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*

## JOINT APPENDIX


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**JURISDICTIONAL STATEMENT FILED: JULY 2, 2021**
**JURISDICTION POSTPONED: SEPT. 30, 2021**

**TABLE OF CONTENTS**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:19cv908

TED CRUZ FOR SENATE; RAFAEL EDWARD CRUZ, ALSO KNOWN AS "TED", PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION; ELLEN L. WEINTRAUB IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE FEDERAL ELECTION COMMISSION; MATTHEW S. PETERSEN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE FEDERAL ELECTION COMMISSION; CAROLINE C. HUNTER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE FEDERAL ELECTION COMMISSION; STEVEN T. WALTHER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE FEDERAL ELECTION COMMISSION, DEFENDANTS

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 4/1/19 | 1 | COMPLAINT against FEDERAL ELECTION COMMISSION, CAROLINE C. HUNTER, MATTHEW S. PETERSEN, STEVEN T. WALTHER, ELLEN WEINTRAUB (Filing fee $ 400 receipt number 0090-6031911) filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Attachments: # 1 Civil Cover Sheet, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons) (Cooper, Charles) (Entered: 04/01/2019) |
| 4/1/19 | 2 | MOTION to Convene Three-Judge Court by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE (Cooper, Charles) (Entered: 04/01/2019) |
| | | * * * * * |
| 6/7/19 | 25 | MOTION to Dismiss for Lack of Jurisdiction by FEDERAL ELECTION COMMISSION (Attachments: # 1 Text of Proposed Order) (Nesin, Seth) (Entered: 06/07/2019) |
| 6/7/19 | 26 | Memorandum in opposition to re 2 MOTION to Convene Three-Judge Court filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order) (Nesin, Seth) (Entered: 06/07/2019) |
| | | * * * * * |
| 6/28/19 | 29 | Memorandum in opposition to re 25 MOTION to Dismiss for Lack of Jurisdiction filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (At- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | tachments: # 1 Text of Proposed Order) (Cooper, Charles) (Entered: 06/28/2019) |
| 6/28/19 | 30 | REPLY to opposition to motion re 2 MOTION to Convene Three-Judge Court filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Attachments: # 1 Text of Proposed Order) (Cooper, Charles) (Entered: 06/28/2019) |
| | | * * * * * |
| 7/12/19 | 32 | REPLY to opposition to motion re 25 MOTION to Dismiss for Lack of Jurisdiction filed by FEDERAL ELECTION COMMISSION. (Nesin, Seth) (Entered: 07/12/2019) |
| | | * * * * * |
| 12/6/19 | | Minute Entry for proceedings held before Judge Amit P. Mehta: Oral Argument held on 12/6/2019. Arguments heard and taken under advisement. (Court Reporter: William Zaremba) (zjd) (Entered: 12/06/2019) |
| 12/24/19 | 34 | MEMORANDUM OPINION AND ORDER granting Plaintiffs' 2 Motion to Convene |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Three-Judge Court, and denying Defendants' 25 Motion to Dismiss for Lack of Jurisdiction. The Clerk of Court is directed to notify the Chief Judge of the D.C. Circuit for assignment of this matter to a three-judge district court. See the attached Memorandum Opinion and Order for additional details. Signed by Judge Amit P. Mehta on 12/24/2019. (lcapm1) Modified document type on 1/28/2020 (zjd). (Entered: 12/24/2019) |
| | | * * * * * |
| 1/7/20 | 36 | ANSWER to Complaint by FEDERAL ELECTION COMMISSION. (Nesin, Seth) (Entered: 01/07/2020) |
| 1/9/20 | 37 | ORDER of USCA filed in USCA on January 9, 2020, designating Circuit Judge Neomi J. Rao and District Judge Timothy J. Kelly to serve with District Judge Amit P. Mehta to hear and determine this case. Judge Rao will preside. (Signed by Merrick B. Garland on 1/9/2020). (jf) Modified on 1/10/2020 to edit text (zrdj). (Entered: 01/10/2020) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 2/14/20 | 42 | MOTION Partial remand to single district court judge, MOTION to Compel by FEDERAL ELECTION COMMISSION (Attachments: # 1 Exhibit FEC Exhibit A, # 2 Exhibit FEC Exhibit B, # 3 Exhibit FEC Exhibit C, # 4 Exhibit FEC Exhibit D, # 5 Exhibit FEC Exhibit E, # 6 Exhibit FEC Exhibit F, # 7 Text of Proposed Order Prop. Order for Mot. for Remand, # 8 Text of Proposed Order Prop. Order for Mot. to Compel) (Senanayake, Tanya) (Entered: 02/14/2020) |
| 2/21/20 | 43 | Memorandum in opposition to re 42 MOTION Partial remand to single district court judge MOTION to Compel filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Attachments: # 1 Exhibit 1—Maddux Declaration, # 2 Exhibit 2—Cruz Committee's Privilege Log, # 3 Exhibit 3—Senator Cruz's Privilege Log, # 4 Text of Proposed Order, # 5 Text of Proposed Order) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | (Cooper, Charles) (Entered: 02/21/2020) |
| 2/28/20 | 44 | REPLY to opposition to motion re 42 MOTION Partial remand to single district court judge MOTION to Compel filed by FEDERAL ELECTION COMMISSION. (Senanayake, Tanya) (Entered: 02/28/2020) |
| | | * * * * * |
| 3/30/20 | 45 | MEMORANDUM OPINION AND ORDER granting in part and denying in part Defendants' 42 Consolidated Motion for Partial Remand and to Compel Discovery Responses. See the attached Memorandum Opinion and Order for additional details. Signed by Circuit Judge Neomi J. Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly on 3/30/2020. (lcapm1). Modified on 3/30/2020 (lcapm1). (Entered: 03/30/2020) |
| | | * * * * * |
| 4/6/20 | 46 | MOTION for Reconsideration re 45 Memorandum & Opinion, by RAFAEL EDWARD CRUZ, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | TED CRUZ FOR SENATE (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Text of Proposed Order) (Cooper, Charles) (Entered: 04/06/2020) |
| 4/7/20 | 47 | Unopposed MOTION to Hold in Abeyance Plaintiffs' Claims Against the Regulation by FEDERAL ELECTION COMMISSION (Attachments: # 1 Text of Proposed Order) (Senanayake, Tanya) (Entered: 04/07/2020) |
| | | * * * * * |
| 4/13/20 | 48 | Memorandum in opposition to re 46 MOTION for Reconsideration re 45 Memorandum & Opinion, filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Nesin, Seth) (Entered: 04/13/2020) |
| 4/15/20 | 49 | ORDER granting Defendants' 47 Unopposed Motion to Hold Plaintiffs' APA Claims in Abeyance. Counts III-V of Plaintiffs' Complaint are held in abey- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | ance. The Commission's service of the administrative record and filing of its certified list of the contents of that record are deferred until further order of this court. See the attached Order for additional details. Signed by Circuit Judge Neomi J. Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly on 4/15/2020. (lcapm1) (Entered: 04/15/2020) |
| 4/15/20 | 50 | REPLY to opposition to motion re 46 MOTION for Reconsideration re 45 Memorandum & Opinion, filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Attachments: # 1 Exhibit A) (Cooper, Charles) (Entered: 04/15/2020) |
| | | * * * * * |
| 4/24/20 | 54 | ORDER denying Plaintiffs' 46 Motion to Reconsider. See the attached Order for additional details. Signed by Circuit Judge Neomi Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly on |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | 4/24/2020. (lcapm1) (Entered: 04/24/2020) |
| | | * * * * * |
| 6/9/20 | 61 | MOTION for Summary Judgment by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE (Attachments: # 1 Memorandum in Support, # 2 Statement of Facts, # 3 Declaration of Cabell Hobbs, # 4 Declaration of John D. Ohlendorf, # 5 Text of Proposed Order) (Cooper, Charles) (Entered: 06/09/2020) |
| | | * * * * * |
| 7/14/20 | 65 | MOTION for Summary Judgment with statement of material facts and statement of genuine issues by FEDERAL ELECTION COMMISSION (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Text of Proposed Order Proposed Order) (Senanayake, Tanya) (Entered: 07/14/2020) |
| 7/14/20 | 66 | Memorandum in opposition to re 61 MOTION for Summary Judgment with Statement of Material Facts and Statement of Genuine Issues (For Exhibits See Docket Entry 65) filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order Proposed Order) (Senanayake, Tanya) Modified docket event/text on 7/15/2020 (eg). (Entered: 07/14/2020) |
| 8/11/20 | 67 | Memorandum in opposition to re 65 MOTION for Summary Judgment with statement of material facts and statement of genuine issues filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Attachments: # 1 Statement of Facts Response, # 2 Text of Proposed Order) (Cooper, Charles) (Entered: 08/11/2020) |
| 8/11/20 | 68 | REPLY to opposition to motion re 61 MOTION for Summary |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Judgment filed by RAFAEL EDWARD CRUZ, TED CRUZ FOR SENATE. (Cooper, Charles) (Entered: 08/11/2020) |
| | | * * * * * |
| 9/8/20 | 70 | REPLY to opposition to motion re 65 MOTION for Summary Judgment with statement of material facts and statement of genuine issues filed by FEDERAL ELECTION COMMISSION. (Nesin, Seth) (Entered: 09/08/2020) |
| | | * * * * * |
| 10/28/20 | | Minute Entry for Three-Judge Court Panel Hearing proceedings held before Circuit Judge Neomi J. Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly: Oral Argument held on 10/28/2020 re 61 65 Cross-Motions for Summary Judgment. Arguments heard and taken under advisement. (Court Reporter: William Zaremba) (zjd) Modified on 10/28/2020 to add in type of hearing. (ztnr) (Entered: 10/28/2020) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 6/3/21 | 71 | MEMORANDUM OPINION re: 61 Plaintiffs' Motion for Summary Judgment and 65 Defendants' Motion for Summary Judgment. See the attached Memorandum Opinion for additional details. Signed by Circuit Judge Neomi J. Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly on 6/3/2021. (lcapm1) Modified on 6/3/2021 (lcns). (Entered: 06/03/2021) |
| 6/3/21 | 72 | ORDER: For the reasons stated in the 71 Memorandum Opinion, the court grants Plaintiffs' 61 Motion for Summary Judgment and denies Defendants' 65 Motion for Summary Judgment. See the attached Order for further details. Signed by Circuit Judge Neomi J. Rao, District Judge Amit P. Mehta, and District Judge Timothy J. Kelly on 6/3/2021. (lcapm1) (Entered: 06/03/2021) |
| 6/11/21 | 73 | NOTICE of Filing an Appeal with the Supreme Court by Harry Jacobs Summers on behalf of FEDERAL ELECTION COMMISSION (Summers, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Harry) Modified on 6/16/2021 (eg). (Entered: 06/11/2021) |
| 6/13/21 | 74 | Amended NOTICE of Filing an Appeal with the Supreme Court by Harry Jacobs Summers on behalf of FEDERAL ELECTION COMMISSION (Summers, Harry) Modified on 6/16/2021 (eg). (Entered: 06/13/2021) |
| | | * * * * * |
| 10/6/21 | 76 | SUPREME COURT ORDER (zjf) (Entered: 10/12/2021) |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-908

TED CRUZ FOR SENATE, 815 A BRAZOS, PMB 550 AUSTIN, TX 78701, AND RAFAEL EDWARD ("TED") CRUZ 815 A BRAZOS, PMB 550 AUSTIN, TX 78701, PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, AND ELLEN L. WEINTRAUB, MATTHEW S. PETERSEN, CAROLINE C. HUNTER, AND STEVEN T. WALTHER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE FEDERAL ELECTION COMMISSION 1050 FIRST STREET, N.E. WASHINGTON, D.C. 20002, DEFENDANTS

Filed: Apr. 1, 2019

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**PRELIMINARY STATEMENT**

1. The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech." This bedrock liberty was designed to ensure the full and free political debate that is the hallmark of our democratic form of government. At its core, it protects the rights of citizens to engage in political speech. Since the founding of the republic, much of that speech has originated with candidates for public office in the context of elections.

2. Section 304 of the Bipartisan Campaign Reform Act ("BCRA"), which amended the Federal Election Campaign Act of 1971 (as amended, "FECA"), abridges political speech at the very core of the First Amendment's guarantee. Specifically, Section 304 of BCRA provides that if a candidate "incurs personal loans . . . in connection with the candidate's campaign for election," his or her authorized campaign committee "shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election." 52 U.S.C. § 30116(j). The FEC has interpreted this statute to restrict repayment not only of loans secured or guaranteed by the candidate for his or her campaign, but also of loans made to the campaign from the candidate's personal funds. *See* 11 C.F.R. § 116.11. BCRA and its implementing regulation thus effectively restrict a candidate's ability personally to fund his or her own campaign for federal office by capping at $250,000 the amount of money raised after an election that an authorized campaign committee may use to discharge a pre-election debt owed to the candidate. Sanctions for violating Section 304 include substantial civil fines and, for a knowing and willful violation, criminal penalties of up to five years in prison.

3. The $250,000 post-election loan-repayment limitation violates the fundamental First Amendment rights of candidates, their authorized campaign committees, and their donors. It restricts the political speech of candidates and their campaign committees by limiting the time period in which the candidate may raise money to communicate his or her political message and by ef-

fectively limiting the candidate's ability to lend the campaign necessary funds. Criminalizing this basic means of financing political communication infringes a candidate's "fundamental . . . right to spend personal funds for campaign speech." *Davis v. FEC*, 554 U.S. 724, 738 (2008). In addition, the post-election repayment limitation restricts the speech of those potential donors who would otherwise support a candidate financially by contributing after an election to fund pre-election political speech.

4. In short, Section 304 of BCRA and its implementing regulation are precisely the sort of laws that the First Amendment was designed to prevent and that the Supreme Court has consistently held unconstitutional. These arbitrary restrictions on core political speech by candidates, their campaign committees, and their supporters are invalid and must be struck down.

**NATURE OF THIS ACTION**

5. This is an action for declaratory relief invalidating Section 304 of BCRA, 52 U.S.C. § 30116(j), and its implementing regulation, 11 C.F.R. § 116.11, and for injunctive relief against enforcement of those provisions by the Defendants, on the grounds that: (1) Section 304 and its implementing regulation infringe Plaintiffs' freedom of speech in violation of the First Amendment to the Constitution of the United States; (2) those provisions infringe the First Amendment rights of potential post-election donors to Plaintiffs' federal election campaign; and (3) the implementing regulation, Section 116.11, is not in accordance with BCRA itself.

6. On March 27, 2002, President George W. Bush signed BCRA into law, thereby enacting a comprehensive revision and enlargement of the Nation's campaign finance regulatory regime. This revision and enlargement sought to implement sweeping new restrictions on the rights of corporations, individuals, and other entities to participate in the political process and to exercise their constitutional right to express their political views.

7. The Supreme Court has repeatedly invalidated provisions of BCRA that restricted core political speech. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003). Most pertinently, in *Davis v. FEC*, 554 U.S. 724 (2008), the Court struck down the so-called "Millionaires' Amendment," which effectively penalized a self-financing candidate by raising contribution limits for his opponent when the self-financing candidate's campaign expenditures exceeded a certain amount. And in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court reaffirmed *Davis* and applied its reasoning to invalidate a state public-financing scheme that similarly "force[d] [a] privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy." 564 U.S. 721, 737 (2011) (quoting *Davis*, 554 U.S. at 739).

