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

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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.

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OPINIONS BELOW

The order of the district court granting appellees' motion for summary judgment (J.S. App. 38a-39a) is not reported. The opinion of the district court granting appellees' motion for summary judgment (J.S. App. 5a-37a) is not yet published in the Federal Supplement but is available at 2021 WL 2269415. The order of the district court denying appellees' motion to reconsider is not published in the Federal Supplement but is available at 2020 WL 7699951. The opinion of the district court granting in part and denying in part the Federal Election Commission's motion for partial remand and to compel discovery responses (J.A. 68-82) is reported at 451 F. Supp. 3d 92. The opinion and order of the district court granting appellees' motion to convene a three-judge court and denying the Commission's motion to dismiss (J.S. App. 40a-64a) is not published in the Federal Supplement but is available at 2019 WL 8272774.

JURISDICTION

The district court entered its judgment on June 3, 2021. The Federal Election Commission filed an amended notice of appeal on June 13, 2021 (J.S. App. 1a-2a) and a jurisdictional statement on July 2, 2021. On September 30, 2021, this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of the Court rests on the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced at App., *infra*, 1a-3a.

STATEMENT

A. Legal Background

1. Congress enacted the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3, to regulate the financing of federal election campaigns. It later amended FECA in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. The Federal Election Commission (FEC or Commission) administers those statutes. 52 U.S.C. 30106.

Under FECA, BCRA, the Commission's regulations, and this Court's First Amendment precedents, federal candidates may use a variety of means to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his campaign. *Buckley* v. *Valeo*, 424 U.S. 1, 51-52 (1976) (per curiam). A campaign also may accept contributions from individuals and certain political committees. 52 U.S.C. 30116(a). And a campaign may borrow an unlimited amount of

money from third-party lenders or from the candidate himself. J.S. App. 7a.

2. Individuals' contributions to federal campaigns are subject to per-election dollar limits, which are indexed for inflation. 52 U.S.C. 30116(a) and (c). In 2017 and 2018, the election cycle at issue here, an individual generally could contribute a maximum of $5400 to a campaign: $2700 for the primary and $2700 for the general election. See *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 82 Fed. Reg. 10,904, 10,906 (Feb. 16, 2017). Today, the combined limit is $5800: $2900 for the primary and $2900 for the general election. J.S. App. 6a n.1.

A campaign generally may receive contributions only for future elections, not for past elections. 11 C.F.R. 110.1(b)(3). But a campaign may receive contributions for a past election to repay "net debts outstanding from such election." 11 C.F.R. 110.1(b)(3)(i).

3. This case concerns the use of post-election contributions to repay loans made by the candidate himself. In BCRA, Congress enacted the following restriction on such repayments:

> Any candidate who incurs personal loans made after the effective date of [BCRA] 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). Thus, under Section 30116(j), a campaign may use contributions made after election day to repay only up to $250,000 in candidate loans.

To supplement BCRA's loan-repayment limit, the Commission has promulgated regulations establishing three principles that are relevant here. First, a campaign may repay "up to $250,000" in candidate loans from contributions made "at any time before, on, or after the date of the election." 11 C.F.R. 116.12(a). Second, a campaign may use pre-election funds to repay the portion of the candidate loans that exceeds $250,000 only if the repayment occurs within 20 days after the election. 11 C.F.R. 116.11(b)(1) and (c)(1). If more than $250,000 remains unpaid when the 20-day period expires, the campaign must recharacterize the portion above $250,000 as a contribution to the campaign, precluding later repayment. 11 C.F.R. 116.11(c)(2). Third, the regulations echo the statutory loan-repayment limit in providing that the campaign "[m]ust not repay * * * the aggregate amount of the personal loans that exceeds $250,000, from contributions * * * made after the date of the election." 11 C.F.R. 116.11(b)(3).

B. Facts And Proceedings Below

1. Appellee Ted Cruz represents Texas in the United States Senate. J.A. 290. Appellee Ted Cruz for Senate is his principal campaign committee. J.A. 291.

Senator Cruz ran for re-election in 2018. J.A. 290. In the lead-up to the election, his campaign raised more than $35 million in 2017 and 2018. J.A. 324.

The day before the general election, Senator Cruz loaned his committee $260,000—$10,000 more than the maximum amount that BCRA's loan-repayment provision allows to be repaid with post-election contributions. J.S. App. 8a. After the election, the committee had approximately $2.38 million in pre-election funds left on hand. J.A. 326. The committee could have used those funds to repay Senator Cruz in whole or in part,

but it chose not to do so within the 20-day deadline set by the regulations. J.S. App. 8a-9a. If the committee had used pre-election funds to repay Senator Cruz $10,000 within that 20-day window, it could have used post-election funds to repay the remaining $250,000 at any time following the election.

Once the 20-day deadline elapsed, the Commission's regulation required that $10,000 of the $260,000 loan be recharacterized as a contribution from Senator Cruz to his campaign. 11 C.F.R. 116.11(c)(2). Senator Cruz then emailed his campaign staff: "Since more than 20 days have passed, it would be REALLY good if we could pay back at least some of the $250k now." J.A. 328-329 (citation omitted). The committee then repaid Senator Cruz $250,000. J.S. App. 9a. But because the committee had purposely waited until the 20-day post-election period had elapsed, it could not repay the remaining $10,000. *Ibid.*; see 11 C.F.R. 116.11(c)(2). Appellees have stipulated that "the sole and exclusive motivation behind Senator Cruz' actions in making the 2018 loan and the committee's actions in waiting to repay them was to establish the factual basis for this challenge." J.A. 196-197, 325.

2. On April 1, 2019, appellees sued the Commission in federal district court in the District of Columbia, alleging that BCRA's loan-repayment limit violates the First Amendment and raising additional challenges to the FEC's regulations. J.A. 24-26. Appellees invoked Section 403(a) of BCRA, which authorizes a three-judge court to hear challenges to "the constitutionality of any provision of this Act or any amendment made by this Act." BCRA § 403(a), 116 Stat. 113-114; see J.A. 26.

A single judge may dismiss a complaint for lack of jurisdiction without convening a three-judge court. See

Shapiro v. *McManus*, 577 U.S. 39, 45 (2015). Invoking that principle, the Commission moved to dismiss the claims for lack of standing before a three-judge court had been convened. J.S. App. 9a. Acting through a single judge, the district court denied the motion to dismiss and granted the application to convene a three-judge court. *Id.* at 40a-64a.

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

3. During discovery, the Commission took steps to renew its standing argument. J.A. 76-77. Specifically,

it sought documents concerning "the circumstances surrounding Senator Cruz's loans and their repayment." J.A. 76.

In the course of resolving a dispute over those discovery requests, the three-judge court "reject[ed] outright" the Commission's "continued assertion that information about [appellees'] subjective motivation in taking out the loans is somehow relevant to [appellees'] standing." J.A. 77. The court instead adopted "in its entirety" the single-judge court's prior analysis of standing. *Ibid.*

In its subsequent summary-judgment briefing, the FEC did not reassert its argument that appellees lacked standing. The FEC did, however, bring to the three-judge court's attention record materials (including the parties' stipulation) showing that the campaign's $250,000 repayment to Senator Cruz had been made with pre-election funds rather than post-election funds. In arguing that appellees' as-applied constitutional challenge to the loan-repayment limit failed, the FEC relied in part on the committee's use of pre-election funds to repay the $250,000 as evidence that BCRA's loan-repayment limit had not subjected appellees to any burden of constitutional magnitude. See Appellant Mot. for Summ. J. 16; Appellant Reply Br. in Supp. of Mot. for Summ. J. 16-18.

4. The three-judge district court granted appellees' motion for summary judgment, denied the Commission's motion for summary judgment, and held that BCRA's loan-repayment limit violates the First Amendment. J.S. App. 5a-37a. In its description of the factual background of the suit, the three-judge court stated (consistent with appellees' complaint and the prior opin-

ion of the single-judge court) that the campaign committee had "repaid Senator Cruz the maximum $250,000 with post-election contributions but [BCRA's loan-repayment limit] prevented the campaign from paying back the final $10,000." *Id.* at 9a.

