No. 21-12

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

TED CRUZ FOR SENATE, ET AL.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM OR DISMISS

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 97-100, prohibits a political campaign from using more than $250,000 in post-election contributions to repay a candidate's personal loans. 52 U.S.C. 30116(j). The district court held that provision unconstitutional. Appellees have filed a motion to affirm the district court's judgment or, in the alternative, to dismiss the appeal taken by the Federal Election Commission (FEC or Commission). See Mot. to Affirm or Dismiss 1 (Mot.).

The Court should deny that motion. As the jurisdictional statement explains, appellees lack standing to challenge the statutory loan-repayment limit, and that limit complies with the First Amendment. The Court should either vacate the judgment below or set the case for plenary consideration by postponing jurisdiction.

A. Appellees Lack Article III Standing

1. The injury that appellees identify—*i.e.*, the Cruz campaign's current inability to repay Senator Cruz the remaining $10,000 of his $260,000 loan—is not traceable to the statutory provision they challenge. See J.S. 9-13. Section 30116(j) prohibits a campaign from using more than $250,000 in post-election contributions to repay a candidate's personal loans. But the summary-judgment record does not indicate that the committee has yet used *any* post-election funds, much less the maximum of $250,000, to repay Senator Cruz's personal loan. For that reason, Section 30116(j) does not preclude appellees from raising additional post-election contributions and using those contributions to repay the remaining debt to Senator Cruz. J.S. 10-11. Appellees' responses to that argument lack merit.

a. Appellees contend (Mot. 14-18) that the FEC's standing argument contradicts the summary-judgment record. That is incorrect. "[S]tanding cannot be 'inferred argumentatively' * * * but rather 'must affirmatively appear in the record.'" *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted). Appellees have not cited any record evidence that they used post-election contributions for the $250,000 increment of Senator Cruz's personal loan that the committee previously repaid. And appellees admitted below that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." D. Ct. Doc. 67-1 ¶ 64 (Aug. 11, 2020) (FEC Statement of Undisputed Material Facts); see J.S. 10-11. If appellees believed that paragraph 64 of the FEC's Statement of Undisputed Material Facts reflected a misunderstanding of the pertinent deposition testimony (see Mot. 16-

17), they could have denied (in whole or in part) the factual proposition stated in that paragraph; but appellees admitted that proposition instead. That factual stipulation is "binding and conclusive" on the parties. *Christian Legal Society of the University of California* v. *Martinez*, 561 U.S. 661, 677 (2010) (citation omitted).

Appellees explain that, although Senator Cruz's committee designated the funds that it raised after the 2018 election for Senator Cruz's 2024 campaign, that designation did not preclude the committee from subsequently using the funds to retire 2018 campaign debts. See Mot. 16-17. Appellees assert that "those contributions were *available* to pay 2018 election debts." Mot. 17 (emphasis added); see Mot. 18 ("these contributions were *available* * * * to repay all of the Committee's 2018 debts including $250,000 of Senator Cruz's loans") (emphasis added). But to establish that Section 30116(j) has injured appellees by barring them from using post-election contributions to pay the remaining $10,000 owed to Senator Cruz, it is not sufficient to show that post-election funds were *available* to pay off the first $250,000. Rather, appellees must establish that they *actually used* $250,000 in post-election funds for that purpose. Appellees identify no record evidence showing that they did, and they admitted below that, "during the 20 days after the election and later, the Committee continued receiving post-election contributions, but *rather than using those contributions* * * * *to pay any of Senator Cruz's debt*, the campaign designated the contributions for Senator Cruz's 2024 re-election effort." D. Ct. Doc. 67-1 ¶ 60 (emphases added).

Appellees assert (without record citation) that post-election funds "could be and were used to pay 2018 election debts." Mot. 16; see Mot. 17. But Section 30116(j)

would cause appellees injury only if appellees had previously used $250,000 in post-election funds to repay the campaign's debt *to Senator Cruz*. Evidence that appellees used post-election contributions to repay "election debts" would not prove that that they had used such funds to repay that specific loan.

Appellees also suggest (Mot. 16, 17) that the conduct of FEC trial counsel reflected an awareness that post-election funds had been used to repay $250,000 of the committee's debt to Senator Cruz. That suggestion is inconsistent with paragraphs 60 and 64 of the FEC's Statement of Undisputed Material Facts (quoted above), which expressed the opposite understanding, and with the Commission's summary-judgment filings, which likewise asserted that pre-election funds had been used. See J.S. 12. And while appellees' own Statement of Undisputed Material Facts identified the dates when various increments of Senator Cruz's loan were repaid, it did not specify whether those repayments were made with pre- or post-election funds. See D. Ct. Doc. 61-2 ¶¶ 41-44 (June 9, 2020).

b. There likewise is no merit to appellees' legal objections (Mot. 6-14) to the FEC's standing argument. Appellees do not appear to dispute that, if pre-election funds were used to repay the $250,000, appellees would lack standing to bring a freestanding constitutional challenge to Section 30116(j). They point out, however, that the FEC regulation that directly injures them—*i.e.*, 11 C.F.R. 116.11(c)(2), which required the committee to recharacterize $10,000 of its debt to Senator Cruz as a contribution from the Senator once the 20-day post-election period had expired, see J.S. 12—was promulgated to implement Section 30116(j). See Mot. 8-9. Ap-

pellees argue that, "where a statutory provision is invalid and unenforceable, any implementing regulations that were promulgated under its authority are likewise invalid and unenforceable." Mot. 8.