8. Although the statutory loan repayment limitation "is in the same statutory subsection of BCRA (section 304(a)) as other provisions that the Supreme Court in *Davis* held to be unconstitutional," Defendant FED-

ERAL ELECTION COMMISSION ("FEC") has concluded that "the *Davis* decision did not invalidate the personal loan provision in BCRA." Notice 2008-14, 73 Fed. Reg. 79597-01, 79600. (Dec. 30, 2008).

9. The FEC has also concluded that the loan repayment restriction challenged here is severable from the provision of Section 304 struck down in *Davis* and that it therefore is valid and enforceable notwithstanding the *Davis* decision. *Id.*

10. Like the other provisions of BCRA that the Supreme Court has invalidated, the loan repayment limitation of Section 304 and its implementing regulation infringe the fundamental First Amendment rights of candidates, their authorized campaign committees, and their supporters to engage in political speech.

11. For this reason, and for the reasons set forth in the allegations below, Plaintiffs seek a declaration that the loan repayment restrictions of Section 304, 52 U.S.C. § 30116(j), and its implementing regulation, 11 C.F.R. § 116.11, are unconstitutional, and an order enjoining Defendants from enforcing them.

**PARTIES TO THIS ACTION**

12. Plaintiff RAFAEL EDWARD "TED" CRUZ ("CRUZ") was first elected United States Senator from the State of Texas in 2012, and he was re-elected to that same position in the 2018 general election. During the 2018 election cycle, CRUZ'S campaign was funded in large part by contributions from individual supporters. Prior to the 2018 general election, CRUZ's authorized campaign committee also received loans originating from CRUZ's personal bank account funds and CRUZ's

margin-approved brokerage account that is secured with CRUZ's personal assets.

13. Plaintiff TED CRUZ FOR SENATE ("CRUZ COMMITTEE") is the official authorized campaign committee for the 2018 primary and general election campaigns of CRUZ.

14. Defendant FEDERAL ELECTION COMMISSION was established by 52 U.S.C. § 30106 and is an independent agency with regulatory authority over federal elections and campaigns of candidates for federal office. The duties of the FEC include the collection, review, and audit of campaign finance disclosures by regulated entities, the enforcement of the provisions of FECA, including as amended by BCRA, and oversight of the public funding of Presidential elections. The FEC has exclusive jurisdiction with respect to the civil enforcement of FECA.

15. Defendant ELLEN L. WEINTRAUB is a Commissioner and the Chair of the FEC. As a Commissioner, she is responsible for administering and enforcing FECA, as amended by BCRA. She is sued in her official capacity.

16. Defendant MATTHEW S. PETERSEN is a Commissioner and the Vice Chair of the FEC. As a Commissioner, he is responsible for administering and enforcing FECA, as amended by BCRA. He is sued in his official capacity.

17. Defendant CAROLINE C. HUNTER is a Commissioner of the FEC. As a Commissioner, she is responsible for administering and enforcing FECA, as amended by BCRA. She is sued in her official capacity.

18. Defendant STEVEN T. WALTHER is a Commissioner of the FEC. As a Commissioner, he is responsible for administering and enforcing FECA, as amended by BCRA. He is sued in his official capacity.

**JURISDICTION AND VENUE**

19. This Court has jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202, and § 403 of BCRA.

20. Plaintiffs request that a three-judge court be convened pursuant to 28 U.S.C. § 2284, and section 403(a)(1) of BCRA, 52 U.S.C. § 30110 note.

21. Venue in this Court is proper pursuant to section 403 of BCRA, 52 U.S.C. § 30110 note.

**FACTUAL BASIS FOR CLAIMS**

22. Section 304 of BCRA imposes a $250,000 limit on an authorized campaign committee's use of post-election campaign contributions to repay a candidate's personal campaign 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.

52 U.S.C. § 30116(j).

23. While the text of Section 304 reaches only personal loans that a candidate "*incurs*" in connection with his campaign, *id.* (emphasis added), the FEC's implementing regulation applies not only to loans incurred by

the candidate for the benefit of his campaign, but also to loans that a candidate *makes* directly to the campaign from his personal funds. 11 C.F.R. § 116.11(a).

24. When it promulgated 11 C.F.R. Section 116.11, the FEC acknowledged that this interpretation is difficult to square with the ordinary meaning of the term "incur," and that by its text Section 304 "arguably" applies only to "loans that are made to candidates rather than loans made by candidates." Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003). But the FEC nonetheless interpreted Section 304 as reaching loans made by candidates to their committees because it thought that interpretation justified by BCRA's "legislative history" and the "practical consequences" of adopting the narrow interpretation. *Id.*

25. When "the aggregate outstanding balance of the personal loans exceeds $250,000 after the election," the FEC's regulations establish a post-election time limit on a campaign committee's ability to use cash on hand as of the date of the election to repay pre-election debts owed to the candidate. 11 C.F.R. § 116.11(c) "If [a candidate's] authorized committee uses the amount of cash on hand as of the day after the election to repay all or part of [the candidate's] personal loans, it must do so within 20 days of the election." *Id.* § 116.11(c)(1). Any outstanding loan balance in excess of the $250,000 cap must be treated "as a contribution by the candidate." *Id.* § 116.11(c)(2).

26. The FEC may seek civil penalties, including the greater of $5,000 or the amount of the contributions or expenditures at issue, for any violation of FECA. 52

U.S.C. § 30109(a)(5)(A). If a violation is knowing or willful, the FEC may seek civil penalties of up to $10,000 or double the amount of the contributions or expenditures at issue. *Id.* § 30109(a)(5)(B).

27. Criminal penalties attach to any knowing and willful violation of FECA that involves the making, receiving, or reporting of any contributions, donations, or expenditures totaling $2,000 or more during a calendar year. *Id.* § 30109(d)(1)(A). An individual or corporation that knowingly commits such a violation is subject to fines under Title 18 of the United States Code, and imprisonment for up to five years, depending on the amount of the repayment. *Id.* § 30109(d)(1)(A)(ii).

28. Prior to the November 6, 2018 general election, two loans totaling $260,000 were made to CRUZ's authorized campaign committee to help finance his campaign for the United States Senate. Of the $260,000 lent to CRUZ COMMITTEE, $5,000 originated from CRUZ's personal bank accounts and $255,000 originated from a margin loan that is secured with CRUZ's personal assets.

29. CRUZ COMMITTEE had approximately $2.2 million on hand as of 11:59 p.m. on November 6, 2018; however, CRUZ COMMITTEE also incurred nearly $2.5 million in debts in connection with the 2018 general election, leaving it with approximately $406,194 in "net debts outstanding," as that term is defined and calculated pursuant to 11 C.F.R. § 110.1(b)(3). CRUZ COMMITTEE accordingly used the funds it had on hand to pay vendors and meet other obligations instead of repaying CRUZ's loans.

30. As of November 27, 2018, the day following the 20-day deadline for repaying any personal loans in excess of the $250,000 limit under Section 116.11(c)(1), CRUZ COMMITTEE owed CRUZ $260,000 on the general election loans. CRUZ COMMITTEE subsequently made four repayments on the margin loan secured by CRUZ's assets totaling $250,000: (i) $25,000 on December 4, 2018; (ii) $100,000 on December 11, 2018; (iii) $75,000 on December 18, 2018; and (iv) $50,000 on December 24, 2018. CRUZ COMMITTEE has not repaid any portion of CRUZ's $5,000 personal loan.

31. Since CRUZ COMMITTEE has repaid the statutory maximum of $250,000 from money raised after the election toward the various loans originating from CRUZ's personal bank accounts and CRUZ's margin-approved brokerage account, CRUZ COMMITTEE continues to owe CRUZ $10,000 on the general election loans: the remaining $5,000 balance of the margin loan secured by CRUZ's assets and CRUZ's $5,000 personal loan.

32. Because more than 20 days have now passed since the general election, the challenged statute and its implementing regulation prevent CRUZ COMMITTEE from making any additional payments toward the remaining balance due on the debts originating from CRUZ's personal bank accounts or the margin loan secured with CRUZ's personal assets, even if such payments are from contributions specifically raised, received, and designated for the retirement of debts in accordance with FEC regulations.

33. Absent the restrictions of Section 304 and the Commission's corresponding regulation, Plaintiffs would solicit debt-retirement funds from potential donors and

would use post-election contributions to defray the remaining $10,000 loan balance.

## CLAIMS FOR RELIEF

### COUNT I

34. Plaintiffs hereby reallege and incorporate each of the foregoing allegations as if set forth herein.

35. By its terms, Section 304 of BCRA restricts the use of post-election contributions to repay loans incurred by a candidate for his or her campaign in order to disseminate the candidate's political message.

36. In addition, the FEC has interpreted this statute to restrict the repayment of loans made by a candidate from personal funds to his or her campaign for this purpose.

37. A candidate's political message is core political speech.

38. Regardless of whether Section 304 applies only to loans incurred by a candidate or also extends to loans made by a candidate from personal funds, the Government has no interest that can justify the challenged loan repayment restriction's infringement of Plaintiffs' First Amendment right to freedom of speech.

39. Because the Government has no interest that can justify the challenged statute's infringement of Plaintiffs' First Amendment rights to freedom of speech, the statute is unconstitutional on its face and as applied to Plaintiffs.

40. Even if Section 304's loan repayment restriction could be justified as applied to Plaintiffs and other winning candidates, the statute would have no justifiable

application to losing candidates. Therefore, the loan repayment restriction is in any event unconstitutionally overbroad and is thus invalid in its entirety.

41. Accordingly, BCRA's loan repayment restriction is an unconstitutional abridgement of Plaintiffs' First Amendment right of free speech.

**COUNT II**

42. Plaintiffs hereby reallege and incorporate each of the foregoing allegations as if set forth herein.

43. Contributions to political campaigns are protected speech, whether made before or after an election.

44. Regardless of whether Section 304 applies only to loans incurred by a candidate or also extends to loans made by a candidate from personal funds, BCRA's loan repayment restriction is an unconstitutional infringement on the First Amendment rights of potential post-election donors to Plaintiffs and to the campaigns of all candidates for federal office.

**COUNT III**

45. Plaintiffs hereby reallege and incorporate each of the foregoing allegations as if set forth herein.

46. Because the challenged statute is unconstitutional, the FEC's regulation implementing that statute, 11 C.F.R. § 116.11, is likewise unconstitutional and is, therefore, "not in accordance with law." 5 U.S.C. § 706(2)(a).

**COUNT IV**

47. Plaintiffs hereby reallege and incorporate each of the foregoing allegations as if set forth herein.

48. The FEC's 20-day regulatory limit on using cash on hand as of the date of the election to repay the candidate's personal campaign loans after an election violates the First Amendment, is not in accordance with law, and is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(c)(1).

**COUNT V**

49. Plaintiffs hereby reallege and incorporate each of the foregoing allegations as if set forth herein.

50. Section 304 encompasses only personal loans that a candidate "*incurs* . . . in connection with the candidate's campaign." 53 U.S.C. § 30116(j) (emphasis added).

51. The FEC's regulatory inclusion of loans not only "incurred" by a candidate in connection with his campaign but also loans the candidate directly *makes* to his campaign from his personal funds is contrary to the plain text of Section 304, and it is thus not in accordance with law and is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(c)(1).

**RELIEF REQUESTED**

52. Wherefore, Plaintiffs respectfully pray that a three-judge district court be convened and that said three-judge court hear this action, and upon such hearing:

a. Declare that Section 304's loan repayment restriction, 52 U.S.C. § 30116(j), violates Plaintiffs' rights under the Constitution of the United States;

b. Declare that 11 C.F.R. § 116.11 violates Plaintiffs' rights under the Constitution of the United

States or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

c. Permanently enjoin and restrain Defendants, their agents, and assistants from enforcing, executing, and otherwise applying the challenged provisions; and

d. Grant and order such further relief as the Court may deem just and proper, together with the costs and expenses, including attorney's fees, of this action.

Dated: Apr. 1, 2019

Respectfully submitted,

/s/ CHARLES J. COOPER

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 19-908 (APM)

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 7, 2019

MOTION TO DISMISS AND OPPOSITION

**DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR A THREE-JUDGE COURT AND MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION**

* * * * *

**2. The Loan Repayment Limit Is Rationally Related to the Government's Anti-Corruption Interests and Not Overbroad**

Plaintiffs also cannot demonstrate, as they must, that the Loan Repayment Limit is an irrational means for Congress to address concerns about corruption and its appearance stemming from campaigns using funds received from contributors after an election to give directly to the candidate. Even if there are better means by which Congress could have addressed its anticorruption interests, the Loan Repayment Restriction would nonetheless easily pass constitutional muster under rational basis review.

The Loan Repayment Limit does not restrict political spending. And courts have repeatedly held that even laws that do limit political contributions or spending (or even prohibit certain types of such spending) are not overbroad and are sufficiently tailored to the anticorruption interests where those restrictions target the types of contributions or spending most likely to result in corruption while leaving open other avenues for political speech and association. *See, e.g.*, *Buckley*, 424 U.S. at 28, 29, 33-35 (contribution limits closely drawn to anticorruption interests because they focus on "the narrow aspect of political association where the actuality and potential for corruption have been identified").

For two reasons, the Loan Repayment Limit is tailored to apply in situations when the strength of the government's already important interests are at their peak. First, the limit applies where a campaign has spent hundreds of thousands of dollars received *after* an election, at a time when the winner is already known and thus in a better position than a mere candidate to guarantee legislative favors to big donors. Second, the Loan Repayment Limit applies to funds given by a campaign to a candidate or officeholder who can then essentially pocket those funds and use them for any purpose.

Given these two aspects of the Loan Repayment Limit, in the absence of the provision, an individual interested in obtaining legislative favor with a newly elected Senator or Representative could give up to a total of $5,600 ($2,800 for the primary and general elections) that would go directly into the pocket of that officeholder. Even when used for campaign-related purposes, large contributions that are "given to secure a political quid pro quo from current and potential office

holders" undermine the "integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27. That system is threatened even further when federal candidates use contributions to subsidize their own personal expenses. At the very least, it *appears* corrupt to the public when candidates use contributions for their personal projects. And as the Supreme Court has explained, "the avoidance of the appearance" of corruption is "critical" to prevent the public's "confidence in the system of representative Government" from being "eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (internal quotation marks omitted).[22]

The Loan Repayment Limit is well-tailored for the additional reason that it does not restrict *any* avenues for independent political speech by candidates and campaign committees, or for contributions by candidate supporters. *See supra* pp. 29-35. Nor does the Loan Repayment Limit prevent campaigns from repaying candidate personal loans *in full* by using any funds before an election or by using their election-day cash on hand within 20 day of the election. *See supra* pp. 6-7.