On the merits, the district court first concluded that the loan-repayment limit burdens the exercise of political speech. J.S. App. 11a-19a. The court explained that the limit burdens the right to lend money to campaigns by "constrain[ing] the repayment options." *Id.* at 13a-14a. The court suggested that, as a result of the limit, a candidate could be "inhibited" from lending money, "out of concern that she will be left holding the bag on any unpaid campaign debt." *Id.* at 19a.

Applying heightened scrutiny, the district court then concluded that the government had not adequately justified this burden. J.S. App. 20a-36a. The district court acknowledged that, under this Court's precedents, Congress may enact campaign-finance laws to prevent actual and apparent *quid pro quo* corruption. *Id.* at 21a. But the district court concluded that the Commission had failed to show that the use of post-election contributions to repay candidate loans poses a risk of corruption. *Id.* at 23a. The court also held that the limit was not "sufficiently tailored" to serve the government's interests. *Id.* at 31a. The court deemed the limit "over inclusive" because it "applies across the board to winning and losing candidates," and "substantially underinclusive" because it applies to personal but not third-party loans and to post-election but not pre-election contributions. *Id.* at 31a-32a.

The district court additionally "ordered that [appellees'] regulatory claims, previously held in abeyance, are dismissed as moot." J.S. App. 38a.

SUMMARY OF ARGUMENT

I. Appellees lack Article III standing to challenge the loan-repayment limit imposed by 52 U.S.C. 30116(j).

A. The loan-repayment limit did not cause, and restraining its enforcement would not redress, the injury that appellees assert—the committee's current inability to repay the final $10,000 of Senator Cruz's loan. Appellees have not shown that they exhausted the loan-repayment limit's $250,000 cap because they have not established that they used *post-election* contributions to repay the first $250,000 of Senator Cruz's loan. To the contrary, appellees stipulated below that they did *not* use post-election funds for any part of that repayment. As far as the statutory limit is concerned, they accordingly remain free to raise $10,000 in post-election contributions and to use those funds to repay the rest of Senator Cruz's loan. The current legal obstacle to their repaying that final increment comes not from the statute but from the regulations—but an injury caused by the regulations does not confer standing to challenge the enforcement of the statute.

B. Any injury to Senator Cruz was in any event self-inflicted. The committee could easily have repaid Senator Cruz using pre-election funds during the 20 days following the 2018 election. Or by repaying $10,000 with pre-election funds during that period, it could have preserved the option to raise additional post-election contributions to repay the remaining debt. It simply chose not to do so, as part of an effort to create standing to bring this suit. Any injury is thus traceable to appellees themselves, not to the Commission.

II. BCRA's loan-repayment limit complies with the First Amendment.

A. The loan-repayment limit imposes at most a modest burden on the right to make and accept contributions: it restricts the right to use money donated during only a specific period of time—after the election—and only for the single purpose of repaying candidate loans. Any burden on the candidate's right to make loans is equally modest. The candidate remains free to loan his campaign an unlimited amount of money, and the campaign remains free to repay the loan in full. The limit simply means that the campaign may not use funds raised after the election to repay more than $250,000 of the loan.

B. That modest burden is tailored to serve Congress's compelling interest in preventing actual and apparent *quid pro quo* corruption. Contributions that repay a candidate's personal loans pose a heightened risk of corruption because, like gifts, and unlike routine contributions, they add to the recipient's personal wealth. The post-election context magnifies that risk of corruption. Once the election is over, it is less likely that the donor is giving money to fund speech or to help the favored candidate win, and more likely that she is giving money because of an expectation of special favors or a fear of retaliation. The limit targets the specific practice that poses the heightened risk, while leaving candidates' and contributors' speech otherwise unimpaired.

ARGUMENT

I. APPELLEES LACK ARTICLE III STANDING

To establish Article III standing, a plaintiff must show that (1) he has suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged action; and (3) the judicial relief he seeks would likely redress the injury. See *Lujan* v. *Defenders of Wildlife*,

504 U.S. 555, 560-561 (1992). The district court held that Senator Cruz has standing to challenge the Commission's enforcement of the loan-repayment limit because the statute barred the committee from repaying him the remaining $10,000 of his original $260,000 loan. J.S. App. 51a. That holding was incorrect. First, the committee's current inability to repay Senator Cruz $10,000 is not traceable to—and would not be redressed by an order restraining the enforcement of—the statutory provision that appellees challenge. Second, Senator Cruz's injury is self-inflicted, since he and his campaign deliberately arranged their transactions so as to create a legal barrier to full repayment of the loan.

A. Appellees' Injury Is Not Traceable To, And Would Not Be Redressed By Restraining The Enforcement Of, BCRA's Loan-Repayment Limit

A plaintiff who challenges a statutory provision bears the burden of showing that his injury is traceable to the enforcement of that particular provision and that restraining the enforcement of that provision would redress the injury. In this case, appellees have failed to show that the committee's current inability to repay Senator Cruz is traceable to the statutory loan-repayment limit, or that restraining the enforcement of that limit would redress appellees' injury. To the extent appellees' injury is attributable to the government at all, it results from the Commission's regulations rather than from 52 U.S.C. 30116(j). But an injury caused by the regulations does not establish standing to challenge the statute.

1. Appellees have not shown that their injury is fairly traceable to BCRA's loan-repayment limit or that restraining its enforcement would redress the injury

a. As the party invoking the federal court's jurisdiction, the plaintiff bears the burden of proving the elements of standing. *Defenders of Wildlife*, 504 U.S. at 561. Standing "cannot be 'inferred argumentatively,'" and the "facts supporting Article III jurisdiction must 'appear affirmatively from the record.'" *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) (brackets and citations omitted).

A plaintiff must establish the facts necessary to show standing "in the same way as any other matter on which the plaintiff bears the burden of proof," *i.e.*, "with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. The plaintiff may rely on allegations at the pleading stage, affidavits and other evidentiary materials at the summary-judgment stage, and testimony and other evidence at the trial stage. *Ibid.*

This case arises on cross-motions for summary judgment. See J.S. App. 9a. To survive the Commission's motion, appellees must cite "particular parts of materials in the record" supporting each necessary factual predicate of standing. Fed. R. Civ. P. 56(c)(1)(A). And to prevail on their own motion, appellees must go further and show that "there is no genuine dispute" that those predicates are satisfied. Fed. R. Civ. P. 56(a).

b. The BCRA loan-repayment limit that appellees challenge prohibits a campaign from using "contributions made * * * after the date of [an] election" to repay more than $250,000 in candidate loans for that election. 52 U.S.C. 30116(j). Appellees contend (Mot. to Affirm

or Dismiss (Mot.) 6) that Senator Cruz loaned his campaign $260,000, that the committee has repaid $250,000 of that loan, and that the statutory loan-repayment limit prevents it from using post-election funds to repay the remaining $10,000.

To establish standing under that theory, appellees must show that the committee used *post-election* contributions to repay the first $250,000 of Senator Cruz's loan. If the committee instead used *pre-election* contributions, nothing in the statutory provision they challenge would stop them from raising additional post-election contributions and using those funds to repay the remaining $10,000 debt. Indeed, if pre-election funds were used for even $10,000 (or more) of the prior $250,000 repayment, the statute would leave the campaign free to use post-election funds to repay the remaining indebtedness.

Appellees have produced no record evidence, however, showing that they have exhausted the $250,000 cap on the use of post-election funds. Appellees' statement of undisputed material facts, and a declaration from the committee's assistant treasurer, both state only that the committee has repaid Senator Cruz $250,000. J.A. 219, 222. Neither states that the committee repaid that sum using post-election contributions. Those statements leave open the possibility that the committee instead repaid the loan, in whole or in part, using the $2.38 million in pre-election funds that it had on hand at the end of election day 2018. J.A. 326.