Appellees contend on that basis (Mot. 8) that, in adjudicating their challenge to 11 C.F.R. 116.11(c)(2), the district court could assess the validity of the statute itself, on the theory that invalidation of the statute would lead to invalidation of the implementing regulation and thus redress appellees' injury. Cf. *California* v. *Texas*, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring) (discussing an analogous "standing-through-inseverability argument"). That argument is mistaken.

Even if appellees' approach were otherwise sound, but cf. *California*, 141 S. Ct. at 2116 (characterizing the standing-through-inseverability argument as a "novel alternative theory"), this basis for standing would be unavailable here, since the three-judge district court lacked independent subject-matter jurisdiction to hear appellees' challenge to 11 C.F.R. 116.11(c)(2). Congress has empowered a three-judge court to hear "any action * * * brought for declaratory or injunctive relief to challenge the constitutionality of *any provision of this Act or any amendment made by this Act*." BCRA § 403(a), 116 Stat. 113-114 (emphasis added). Challenges to the FEC's implementing regulations, by contrast, "are not appropriately raised in [a] facial challenge to BCRA, but must be pursued in a separate proceeding." *McConnell* v. *FEC*, 540 U.S. 93, 223 (2003).

The district court held that it had supplemental jurisdiction over appellees' challenges to the FEC's regulations. See J.S. App. 9a n.2, 59a-63a; 451 F. Supp. 3d 92, 100. "In order for a federal court to invoke supple-

mental jurisdiction," however, "it must first have original jurisdiction over at least one claim in the action." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 554 (2005). The three-judge court lacked original jurisdiction over appellees' claim that the statutory loan-repayment limit violated the Constitution because, as explained above and in the jurisdictional statement, appellees lacked standing to bring a freestanding challenge to Section 30116(j) itself. Because the court lacked original jurisdiction over the challenge to the statute, it had no basis for exercising supplemental jurisdiction over the challenge to the regulation. And because it lacked jurisdiction over the challenge to the regulation, it could not consider the alleged unconstitutionality of the statute as a ground for invalidating the regulation.

c. As the above discussion shows, the standing issue raises fact-bound questions about the import of appellees' admissions, the deposition testimony, and the rest of the summary-judgment evidence. It also raises complex, case-specific questions about the interaction of standing, subject-matter jurisdiction, and supplemental jurisdiction. The district court has not yet addressed any of those factual or legal issues. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it should vacate the judgment and remand the case so that the district court may consider those issues in the first instance.

Appellees contend (Mot. 17-18) that vacatur and remand would be inequitable because the government failed to raise its present standing argument in the district court. The FEC argued at the motion-to-dismiss stage that appellees lacked standing, but it could not raise its present argument about traceability because

appellees' complaint alleged that the committee had used $250,000 in post-election funds to repay Senator Cruz. See J.S. 9-10. The FEC subsequently argued during discovery that the court's earlier ruling on standing was "based on the review that is undertaken 'at the motion to dismiss stage,'" and that discovery could reveal evidence that would "help th[e] three-judge Court * * * fulfill the obligation to satisfy itself that it possesses jurisdiction * * * at the summary judgment stage." D. Ct. Doc. 39, at 11 (Jan. 24, 2020) (citations omitted). The three-judge court, however, "reject[ed] outright [the Commission's] assertion." 451 F. Supp. 3d at 98.

Under these circumstances, the FEC should not be faulted for failing to contest appellees' standing yet again after discovery concluded. That is particularly so because this Court's decision in *California*, which emphasized the need for a plaintiff to show injury traceable to the specific provision of law that is alleged to be unconstitutional, was issued after the proceedings below ended. See J.S. 13. This Court routinely vacates lower-court judgments to facilitate reconsideration of contested issues in light of intervening decisions, and that approach would be appropriate here.

2. Appellees cannot establish the traceability component of standing for a second reason: their injuries were self-inflicted. See J.S. 14-16. Appellees' responses to that argument (Mot. 18-25) are incorrect.

Appellees cite (Mot. 19-20) decisions such as *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), and *Evers* v. *Dwyer*, 358 U.S. 202 (1958) (per curiam), to show that a plaintiff may have standing even if he acts with the purpose of instituting litigation. The problem here, however, is not simply that Senator Cruz sought to lay

the groundwork for a lawsuit when he lent his campaign committee $260,000 the day before the election. Rather, the crucial point is that, even after the election, appellees could have repaid Senator Cruz in full without violating either the statute or the regulation, simply by using available pre-election funds to repay Senator Cruz $10,000 or more during the 20-day post-election window rather than waiting until just after the deadline had lapsed. See J.S. 14. Appellees' injury resulted from their own decision to forgo that course.