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[22] In other contexts, the law recognizes the particular danger of elected officials receiving funds that they can use for any purpose from constituents. Giving something of value to a public official for the purpose of influencing an official act under other circumstances constitutes bribery. 18 U.S.C. § 201(b)(1). Similarly, the Senate Ethics Rules prohibit Senators from receiving gifts over $50, and limit the total amount of gifts a Senator may receive in an entire year to $100. *See* The Senate Code of Official Conduct, Select Committee on Ethics (March 2015), Rule XXXV(2)(A), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=EFA7BF74-4A50-46A5-BB6F-B8D26B9755BF (last visited on June 5, 2019). The Loan Repayment Restriction is another means by which such quid pro quo corruption and its appearance are diminished.

Finally, the Loan Repayment Limit is not overbroad because it applies equally to all candidates, including candidates who lost an election, as plaintiffs claim (*see* Compl.¶ 40). As previously discussed, the Loan Repayment Limit does not infringe on speech, and the overbreadth doctrine would only be applicable if the First Amendment were implicated. *See O'Donnell*, 209 F. Supp. 3d at 740 (rejecting overbreadth challenge against the personal-use ban because defendants "fail to identify *even one* fact pattern in which a prohibited expense would interfere with political speech"). But even if the Court finds some infringement of speech, "the overbreadth doctrine is not casually employed." *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39-40 (1999). To strike down a statute for being overbroad, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Any overbreadth of the Loan Repayment Restriction would be insubstantial in relation to its legitimate sweep. First, the statute's "plainly legitimate sweep" includes application to winning candidates and is thus extensive. *Broadrick*, 413 U.S. at 615. Though both winning and losing candidates carry debt from personal loans, winning candidates do possess a greater capacity to retire that debt through payment from contributions over time. *See, e.g.*, Peter Overby, *How Will Clinton Resolve Campaign Debt?*, National Public Radio (May 14, 2018, 6:00 AM), https://www.npr.org/templates/story/story.php?storyId=90425733 (noting the comment of a former FEC Commissioner and counsel to a losing presidential campaign that "only winners have an easy time

dealing with debt" and that debt retirement in the context of those not taking office "'is the hardest task in American politics'").

But even so, winning candidates do not mark the full extent of the Loan Repayment Limit's legitimate sweep, because incumbent candidates that lose are still officeholders for some time after their loss and other candidates who lose an election may be elected to federal office in the future.[23] In any case, courts have repeatedly upheld FECA restrictions that apply to *all* candidates against overbreadth challenges, even if the justification applied more to some candidates than others. *Buckley*, 424 U.S. at 29 (even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," it is nonetheless justified as a "prophylactic" to limit the *risk* and *appearance* of corruption arising inherently from large contributions because it is "difficult to isolate suspect contributions"); *McConnell*, 540 U.S. at 158-59 (restrictions on minor parties closely drawn despite unlikelihood of success because "[i]t is . . . reasonable to require that all parties and candidates follow the same set of rules designed to protect the integrity of the electoral process."); *Libertarian Nat'l Comm.*, 2019 WL 2180336 at *6 ("Because the First Amendment does not require Congress to ignore the fact that candidates, donors, and parties test the limits of the current law, prophylactic contribution limits are permissible—even vital—to forestall the

[23] The number of losing candidates who will never hold federal office to whom the Loan Repayment Restriction could apply is lessened even further by the fact that a substantial number of candidates for federal office are either not able to loan their campaign $250,000 or not able to raise $250,000 in campaign contributions.

worst forms of political corruption." (internal quotation marks and citations omitted)).

Indeed, if the Loan Repayment Limit did only apply to winning candidates, it would risk creating the very type of "asymmetrical" limit that the Supreme Court condemned in *Davis*, the primary case upon which plaintiffs' rely. And such a law would be administratively problematic for candidates, because a candidate deciding to loan his or her campaign money in advance of the election would not be able to accurately determine the likelihood he or she might be repaid. *Cf. O'Donnell*, 209 F. Supp. 3d at 740-41 (suggesting that under rational basis review, the personal-use ban's application to expenses "almost always personal in nature" would be constitutional even if justified only by "administrative efficiency").

Because plaintiffs have failed to identify any legitimate constitutional rights that are being infringed, and because plaintiffs cannot show that the Loan Repayment Limit fails to rationally serve government's legitimate interest in diminishing quid pro quo corruption and its appearance, the Court should deny plaintiffs' application for a three-judge court for failure to present a substantial question.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-908

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: Feb. 14, 2020

**PLAINTIFF TED CRUZ FOR SENATE'S RESPONSES AND OBJECTIONS TO DEFENDANTS' FIRST SET OF REQUESTS FOR ADMISSION, INTERROGATORIES, AND DOCUMENT REQUESTS**

Pursuant to Federal Rules of Civil Procedure 26, 33, 34, and 36, Plaintiff Ted Cruz for Senate ("Plaintiff" or "Cruz Committee"), by and through undersigned counsel, hereby serves upon all defendants in the above-captioned action ("Defendants") the following Responses and Objections to the Defendant Federal Election Commission's First Set of Discovery Requests to Plaintiff Ted Cruz for Senate (May 9, 2019) (the "Discovery Requests" or "Requests"). Plaintiff responds as follows:

**GENERAL OBJECTIONS AND LIMITATIONS**

1. If Defendants did not provide definitions in their Discovery Requests, Plaintiff Cruz Committee shall give the words therein their ordinary and common meaning in

responding to them. Plaintiff shall respond to the Discovery Requests as, and to the extent, required by the Federal Rules of Civil Procedure.

2. By responding and objecting to the Requests, Plaintiff Cruz Committee does not admit, adopt, or acquiesce in any factual or legal contention, assumption, or implication contained in the Requests.

3. Plaintiff Cruz Committee's responses are made subject to and without waiver of any objection as to the competency, relevancy, materiality, privilege, work-product protection, or admissibility, as evidence or for any other purpose, of any of the documents or information referred to, or of the responses given herein, or of the subject matter thereof, in any proceeding, including any hearing or trial in this action or any other subsequent proceedings; and said responses are made specifically subject to the right to object in any proceeding involving or relating to the subject matter of the requests responded to herein. Nothing contained in any response herein will be deemed an admission, concession, or waiver by Plaintiff as to the relevance, materiality, or admissibility of any answer to Defendants' Requests.

4. Plaintiff Cruz Committee objects to each and every request to the extent that it seeks information that is not in the possession, custody, or control of Plaintiff. Plaintiff will only search for documents in its current possession, custody, or control and will not search for documents in the possession, custody, or control of third parties.

5. Plaintiff Cruz Committee objects to each and every request to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the

needs of the case and the issues at stake in this litigation, and to the extent that it requests disclosure of information that is not relevant to any party's claim or defense.

6. Plaintiff Cruz Committee objects to each and every request on the ground that it is unduly burdensome and oppressive to the extent that it requests publicly available information or documents, information or documents already in Defendants' possession, custody, or control, or information or documents equally available to Defendants. To the extent Plaintiff provides such otherwise-available information or documents, it is as a courtesy and shall not be understood as a waiver of this objection.

7. Plaintiff Cruz Committee objects to each and every request to the extent that it seeks information protected as attorney work product, by the attorney-client privilege, joint defense privilege, First Amendment privilege, or any other cognizable privilege or restriction on discovery. Nothing contained in these responses—including but not limited to the inadvertent disclosure of privileged information—is intended as, or shall in any way be deemed, a waiver of any applicable privilege or protection.

8. Plaintiff Cruz Committee objects to each and every request to the extent that it seeks disclosure of documents or information where such disclosure would violate any federal or state constitutional, statutory, or common-law right of privacy, or any confidentiality agreement between Plaintiff and any entity or person.

9. Plaintiff Cruz Committee objects to each and every request to the extent that the "Definitions" or "Instructions" are vague, ambiguous, uncertain, unreasonable, overly broad, duplicative, unnecessarily complex, unduly burdensome or oppressive, or purport to impose on Plaintiff duties different from or in addition to those imposed by the Federal Rules of Civil Procedure.

10. Without limiting the generality of the foregoing objections, Plaintiff Cruz Committee objects to Defendants' definition of "YOU" and "YOUR" as overbroad and unduly burdensome, not proportional to the needs of the case, and/or unduly intrusive on attorney-client and work-product privileges to the extent it includes Plaintiff's attorneys or other third-party professionals who represent Plaintiff. Accordingly, Plaintiff will construe "YOU" and "YOUR" as limited to the Cruz Committee itself and its officers, employees, and contractors acting in the course and scope of their employment.

11. Without limiting the generality of the foregoing objections, Plaintiff Cruz Committee objects to Defendants' definition of "IDENTIFY" as overbroad and unduly burdensome and not proportional to the needs of the case to the extent it purports to require the identification of the residential address(es) and telephone number(s) of each person identified in response to a discovery request, in addition to their business address and telephone number.

12. The foregoing General Objections are hereby incorporated by reference into the response made with respect to each individual request. For particular emphasis, Plaintiff may, from time to time, expressly include one or more of the General Objections in the responses below. Plaintiff's response to each individual

request is made without prejudice to, and without in any respect waiving, any General Objection not expressly set forth in that response. Accordingly, the inclusion in any response below of any specific objection to a specific request is neither intended as, nor shall in any way be deemed, a waiver of any general objection or of any other specific objection made herein or that may be asserted at a later date.

13. Plaintiff Cruz Committee will make reasonable efforts to respond to each request based on a fair and reasonable interpretation of the request. If Defendants subsequently assert an interpretation of a request that differs from Plaintiff's interpretation, Plaintiff reserves the right to supplement its objections and responses. Further, Plaintiff reserves the right to supplement, revise, correct, add to, or clarify its objections, answers, or responses, or to rely upon additional or different information or contentions at any hearing, trial, or other proceeding in connection with the action. These responses are made without prejudice to Plaintiff's right to utilize subsequently discovered evidence at trial or in connection with pre-trial proceedings, or to amend these responses in the event that any information is subsequently acquired or learned by Plaintiff or inadvertently omitted from these responses. Plaintiff will supplement its responses in accordance with the Federal Rules of Civil Procedure as necessary based upon Plaintiff's further review of documents or acquisition of responsive documents from other sources. These responses are made in a good faith effort to supply documents and other things that are presently known.

**SPECIFIC OBJECTIONS AND RESPONSES**

**Request for Production No. 1:**

All ITEMS or COMMUNICATIONS that RELATE to the $255,000 LOAN.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000253-000257, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000372-000377, and CRUZ_COMMITTEE_002342-002346 as responsive to this request. Plaintiff is also in possession of additional re-

sponsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 2:**

All ITEMS or COMMUNICATIONS that RELATE to the $5,000 LOAN.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010). Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000639, CRUZ_COMMITTEE_000644-000645, and CRUZ_COMMITTEE_002342-002346 as responsive to this re-

quest. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 3:**

All ITEMS or COMMUNICATIONS that RELATE to (1) YOUR contributors or donors or potential contributors or donors, and (2) the restrictions on repayment of personal loans in 52 U.S.C. § 30116(j) or 11 C.F.R. § 116.11.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request on the basis that the phrase "potential contributors or donors" is vague, uncertain, or ambiguous. Plaintiff further objects to this Request on the grounds that it is overbroad, unduly burdensome and oppressive, and seeks documents that are not relevant to any party's claim or defense, to the extent that it seeks ITEMS or COMMUNICATIONS related to contributors or potential contributors or donors that do not refer or relate to the repayment of the LOANS. Plaintiff accordingly does not interpret the Request as referring to such unrelated ITEMS or COMMUNICATIONS. Plaintiff further objects to this Request to the extent that it seeks

information related to the purpose of the LOANS or the planning and filing of this lawsuit, on the basis that such information is not relevant to any party's claim or defense, given that the motivation for the LOANS has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979). Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort, or future election efforts, would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000253-000257, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000372-000377, CRUZ_COMMITTEE_000828-000829, CRUZ_COMMITTEE_000833-000836, CRUZ_COMMITTEE_000847-000849, CRUZ_COMMITTEE_000852-000853, CRUZ_COMMITTEE_000859-000860, CRUZ_COMMITTEE_000871, CRUZ_COMMITTEE_000875-000876, CRUZ_

COMMITTEE_000878-000881, CRUZ_COMMITTEE_000886-000888, CRUZ_COMMITTEE_000908-000915, CRUZ_COMMITTEE_000919, CRUZ_COMMITTEE_000921, CRUZ_COMMITTEE_000924, CRUZ_COMMITTEE_000931-000934, CRUZ_COMMITTEE_000937-000938, CRUZ_COMMITTEE_ 000941-000943, CRUZ_COMMITTEE_000946-000948, CRUZ_COMMITTEE_000951-000952, CRUZ_COMMITTEE_000955, CRUZ_COMMITTEE_000961, CRUZ_COMMITTEE_000963, CRUZ_COMMITTEE_000967, CRUZ_COMMITTEE_000969, CRUZ_COMMITTEE_000973-000974, and CRUZ_COMMITTEE_002342-002346 as responsive to this request. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 4:**

All COMMUNICATIONS with YOUR creditors (including but not limited to vendors and SENATOR CRUZ), to whom you made payments for CAMPAIGN debts after the November 6, 2018 election, that RELATE to the terms or conditions of YOUR payments to those creditors.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney

work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000187-000194, CRUZ_COMMITTEE_000253-000263, CRUZ_COMMITTEE_000274-000275, CRUZ_COMMITTEE_000278-000279, CRUZ_COMMITTEE_000285-000328, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000372-000377, CRUZ_COMMITTEE_000415-000419, CRUZ_COMMITTEE_000461-000464, CRUZ_COMMITTEE_000565-000575, CRUZ_COMMITTEE_000584, CRUZ_COMMITTEE_000648-000650, CRUZ_COMMITTEE_000653-000673, CRUZ_COMMITTEE_000769-000770, CRUZ_COMMITTEE_000806-000808, CRUZ_COMMITTEE_001443-001687, CRUZ_COMMITTEE_002070-002143, CRUZ_COMMITTEE_002146-002197, CRUZ_COMMITTEE_002214-002244, and CRUZ_COMMITTEE_002257-002270 as responsive to this request. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 5:**

All COMMUNICATIONS with any PERSON regarding the motivation, purpose, or planning for the LOANS.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that it requests information not relevant to any party's claim or defense, given that the motivation of the LOANS has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979).