At the outset of the case, appellees alleged in their complaint that the committee had "repaid the statutory maximum of $250,000 from money raised after the election." J.A. 23. In denying the FEC's motion to dismiss at the pleading stage, the single-judge district court

cited that allegation and stated that the committee had "repaid Senator Cruz the $250,000 statutory maximum using post-election contributions, but BCRA foreclosed it from paying back the $10,000 balance." J.S. App. 44a. The court was correct to accept appellees' allegation as true in denying the motion to dismiss. The three-judge court erred, however, in uncritically repeating that statement at summary judgment, by remarking that "the campaign repaid Senator Cruz the maximum $250,000 with post-election contributions but [BCRA] prevented the campaign from paying back the final $10,000." *Id.* at 9a.

At the summary-judgment stage, mere allegations no longer suffice; the plaintiff must produce evidence to support the allegations. See *Defenders of Wildlife*, 504 U.S. at 561. Here, appellees failed to substantiate the allegation that the committee repaid the first $250,000 "from money raised after the election." J.A. 23. And by the time the district court ruled on the cross-motions for summary judgment, the court had before it the parties' stipulation that *pre*-election funds had been used for this purpose, as well as FEC summary-judgment filings drawing that stipulated fact to the court's attention, albeit as part of a merits rather than a standing argument. See p. 7, *supra*; pp. 15-16, *infra*.

c. Appellees' failure to meet their burden of proof itself requires dismissing this suit for lack of standing, but the jurisdictional problem runs deeper than that. The record affirmatively refutes the factual predicate of appellees' original theory of standing—*i.e.*, the premise that the committee used contributions made after the date of the election to repay Senator Cruz $250,000.

Appellees stipulated in the district court that, far from exhausting the statutory $250,000 limit, the committee did not use *any* contributions made after the date of the 2018 election to repay Senator Cruz. Paragraph 60 of the Commission's statement of undisputed material facts stated 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." J.A. 245. And paragraph 64 stated that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." J.A. 246. In response, appellees expressly admitted both facts. J.A. 328-329. Those factual admissions are now "binding and conclusive"; appellees are not "permitted to deny the truth of the facts stated, or to maintain a contention contrary to the agreed statement, or to suggest, on appeal, that the facts were other than as stipulated." *Christian Legal Society Chapter* v. *Martinez*, 561 U.S. 661, 677 (2010) (citation and ellipses omitted).

Even apart from those admissions, the committee's financial disclosures show that it is mathematically impossible for the committee to have repaid Senator Cruz $250,000 using contributions made after the date of the election. The repayments were made by December 24, 2018. See J.A. 323. But the committee's reports to the Commission indicate that it received at most $166,547.01 in contributions between election day and that date.* The committee could not have repaid Senator Cruz $250,000 using post-election funds, because it

* See Ted Cruz for Senate, *FEC Form 3: Report of Receipts and Disbursements* 3 (Dec. 6, 2018) (reporting $42,201.48 in unitemized

received significantly less than $250,000 in new contributions between the date of the election and the date when it made the repayments.

Put simply, the record shows that the committee has not yet reached BCRA's $250,000 cap on the use of post-election contributions to repay candidate loans. BCRA's loan-repayment provision thus causes Senator Cruz and his committee no injury, and restraining its enforcement would afford them no redress.

2. An FEC regulation currently precludes the committee from repaying the remaining $10,000 of Senator Cruz's loan, but that regulatory bar does not give appellees standing to challenge the statutory loan-repayment limit

a. The current legal barrier to the committee's repayment of the final $10,000 of Senator Cruz's loan is not the loan-repayment limit imposed by Congress, but a regulation adopted by the Commission. The regulation provides that, if more than $250,000 in candidate loans remains unpaid 20 days after the election, the campaign must recharacterize the portion in excess of $250,000 as a contribution by the candidate to the campaign. 11 C.F.R. 116.11(c)(2). The campaign then is forbidden from using *any* funds—whether pre-election or

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contributions from the day after election day through November 26, 2018); *id.* at 7478-7498 (reporting a total of $16,300 in itemized contributions and other receipts from the day after election day through November 26, 2018); Ted Cruz for Senate, *FEC Form 3: Report of Receipts and Disbursements* 3 (Aug. 23, 2019) (reporting $78,465.53 in unitemized contributions from November 27, 2018 through December 31, 2018); *id.* at 5-247 (reporting $29,580 in itemized contributions and other receipts from November 27, 2018 through December 24, 2018).

post-election—to repay the recharacterized portion. *Ibid.*

In this case, the committee allowed the 20-day post-election period to expire without repaying any part of the $260,000 debt it owed to Senator Cruz. J.A. 327-328. At that point, the regulation required the committee to recharacterize $10,000 of that debt—*i.e.*, the increment above $250,000—as a contribution. J.A. 328. It is that regulation, not BCRA's loan-repayment limit, that today prevents the committee from repaying the final $10,000.

Even if appellees were injured by the regulation, but see pp. 20-25, *infra* (arguing that appellees' current injury is not attributable to the FEC because appellees deliberately arranged their transactions to trigger the regulatory bar), they would lack standing to challenge the statute. "[S]tanding is not dispensed in gross," and a plaintiff instead must establish standing separately for "each claim" he presses and "each form of relief" he seeks. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021).

In accord with that principle, this Court has repeatedly held that a plaintiff injured by one law does not thereby acquire standing to challenge a different law. Most recently, in *California* v. *Texas*, 141 S. Ct. 2104 (2021), a group of States challenged the enforcement of the minimum-essential-coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. 5000A(a). They argued that the statute injured them by requiring them to incur various costs, such as the costs of informing beneficiaries of state health plans about their insurance coverage. *California*, 141 S. Ct. at 2119. The "problem" with that theory, the Court explained, was that "other provisions of [the] Act, not the minimum

essential coverage provision, impose[d] these other requirements." *Ibid.* As a result, the injury asserted by the States was "not 'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the [States] complain[ed]—§ 5000A(a)." *Ibid.* (citation omitted).

Many other precedents point in the same direction. In *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), the Court held that plaintiffs injured by a municipal tax did not thereby acquire standing to challenge a closely related state tax. *Id.* at 350-353. The Court explained that a litigant cannot, "by virtue of his standing to challenge one government action, challenge other government actions that did not injure him." *Id.* at 353 n.5. In *Lewis* v. *Casey*, 518 U.S. 343 (1996), the Court held that a prisoner injured by one alleged flaw in a prison's law-library system lacked standing to challenge other alleged defects in that system. *Id.* at 357-360. The Court explained that "harm from one particular inadequacy in government administration" does not create standing to challenge "*all* inadequacies in that administration." *Id.* at 357. And in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court held that a guest excluded from a private club lacked standing to challenge the club's membership policies. *Id.* at 165-171. The Court explained that the guest's injury "stemmed, not from the [club's] membership requirements, but from its policies with respect to the serving of guests." *Id.* at 166. Those principles decide this case.

b. Appellees argue (Mot. 6-14) that they have Article III standing to challenge BCRA's loan-repayment limit because the FEC regulation that directly injures them was promulgated to implement that limit. They contend (Mot. 8) that, in adjudicating their challenge to the reg-

ulation, the district court could assess the constitutionality of the statute itself, on the theory that invalidation of the statute would lead to invalidation of the regulation and thus redress appellees' injury.

Appellees' theory resembles the "standing-through-inseverability argument" advanced in *California*. 141 S. Ct. at 2122 (Thomas, J., concurring). Under that theory, a plaintiff may challenge a provision that does not cause him injury (here, the loan-repayment limit) if its invalidation would lead to the invalidation of another provision that does cause him injury (the FEC regulation). That is a "novel theory" of standing, *id.* at 2116 (majority opinion), and this Court has never addressed it "in any detail," *id.* at 2122 (Thomas, J., concurring). The theory depends on the premises that Section 30116(j) *caused* appellees' current injury by leading the Commission to promulgate 11 C.F.R. 116.11(c)(2), and that judicial invalidation of the statute would *redress* the injury by causing the rule to be vacated or repealed.