Appellees also contend that the FEC's standing argument "would require Senator Cruz to avoid an injury by subjecting himself to the very framework he alleges is unconstitutional." Mot. 20 (citation omitted). But this Court's standing jurisprudence focuses on whether the defendant has caused the plaintiff concrete injury, not on whether the defendant has violated the law. See, *e.g.*, *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[A]n injury in law is not an injury in fact."). To establish standing, appellees therefore must show that using the FEC's proposed alternative (repaying Senator Cruz at least $10,000 with pre-election funds during the 20-day post-election window) would have caused them concrete harm. See J.S. 15. Appellees have not made that showing.

B. The Loan-Repayment Limit Complies With The First Amendment

Appellees also defend (Mot. 25-38) the district court's holding that the loan-repayment limit violates the First Amendment. Appellees' merits arguments are incorrect.

1. Appellees argue that Section 30116(j)'s loan-repayment limit is subject to strict scrutiny because it "burdens First Amendment expression." Mot. 29. But

"not every electoral law that burdens associational rights is subject to strict scrutiny." *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005). "Instead, as [the Court's] cases * * * have clarified, strict scrutiny is appropriate only if the burden is severe." *Ibid.*

Contrary to appellees' suggestion (Mot. 25-28), the loan-repayment limit does not severely burden candidates, campaigns, or contributors. It does not restrict the amount of money that a candidate may spend, the amount he may donate or lend to his campaign, or the amount of money campaigns may raise from donors. It instead imposes a narrow timing restriction, capping the campaign's ability to use a specific set of funds (post-election contributions) for a specific purpose (repaying the candidate's personal loans). See J.S. 17. Appellees argue (Mot. 26-27) that Section 30116(j) could deter some candidates from lending money to their campaigns in some circumstances. But in the absence of a severe burden, the prospect of *some* discernible impact on a campaign's fundraising capabilities is not a sufficient basis for applying strict scrutiny. The Court has declined to subject contribution limits to strict scrutiny, for example, even though those laws foreseeably affect the ability of federal candidates to finance their campaigns. See *Buckley* v. *Valeo*, 424 U.S. 1, 20-23 (1976) (per curiam).

2. Based on the legislative history of the loan-repayment limit, appellees argue (Mot. 30-31) that Members of Congress voted to enact the limit to protect incumbents and to equalize electoral opportunities, not to prevent the reality and appearance of corruption. As an initial matter, appellees' account of the legislative history is highly selective. Members of Congress invoked

the public and governmental interest in fighting corruption as a justification for the provision. See, *e.g.*, 147 Cong. Rec. 3882 (2001) (statement of Sen. Domenici) (explaining that a candidate who loans his campaign money should not be able "to get it back from [his] constituents under fundraising events that [he] would hold and then ask them: How would you like me to vote now that I am a Senator?"); *id.* at 3970 (statement of Sen. Hutchison) ("[Candidates] have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it. That is what my part of this amendment attempts to prevent.").

In any event, "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an * * * illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384. BCRA's loan-repayment limit is constitutional on its face, and the snippets of legislative history cited by appellees do not undermine that conclusion.

3. Appellees argue (Mot. 31-37) that post-election contributions used to repay personal loans pose no greater threat of corruption than any other contributions. They contend (Mot. 32), for example, that a contribution used to repay a candidate's personal loan to his campaign operates "in precisely the same manner" as any other contribution. But that is not so: a contribution used to repay a personal loan made by the candidate directly increases the candidate's personal wealth, while a contribution used for campaign purposes does not.

Appellees also argue that post-election contributions used to repay personal loans can serve the legitimate purposes of expressing "'support for the candidate and his views'" and "free[ing] up money that the candidate can spend on *the next* campaign." Mot. 34 (quoting *Buckley*, 424 U.S. at 21). But the "symbolic act of contributing" as an expression of support, *Buckley*, 424 U.S. at 21, has its primary value before the election occurs, when it may potentially sway other voters. A post-election contribution can neither influence voters nor facilitate additional electoral advocacy by the campaign. See J.S. 20-21. And the most straightforward way to help a candidate spend money on his next campaign is to donate money to *that* campaign—not to donate money for use in repaying the candidate's personal loan to his previous campaign.

4. Appellees contend (Mot. 37-38) that the loan-repayment limit is not narrowly tailored to the government's asserted interest in combating corruption. But this Court's decisions require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989) (citation omitted). The loan-repayment limit satisfies that standard because it restricts only a narrow category of speech that poses a particularly serious risk of corruption. See J.S. 19-22.

5. At a minimum, this Court should not decide the foregoing issues summarily. Out of respect for a coordinate branch of government, the Court has "recognized a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa County* v.

Lopez-Valenzuela, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay). The same respect that underlies that presumption also supports plenary review of three-judge courts' decisions holding federal statutes unconstitutional. Appellees identify no case in which this Court has summarily upheld a lower-court decision striking down an Act of Congress.

CONCLUSION

This Court should summarily vacate the judgment of the district court and remand the case for further consideration of standing in light of *California* v. *Texas*, 141 S. Ct. 2104 (2021). Alternatively, the Court should postpone jurisdiction.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General

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