**Request for Production No. 6:**

All ITEMS that RELATE to the terms or conditions of YOUR payments to YOUR creditors (including but not limited to vendors and SENATOR CRUZ), to whom you made payments for CAMPAIGN debts after the November 6, 2018 election.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are

equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000015-000194, CRUZ_COMMITTEE_000250-000263, CRUZ_COMMITTEE_000274-000275, CRUZ_COMMITTEE_000278-000282, CRUZ_COMMITTEE_000285-000328, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000372-000377, CRUZ_COMMITTEE_000415-000419, CRUZ_COMMITTEE_000461-000464, CRUZ_COMMITTEE_000565-000584, CRUZ_COMMITTEE_000639, CRUZ_COMMITTEE_000644-000645, CRUZ_COMMITTEE_000648-000650, CRUZ_COMMITTEE_000653-000673, CRUZ_COMMITTEE_000764-000767, CRUZ_COMMITTEE_000769-000770, CRUZ_COMMITTEE_000806-000808, CRUZ_COMMITTEE_000891-000907, CRUZ_COMMITTEE_000979-000985, CRUZ_COMMITTEE_001443-002069, CRUZ_COMMITTEE_002070-002143, CRUZ_COMMITTEE_002146-002197, CRUZ_COMMITTEE_002214-002244, CRUZ_COMMITTEE_

002257-002270, CRUZ_COMMITTEE_002342-002346, and CRUZ_COMMITTEE_002361-002567 as responsive to this request. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 7:**

All ITEMS or COMMUNICATIONS that RELATE to YOUR decisions about when, in what order, and how much to pay YOUR creditors (including but not limited to vendors and SENATOR CRUZ) after the November 6, 2018 election for CAMPAIGN debts.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objections to this Request to the extent it seeks documents related to the motivation or purpose behind Plaintiff's decision not to repay the LOANS during the period from November 7 through November 27, 2018, since such documents are not relevant to any party's claim or defense. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979). Plaintiff further objects to this Request to the

extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000015-000194, CRUZ_COMMITTEE_000250-000252, CRUZ_COMMITTEE_000258-000263, CRUZ_COMMITTEE_000274-000275, CRUZ_COMMITTEE_000278-000282, CRUZ_COMMITTEE_000285-000328, CRUZ_COMMITTEE_000415-000419, CRUZ_COMMITTEE_000461-000464, CRUZ_COMMITTEE_000565-000584, CRUZ_COMMITTEE_000639, CRUZ_COMMITTEE_000644-000650, CRUZ_COMMITTEE_000653-000674, CRUZ_COMMITTEE_000764-000767, CRUZ_COMMITTEE_000769-000770, CRUZ_COMMITTEE_000806-000808, CRUZ_COMMITTEE_000891-000907, CRUZ_COMMITTEE_000979-000985, CRUZ_COMMITTEE_001443-002069, CRUZ_COMMITTEE_002070-002143, CRUZ_COMMITTEE_002146-002197, CRUZ_COMMITTEE_002214-002244, CRUZ_COMMITTEE_002257-002270, CRUZ_COMMITTEE_002342-002346, and CRUZ_COMMITTEE_002361-002567 as responsive to this request. Plaintiff is also in possession of additional re-

sponsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 8:**

All ITEMS or COMMUNICATIONS that RELATE to injuries or burdens YOU claim in the COMPLAINT to have suffered as a result of 52 U.S.C. § 30116(j) or 11 C.F.R. § 116.11.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000015-000194, CRUZ_COMMITTEE_000250-000263,

CRUZ_COMMITTEE_000274-000275, CRUZ_COMMITTEE_000278-000280, CRUZ_COMMITTEE_000282, CRUZ_COMMITTEE_000285-000328, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000372-000377, CRUZ_COMMITTEE_000415-000419, CRUZ_COMMITTEE_000461-000464, CRUZ_COMMITTEE_000565-000584, CRUZ_COMMITTEE_000639, CRUZ_COMMITTEE_000644-000650, CRUZ_COMMITTEE_000653-000674, CRUZ_COMMITTEE_000764-000767, CRUZ_COMMITTEE_000769-000770, CRUZ_COMMITTEE_000806-000808, CRUZ_COMMITTEE_000891-000907, CRUZ_COMMITTEE_000979-000985, CRUZ_COMMITTEE_001443-001687, CRUZ_COMMITTEE_002053-002069, CRUZ_COMMITTEE_002070-002143, CRUZ_COMMITTEE_002146-002197, CRUZ_COMMITTEE_002214-002244, CRUZ_COMMITTEE_002257-002270, CRUZ_COMMITTEE_002342-002346, and CRUZ_COMMITTEE_002361-002567 as responsive to this request. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 9:**

All ITEMS or COMMUNICATIONS that RELATE to injuries or burdens YOU claim in the COMPLAINT that contributors or donors or potential contributors or donors have suffered as a result of 52 U.S.C. § 30116(j) or 11 C.F.R. § 116.11.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically

objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request on the basis that the phrase "potential contributors or donors" is vague, uncertain, or ambiguous. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks documents protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort, or future election efforts, would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff is producing the documents bates-numbered CRUZ_COMMITTEE_000187-000194, CRUZ_COMMITTEE_000250-000252, CRUZ_COMMITTEE_000258-000263, CRUZ_COMMITTEE_000274-000275, CRUZ_COMMITTEE_000278-000280, CRUZ_COMMITTEE_000285-000328, CRUZ_COMMITTEE_000367-000370, CRUZ_COMMITTEE_000415-000419, CRUZ_COMMITTEE_000461-000524, CRUZ_COMMITTEE_000565-000575, CRUZ_COMMITTEE_000584, CRUZ_COMMITTEE_000639, CRUZ_COMMITTEE_000644-000645, CRUZ_COMMITTEE_000648-000650, CRUZ_

COMMITTEE_000653-000673, CRUZ_COMMITTEE_000764-000767, CRUZ_COMMITTEE_000769-000770, CRUZ_COMMITTEE_000806-000808, CRUZ_COMMITTEE_000891-000907, CRUZ_COMMITTEE_000979-000985, and CRUZ_COMMITTEE_002342-002346 as responsive to this request. Plaintiff is also in possession of additional responsive documents that contain sensitive financial information, and is prepared to produce those documents upon the entry of an appropriate protective order.

**Request for Production No. 10:**

All ITEMS referred to or relied upon by you in answering the FEC's requests for admission and interrogatories.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff further incorporates its objections to the FEC's requests for admission and interrogatories as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it requests documents that are publicly available, that are already in Defendants' possession, custody, or control, or that are equally available to Defendants; and to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks documents protected as attorney work product, by the attorney-client privilege, or by the joint defense privilege.

Subject to and without waiver of the foregoing general and specific objections, Plaintiff refers Defendants

to its answers to Requests for Production 1-4 and 6-9 and states that it is in possession of no additional responsive, nonprivileged documents.

**Request for Production No. 11:**

All non-privileged ITEMS or COMMUNICATIONS that RELATE to the planning or filing of this lawsuit.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that the information it requests is not relevant to any party's claim or defense, given that information related to the planning and filing of this lawsuit has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979).

**Request for Admission No. 1:**

On November 27, 2018, YOU were relieved of any legal obligation to repay $10,000 of the LOANS by operation of 11 U.S.C. § 116.11(c)(2).

**Response:**

DENIED. There is no 11 U.S.C. § 116.11(c)(2). To the extent the Request is meant to refer to 11 C.F.R. § 116.11(c)(2), ADMITTED.

**Request for Admission No. 2:**

At any point from November 7, 2018 to November 27, 2018, YOU had sufficient cash on hand to repay $10,000 of the LOANS.

**Response:**

ADMITTED.

**Request for Admission No. 3:**

At any point from November 7, 2018 to November 27, 2018, YOU had sufficient cash on hand to repay the entire $260,000 amount of the LOANS.

**Response:**

ADMITTED.

**Request for Admission No. 4:**

Any ITEMS you are producing to the FEC in response to these discovery requests are original ITEMS or are true and correct copies of such ITEMS.

**Response:**

ADMITTED.

**Interrogatory No. 1:**

Describe in detail each injury YOU claim to have suffered as a result of the restrictions on repayment of personal loans in 52 U.S.C. § 30116(j), as described in Count I of the COMPLAINT.

**Response:**

By restricting the post-election repayment of personal loans, 52 U.S.C. § 30116(j) burdens the ability of candidates to loan money to their campaigns. It thereby burdens the Cruz Committee's ability to raise the

money it uses to generate essential political speech furthering Senator Cruz's candidacy. By limiting the Cruz Committee's use of funds raised after an election to repay personal loans, 52 U.S.C. § 30116(j) also forces the Committee to either breach its obligation to repay the loans altogether or use pre-election money to repay all but $250,000 of those loans, in preference to spending that money on other forms of pure political speech. These burdens amount to a direct quantity restriction on political communication and association by the Committee, curbing its right to present information necessary for the effective operation of the democratic process and reducing the quantity of its expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

**Interrogatory No. 2:**

Describe in detail each injury YOU claim to have suffered as a result of the restrictions on repayment of personal loans in 52 U.S.C. § 30116(j), as described in Count II of the COMPLAINT.

**Response:**

By restricting the post-election repayment of personal loans, 52 U.S.C. § 30116(j) burdens the ability of candidates to loan money to their campaigns. It thereby burdens the Cruz Committee's ability to raise the money it uses to generate essential political speech furthering Senator Cruz's candidacy. By limiting the Cruz Committee's use of funds raised after an election to repay personal loans, 52 U.S.C. § 30116(j) also forces the Committee to either breach its obligation to repay the loans altogether or use pre-election money to repay all but $250,000 of those loans, in preference to spending

that money on other forms of pure political speech. These burdens amount to a direct quantity restriction on political communication and association by the Committee, curbing its right to present information necessary for the effective operation of the democratic process and reducing the quantity of its expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

**Interrogatory No. 3:**

Describe in detail each injury YOU claim to have suffered as a result of the restrictions on repayment of personal loans in 11 C.F.R. § 116.11, as described in Count III of the COMPLAINT.

**Response:**

By restricting the post-election repayment of personal loans, 11 C.F.R. § 116.11 burdens the ability of candidates to loan money to their campaigns. It thereby burdens the Cruz Committee's ability to raise the money it uses to generate essential political speech furthering Senator Cruz's candidacy. By limiting the Cruz Committee's use of funds raised after an election to repay personal loans, 11 C.F.R. § 116.11 also forces the Committee to either breach its obligation to repay the loans altogether or use pre-election money to repay all but $250,000 of those loans, in preference to spending that money on other forms of pure political speech. 11 C.F.R. § 116.11 thus interferes with the Cruz Committee's constitutional right to engage in speech in the order and timing of its own choosing, according to ordinary business, contractual, political, and strategic imperatives. These burdens amount to a direct quantity restriction on political communication and association

by the Committee, curbing its right to present information necessary for the effective operation of the democratic process and reducing the quantity of its expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

**Interrogatory No. 4:**

Describe in detail each injury YOU claim to have suffered as a result of the "20-day regulatory limit," as described in Count IV of the COMPLAINT.

**Response:**

By restricting the post-election repayment of personal loans, 11 C.F.R. § 116.11's 20-day limit burdens the ability of candidates to loan money to their campaigns. It thereby burdens the Cruz Committee's ability to raise the money it uses to generate essential political speech furthering Senator Cruz's candidacy. By limiting the Cruz Committee's use of funds raised after an election to repay personal loans, and requiring any repayment of personal loans from cash on hand the day after the election to be made within 20 days of the election, 11 C.F.R. § 116.11 also forces the Committee to either breach its obligation to repay the loans altogether or use pre-election money in the immediate aftermath of an election to repay all but $250,000 of those loans, in preference to spending that money on other forms of pure political speech. 11 C.F.R. § 116.11 thus interferes with the Cruz Committee's constitutional right to engage in speech in the order and timing of its own choosing, according to ordinary business, contractual, political, and strategic imperatives. These burdens

amount to a direct quantity restriction on political communication and association by the Committee, curbing its right to present information necessary for the effective operation of the democratic process and reducing the quantity of its expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

**Interrogatory No. 5:**

Describe in detail each injury YOU claim to have suffered as a result of 52 U.S.C. § 30116(j), as described in Count V of the COMPLAINT.

**Response:**

The injuries suffered by the Cruz Committee as described in Count V of the COMPLAINT are not a result of 52 U.S.C. § 30116(j), but rather of 11 C.F.R. § 116.11's interpretation and implementation of Section 30116(j).

**Interrogatory No. 6:**

Describe in detail any changes made in YOUR CAMPAIGN disbursements as a result of YOUR receipt of the LOANS.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that it requests information not relevant to any party's claim or defense, given that the details of how the Cruz Committee spent the money received from the LOANS has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee

and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. Plaintiff further objects to this Request to the extent that it seeks information protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff states that the Cruz Committee did not have enough cash on hand at the end of the 2018 general election to pay all outstanding debts incurred in connection with the 2018 general election; therefore, the Cruz Committee was required to raise funds for the 2024 primary election to make up for the deficiency in funds. As a result of the deficiency and the cash-flow issues it created, the Cruz Committee was required to make strategic decisions about which expenses it could pay, as well as the timing of making those payments, based on the Cruz Committee's anticipated receipts from 2024 primary election contributions and other unanticipated obligations that could become due.

**Interrogatory No. 7:**

IDENTIFY any PERSON that YOU had COMMUNICATIONS with regarding the motivation, purpose, or planning for the LOANS.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically

objects to this Request on the basis that it requests information not relevant to any party's claim or defense, given that the motivation of the LOANS has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979).

**Interrogatory No. 8:**

State the total amount YOU paid from the "funds [you] had on hand" in order to "pay vendors and meet other obligations" during the period between November 6, 2018 and November 27, 2018 as described in Paragraph 29 of the COMPLAINT.

**Response:**

During the period between November 6, 2018 and November 27, 2018, the Cruz committee disbursed approximately $1,965,893 to "pay vendors and meet other obligations."

**Interrogatory No. 9:**

Describe in detail the "other obligations" described in Paragraph 29 of the COMPLAINT.

**Response:**

During the period between November 6, 2018 and November 27, 2018, the Cruz committee disbursed approximately $2,356 for various merchant fees and approximately $46 for delivery fees.

**Interrogatory No. 10:**

Describe in detail why YOU "used the funds [you] had on hand to pay vendors and meet other obligations instead of repaying CRUZ's loans," as described in Paragraph 29 of the COMPLAINT.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that it requests information not relevant to any party's claim or defense, given that Cruz Committee's motivation for prioritizing the payment of some obligations over others has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979). Plaintiff further objects to this Request to the extent that it seeks information protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff states that the Cruz Committee had contractual obligations to "pay vendors and meet other obligations." Therefore, in addition to

the reputational issues associated with not paying vendors, a decision by the Cruz Committee to repay Cruz's loans instead of paying vendors would have exposed the Cruz Committee to legal liability.

**Interrogatory No. 11:**

Describe in detail how YOU determined when, in what order, and how much to pay YOUR creditors (including but not limited to vendors and SENATOR CRUZ) after the November 6, 2018 election for CAMPAIGN debts.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that it requests information not relevant to any party's claim or defense, given that Cruz Committee's decision to prioritize the payment of some obligations over others has no bearing whatsoever on the existence of the LOANS, the challenged limits on repaying them, the injury those limits cause Plaintiffs Senator Cruz and the Cruz Committee and their contributors or donors or potential contributors or donors, or any other material fact alleged in the complaint. *See generally Evers v. Dwyer*, 358 U.S. 202, 204 (1958); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982); *Gavett v. Alexander*, 477 F. Supp. 1035, 1041 (D.D.C. 1979). Plaintiff further objects to this Request to the extent that it seeks information protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the

First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).

Subject to and without waiver of the foregoing general and specific objections, Plaintiff states that the Cruz Committee did not have enough cash on hand at the end of the 2018 general election to pay all outstanding debts incurred in connection with the 2018 general election; therefore, the Cruz Committee was required to raise funds for the 2024 primary election to make up for the deficiency in funds. As a result of the deficiency and the cash-flow issues it created, the Cruz Committee was required to make strategic decisions about which expenses it could pay, as well as the timing of making those payments, based on the Cruz Committee's anticipated receipts from 2024 primary election contributions and other unanticipated obligations that could become due.