Even if appellees' approach were otherwise sound, that basis for standing would be unavailable here, since the district court lacked independent subject-matter jurisdiction to hear appellees' challenge to the regulation. BCRA grants three-judge courts jurisdiction over a suit "to challenge the constitutionality of any provision of this Act or any amendment made by this Act." BCRA § 403(a), 116 Stat. 113-114. It does not grant such courts jurisdiction over challenges to the Commission's regulations. This Court has accordingly recognized that "issues concerning the regulations are not appropriately raised" before the three-judge court, "but must be pursued in a separate proceeding." *McConnell* v. *FEC*, 540 U.S. 93, 223 (2003); see, *e.g.*, *Bluman* v. *FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011).

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. But before invoking supplemental jurisdiction, a court "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). In this case, the three-judge court lacked original jurisdiction over the claims challenging the statutory loan-repayment limit, because, as explained above, appellees lacked standing to bring those claims.

Because the three-judge 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. Indeed, while appellees have since suggested that the three-judge court could have treated the purported unconstitutionality of BCRA's loan-repayment limit as a ground for invalidating 11 C.F.R. 116.11(c)(2), that is not what the court did. Rather, having held the challenged statutory provision to be invalid, the district court "ordered that [appellees'] regulatory claims * * * are dismissed as moot." J.S. App. 38a.

B. Appellees Lack Standing Because Their Injury Is Self-Inflicted

Appellees lack standing for a second reason: their injury was self-inflicted.

1. Self-inflicted injury does not create standing

A plaintiff has Article III standing only if his injury is "fairly traceable to *the defendant's* allegedly unlawful

conduct." *California*, 141 S. Ct. at 2113 (emphasis added; citation omitted). When an injury results from a plaintiff's own conduct, that requirement is not satisfied. As one treatise explains, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury," but it is defeated if "the injury is so completely due to the plaintiff's own fault as to break the causal chain." 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.5, at 361-362 (2008) (Wright & Miller).

In *Clapper* v. *Amnesty International USA*, 568 U.S. 398 (2013), for example, this Court held that a group of plaintiffs lacked standing to challenge an intelligence program, even though the plaintiffs had incurred costs to avoid surveillance under that program. *Id.* at 415-419. The Court refused to allow the plaintiffs to "manufacture standing merely by inflicting harm on themselves." *Id.* at 416. Said otherwise, the plaintiffs' "self-inflicted injuries" were not "fairly traceable to the Government's purported activities." *Id.* at 418.

Similarly in *McConnell* v. *FEC*, *supra*, this Court held that a group of political candidates lacked standing to challenge federal contribution limits as being too high. 540 U.S. at 228-229. The candidates claimed that large contributions created an appearance of improper influence; that they consequently did not wish to accept large contributions; and that the statute put them at a competitive disadvantage by allowing such contributions to be made to competing candidates. *Id.* at 228. The Court rejected that theory of standing, holding that the plaintiff candidates' alleged injury was not "fairly traceable" to the statute. *Ibid.* (citation omitted). The candidates' "alleged inability to compete," the Court ex-

plained, "stem[med] not from the operation of [the statute], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice." *Ibid.*

So too in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), the Court held that a group of States did not acquire Article III standing to challenge taxes imposed by other States simply because the plaintiff States gave their residents credits for taxes paid to the defendant States. *Id.* at 664-665. The Court explained that the "injuries to the plaintiffs' fiscs were self-inflicted" since nothing required the plaintiff States to extend tax credits for taxes paid to the defendant States. *Id.* at 664. "No State," the Court concluded, "can be heard to complain about damage inflicted by its own hand." *Ibid.*

2. The injury in this case was self-inflicted

a. In this case, the committee's inability to repay the final $10,000 of Senator Cruz's loan is traceable to appellees' own actions, not to the Commission's conduct. The day before the 2018 election, Senator Cruz loaned his campaign $260,000—$10,000 more than the amount specified in the loan-repayment limit. J.A. 324. After the election, the committee had more than $2 million in pre-election funds still on hand. J.S. App. 8a. The committee could have used that money to repay Senator Cruz in full. The committee could also have used that money to pay Senator Cruz $10,000, and then raised post-election contributions to repay the remaining $250,000. All the committee needed to do was to make the payment within 20 days after the election.

The committee, however, chose not to pay any part of Senator Cruz's loan within the 20-day period. J.A. 327-328. Two days after that period expired, Senator

Cruz sent his campaign staff an email stating that, "[s]ince more than 20 days have passed, it would be REALLY good if we could pay back at least some of the $250k now." J.A. 328. That email implies that repayment of the $250,000 was intentionally delayed until the 20-day post-election period had expired, thus triggering the regulatory requirement that the remaining $10,000 be recharacterized as a contribution by Senator Cruz to the campaign. The email also implies that Senator Cruz regarded delay in the repayment as otherwise undesirable. And appellees have stipulated that "the sole and exclusive motivation behind Senator Cruz' actions in making the 2018 loan and the committee's actions in waiting to repay them was to establish the factual basis for this challenge." J.A. 325.

In these circumstances, the committee's inability to repay the final $10,000 of Senator Cruz's loan is not fairly traceable to the Commission. Rather, "the injury is so completely due to [appellees'] own fault" as to defeat standing. Wright & Miller § 3531.5, at 362.

b. The single-judge district court acknowledged that a plaintiff lacks standing if the injury is "so completely due to the plaintiff's own fault as to break the causal chain." J.S. App. 52a (brackets and citation omitted). The court nonetheless concluded that "[appellees'] role in Senator Cruz's injury does not rise to that level." *Ibid.* The court's stated reasons for that conclusion lack merit.

The district court reasoned that, although the committee could have avoided its present injury by using pre-election funds to repay a portion of the loan within the 20-day window, that alternative course of action would itself have injured appellees. J.S. App. 53a-57a. It is true that an injury is not self-inflicted where taking

the action needed to avoid that injury would subject the plaintiff to a different harm. See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *United States Food & Drug Administration*, 710 F.3d 71, 85 (2d Cir. 2013). In this case, however, appellees have not shown that they would have suffered any concrete harm from disbursing $10,000 in pre-election funds within the 20-day regulatory deadline. To the contrary, Senator Cruz's email suggests that, if delay had not been essential to trigger the regulatory requirement that $10,000 of the total loan amount be recharacterized as a contribution to the campaign, appellees would have viewed earlier repayment as affirmatively desirable.

The single-judge district court also stated that "[o]bligating [appellees] to avoid the Senator's injury by repaying at least a portion of the loans using pre-election contributions would * * * require Senator Cruz to forego exercising a right that the court must assume he has, and subject him to the very framework that ostensibly unconstitutionally burdens his free speech." J.S. App. 54a. The court made that statement at the motion-to-dismiss stage of the case, when it appropriately took as true the complaint's allegations and therefore treated BCRA's loan-repayment limit as the existing legal barrier to full repayment of Senator Cruz's loan. As explained above, however, repayment of the remaining $10,000 is actually barred only by a Commission regulation, because appellees *voluntarily* used *pre*-election funds to repay $250,000 of the campaign's debt. See p. 16, *supra*. Appellees would not have "subject[ed]" themselves any further to BCRA's "ostensibly unconstitutional[]" loan-repayment limit if they had made that $250,000 repayment—or even just $10,000 of it—within 20 days after the election.

In any event, a plaintiff's belief that a legal framework violates the Constitution does not by itself mean that the framework injures him. See, *e.g.*, *United States* v. *Richardson*, 418 U.S. 166, 175 (1974). "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, 141 S. Ct. at 2205 (citation omitted). Appellees' belief that the Commission's 20-day requirement (or the statutory limitation that the 20-day requirement is intended to implement) violates the Constitution thus does not, by itself, mean that compliance with the requirement would have caused concrete injury.

Appellees also have argued that the committee "had a First Amendment right to prioritize its spending of pre-election contributions by paying vendors and other creditors rather than reimbursing Senator Cruz," and that the government may not "demand that the [campaign] give up that right to avoid the financial injury resulting from an unconstitutional statute." D. Ct. Doc. 29, at 41 (June 28, 2019). But appellees did not identify any specific payment to a vendor or other creditor that the committee would have been hindered from making if it had used $10,000 of pre-election funds to repay Senator Cruz during the first 20 days after the election. Cf. *Defenders of Wildlife*, 504 U.S. at 563 (requiring "specific facts" to establish standing at the summary-judgment stage). Because sufficient funds for repaying the $10,000 were in the committee's possession on election day, were still in its possession 20 days after the election, and were actually used to repay Senator Cruz $250,000 with pre-election contributions shortly after

the 20-day post-election window had expired, it is difficult to see how using those funds for loan-repayment purposes during that 20-day interval would have impaired the committee's ability to repay other debts. And by stipulating that the desire "to establish the factual basis for this challenge" was "the sole and exclusive motivation" for the committee's delay in repaying the loan, J.A. 325, appellees unambiguously disavowed any contention that the delay resulted from prioritizing other creditors.

