voting pattern changes" it linked to candidate indebtedness were in fact caused by rampant, undetected criminal bribes. *See* App. 25a.

Finally, and again with little explanation, the district court rejected robust polling data showing that the overwhelming public perception of post-election campaign contributions is that they are fundamentally corruptive. *See id.* ¶¶ 90-98 (describing April 2020 survey of 1,000 Americans, 81 percent of whom stated that they "believed it was 'very likely' or 'likely' that individuals who donate money to a federal candidate's campaign after an election expect a political favor in return from candidates who later take office") (citations omitted).

In sum, the FEC proffered substantial evidence of the corruptive effects of post-election political contributions used to repay candidate loans, but the lower court dismissed it all as mere "speculation." App. 30a. This disregard for the evidence was arbitrary and constitutes a reversible error.

C. The district court failed to pay deference to Congress in an area of unique legislative expertise.

The lower court also erred in failing to accord deference to Congress's evaluation of the potential dangers of post-election fundraising to repay candidate loans, although this type of evaluation is squarely within the expertise of legislators. *Nixon*, 528 U.S. at 402 ("Where a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments."). Indeed, the loan-repayment limit at issue here would seem to be *uniquely* within the experience of legislators, many of whom have likely faced the fundraising pressures associated with post-election debt and the temptation to benefit personally from post-election campaign contributions.

This Court has further recognized that Congress may combat corruption by focusing on the problems it perceives as the most egregious and proceeding with reform incrementally. *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (noting that the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . warrants considerable deference") (citation omitted). But the lower court nevertheless objected that the loan-repayment limit was "substantially underinclusive" because it applies only to post-election contributions, not pre-election contributions; and because it does not ban, but instead allows the use of up to $250,000 in post-election contributions to retire candidate loans. App. 32a-33a. Even putting aside the question of whether pre- and post-election contributions are interchangeable with respect to the risks they pose for abuse, it is not typically a constitutional problem when Congress regulates campaign or other expressive activities too *lightly*. "[T]he First Amendment imposes no freestanding 'underinclusiveness limitation'" requiring a legislature to "address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

The lower court also did not acknowledge that Congress must balance its pursuit of the anti-corruption interest against the need to ensure that candidates can "amass[] the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and can self-finance their campaigns without undue restriction, *id*. at 51-52. Because this balancing act requires a complex, fact-dependent inquiry, uniquely within Congress's expertise, the Court has consistently counseled deference to legislative judgments regarding the structure of contribution limits and the design of solicitation restrictions. *See Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *McConnell*, 540 U.S. at 137; *Beaumont*, 539 U.S. at 155; *Nixon*, 528 U.S. at 391, 397; *Nat'l Conservative PAC*, 470 U.S. at 500; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30.

Here, Congress balanced these important but somewhat conflicting goals by allowing candidates to freely spend and loan personal funds to support their campaigns, while electing to restrict only a particularly corruptive type of post-election fundraising to repay personal loans and only once it exceeds certain monetary parameters. This does not "raise doubts about whether the law advances the interests invoked by the government," App. 32a; it demonstrates that Congress is properly *balancing* competing compelling interests. Congress is permitted to—in fact, is required to—reconcile its anti-corruption goals with the constitutional imperative that it give ample berth to campaign activities protected by the First Amendment.

CONCLUSION

The judgment of the district court should be summarily reversed, and the case remanded to the district court with instructions to dismiss.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
TARA MALLOY
ADAV NOTI
ALEXANDRA COPPER
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Counsel for Amicus Curiae

August 6, 2021