**Interrogatory No. 12:**

Describe in detail any COMMUNICATION between YOU and any creditors (including but not limited to vendors and SENATOR CRUZ) that RELATES to the terms or conditions of YOUR payments to those creditors after the November 6, 2018 election for CAMPAIGN debts.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request to the extent that it is overbroad, unduly burdensome, and oppressive taking into account the needs of the case and the issues at stake in this litigation. Plaintiff further objects to this Request to the extent that it seeks information protected as attorney

work product, by the attorney-client privilege, or by the joint defense privilege. Plaintiff further objects to this Request to the extent that it seeks information protected by the First Amendment in that disclosure to the federal government of the strategic details of Plaintiffs Senator Cruz and Cruz Committee's 2018 reelection effort would impermissibly chill activity protected by the First Amendment. *See generally Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010). Subject to and without waiver of the foregoing general and specific objections, Plaintiff refers Defendants to the documents produced in response to Request for Production No. 4 and states that these documents speak for themselves.

**Interrogatory No. 13:**

IDENTIFY any contributors or donors or potential contributors or donors who were injured or burdened as a result of 52 U.S.C. § 30116(j) or 11 C.F.R. § 116.11.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Plaintiff specifically objects to this Request on the basis that the phrase "potential contributors or donors" is vague, uncertain, or ambiguous. Subject to and without waiver of the foregoing general and specific objections, Plaintiff states that all individuals and entities who have previously contributed or donated funds to the Cruz Committee and have not made the maximum contribution allowed by law in connection with the 2018 election were injured or burdened by 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 by being deprived of the ability to contribute money, after the November 6, 2018, election, for the purpose of

paying off the LOANS, and thereby engaging in and facilitating expression and association protected by the First Amendment. The identities of all individuals and entities who have previously contributed or donated funds to the Cruz Committee and have not made the maximum contribution allowed by law in connection with the 2018 election are publicly available in the books and records kept by Defendants and are therefore already in Defendants' possession, custody, or control, or equally available to Defendants.

Plaintiff further states that all individuals and entities who have not previously contributed or donated funds to the Cruz Committee, but would do so for the purpose of paying off the LOANS were it not for the limits challenged in this litigation, are also injured or burdened by 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 by being deprived of the ability to contribute money, after the November 6, 2018, election, for the purpose of paying off the LOANS, and thereby engaging in and facilitating expression and association protected by the First Amendment. Plaintiff has not identified these potential contributors and has no practicable way of doing so.

**Interrogatory No. 14:**

IDENTIFY any law that prevented YOU from repaying $10,000 of the LOANS on November 7, 2018.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Subject to the foregoing general objections, Plaintiff states that 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 prevented it from repaying $10,000 of the LOANS beginning on November 7, given that these laws barred it from repaying more

than $250,000 of the LOANS with any funds raised on that date or any date thereafter, and all of the funds raised prior to the election by the Cruz Committee were needed to cover Plaintiff's other debts and obligations.

**Interrogatory No. 15:**

IDENTIFY any law that prevented YOU from repaying the entire $260,000 amount of the LOANS on November 7, 2018.

**Response:**

Plaintiff reasserts the foregoing General Objections as though fully set forth herein. Subject to the foregoing general objections, Plaintiff states that 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 prevented it from repaying the entire $260,000 amount of the LOANS beginning on November 7, given that these laws barred it from repaying more than $250,000 of the LOANS with any funds raised on that date or any date thereafter, and all of the funds raised prior to the election by the Cruz Committee were needed to cover Plaintiff's other debts and obligations.

Dated: June 24, 2019 Respectfully submitted,

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As to objections:

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*Attorneys for Plaintiffs*

SIGNED: DATED:

/s/ CABELL HOBBS
CABELL HOBBS
Assistant Treasurer for
Ted Cruz for Senate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: Mar. 30, 2020

**MEMORANDUM OPINION AND ORDER**

Before the court is Defendants' Consolidated Motion for Partial Remand and to Compel Discovery Responses. *See* ECF No. 42 (hereinafter Defs.' Mot.). In their Motion for Partial Remand, Defendants ask the three-judge court to decline to exercise supplemental jurisdiction over Plaintiffs' challenge to the Federal Election Commission's regulations and to remand those claims for consideration by a single judge. Defendants' Motion to Compel concerns documents and information responsive to certain requests for production and interrogatories, which Plaintiffs have withheld on relevance grounds and pursuant to a First Amendment privilege.

Having considered the parties' briefs and accompanying exhibits, and for the reasons set forth below, the court concludes first that Plaintiffs' challenges to the FEC's implementing regulations are within the scope of the three-judge court's discretionary supplemental jurisdiction, and that interests of efficiency militate against

remanding these regulatory claims for consideration by a single judge. The court further concludes that the disputed discovery requests seek information that is relevant to Defendants' merits-based defenses. At the same time, because Plaintiffs assert that certain documents and information responsive to the disputed discovery requests are shielded by a First Amendment privilege, in camera review of any documents arguably subject to that First Amendment privilege is necessary before such documents may be produced to Defendants.

Accordingly, the court denies the Motion for Partial Remand and grants in part the Motion to Compel, subject to in camera review of any responsive documents as to which Plaintiffs assert a claim of First Amendment privilege.

## I. Background

The court assumes familiarity with Judge Mehta's December 24, 2019, Memorandum Opinion and Order, which details the factual background of this case. Mem. Op. & Order, ECF No. 34 (Dec. 24, 2019). Briefly, Plaintiffs, Senator Rafael Edward Cruz ("Senator Cruz") and Ted Cruz for Senate ("Cruz Committee" or "Committee"), seek declaratory and injunctive relief invalidating and enjoining the enforcement of Section 304 of the Bipartisan Campaign Reform Act ("BCRA") and its implementing regulations, which place a $250,000 limit on the amount of post-election contributions that may be used to pay back a candidate's pre-election loans. *See* 52 U.S.C. § 30116(j); 11 C.F.R. § 116.11. Plaintiffs raise facial and as-applied constitutional challenges to both the statute and the regulations, alleging that the loan repayment limit contained therein infringes the First Amendment rights of Plaintiffs, other candidates,

and potential post-election donors. In the alternative, Plaintiffs challenge the Commission's implementing regulations as arbitrary, capricious, and contrary to law.

At issue in this case are two campaign finance loans totaling $260,000 made by Senator Cruz to the Cruz Committee on the day before Election Day 2018. *See* Compl., ECF No. 1 (hereinafter Compl.), ¶ 28. Of the $260,000 lent to the Committee, $5,000 originated from Senator Cruz's personal bank accounts and $255,000 from a margin loan secured with Senator Cruz's personal assets. *See id.* Following election day, the Cruz Committee "used the funds it had on hand to pay vendors and meet other obligations instead of repaying [Senator Cruz's] loans." *Id.* ¶ 29. The Committee did not use any of the funds it had on hand to pay off Senator Cruz's loans during the 20-day period within which Section 304's implementing regulations allow a candidate to pay back loans using pre-election contributions. *See* 11 C.F.R. § 116.11(c)(1). This meant that after that period elapsed, the balance of those loans that exceeded BCRA's $250,000 statutory cap on post-election contributions—$10,000—converted into a campaign contribution. *See id.* ¶¶ 30-31; 11 C.F.R. § 116.11(c)(2).

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

In December 2019, Judge Mehta granted Plaintiffs' Application for a Three-Judge Court, and, in the same order, denied Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction. *See* Mem. Op. & Order, ECF No. 34. Defendants now move the three-judge court to remand Plaintiffs' challenges to the implementing regulations to a single judge, and to order Plaintiffs to respond to certain discovery requests to which Plaintiffs have objected on relevance and First Amendment privilege grounds.

II. Motion for Partial Remand

In their Motion for Partial Remand, Defendants urge the three-judge court to decline to exercise supplemental jurisdiction over Plaintiffs' challenges to the regulations implementing Section 304 of BCRA, and instead remand those claims to a single district judge. Defendants raised a similar argument in their Motion to Dismiss for Lack of Subject-Matter Jurisdiction, which Judge Mehta rejected. In his Memorandum Opinion and Order, Judge Mehta held that three-judge courts convened under BCRA have authority to exercise supplemental jurisdiction over ancillary claims "[i]f appropriate," but determined that the question of whether to do so here was "better left for the three-judge panel to resolve in the discretionary exercise of its supplemental jurisdiction." Mem. Op. & Order, ECF No. 34, at 17, 21. We resolve that question now and conclude that supplemental jurisdiction over Plaintiffs' regulatory claims is appropriate in this case.

At the outset, we must address whether this panel has authority to exercise supplemental jurisdiction over Plaintiffs' regulatory claims, which are ancillary to the constitutional claim under BCRA that provides the basis

for the three-judge court's jurisdiction. Judge Mehta previously considered this question and determined that three-judge courts do have the power to consider regulatory claims of the type Plaintiffs assert here. *See* Mem. Op. & Order, ECF No. 34, at 17-21. We agree with Judge Mehta's analysis. Indeed, another three-judge district court recently confirmed this conclusion, observing that "[t]he Supreme Court has made clear that a properly convened three-judge district court has some ability to exercise a brand of supplemental jurisdiction over claims beyond those that form the core of its statutory jurisdictional grant." *Castañon v. United States*, No. 18-cv-2545, 2020 WL 1189458, at *6 (D.D.C. Mar. 12, 2020) (Wilkins, J.); *see also Zemel v. Rusk*, 381 U.S. 1, 5-6 (1965); *Allee v. Medrano*, 416 U.S. 802, 812 (1974). Moreover, we agree with Judge Mehta that the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), does not compel a different result. *See* Mem. Op. & Order, ECF No. 34, at 18-19. Rather than reexamine this threshold question in detail, we direct the parties to Judge Mehta's opinion.

Because supplemental jurisdiction is permitted but not required, we next consider whether to exercise discretionary supplemental jurisdiction over Plaintiffs' regulatory claims. In cases involving claims subject to review by a three-judge court, supplemental jurisdiction has generally been found to be proper where the ancillary claims "[bear] an intimate relation to those that impelled the formation of a three-judge district court in the first instance." *Castañon*, 2020 WL 1189458, at *6 (collecting cases). In other words, the propriety of supplemental jurisdiction in three-judge district court cases turns on many of the same considerations that are pre-

sent in every case involving a question of pendent jurisdiction: Whether the core and ancillary claims are "so related . . . that they form part of the same case or controversy." *Adams v. Clinton*, 40 F. Supp. 2d 1, 4-5 (D.D.C. 1999) ("*Adams I*") (quoting 28 U.S.C. § 1367); *see also Green v. Connally*, 330 F. Supp. 1150, 1170 (D.D.C. 1971) (three-judge court) ("The test is that the two claims 'must derive from a common nucleus of operative fact,' and if 'a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the [three-judge] issues, there is *power* in [the three-judge] court[] to hear the whole.'" (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

That is precisely the case here. Plaintiffs' core constitutional challenge to the statute and its implementing regulations is identical: Both the statute and the regulations are alleged to impose the same unconstitutional burden on the rights of Plaintiffs, other candidates, and potential post-election donors to engage in protected First Amendment activity. For that reason, as Plaintiffs point out, the regulatory claims will not "predominate" over the statutory challenge. *See* 28 U.S.C. § 1367(c)(2). Rather, Plaintiffs' constitutional challenge to the regulations "is aimed . . . at the subsidiary details of how Section 304's [allegedly] unconstitutional limit is implemented." Pls.' Opp'n to Defs.' Mot., ECF No. 43 (hereinafter Pls.' Opp'n), at 21. Indeed, in many respects, the regulations at issue simply echo the legal limits established by Section 304. There is also significant *factual* overlap between Plaintiffs' as-applied challenges to the statute and the regulations, as both

sets of claims arise out of Senator Cruz's 2018 loans to his senatorial campaign.

Defendants attempt to downplay the relatedness of the statutory and regulatory claims by emphasizing that Plaintiffs' APA challenge to the implementing regulations will focus primarily on "the [administrative] record that the Commission considered in promulgating the regulation," while their statutory challenge will center on facts regarding Congress's interests in promulgating this statutory scheme, and its "tailoring of the provision in serving those interests, including any burdens it places on plaintiffs and others." Defs.' Reply ISO Consolidated Mot., ECF No. 44 (hereinafter Defs.' Reply), at 3; *accord* Defs.' Mot. at 10-11. But this purported distinction is not apparent from the face of the Complaint, which appears to raise *Chevron*-style challenges to the regulations that presumably would be susceptible to resolution without much (if any) resort to the administrative record. *See* Compl. ¶¶ 48, 51. In any event, even if the APA claims require some consideration of the administrative record, that difference does nothing to diminish the factual and legal overlap in Plaintiffs' *constitutional* challenges to the statute and regulations.

The cases from this district that Defendants point to in support of remand are not to the contrary. In each of these cases, the three-judge court held that the ancillary claims were so factually and legally distinct from the claims over which it had original jurisdiction that there was no basis to extend its jurisdiction. *See Adams I*, 40 F. Supp. 2d at 4-5 (declining to exercise supplemental jurisdiction where "there [were] no factual issues common to" the original and ancillary claims); *Ad-*

*ams v. Clinton*, 90 F. Supp. 2d 35, 39 (D.D.C. 2000) (declining supplemental jurisdiction where ancillary claims implicated distinct constitutional questions and deciding those claims "would take [the court] far afield from the core of the original jurisdictional grant"); *Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992) (finding supplemental jurisdiction improper where "plaintiffs . . . identified no links between [the core statutory claim and challenges to other sections of the statute] so close as to bring their attacks on the latter squarely within the 'same case or controversy,'" and there was "no doubt" that plaintiffs' "avalanche of [ancillary] claims predominates over the" claims subject to review by a three-judge court). For the reasons already stated, that is not the case here.

Moreover, we find that interests of efficiency and consistency would be better served by considering the statutory and regulatory challenges together. While we express no view on the merits at this stage, we note that a decision invalidating Section 304's loan repayment limit as unconstitutional would effectively dispose of Plaintiffs' regulatory claims.[1] Even if the statute is upheld, the significant factual and legal overlap between the claims leads us to conclude that judicial time and resources would not be well spent by requiring this three-judge court *and* a single judge to consider separately claims that are as interwoven as these. *Cf. Henok v.*

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[1] Indeed, given the possibility that a decision on the statute's constitutionality would preempt a decision on the regulatory claims, the parties appear to agree that Plaintiffs' regulatory claims are best held in abeyance until after a decision on the constitutionality of the statute to avoid wasting judicial resources. *See* Defs.' Mot. at 9; Pls.' Opp'n at 22.

*Kessler*, 78 F. Supp. 3d 452, 462 n.9 (D.D.C. 2015) ("It would be a waste of judicial resources and the time and resources of the parties to decline to exercise supplemental jurisdiction only to have a [single judge] . . . reach these same . . . conclusions.").

In sum, the overlap between Plaintiffs' statutory and regulatory claims is readily apparent. Accordingly, we will exercise our discretionary supplemental jurisdiction to consider Plaintiffs' regulatory claims alongside their constitutional challenge to Section 304 of BCRA.