II. THE LOAN-REPAYMENT LIMIT COMPLIES WITH THE FIRST AMENDMENT

If this Court concludes that appellees have standing to challenge the constitutionality of BCRA's loan-repayment limit, it should reverse the district court's judgment on the merits.

The First Amendment protects the right to spend money on and to contribute money to campaigns, but that right is not absolute. See *Buckley* v. *Valeo*, 424 U.S. 1, 14-23 (1976) (per curiam). The validity of a law regulating campaign-related activity depends on the interest served and the burden imposed; "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis* v. *FEC*, 554 U.S. 724, 744 (2008). A law that imposes a "severe" burden on protected speech, such as a restriction on independent campaign spending, is subject to strict scrutiny. *Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005); see, *e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 372 (2010). A law satisfies that test if it is "narrowly tailored" to serve a "compelling interest." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 442 (2015). A "less onerous" restriction, such as a restriction on campaign contributions, is subject to "a lower level of scrutiny."

Arizona Free Enterprise Club's Freedom Club PAC v. *Bennett*, 564 U.S. 721, 735 (2011); see, *e.g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 386-387 (2000). A law satisfies that standard if it is "closely drawn" to serve a "sufficiently important interest." *Buckley*, 424 U.S. at 25.

BCRA's loan-repayment limit imposes at most a modest burden on speech. That burden is justified under any applicable standard of review. The use of post-election contributions to repay candidate loans poses a special danger of real and apparent *quid pro quo* corruption, and the limit is carefully tailored to address that risk.

A. The Loan-Repayment Limit Imposes At Most A Modest Burden On Speech

On its face, the loan-repayment limit imposes at most a modest burden on political speech. As applied in this case, the limit imposes no burden at all on such speech.

1. On its face, the loan-repayment limit imposes at most a modest burden on speech

a. The First Amendment protects an individual's right to make and a candidate's right to receive contributions. See *Buckley*, 424 U.S. at 20-21. On its face, however, the loan-repayment limit imposes at most a modest burden on that right.

The "communicative value" of contributions "inheres mainly in their ability to facilitate the speech of their recipients." *McConnell*, 540 U.S. at 135. The right to make contributions enables the contributor to pool resources with others to fund speech, and the right to receive contributions enables the candidate to amass the resources necessary to run a campaign. The loan-repayment limit, however, does not restrict the use of

contributions to fund election speech. The limit, after all, applies only to contributions made after the date of the election. Such contributions, by definition, do not fund additional political speech and instead can be used only to repay "net debts outstanding from such election." 11 C.F.R. 110.1(b)(3)(i).

A contribution also has "symbolic" value as an "expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. But the loan-repayment limit does not prevent any contributor from engaging in that symbolic act. Individuals who wish to contribute money to a candidate remain free to do so. And a contribution's symbolic value is substantially reduced if it is made after the election, when it cannot sway other voters.

The loan-repayment limit is instead akin to a time, place, and manner regulation—a type of restriction on speech that this Court has often upheld. See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984). The restriction simply means that contributions used for a given purpose (repaying candidate loans) must be made at a given time (before rather than after election day). And even that timing restriction is not absolute. The limit on the use of post-election funds to repay candidate loans applies only to the extent that such repayments exceed $250,000.

b. The First Amendment also protects a candidate's right to finance his own campaign. See *Davis*, 554 U.S. at 738-739. But the loan-repayment limit, on its face, does not severely burden that right either.

This Court's decisions addressing candidate self-financing of electoral campaigns have focused on the right to spend money rather than the right to lend it. See, *e.g.*, *Davis*, 554 U.S. at 738-739; *Buckley*, 424 U.S. at 52-53. Allowing candidates to spend personal funds

on campaigns, the Court has observed, *reduces* the risk of corruption by diminishing candidates' "dependence on outside contributions." *Buckley*, 424 U.S. at 53. That rationale does not apply to candidate lending, for the candidate remains dependent on outside contributions for repayment of the loan.

In any event, the loan-repayment limit does not impose a severe burden on the right to lend money to a campaign. It neither prohibits candidate loans nor restricts the size of such loans.

The district court believed that the loan-repayment limit could nonetheless have an "indirect" effect on lending. J.S. App. 16a. The court inferred that, because the limit restricts repayment options, a candidate could be "inhibited from making a personal loan * * * out of concern that she will be left holding the bag on any unpaid campaign debt." *Id.* at 16a, 19a. Any such indirect effect, however, does not amount to a substantial burden on speech. So long as the campaign uses pre-election funds, it may repay the candidate in full no matter how large the debt. The limit, again, operates only as a narrow timing restriction; it requires the funds used to repay the increment of a candidate loan above $250,000 to be raised before rather than after the election.

The record in this case contains substantial evidence regarding the effect of the loan-repayment limit, and candidate lending practices more generally, in federal electoral campaigns nationwide. That evidence underscores the modesty of the burden imposed. It shows, to start, that many payments made by candidates to their campaigns, although designated as "loans," are "in essence contributions," because they are made "with limited expectations of repayment." J.A. 237. The loan-

repayment limit imposes no meaningful burden on the right to make such "loans."

The record also shows that the great majority of candidate loans are for less than $250,000 and thus do not implicate the loan-repayment limit in the first place. During the five election cycles preceding 2020, candidates for Senate made a total of 588 loans to their campaigns, of which 466 (79.3%) were for less than $250,000. J.A. 315-316. Candidates for the House of Representatives made a total of 3444 loans to their campaigns, of which 3076 (89.3%) were for less than $250,000. J.A. 316.

The record also suggests that the loan-repayment limit does not meaningfully discourage candidates from lending their campaigns more than $250,000. As just noted, in the five election cycles preceding 2020, 79.3% of loans by Senate candidates and 89.3% of loans by House candidates were for less than $250,000. J.A. 315-316. In the five election cycles preceding the enactment of BCRA, those figures were 76% for the Senate and 92.7% for the House. J.A. 316-317. The close correspondence between pre- and post-BCRA practices indicates that the limit has not appreciably deterred candidate lending.

c. The burden imposed by the loan-repayment limit is significantly more modest than the burden imposed by contribution limits, which this Court has upheld. Contribution limits cap the amount of money that a contributor may give a candidate, but the loan-repayment limit does not. Contribution limits apply to contributions made at any time, but the loan-repayment limit applies only to contributions made after the election. Contribution limits apply to contributions that are used for any election-related purpose, but the loan-repayment

limit applies only to contributions used to repay candidate loans.

At least in theory, contribution limits could have the same type of deterrent effect on candidate lending that appellees attribute to the loan-repayment limit. Contribution limits may reduce the amount of money that a campaign can amass for any purpose, including repaying loans. On appellees' theory, that possibility might inhibit candidates from loaning money to their campaigns in the first instance. Yet this Court has concluded that contribution limits impose "only a marginal restriction" on speech. *Buckley*, 424 U.S. at 20. The burden imposed by the loan-repayment limit is even less substantial.

2. As applied in this case, the loan-repayment limit does not burden speech at all

"Through contributions [to a candidate] the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the voices of similarly minded voters." *Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring). Senator Cruz's loan to his campaign did not meaningfully serve any of those purposes.

Senator Cruz made the loan the day before the election, and he transparently tailored the loan's $260,000 amount to enable him to bring this challenge to the $250,000 cap, while limiting (to $10,000) the personal financial loss that he might suffer if his challenge ultimately fails. Appellees have presented no evidence that the campaign ever used or even intended to use the money to fund speech. To the contrary, appellees have stipulated that "the sole and exclusive motivation behind Senator Cruz' actions in making the 2018 loan[s]

* * * was to establish the factual basis for this challenge." J.A. 325. As applied in this case, therefore, the loan-repayment limit did not burden the right to fund political speech, but affected only the ability to shuttle money from one account to another for other purposes.