III. Motion to Compel

Defendants' Motion to Compel concerns various requests for production and interrogatories directed to Senator Cruz and the Cruz Committee that relate broadly to the circumstances surrounding Senator Cruz's loans and their repayment. Plaintiffs oppose the Motion to Compel on two grounds. First, they argue that the disputed discovery requests seek documents and information irrelevant to this litigation. Second, they contend that many documents sought by Defendants are shielded from discovery by a First Amendment privilege. We take each argument in turn.

A. Relevance

Defendants contend that the information sought by the disputed discovery requests is relevant to the Commission's defenses because it "would likely confirm . . . that plaintiffs never suffered any genuine burden from the loan repayment restriction at issue and their alleged injuries are entirely self-inflicted, for the purpose of bringing this lawsuit." Defs.' Mot. at 16. According to Defendants, information regarding the nature and extent of Plaintiffs' injury is relevant both to

Plaintiffs' standing to bring this litigation, and to the merits of their constitutional claims. In response, Plaintiffs contend that issues of subjective motivation and individualized burden are entirely irrelevant to their standing and to the merits, especially because Plaintiffs have "challenge[d] Section 304 as unconstitutional *on its face*, not simply as applied to them." Pls.' Opp'n at 11-15.

As a preliminary matter, we reject outright Defendants' continued assertion that information about Plaintiffs' subjective motivation in taking out the loans is somehow relevant to Plaintiffs' standing. In his Memorandum Opinion and Order, Judge Mehta explained, in detail, why Defendants' theory that Plaintiffs caused their own injury by tailoring Senator Cruz's loans to challenge BCRA's loan repayment limit is irrelevant to standing as a matter of law. *See* Mem. Op. & Order, ECF No. 34, at 11-15. We adopt that analysis in its entirety.

Defendants fare better, however, on their argument that the information sought by these discovery requests is relevant to their defense on the merits. The heart of Plaintiffs' constitutional challenge is that Section 304 and its implementing regulations impose an unconstitutional burden on Plaintiffs' exercise of their First Amendment rights, as well as the First Amendment rights of other candidates and potential post-election donors. Plaintiffs contend that the statute and regulations are unconstitutional not only on their face, but as applied to Plaintiffs specifically. In their complaint and in other submissions to the court, Plaintiffs emphasize the individualized injury they suffered as a result of this alleged constitutional infringement. *See, e.g.*, Compl. ¶ 33

("Absent the restrictions of Section 304 and the Commission's corresponding regulation, Plaintiffs would solicit debt-retirement funds from potential donors and would use post-election contributions to defray the remaining $10,000 loan balance."); Pls.' Response to Defs.' Mot. to Dismiss, ECF No. 29, at 33 (claiming the Committee was injured by the loan repayment limit in part because "it wanted to repay its debt to [Senator Cruz] in full, no less than it wanted to pay other creditors to whom it owed money, for that would incentivize Senator Cruz, no less than others, to extend credit to the Committee in the future"). Plaintiffs' allegations imply that their actions regarding Senator Cruz's loans were compelled by the challenged statute and regulations, as opposed to unrelated strategic considerations. As such, information about Senator Cruz's motivation in taking out the loans, and how the Committee chose to repay him, may be relevant to the burden Section 304 places on Plaintiffs' First Amendment rights—and, correspondingly, to defenses the Commission may seek to mount in response to Plaintiffs' as-applied challenges. Tellingly, Plaintiffs do not grapple with the potential relevance of these matters to the merits of their as-applied challenges —instead they focus exclusively on the fact that individualized considerations of burden have no bearing on their *facial* challenges to the statute and regulations.

In the context of discovery, "[r]elevance is construed broadly." *Breiterman v. U.S. Capitol Police*, 324 F.R.D. 24, 30 (D.D.C. 2018) (quotation marks omitted). This broad interpretation of relevance "advances Rule 26's liberal and expansive purpose of . . . permit[ting] the parties . . . to develop the facts, theories, and defenses of the case." *Anvik Corp. v. Samsung Elecs.*,

No. 08-CV-818, 2009 WL 10695623, at *2 (S.D.N.Y. Sept. 16, 2009). Keeping this expansive purpose in mind, and in light of Plaintiffs' own assertions about the nature of the alleged burdens imposed on them, we cannot conclude that the information sought by Defendants would have no bearing on any merits-based defense they may raise to Plaintiffs' as-applied challenges. Whether such a defense ultimately will be persuasive to us a matter of law or fact is a separate issue on which we express no view. At this stage of the litigation, we ask only whether the requested materials "'bear[] on, or . . . reasonably could lead to other matter[s] that could bear on' any party's claim or defense." *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). Defendants have made that showing here. Accordingly, Plaintiffs must disclose any documents and information responsive to the disputed discovery requests that are not otherwise subject to a claim of privilege.

B. First Amendment Privilege

Relevance is not the end of the inquiry, however. Plaintiffs also cite First Amendment concerns as a separate ground for denying Defendants' Motion to Compel. According to Plaintiffs, "nearly all of the documents sought by the FEC would be protected by the First Amendment privilege, since they reveal sensitive and confidential information about the decisions concerning political strategy and tactics made inside the Cruz Campaign during the 2018 election." Pls.' Opp'n at 15. Specifically, Plaintiffs assert that documents responsive to the disputed discovery requests include ma-

terials such as "internal discussions over which advertising markets to prioritize in the final days of the campaign, details about the cost—and results—of internal polling, and billing statements from Senator Cruz's retained political consultants that include detailed descriptions of their activities and expenses on behalf of the campaign." *Id.* at 17. In response, Defendants do not argue that the documents in question cannot be subject to a claim of First Amendment privilege—they argue instead that any First Amendment interests Plaintiffs may have in shielding these documents from disclosure is outweighed by Defendants' need for the materials. Defs.' Mot. at 22-23; Defs.' Reply at 14-15.

Materials of the type described by Plaintiffs may, under certain circumstances, be withheld from discovery pursuant to a First Amendment privilege. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *AFL-CIO v. FEC*, 333 F.3d 168, 176-77 (D.C. Cir. 2003). The First Amendment privilege inquiry turns on a balancing of interests: The court must determine whether the interests and need of the party seeking the arguably protected materials outweigh the likely burden on the objecting party's First Amendment rights. *See AFL-CIO*, 333 F.3d at 176-78; *see also Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) ("[T]o determine whether a claim of privilege should be upheld . . . the plaintiffs' First Amendment claim should be measured against the defendant's need for the information sought. If the former outweighs the latter, then the claim of privilege should be upheld." (quoting *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981), *vacated as moot sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982))). The court cannot conduct the required balancing, however, without

having reviewed the materials in question, or even knowing exactly what the arguably privileged materials are.[2] Accordingly, the court will direct Plaintiffs to produce for in camera inspection any documents responsive to the disputed discovery requests that Plaintiffs seek to withhold based on a First Amendment privilege.

IV. Conclusion and Order

For the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' Consolidated Motion for Partial Remand and to Compel Discovery Responses, ECF No. 42, is **GRANTED IN PART AND DENIED IN PART**;

2. The court shall assume supplemental jurisdiction over Plaintiffs' regulatory claims;

3. Consistent with this Memorandum Opinion, Plaintiffs shall produce all responsive, non-privileged documents, and revise their interrogatory responses and privilege logs, as to the following of Defendants' discovery requests:

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[2] Plaintiffs concede that their previously produced privilege logs did not identify any allegedly privileged documents that, in their view, are not subject to production on relevance grounds. *See* Pls.' Opp'n at 6 n.1 ("What the privilege logs do not identify are any privileged documents that are entirely outside the scope of discovery—whether because that document is not responsive to any discovery request or because it is responsive solely to a request that is plainly outside the scope allowed by Rule 26(b)(1), such as FEC's requests relating to the Plaintiffs' subjective motivations.").

- Plaintiff Ted Cruz for Senate: Requests for Production ¶¶ 3, 5, 7, and 11; Interrogatories 7, 10, and 11.
- Plaintiff Rafael Edward ("Ted") Cruz: Requests for Production ¶¶ 3 and 5; Interrogatories 6 and 7.

As to any documents responsive to the foregoing discovery requests over which Plaintiffs assert a First Amendment privilege, Plaintiffs shall submit three Bates-stamped sets of the documents withheld from production to the court, via Judge Mehta's chambers, for in camera inspection on or before April 6, 2020. Following in camera inspection, the court will assess the need, if any, for Plaintiffs to amend their interrogatory responses to include responsive information that Plaintiffs declined to disclose on the basis of the First Amendment privilege.

Dated: Mar. 30, 2020

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

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

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 19-908

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL.,
DEFENDANTS

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Wed., May 13, 2020
9:10 a.m. EST.

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**TRANSCRIPT OF PROCEEDINGS**

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APPEARANCES

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CONTENTS



EXHIBITS

(NONE MARKED)

[4]

PROCEEDINGS

(9:10 a.m.)

Whereupon—

CABELL HOBBS,

having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL

FOR THE DEFENDANTS

BY MR. NESIN:

Q. Thank you, Mr. Hobbs, for appearing today and dealing with this unusual situation.

Are you able to hear me okay?

A. Yes, sir.

Q. My name is Seth Nesin. I am the attorney from the Federal Election Commission taking this deposition.

Are you here as a representative of the Ted Cruz for Senate Committee?

A. Yes, sir.

Q. Have you seen the deposition notice that lists a number of subjects on which the representative for the committee has been asked to provide testimony?

A. Yes, sir.

[5]

Q. And are you prepared today to speak as to those subjects?

A. Yes, sir.

Q. And without revealing any attorney-client privileged communications, what did you do to prepare to testify today?

A. I did several things. I went back through notes that—that we had come up with as it related to the time frames that are in question, and reviewed the committee finances the best that I could for the time frames as well.

Q. Anything else?

A. I went through all of the documents that had been requested that were turned over to refresh my memory the best I could of them since they were some time ago.

Q. Okay. And what is your personal role on the committee?

A. I am the assistant treasurer of Ted Cruz for Senate.

Q. And what are your responsibilities as assistant treasurer?

[6]

A. They stem from working with the committee to keep it compliant as it relates to its financial matters, and those stem from filing FEC reports on the schedules that are laid out by the regulations, on a daily basis reconciling the committee's bank accounts and handling the committee's finances as it relates to contributions, receipts, disbursements and expenditures.

Q. And you are the assistant treasurer.

Who is the treasurer?

A. Mr. Bradley Knippa.

Q. And what are Mr. Knippa's general responsibilities?

A. As the treasurer he is legally responsible for the committee. And I work with him as it relates to documents they need to review or sign on behalf of Ted Cruz for Senate.

An example of that would be the committee's annual 1120-POL, and so any questions that he might have that arise from the committee's finances as it [7] relates to that report that he signs on behalf of the committee.

Q. And I understand there are a number of staff members who work for the committee, particularly during an election cycle.

But can you let me know who the other primary decision-makers on the committee are with respect to raising and spending money?

A. As with many organizations, Ted Cruz for Senate is structured in a way where you have multiple different revenue streams, and if you would call them division directors by revenue stream, those individuals are responsible for those types of revenue, just as on the disbursement and expenditure side you have individuals that are responsible for certain departments within a campaign.

And where there is overlap in the two, for instance, there is a cost to raising contributions. So an individual that is raising contributions of some source would also be responsible for the [8] costs that go into that.

As it relates to the departments as a whole, the —there is a campaign manager and general consultants who ultimately authorize the committee budget and the underlying expenses and direction of that budget.

Q. And what is the name of the campaign manager during the 2018 cycle?

A. I believe the campaign manager was Bryan English.

Q. And you noted that there were multiple different revenue streams, each coordinated by a different person.

So would one of the revenue streams be individual contributions, is that what you're getting at, or is it more narrow than that?

A. Individual contributions would be the broad category.

Q. Okay.

A. I was referring more to the different revenue streams in terms of direct marketing type contributions that would be originated from a direct mail [9] piece or digital fundraising campaign versus an individual contribution that the campaign might consider a major donor that might originate from an event or a phone call or direct ask.

Q. And do you know the name of the person who was in charge of the direct marketing during the 2018 cycle?

A. There were—there were several individuals that were part of that team.

As it related to the direct marketing, the committee had an outside direct mail firm, Dix Company, and they worked internally with members of the campaign on those direct mail pieces.

The campaign also utilized what would be considered digital firms and raising online contributions through various channels, whether it was the campaign's website, its main landing page, or various e-mail campaigns.

Q. Okay. I may during the deposition ask, if a person's name comes up on a document or in a discussion, I may want to come back to learn what their role [10] was on the campaign, but we can move on from that for now.

What is Senator Cruz's role generally in the decision-making process of the Campaign Committee?

A. Well, Senator Cruz is the candidate and the candidate has various responsibilities to the campaign as it relates to generally a campaign's purpose, which is to try and elect that candidate.

So a candidate does many things on any given day as it relates to the campaign.

Q. All right. Does the campaign ever do anything that knowingly is in conflict with what Senator Cruz would want?

A. Not to my understanding.

Q. So would you regard Senator Cruz as sort of the ultimate decision-maker over the entire enterprise?

A. I think the parameters of that question kind of goes at how organizations, and in this case this committee is structured, and that you have [11] delegation of duties.

And as long as those fall within a general consensus or framework that is agreed upon, then it is expected that that delegation to whomever is done.

Q. Right. But if, say, if Senator Cruz, for example, wanted to spend money in a particular way or did not want to spend money in a particular way and conveyed that information to the committee, the committee would act in accordance with his—what he wanted?

A. That would be my understanding.

Q. Okay. So now I would like to move on to just some general questions about the way the campaign operated during the 2018 election cycle.

So at the beginning of the cycle the committee doesn't know how much money it will raise, is that correct?

A. Correct.

Q. How did the committee go about planning its spending, or does the committee plan spending based on estimates of how much money it thinks it will raise?

[12]

A. This specific committee, being in an election cycle, so the 2018 election cycle is essentially a six-year cycle, and so the committee initially would try to use historical information in order to begin drafting potential revenue streams and what those could look like on a monthly and quarterly basis.

In this specific situation, the historical information was not terribly relevant as it was a very different situation for the 2018 race.

And so the result of that is monthly discussions to try to refine the revenue streams, to realistically see what a committee is capable of raising for the duration of the cycle.

Q. So when you said that normally you would rely on historical information but in this case there were some unique qualities that made that a challenge, what was special about this particular election that made it so it was difficult to rely upon historical information?

A. The 2018 election was not [13] special in that it was—as it relates to many campaigns it was very ordinary.

But how it was different from the historical payment we would have used was that there was a primary election, a runoff election and a general election for the previous cycle.

And so that has a very unique financial set of circumstances in itself. And as the committee was preparing for the 2018 election, there was general thought that more—(audio interference)—that unique situation again. Therefore, it was mostly irrelevant.

Q. When you talk about the previous cycle, you're referring to Senator Cruz's 2012 election for the Senate, is that correct?

A. Yes, sir.

Q. And the expectation in 2018 was that it would go differently than 2012 because there would be no primary or runoff elections; is that what you're saying?

A. The expectation was that it [14] would be more of a normal campaign where you would have a primary election. In some cases primary elections you have opponents and in some cases you don't.

And then it would follow the path of the normal general election where in most cases you have a general opponent.

Q. So based on these challenges and comparing the 2012 election cycle to the 2018 election cycle, would it have been possible to look at other historical information such as, you know, for example, how much the other Senator from Texas was capable of raising for his election cycle, or is that not a good methodology?

A. That methodology could be used, but each, each election cycle is unique, and each candidate and ultimately candidate committee is unique.

And so where there could be useful information from that, that would be one piece of information.

Q. So during the 2018—as the 2018 cycle began to ramp up, and you would [15] have periodic discussions with the team about the amount of money that you were raising, was the amount of money you were raising consistent with what you thought you would be raising?

A. Consistent with what we thought we would be raising, the basis for that is—is tough because we were analyzing this on a regular basis, and as an election proceeds you are adapting to the situations in that election.

And the vast majority of situations had the potential to impact your revenue streams.

Q. When you say "situations," what exactly are you talking about?

A. You could have a situation where something as simple as just changing a vendor could make a direct marketing program more responsive than not to a situation of whether you—whether there is a challenger in your primary or a challenger on the—on the other side in its primary.

Q. Did the committee have in mind a [16] certain amount of money that it believed it needed to be able to run a successful campaign, at any time?

A. The committee at any given time attempts to do its due diligence in sketching out a relative budget framework, and that tends to be done on a quarterly basis.

Q. Is that budget or—is that a predicted budget for the entirety of the election cycle or is that a short-term budget?

A. The budget itself is a long-term budget but it is much more under the microscope within the given quarter that the committee is in, understanding that the impact of the current quarter can potentially greatly impact what you would be budgeting for in the following quarter.

Q. Right. So I understand in general that's how it works.

So during the 2018 cycle, were the budgets over time being revised to be larger because you unexpectedly were receiving more money than you thought you [17] would or was the budget being lower over time because you were not receiving as much money? In what ways did the budgets change over time?

A. The budget changed over time as it related to decisions as various division directors saw it. In each situation where the campaign saw priorities, it either increased its budget or decreased its budget. So both happened many times throughout the campaign.

Q. Are you saying it decreased its budget for a specific type of spending or are you saying it decreased its budget overall for the entire—how much the campaign was going to spend overall?

A. Both, both situations.

Q. And for what reason would the campaign decide to make its budget smaller? Why would it choose to shrink its budget?

A. It's not so much that it is choosing to shrink its budget so much as you've budgeted in any given quarter for what you expect to happen. And depending [18] on how that quarter plays out, you then try to use that information and adjust accordingly in the quarters for.

And, again, you have multiple revenue streams. And so you can have—a decision could be made to put more emphasis on one revenue stream as opposed to another based on how it's performing.

But as it relates to individual contributions, you have small dollar contributions and large dollar contributions. And so your revenue streams can go up and down depending on where you're emphasizing.

Q. So I'm just—so during the 2018 election cycle, were there quarters in which the committee received less revenue than it was anticipating and, therefore, when budgeting in the next quarter it shrunk the budget

because of this new information? Is that—is that the sort of process that you're describing?

A. I wouldn't say that it would have that impact immediately. When you [19] say shrink the budget, if you are sitting in Q1, 2017, you're not necessarily increasing or decreasing a budget for, say, Q2 in 2018. You're in an information-gathering point and you're trying to hit your budget objectives.

Q. So I understand the theoretical ways in which the budget could be sort of expanded or contracted.

Can you identify any time during the 2018 cycle in which the Cruz campaign decided to shrink—to spend less money than it had earlier anticipated spending?

A. Again, off the top of my head, the campaign is tweaking revenue streams frequently, not just on quarter changes, and so it's difficult to say simply because you could have a revenue stream that changed mid-quarter and that affected the budget and, therefore, there potentially was an increase or decrease in that stream when you got to the end of the quarter.

It just was that type of information is very fluid.

[20]

Q. Right. But what I'm asking for is a specific time. If you can—I understand that you said that you reviewed the financial information of the campaign over time.

Can you think of any time, specific times when, you know, it was Quarter 2, 2017, for example, and we expected the revenue streams would be X and we received less than that and, therefore, we downgraded our estimate of how much we would be able to raise?

Are you able to point to any patch of time during the cycle where that happened?

A. There are really too many decisions made as it related to the budget to pinpoint a specific time that you're asking.

Q. Okay. Well, rather than a specific time, can we discuss the overall trend, for example, you know, from, you know, 2016 to 2018 did the budget generally—it may have gone up and down to some degree is what you're saying, but [21] did it generally have an upward trajectory or a downward trajectory?

A. Generally it had an upward trajectory. As it relates to this campaign there was tremendous grass roots support and so that generally led to an increase over time as momentum grew throughout the election cycle.

Q. So would it be fair to say that the campaign was able to raise more money than it had originally anticipated or expected that it would?

A. If you were to ask that question in 2018, in any given quarter, then your answer would potentially be yes for various factors.

If you were to ask that question in 2017, your answer would have potentially been no because of factors that had not played out yet.

And so the thrust of your question is asking for that one point trying to deal with an extremely fluid and complex campaign cycle.

Q. I understand. I'm a little [22] confused by your answer, though.

So in 2017 the campaign had outlined—you said that there are both long-term budgets and then the quarterly budget.

In 2017 the campaign had an idea of a budget for the entire—what it was going to spend for the entire cycle; is that right?

A. I believe in 2017, again, if my memory serves me right, we probably only sketched out to the end of 2017.

Q. Okay.

A. So it's too far out to budget at that point.

Q. Okay. So the first time that you made a budget that would count the entire election cycle was in 2018, is that right?

A. I would think that we probably started to think about it toward the end of '17 so that, as most organizations would do, we have something at least generally to work off of on January 1st.

Q. Okay. And so on January 1st, [23] 2018, you had some number in mind, is that right?

A. Generally speaking.

Q. And the amount that the campaign was able to raise exceeded that number ultimately, is that correct?

A. Yes, I believe so.

Q. Do you know what, approximately, the number was at the beginning of 2018 that you expected the campaign would be able to raise?

A. I don't know that off the top of my head.

Q. Do you know how much money the campaign ultimately raised for the 2018 election cycle?

A. I believe that figure is—is in our FEC filings that are—that are public documentations. That would be—in this case it would be total contributions or receipts, you know, column B of the post-general report. You should have that information.

Q. Right. But you don't—you don't know the number off the top of your [24] head, roughly?

A. No, sir.

Q. Okay. Was it in the range of in the 30 millions or something; does that sound about right?

A. It was a pretty engaging campaign so that, you know, again, the number is a public number on the committee's FEC filings that you have the ability to look up just as I do.

Q. Okay.

A. So I can't give you an exact number off the top of my head.

Q. Can you express—I recognize that you don't have either of these exact numbers in your head, and maybe this question will be difficult to answer but I don't know.

Can you estimate a ratio between the amount of money that you eventually raised and the amount of money that you in 2000—in the beginning of 2018 you anticipated you might be able to raise?

A. I don't think I could give that ratio. But I think it's important to add [25] that the time duration between what you're asking for is an eternity in a campaign.

And factors that go into a campaign really impact its financial position and ultimately its impact on budgeting.

So, you know, again, I don't think I can give you that ratio off the top of my head other than revenue generally increased over time as it would be expected in most campaigns.

Q. Well, it seems like that's conflating two different ideas, and maybe I'm confused, but let me try and piece it out.

So I understand that in the course of virtually any campaign the amount of money the campaign received would increase over time leading up to Election Day because the electorate is more engaged, more willing to donate money, et cetera.

You agree with that, correct?

A. Sure.

Q. What I'm asking about is, even [26] in the beginning of 2018, the campaign undoubtedly was operating under the assumption that its money would go up during the following 11 months.

Do you agree with that?

A. Yes.

Q. So what I'm asking about is differences above or below what you had anticipated raising during those months, not that the money would increase from January to November, but is the money that you raised in Quarter 3 more than what your original expectations

were about how much you would be able to raise in Quarter 3? That's—that's the line of questioning I'm trying to get at.

A. There were quarters where revenue exceeded projections.

Q. Do you know if it exceeded projections in the first quarter of 2018?

A. I don't know specific quarters off the top of my head. The—I would say post the election, the primary election in March would be potentially where you would start to see that if that [27] were to be the case.

Q. Well, what—you said that there were quarters, so was it the case in—in—in quarter, the second quarter, you said if it begins in March 2018, are you saying that in Quarter 2 and 3 of 2018 the revenue exceeded the expectation?

A. Yeah, I would say that there were—there were quarters in there that revenue exceeded its expectations, yeah, especially—

Q. Were there any—oh, continue. I'm sorry.

A. I was just saying as the momentum of the campaign grew.

Q. Okay. Were there any quarters during 2018 in which the revenue was less than what you had anticipated?

A. Off the top of my head I would say no, but I would, you know, again, there are so many different numbers in that time period that I couldn't say for certain, but it seems like the potential for no.

Q. Let me just try and make that [28] more concrete because I'm really only asking about one particular number, and that is the amount of total money raised by the campaign from any revenue stream.

So your best recollection today as a representative of the committee is that in every quarter in 2018 the campaign either met or exceeded the amount of total revenue that it believed it would receive.

Is that accurate?

A. That would have been the committee goal for people to do their jobs. Certainly would have tried to do that.

Q. I understand that in 2018 that's what you were trying to do. But it's 2020 now and we know what actually happened and we can look back and say, oh, we thought we could raise X but we actually raised twice as much.

You know, do you agree that it's possible to look at the data and figure that out?

A. Yes, it's possible to look and see if we out-raised, and most likely for [29] those quarters we exceeded the revenue projections by some degree, so yes.

Q. When you say "by some degree," can you expand on that? By how much—did you just raise a tiny bit more revenue than you thought you might or was it a substantial increase over what you had believed you would be able to raise?

A. When I say a degree, what I mean by that is that the further into 2018 the committee went, the more time,

energy and effort went into really honing in on what financial capabilities and revenue streams were for the remaining of the campaign.

And so as you refine those and you have more information on those revenue streams, you ultimately get better at predicting what those might be and, therefore, it's possible that the later in the campaign you are, the closer to your projections you become because you're significantly better at running models off of that.

So, for an example, if you're looking at the online revenue stream for [30] digital marketing, for the data points you have you can start to run trend lines that make sense on a daily basis.

And if you are further in 2018 you have more data points that make those trend lines a lot more firm, where in the beginning of 2018 you don't have a lot of data points and, therefore, your projections are as not honed as they are further.

So you may be more off of your projections even though you may exceed them in, say, January of '18.

Later in the campaign with more data points you may be raising more than you had projected 10 months earlier, but as your projections have been revised, you may actually be really hitting your projections at that time.

Q. I understand. That makes a lot of sense. Thank you.

Is there any—was there any time during the 2018 election cycle when the committee considered taking out a commercial loan to help with the finances?

[31]

A. Could you repeat which cycle you were referring to?

Q. 2018 election cycle.

A. To my understanding, the committee did not seek any of those commercial loans.

Q. Was it ever considered, the possibility of taking out a commercial loan?

A. To my understanding, it was not, there were not any conversations.

Q. Why did the committee not ever have a conversation about taking out a commercial loan?

A. I think that's a fairly open-ended question.

Q. Well, presumably—can you imagine a hypothetical circumstance in which a committee decides that they need to take out a commercial loan?

A. There are circumstances for various committees all across the country at any given time that—that review their financial situation and try to make determinations of whether they should add [32] additional lawful revenue streams to further the campaign efforts.

So, again, like, you know, you can speak hypothetically to that.

Q. Well, I'm not trying to speak hypothetically. I'm trying to speak concretely about the Cruz Committee during the 2018 election cycle, but you said it was too open-ended a question so I'm trying to narrow it a little bit.

So what are the circumstances in which other committees might decide that they needed to take out a commercial loan?

A. I would say a potential hypothetical situation where the committee would discuss something like that would be where a committee felt that it would be advantageous from a revenue perspective to have additional resources as it related to their ability to engage in political speech to further their campaign.

Q. So is it true that during the 2018 election cycle the Ted Cruz for Senate Committee did not think it would be advantageous to take out the commercial [33] loan for those reasons?

A. Again, that was, you know, a hypothetical situation. I think that revenue streams are revenue streams, and whether they are coming from a commercial loan or they are coming from an individual contributor, revenue generally is considered a positive thing to further the goals of a committee and ultimately electing an individual.

So I don't see a negative.

Q. But I don't understand your answer then, though, because you said revenue was helpful and you view all revenue streams as the same, so why wouldn't the Cruz Committee try to get more revenue by taking out a commercial loan?

A. Well, as the committee worked through its financial decisions, and based primarily on a general assumption that in a general campaign the majority of funds are used at the latter stages of a campaign, that as the committee is in the beginning of the campaign it is—it is [34]

saving its revenue. It is not using our operating expenditures at that time, used further down.

So it potentially wouldn't have been discussed because the committee was in a position of trying to reach its goals to ultimately have funds to use later in the campaign.

That type of decision, you know, would relate more to when the vast majority of funds are spent in any given campaign.

So generally speaking for campaigns, that tends to happen more around election dates as opposed to any other given calendar day.

Q. Okay. But can you identify any perceived need in the 2018 election cycle for the Ted Cruz for Senate Committee in which it would have benefitted from the additional revenue that a commercial loan would provide?

A. Well, the committee's goal in part with our—(audio interference)—during that time period was to try to be [35] prudent with the committee's expenses and its burn rate.

And, therefore, as our federal election quarterly reports show in 2017 and parts of 2018, the committee had more cash on hand than its—than its burn rate or its disbursements for at any given time. And so it ultimately was on purpose to have that.

Q. When you say "ultimately"—I'm sorry, I didn't catch the end of what you said.

A. My point was that, as you can see upon our ending cash on hand numbers, our goal was to continue to raise cash—(audio interference)—because that cash

was used, that revenue would be used later on in the election.

That situation, you know, wouldn't necessarily have come up, you know, in this specific campaign it—it potentially didn't come up. The campaign could have turned out very different, in which case potentially it could have had that situation.

[36]

Q. Is it fair to say that the committee never talked about taking out a commercial loan because it was raising so much money; is that correct?

A. I would say that the committee didn't have those discussions. And so I can't speak to the why it would have—why or why it would not have those because those discussions didn't come up.

Q. If revenue had been less than it turned out to be, and less than you had anticipated, would you expect that there would be such discussions about taking out loans?

A. I would think that, generally speaking, if revenue trends down, a campaign or a committee generally tends to try to determine what other revenue sources it could obtain under lawful methods, with a commercial loan being one of, you know, of many different types of lawful revenue streams.

You know, generally speaking, that could come up, but in any circumstance it was not discussed and the [37] committee was working diligently to stay within its budget.

Q. Okay. Can I just ask quickly about some of these revenue streams that you are describing? Can you explain to me what a recurrent donation is?

A. Sure. In the general sense, if you have an individual donor that goes to a committee's website, it receives an e-mail solicitation in their in box, and in this hypothetical they click on that website or that e-mail and they make the determination, after reading the various committee disclaimers, that they qualify as a—as a potential donor, and they click to donate, there are several questions that the potential donor could be asked, one of which is would you like to make your donation at this time a recurring monthly donation.

And that would be where the donor would either affirmatively click and say yes or decline and only be making that one-time donation.