Even if the loan amounted to political speech, Section 30116(j) imposed no practical impediment to the campaign's ability to repay it. The committee had approximately $2.38 million in pre-election funds left over after the election. J.A. 326. Because the campaign used $250,000 of those funds to repay the bulk of Senator Cruz's loan, BCRA's loan-repayment limit imposed no constraint on appellees' ability to use post-election funds to repay the rest. See pp. 12-16, *supra*. As noted, the campaign's current inability to repay the remaining $10,000 is attributable to an FEC regulation rather than to the statute, see pp. 16-20, *supra*, and in any event it results from the campaign's deliberate delay in repaying the $250,000 so as to facilitate this lawsuit. Nor did the limit prevent anyone who wanted to contribute money from doing so. In fact, appellees have stipulated that they "are unable to identify a single potential contributor" who sought "to make contributions to enable the Committee to repay Senator Cruz using more than $250,000 in post-election funds." J.A. 330.

B. Congress's Compelling Interest In Preventing Actual And Apparent Corruption Justifies The Burden Imposed By The Loan-Repayment Limit

Given the minimal burdens on political speech that the loan-repayment limit imposes, the limit is subject at most to "closely drawn" scrutiny. In any event, the limit satisfies any potentially applicable standard of review, including strict scrutiny.

1. The loan-repayment limit serves the compelling interest in preventing actual and apparent corruption

To satisfy heightened scrutiny, the government must show that the challenged law serves a "compelling" or "sufficiently important" interest. *Arizona*, 564 U.S. at 734-735 (citations omitted). This Court has recognized the government's compelling interest in preventing *quid pro quo* corruption and in avoiding the appearance of *quid pro quo* corruption. See *Buckley*, 424 U.S. at 26-27. That interest "has never been doubted." *Shrink Missouri*, 528 U.S. at 389 (citation omitted). Such corruption leads elected officials to violate their "obligations of office," subverting "the political process" and threatening "the integrity of our system of representative democracy." *Id.* at 388-389 (citations omitted). And avoiding the perception of such corruption "is also critical if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (citation and ellipsis omitted). The loan-repayment limit helps prevent both actual and apparent corruption.

a. The contributions regulated by the loan-repayment limit raise a heightened risk of corruption because of the use to which the contributions are put: repaying a candidate's personal loans. When a campaign uses a contribution to fund routine campaign activities, the contribution helps the candidate by marginally improving his chance of victory, but it does not add to the candidate's personal wealth. But when a campaign uses a contribution to repay the candidate's loan, every dollar given by the contributor ultimately goes into the candidate's pocket. A contribution that adds to a candidate's personal assets (and that can accordingly be used for

personal purposes) poses a far greater threat of corruption than a payment that merely adds to a campaign's treasury (and that can accordingly be used only for campaign purposes).

In many other contexts, officeholders are forbidden to accept payments that add to their personal wealth because of the risk that such payments could corrupt or be seen to corrupt them. The Foreign Emoluments Clause prohibits federal officials from accepting any "present" or "Emolument" from foreign powers. U.S. Const. Art. I, § 9, Cl. 8. Many federal statutes restrict the acceptance of gifts by federal officials. See, *e.g.*, 2 U.S.C. 4725; 5 U.S.C. 7342, 7351, 7353. Rules adopted by the Senate and House of Representatives restrict members' acceptance of gifts worth $50 or more. See Standing Rules of the Senate, 113th Cong., 1st Sess. 46-56 (2013) (Rule XXXV); Rules of the House of Representatives, 116th Cong. 42-46 (2019) (Rule XXV.5). Regulations adopted by the Executive Branch restrict executive officers' and employees' acceptance of gifts worth $20 or more from individuals who may be affected by performance of the gift recipients' official duties. See 5 C.F.R. 2635.204. Similar regulations adopted by the Judicial Conference restrict judges' and judicial employees' acceptance of gifts worth more than $50 from persons doing business with the courts. See United States Courts, *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.35(8) (July 27, 2021). And federal law prohibits candidates from using campaign contributions for personal purposes, such as paying off mortgages and buying clothes. 52 U.S.C. 30114(b)(2); see *FEC* v. *O'Donnell*, 209 F. Supp. 3d 727, 739-741 (D. Del. 2016) (upholding provision).

The loan-repayment limit reflects the same common-sense recognition that a payment that increases an officeholder's personal wealth creates a particular risk of real or apparent corruption. Like a gift made directly to the candidate, a contribution that repays an earlier candidate loan results in a dollar-for-dollar increase in the candidate's personal assets. If a gift of just $50 creates a danger of corruption, a contribution that personally enriches the candidate by up to $2700 (the per-election limit in 2018) can surely have that effect.

b. The contributions targeted by the loan-repayment limit are concerning in an additional respect as well, in that they are made after the election. A post-election contributor usually will be aware that his contribution will personally enrich the candidate, since a campaign may accept post-election contributions only to repay debt. See 11 C.F.R. 110.1(b)(3)(i). And more than 90% of campaign debt consists of candidate loans (as opposed to loans from third-party lenders). See J.A. 308. A pre-election donor may believe that his contribution will incrementally improve the favored candidate's chances of prevailing in the election, but a post-election donor can be reasonably confident that the contribution will help the candidate on a personal level. That knowledge magnifies the risk of a *quid pro quo*.

A post-election contributor also usually will know whether the recipient of the contribution has prevailed in the election. The contributor therefore can know—rather than merely hope—that the recipient will be in a position to do him official favors. That difference "between a bet and a bet on a sure thing" further increases the risk that the contribution will be part of a *quid pro quo*. *Ferre* v. *State ex rel. Reno*, 478 So. 2d 1077, 1080 n.9 (Fla. Dist. Ct. App. 1985).

The post-election context also introduces the risk that the donor will contribute out of perceived compulsion rather than conviction. For example, a donor who contributed to the losing candidate before the election may feel pressure to contribute to the winning candidate afterwards, lest he face retaliation. See pp. 37-38, *infra* (discussing examples of contributions made because of such fears). Congress has a compelling interest in protecting donors from such pressure. See *McConnell*, 540 U.S. at 148 n.47.

Underscoring all those points, the main *legitimate* rationales for donating money to campaigns do not apply (or apply only insubstantially) to contributions made after the election. The most obvious legitimate reasons for contributing money are (1) pooling funds with other donors to facilitate political speech, (2) symbolically expressing support for a candidate, and (3) increasing, at least marginally, the likelihood that the favored candidate will prevail. A post-election contribution serves none of those purposes. It does not facilitate additional political speech, for the campaign is over. Its symbolic value as an expression of support is minimal, since any such message is conveyed after the opportunity to sway voters has ended. And it does not increase the likelihood that the favored candidate will prevail, for the election has already occurred. A post-election contribution is thus more likely than a pre-election contribution to be motivated by an expectation of special favors or a fear of retaliation. Cf. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (explaining that, "when all legitimate reasons" for an action "have been eliminated," one may infer that the actor "based his decision on an impermissible consideration").

c. Empirical evidence reinforces the common-sense judgment that post-election contributions used to repay candidate loans carry inherent corruptive potential. Winning candidates have historically found it easier than losing candidates to raise such contributions. See J.A. 317. "When you wake up a loser, you have a deficit. When you wake up a winner, you have a deficit retirement party." Steven V. Roberts, *Debt Retirement Party Becoming an Institution*, N.Y. Times, Nov. 29, 1982. That pattern suggests that the contributions reflect an expectation of favors from the recipient.

Examples from States without loan-repayment limits, and from the federal government before Congress enacted the BCRA limit, illustrate the point. In 1998, a congresswoman who served on the House Transportation and Infrastructure Committee loaned her campaign $150,000 at 18% interest; collected $221,780 in interest (more than the original amount of the loan) over the next decade; and raised contributions to pay the principal and interest at fundraisers hosted by a lobbying firm representing transportation interests. See J.A. 334; Andrew Zajac, *Interest on campaign loan pays*, L.A. Times, Feb. 14, 2009. In Kentucky, two governors loaned their campaigns millions of dollars, "only to be repaid after the election by contributors seeking no-bid contracts." J.A. 343 (citation omitted). In Ohio, an attorney general routed 225 state contracts worth $9.6 million in legal fees to law firms and lawyers who had given him $194,830 after the election to repay personal loans. J.A. 337. In Oregon, contributors who had supported losing candidates before an election contributed to the winning opponents after the election; Oregon political insiders referred to these payments as "'apology' money or 'make-up' cash." Jeff Mapes, *Brown Enjoys*

Post-Election Donation Boom—While Pushing Campaign Finance Limits, Oregon Public Broadcasting (Portland), Feb. 28, 2019; see Jeff Mapes, *Oregon legislators reap big post-election donations—much of it 'makeup money,'* The Oregonian / OregonLive (Salem), Mar. 10, 2013. Other States have had similar experiences. See, *e.g.*, J.A. 341 (Oklahoma); Conor Shine, *Why did Nevada candidates keep getting donations after election?*, Las Vegas Sun, Jan. 21, 2015 (Nevada); Jerry Cornfield, *Post-election: It's the season to keep on giving*, Auburn Reporter, Dec. 10, 2014 (Washington); Associated Press, *Minnesota's Post-Election Money Blitz, At A Glance* (St. Paul, Minn.), Feb. 5, 2015 (Minnesota).

In the debates that preceded BCRA's enactment, Members of Congress discussed the dangers of allowing candidates to repay personal loans using post-election contributions. One senator remarked that, without the loan-repayment limit, a winning candidate who loaned money to his campaign could "get it back from [his] constituents [at] fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" 147 Cong. Rec. 3882 (2001) (statement of Sen. Domenici). He also observed that, without the limit, a winning candidate could "go around and say, now I am the Senator, I want you to get me money so I can pay back what I used of my own money to run for election." 147 Cong. Rec. 3966 (2001) (statement of Sen. Domenici). Another senator stated that candidates may "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." *Id.* at 3970 (statement of Sen. Hutchison).

A study of campaign debt and voting patterns from 1983 to 2014 underscores the risks posed by the conduct

that the loan-repayment limit addresses. See D. Ct. Doc. 65-1 (July 14, 2020). The study found that "indebted politicians" were "significantly more likely" than "debt-free counterparts" to "switch their votes if they receive[d] contributions from * * * special interests." *Id.* at 29. That finding suggests that contributions used to repay personal loans are more valued by officeholders than are other contributions. The study also found, however, that after enactment of the loan-repayment limit in 2002, politicians who made "large loans to their campaigns" were "significantly less responsive" to contributions than before and began to "behave remarkably similar to their debt free counterparts." *Id.* at 26. That finding suggests that the loan-repayment limit helps counteract the corruptive potential of post-election contributions by diminishing the prospect that such contributions will personally enrich the officeholder.

Finally, a survey in the record showed that 81% of respondents stated that they considered it "likely" or "very likely" that a person who donates money to a campaign after the election expects a political favor in return. J.A. 351 (citation omitted). That perception is understandable. After the election ends, "there is an impression that the contributor is lining the candidate's pocket, as there is no ongoing campaign to which the contribution may be made." *Wilkinson* v. *Jones*, 876 F. Supp. 916, 930 (W.D. Ky. 1995).

To the extent the matter is otherwise in doubt, this Court owes deference to the legislative judgment that the practices targeted by the loan-repayment limit pose a special risk of corruption. Even in First Amendment cases, a court owes "substantial deference to the predictive judgments of Congress." *Turner Broadcasting*

System, Inc. v. *FCC*, 520 U.S. 180, 195 (1997) (citation omitted). That deference rests in part on "respect" for Congress as a coordinate branch of government, and in part on the understanding that Congress "'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions." *Id.* at 195-196 (citation omitted). Deference is especially appropriate in the context of campaign finance, "an area in which [Congress] enjoys particular expertise." *McConnell*, 540 U.S. at 137; see *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209 (1982).

2. The loan-repayment limit is properly tailored

To satisfy heightened scrutiny, the government also must show that the challenged restriction is "narrowly tailored" or "closely drawn" to serve its interest. *Arizona*, 564 U.S. at 734-735 (citations omitted). The loan-repayment limit satisfies that requirement too. The limit "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (citation omitted). Using post-election contributions to repay candidate loans poses a special risk of corruption, and the limit homes in on that specific practice, leaving speech otherwise untouched.

Congress had no less restrictive alternative that would have been equally effective in serving its interest. For example, it could not rely on bribery laws alone. This Court has "expressly rejected the argument that antibribery laws provided a less restrictive alternative" to campaign-finance restrictions, *McConnell*, 540 U.S. at 143; see *Buckley*, 424 U.S. at 28. All three branches of the federal government, moreover, have supplemented bribery laws with restrictions on the acceptance of gifts. See p. 34, *supra*. Those gift rules reflect the judgment that payments resulting in personal financial

gain for an official should be substantially restricted as a categorical matter, without any showing that a particular gift forms part of a *quid pro quo* arrangement. The loan-repayment limit rests on the same judgment.

Federal contribution limits likewise do not suffice, for they do not target the specific circumstances that the loan-repayment limit addresses. Current federal contribution limits reflect Congress's judgment as to the appropriate balance between facilitating effective electoral advocacy on the one hand, and minimizing the risk of actual or apparent corruption on the other, in the more typical circumstances where the contributions will be used for campaign-related activities. The loan-repayment limit, by contrast, addresses the risk of actual or apparent corruption created by a specific class of payments that add to the candidate's personal wealth, and that do not facilitate campaign-related speech in the manner that pre-election contributions typically do. That danger can arise even when each contribution falls within the applicable statutory cap. The recognition that payments flowing to the candidate have increased corruptive potential underlies the decisions of both Houses of Congress to restrict the acceptance of gifts as small as $50. See p. 34, *supra*. In any event, this Court has "never held that adopting contribution limits precludes [the government] from pursuing its compelling interests through additional means." *Williams-Yulee*, 575 U.S. at 455.

Nor, finally, do disclosure laws suffice. Disclosure laws can enable the electorate to supervise *pre-election* contributions; voters who disapprove of a candidate's funding practices can punish him at the ballot box. See *McCutcheon* v. *FEC*, 572 U.S. 185, 223-224 (2014) (opinion of Roberts, C.J.). But *post-election* contributions

are inherently immune from that check; by the time such contributions occur and are disclosed, "it is too late for the revelation to be considered by the voters." *Ferre*, 478 So. 2d at 1080.

C. The District Court's Contrary Analysis Is Flawed

The district court concluded that the loan-repayment limit fails heightened First Amendment scrutiny, but its analysis is flawed.

1. The district court erred in concluding that the loan-repayment limit does not help to prevent actual and apparent corruption

The district court concluded that the government had failed to show that the transactions regulated by the loan-repayment limit pose a special risk of corruption. J.S. App. 21a-30a. The court found the record here less "robust" than in other cases where this Court has upheld challenged laws. *Id.* at 24a.

The district court understated the strength of the government's showing. The government has shown that, as a matter of common sense, contributions that predictably result in personal financial gain for a candidate pose an increased danger of corruption, especially when the contributions occur after the election. See pp. 33-40, *supra*; cf. *McConnell*, 540 U.S. at 158 (relying on "common sense"). It has explained how the judgment that underlies the loan-repayment limit also underlies longstanding laws restricting gifts to officeholders. See p. 34, *supra*; cf. *McConnell*, 540 U.S. at 158 (noting that the principle underlying a challenged restriction "appear[ed] elsewhere in federal laws"). It has cited statements from legislators and from courts discussing the dangers posed by the regulated practice. See pp. 35, 38, *supra*; cf. *Shrink Missouri*, 528 U.S. at 393-394 (relying

on legislators' statements). It has provided examples of the problems that can arise in the absence of the loan-repayment limit. See pp. 37-38, *supra*; cf. *Buckley*, 424 U.S. at 27 (discussing "deeply disturbing examples"). And it has cited studies and surveys underscoring the risk of actual and apparent corruption. See pp. 38-39, *supra*; cf. *Williams-Yulee*, 575 U.S. at 459-461 (Ginsburg, J., concurring in part and concurring in the judgment) (relying on studies and surveys).

The district court's insistence on an even more extensive record was inappropriate. Even administrative agencies may make policy judgments, and promulgate rules premised on those judgments, without producing statistical studies and empirical data to support their findings. See *FCC* v. *Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 518-520 (2009). And "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 666 (1994) (plurality opinion). Congress may instead rely on "deductions and inferences for which complete empirical support may be unavailable." *Id.* at 665.

The district court's concerns about the adequacy of the evidentiary record were particularly misplaced here. First, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The justification raised here—that payments resulting in personal financial gain for the candidate pose a particular risk of corruption—is neither novel nor implausible, but instead underlies gift

rules that apply to officials in all three branches of the federal government. Second, the quantum of evidence needed also varies with the severity of the burden imposed. See *Randall* v. *Sorrell*, 548 U.S. 230, 248-249 (2006) (opinion of Breyer, J.). The burden imposed here is slight. Third, it is one thing to object to the "failure to adduce empirical data that can readily be obtained," but "something else to insist upon obtaining the unobtainable." *Fox*, 556 U.S. at 519. Because BCRA's loan-repayment limit has been in place for nearly 20 years, "no data can be marshaled to capture perfectly the counterfactual world in which [such] limits do not exist." *McCutcheon*, 572 U.S. at 219 (opinion of Roberts, C.J.).

2. *The district court erred in finding the loan-repayment limit to be inadequately tailored*

The district court also found the loan-repayment limit to be "not sufficiently tailored." J.S. App. 31a. That, too, is incorrect.

a. The district court first found the loan-repayment limit "over inclusive" because it "applies across the board to winning and losing candidates, although any purported anticorruption rationale applies only to winning candidates." J.S. App. 31a. That analysis is flawed, because a litigant generally may "challenge the constitutionality of a statute only insofar as it adversely affects his own rights." *Clements* v. *Fashing*, 457 U.S. 957, 966 n.3 (1982). "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Ibid.* (citation omitted). The narrow-tailoring requirement does not create an exception to that rule; it enables a litigant to complain that a law restricts too much of his own speech, see, *e.g.*,

McCullen v. *Coakley*, 573 U.S. 464, 486-497 (2014), not that it restricts the speech of too many other persons. Because this case involves a candidate who won his election, the anticorruption rationale underlying the loan-repayment limit applies with full force here.

This Court has recognized, moreover, that Congress may "require that all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process," even if the rationale for a particular rule applies with greater force to some parties or candidates than to others. *McConnell*, 540 U.S. at 159. For example, Congress may subject minor parties to the same campaign-finance restrictions as the major parties, even though the minor parties' "slim prospects for electoral success" mean that they "pose no threat of corruption comparable to that posed by the [major parties]." *Ibid.*; see *Buckley*, 424 U.S. at 34-35. By the same logic, Congress need not exempt losing candidates from the rules that properly apply to winning candidates. It is also significant, in this regard, that the loan-repayment limit has a practical constraining effect only on candidates who are able to raise more than $250,000 in post-election funds. Because post-election contributions are much more often made to winning candidates than to losing ones, see p. 37, *supra*, the practical impact of the statutory limit falls predominantly on candidates who prevail.

In all events, BCRA's severability clause provides that, "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 52 U.S.C. 30144.

If the loan-repayment limit violates the First Amendment as applied to losing candidates, the proper remedy would be to hold as much if a losing candidate adversely affected by the limit brings suit to challenge it. But the limit would remain valid as applied to winning candidates like Senator Cruz.

b. After concluding that the loan-repayment limit restricts too much speech, the district court complained that it restricted too little, finding it "substantially underinclusive as to the government's asserted interests." J.S. App. 32a. But "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee*, 575 U.S. at 449 (citation omitted); see *McConnell*, 540 U.S. at 207-208; *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992). Rather, underinclusiveness poses a constitutional problem only when it raises "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee*, 575 U.S. at 448 (citation omitted).

The district court deemed the loan-repayment limit underinclusive because it applies to contributions that repay "personal loans" but not "other types of campaign debt." J.S. App. 32a. But contributions that repay candidate loans differ fundamentally from contributions that repay third-party loans. The former result in dollar-for-dollar increases in the candidate's personal wealth, while the latter do not. See pp. 33-35, *supra*. That the loan-repayment limit applies only to the former shows not underinclusiveness but narrow tailoring.

The district court also found the loan-repayment limit underinclusive because it "does not restrict pre-election contributions to incumbents," who are likewise "in a position to grant favors." J.S. App. 33a. The court

saw "no reason why a contribution made to an incumbent before the election poses no risk of corruption, but the same contribution made after the election to a winning candidate (now incumbent) and applied to pre-election debt poses a unique and heightened concern." *Ibid.* But a pre-election contribution, even to an incumbent, differs in meaningful ways from a post-election contribution.

A pre-election contribution usually will not add to the candidate's personal wealth; a post-election contribution that repays personal loans will. And unlike a pre-election contribution to an incumbent, a post-election contribution does not further the usual *legitimate* purposes of campaign contributions, since it cannot be used to fund electoral advocacy during the relevant campaign and cannot increase the incumbent's chances of winning the election. The district court also appeared to suggest that Congress should have pursued its anti-corruption interest by enacting different limits for incumbents than for challengers, see J.S. App. 33a, but that asymmetrical scheme would itself raise constitutional concerns, see *Davis*, 554 U.S. at 738.

Finally, the district court found the loan-repayment limit underinclusive because it permits a candidate to use up to $250,000 in post-election funds to repay personal loans. J.S. App. 32a-33a. That objection is difficult to reconcile with this Court's observation that there is "no constitutional basis for attacking contribution limits on the ground that they are too high." *Davis*, 554 U.S. at 737. It also overlooks the reality that "[n]o legislation pursues its purposes at all costs." *Cyan, Inc.* v. *Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1073 (2018) (citation omitted). Like many other provisions of federal campaign-finance law, the loan-

repayment limit reflects Congress's effort to strike an appropriate balance between potentially competing objectives, so as to vindicate the compelling government interest in avoiding actual or apparent *quid pro quo* corruption while preserving candidates' ability to "amass the resources necessary to reach the electorate." *Buckley*, 424 U.S. at 34. Although Congress could have forbidden all use of post-election contributions to repay personal loans, it chose instead to accommodate candidates who wish to use personal loans to finance their campaigns. This Court should not "punish [Congress] for leaving open more, rather than fewer, avenues of expression." *Williams-Yulee*, 575 U.S. at 452.

CONCLUSION

The judgment of the district court should be vacated, and the case should be remanded with instructions to dismiss for lack of standing appellees' challenge to BCRA's loan-repayment limit. Alternatively, the judgment of the district court on the merits should be reversed.

Respectfully submitted.

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APPENDIX

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

Limitations on contributions and expenditures

(j) Limitation on repayment of personal loans

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

2. 11 C.F.R. 116.11 provides:

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

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

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

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

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

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

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

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

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

(3) The candidate's principal campaign committee must report the transactions in paragraphs (c)(1) and (c)(2) of this section in the first report scheduled to be

filed after the election pursuant to 11 CFR 104.5(a) or (b).

(d) This section applies separately to each election.

3. 11 C.F.R. 116.12 provides:

Repayment of candidate loans of $250,000 or less.

(a) A candidate's authorized committee may repay to the candidate a personal loan, as defined in 11 CFR 116.11(a), of up to $250,000 where the proceeds of the loan were used in connection with the candidate's campaign for election. The repayment may be made from contributions to the candidate or the candidate's authorized committee at any time before, on, or after the date of the election.

(b) This section applies separately to each election.

(c) Nothing in this section shall supersede 11 CFR 9035.2 regarding the limitations on expenditures from personal funds or family funds of a presidential candidate who accepts matching funds.