Q. And if a donor chose to make a [38] recurring donation, until when—when do those donations stop?

A. If a donor chooses to make a recurring donation, that recurring donation can be stopped multiple different ways.

So the first and most important way is that the contribution itself is a lawful contribution as it relates to the contribution limits of a primary or general election or whether you are dealing with a runoff or a special.

And so if a committee has a recurring donor that then becomes an over-limit donor because of a recurring contribution, that recurring contribution would be turned off.

If at any time prior to that, if the donor wanted to stop that recurring donation for any reason, they have the ability to reach out to the committee and the committee would—would stop that recurring donation upon that request.

Those would be two examples of that.

[39]

Q. If the donor does not request to stop the donation and has not reached the maximum, does the committee continue to receive contributions from the donor even after the general election has finished?

A. So it's my understanding that these recurring contributions potentially go on for that donor.

However, that donor in many instances is alerted of that recurring contribution and as it related to crossing an election cycle you would then have—the committee would be updating its presentation materials and its disclaimers as it relates to the new election.

And so the donor would, I mean, potentially be notified of that, as well as when a contribution comes in, whether it's a recurring donor or not, that donor would be receiving a thank you note from the committee for that contribution, which would designate it.

Q. Right. But when the committee is modeling its different revenue streams, does it take into account the fact that [40] there are these recurring donors that you can expect are going to be making X number of contributions in the future?

A. I disagree with your question's premise because you're assuming that a committee is successful in its election. And if a committee is not successful in that election, it potentially would have to stop all of those recurring contributions.

And so a committee—a committee is not necessarily using that information on the assumption that it would win, just as—it's a very similar situation for a

committee that is in a primary campaign and moving into a general campaign. A committee cannot assume that it can use its general contributions just because it thinks it's going to win. It doesn't use those to budget.

And so I just don't think that that's something that would go into the thinking.

Q. Well, maybe the question wasn't clearly phrased.

[41]

I'm not asking about whether a winning candidate versus a losing candidate.

I'm talking about sort of during the duration of the election cycle, before the general election has even happened, the campaign can estimate that it is going to be receiving a certain amount of money from these donors who have already clicked the box that they are going to make recurring contributions, is that right?

A. The campaign makes its financial decisions based off of the potential recurring donations or revenue streams that they can lawfully use in that current cycle.

And as it relates to anything beyond that election cycle, it is not a general thought process to go down that road. It makes a large assumption.

Q. Does the—do donors ever make a pledge to contribute money and then contribute money later?

A. That's a very open-ended question.

[42]

Q. Is there a means by which someone can let the committee know that it intends to contribute money in

the future but not at that time actually contribute the money?

A. For what time frame?

Q. For any time frame. Can I say I would like to, you know, for your Ted Cruz for Senate Committee, I'm planning to give you a thousand dollars but I don't have it right now. I want to give it to you next month, but I would like you to know that I'm going to give it to you.

Has that sort of thing ever happened?

A. I would say in a general sense contributions that come in fall into that category simply where the donor is not making the contributions, say, online themselves.

So, for instance, an example would be where a donor attends an event and they show up to the event, fill out a contribution form, and take—take the business card of someone from the campaign [43] so that they can fulfill the payment for attending that event.

Q. Okay. So the committee is able to take into account in its modeling that there were these number of people who still owe us money from this event they attended and, therefore, that revenue will be coming in in the future?

A. That seems to be a fair assessment of one of the job descriptions of a fundraiser.

Q. Okay. Thank you. So let's move on.

Well, did the committee engage in political speech after the general election is already over with respect to the 2018 election cycle?

A. Can you please repeat the question?

Q. Does the committee engage in political speech after the general election is already over, for example, taking out an ad for a direct mailer after the general election is over?

MR. OHLENDORF: I would object. [44] The question assumes a particular kind of mission of political speech, which is a question of law.

Mr. Hobbs, you can answer to the best of your ability.

THE WITNESS: I would think that there would be a general consensus to, for political speech or free speech, to thank all those that were a part of the 2018 election cycle for their contributions. And by contributions I mean either financial or for the time that they put in.

So I don't know if that answers your question or not.

BY MR. NESIN:

Q. So you say a thank you. Is that the extent of the speech that the committee engaged in during the 2018 cycle after the general election was over?

MR. OHLENDORF: Same objection.

THE WITNESS: I was just saying that that would be a potential type of speech that it would do.

BY MR. NESIN:

[45]

Q. Can you think of any other type of speech that the Ted Cruz for Senate Campaign engaged in after the general election in 2018?

MR. OHLENDORF: Same objection.

THE WITNESS: The general thought process in the immediate time period after an election is for, you know, a committee that's generally in wind-down mode as it relates to the previous election and, therefore, you know, it engages in various lawful activities as it relates to wind-down initiatives for the previous campaign.

Those, in many cases, those are acts of political speech as the use of campaign funds allowed during an election cycle.

BY MR. NESIN:

Q. Can you be more specific about what you mean by the wind-down activities that constitute speech?

MR. OHLENDORF: Same objection.

THE WITNESS: I think that as it, you know, relates to wind-down, [46] you know, in my position the focus is on the post-general election report and determining, you know, what those, you know, what the financial position in getting, you know, what the process is of determining what the financial position is of the committee for that report.

BY MR. NESIN:

Q. Right. But you're testifying on behalf of the committee as a whole, not just in your own personal capacity.

And you indicated that you believe that certain wind-down activities engaged in by the 2018 campaign constituted speech.

And I'm just asking you to identify what those wind-down activities were that you are saying constitute the committee engaging in speech?

MR. OHLENDORF: Again, I would make the same objection. We've not designated Mr. Hobbs as a witness for the committee to testify about the committee's understanding of the legal [47] definition of political speech.

MR. NESIN: Well, the committee has taken this position in this lawsuit that their speech is being infringed upon by this law, and we're going to get to that. So its useful to know what they are actually talking about.

BY MR. NESIN:

Q. You can answer the question, Mr. Hobbs, if you have one.

A. I think the campaign would have potentially paid invoices for media expenditures or various web services, e-mail traffic, that would have constituted that at that time.

Q. But the committee is paying invoices for speech that it engaged in prior to the election. Is that correct?

A. In this case, yes.

Q. So in the 2018 election cycle there was no situation where the committee was paying to engage in speech after the general election, is that correct?

A. So you are asking did the [48] campaign pay for political speech before the election that happened after the election?

Q. I'm just asking whether the committee paid for political speech that took place after the election. The payment could be at any time.

A. Well, the result of the election puts the committee in the position of the next election cycle where it can lawfully engage in those types of activities after the election. So that in that sense, yes.

Q. So any speech that was after the 2000 general election—2018 general election would be for the purposes of the 2024 election; is that correct?

MR. OHLENDORF: I would just reiterate the same objection.

THE WITNESS: I would say in— in those cases I would say yes.

MR. NESIN: Okay. Thank you.

BY MR. NESIN:

Q. So you are here as part of a lawsuit that is being brought by Senator Cruz and the committee against the Federal [49] Election Commission.

What is your understanding of what this lawsuit is about?

A. My understanding of what this lawsuit is about is with regards to the limits that are put upon a committee to repay loans over $250,000 beyond 20 days from the election and how that infringes on the rights of the committee being able to make decisions, and ultimately burdens the committee and the candidate because of those limitations.

Q. When did you first have any discussions about bringing this lawsuit?

MR. OHLENDORF: I would object. I don't think that this was in any of the designated matters.

MR. NESIN: One of the matters is communication with any person during any time period that relates to the loan—(audio interference)—and the committee has already said to the court that the entire purpose for the loan was to bring this lawsuit.

So I see no difference between [50] discussion about the lawsuit and discussion about the loan.

MR. OHLENDORF: I don't think that's right at all. I think there clearly could be conversations hypothetically concerning a potential lawsuit to challenge the loan repayment limits that do not relate to the particular loans that Senator Cruz took out in 2018.

MR. NESIN: Just so I understand, are you going to instruct the witness not to answer questions regarding this lawsuit at all?

MR. OHLENDORF: No, no, but to the extent that you are asking questions about the lawsuit, about communications about the lawsuit that don't also relate to the particular loans that Senator Cruz took out in 2018, I don't think those questions would be within the scope of what we've designated Mr. Hobbs for.

Of course he can answer to the extent he knows.

[51]

BY MR. NESIN:

Q. So your counsel has said that you can answer to the extent that you know an answer.

Do you know when the committee began a conversation about bringing this lawsuit?

A. Is there a specific time frame that you are asking within?

Q. I would like to know the earliest time that you can recall having discussions about bringing this loan—about bringing this lawsuit?

A. I think that the earliest that, that the idea of potentially bringing a lawsuit came into consideration was sometime for me in generally the 2012 time frame when it was determined that the loans that were made for that election cycle could not be fully repaid to the Senator because the regulations only allow up to $250,000.

And so the—that would have potentially started the conversation that probably really didn't take place until [52] the following year, but that would have, you know, that was when then generally the committee came to an understanding that the loans that a candidate would make to a committee have to be converted over to a contribution beyond 250 at that 20 day mark from the election.

Q. Are you saying that prior to 2012 the committee was unfamiliar with these laws and regulations?

A. No, I'm not saying that the committee was unfamiliar. It's just that when you cross those election—that is when those conversations tend to come up from time to time.

Q. So Senator Cruz was unable to get repaid a bunch of money during the 2012 election cycle and so, as a result of that, there were discussions about bringing a

lawsuit to challenge that law. Does that seem accurate?

MR. OHLENDORF: Again, Mr. Hobbs can answer but I just want to reiterate he is answering in his personal capacity.

[53]

THE WITNESS: As it relates to that in my personal capacity was asked to do, you know, an analysis of the loans that came into the 2012 Campaign Committee and how much of those loans would ultimately have to be converted to contributions because the committee didn't have the resources to repay those in full.

BY MR. NESIN:

Q. So did the committee believe that the loans that were not capable of being ultimately repaid in 2012 are issues in this lawsuit; in other words, if the committee were successful in this lawsuit would the committee attempt to repay Senator Cruz whatever amount of his loans were not repaid to the 2012 cycle?

MR. OHLENDORF: I, again, object but I don't think that's within the scope of any of the matters for examination, and it's also asking Mr. Hobbs to testify about a hypothetical situation.

BY MR. NESIN:

[54]

Q. You can answer still, Mr. Hobbs.

A. You know, it's a hypothetical that in my—in my discussions those specific loans had not come into conversation, but it's important to state generally that the

regulations prohibited those loans from being repaid in full are the same regulations that are prohibiting the current loan that we've been discussing being repaid in full.

And that, you know, that basis is a burden to the committee because it's a potential revenue stream that the committee could rely on from a candidate, but because of the regulations it makes it harder to repay those loans and, therefore, it acts as a deterrent then to be made to a committee.

Because of that time frame there is less likely a chance for them to be repaid.

And so, you know, that burdens the committee's ability to use those for free speech.

Q. So, first off, you described my [55] question as a hypothetical, but the committee has already said that if it wins this lawsuit it will pay $10,000 owed—that it believes it owes Senator Cruz from the 2018 election cycle. Is that right?

A. In that situation the committee would be paying —would be repaying $10,000 to—that is going to free speech that's already occurred, you know, the loan repayment is going back to the candidate of $10,000, but that $10,000 was already applied to political speech during the '18—2018 cycle, if that's what you're asking.

Q. That's not what I was asking. I was asking because you seem to see a difference between whether—a question about the repayment of the 2012 loan versus the repayment of the 2018 loans.

And can you explain to me what the difference is, why discussing repayment of one would be hypothetical and the other would not be hypothetical?

A. They are not necessarily hypothetical. Obviously we know what [56] happened in 2012 and we know what happened in 2018.

But you're discussing a situation where limits had been applied to a candidate loan. And in order to repay that loan, you know, for let's just say the 2018 one we're discussing, you would potentially have to either repay that with current election cycle funds or raise debt retirement funds as the law allows for those respective election cycles that the loans fall into. And those themselves have donor limits.

Q. I—I guess what I'm asking is, if the court were to say this law and regulation are invalid, the committee is allowed to repay whatever debts it believes is owed to Senator Cruz, would the committee attempt to repay those debts from (audio interference)—

> MR. OHLENDORF: I'm going to object on the basis that the remedies we're seeking in this lawsuit relate solely to the candidate loans made in 2018, and what you are asking the [57] witness to discuss is internal legal strategy related to loans outside the scope of this lawsuit.
>
> And he would have to reveal privileged conversations as to what that legal strategy would be for loans that are not at issue here.

BY MR. NESIN:

Q. Let me just ask one more quick question about this lawsuit and then we're going to move on to a different area. I'm going to try to do this without using an exhibit because it seems like it's going to be a pain to do exhibits.

There is an e-mail that was produced from April 2017 about where we are on Chuck's FEC loan.

Do you understand that to be this lawsuit?

A. Yes, sir.

Q. And it says in the e-mail Pre, P-r-e, is talking with Senate Ethics.

Is that somebody named Prerak Shah? I don't know how to pronounce his name.

[58]

A. Yes, sir.

Q. What is Mr. Shah's position in the campaign or was his position at that time?

A. I believe at the time Pre was Senator Cruz's official chief of staff.

Q. And what is your understanding as to why he was talking to Senate Ethics about this case?

MR. OHLENDORF: I'm going to, first of all, object, that I think here, again, this is outside the scope of what we've designated Mr. Hobbs to talk about.

He can answer in his personal capacity. I do want to say that it's our position that the content of Mr. Shah's communications with the Senate Ethics

Committee is privileged under the speech and debate clause.

And so I instruct him not to reveal specifics to the extent he knows them of those conversations.

BY MR. NESIN:

Q. So did you understand that your [59] attorney said answer the question without revealing any specific conversations between Mr. Shah and the Senate?

A. It's my understanding that those conversations came about in the hypothetical for how this challenge would proceed and they were seeking guidance and information for how it would be—how it would proceed and how it potentially would be compensated for.

Q. How who would be compensated?

A. How the—how the—challenges cost money.

Q. Who is paying the legal bill, whether the committee is able to pay the legal bills; is that the question?

A. Whether it was the, you know, the committee or just the general framework for how it would be paid for legally and within Senate rules.

Q. Okay. I understand. So are you aware—I think before I get to the next—the next questions that I want to ask you are about ways in which the committee was injured due to the loan [60] repayment restriction at 52 U.S.C. 30116(j) that we've been describing and the—

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. Can you tell me how the committee has suffered as a result of this regulation, and particularly in the 2018 election cycle, how—how the committee suffered?

A. Thank you for clarifying the 2018 election cycle. I would say first the committee would like to be able to repay these loans using pre-election and post-election funds.

And if you can imagine being able to use post-election funds, that constitutes a larger pool of funds for potential repayment.

And with a larger pool of funds there is a case to be made that there is a more likely chance that those candidate loans would be repaid in full, but because of the regulation that you cited, there is [61] a—the committee is injured or burdened in that it deters a candidate from making loans larger than $250,000 because thereis a less likely chance that those loans would be returned to the candidate because you would be dealing with a smaller pool of funds because that regulation limits the number of post-election contributions that can be made. And so—

Q. Okay. You can continue if you have more to say. I thought you were done. I'm sorry.

A. And so it's a burden for the committee. Because of the smaller pool of funds, it deters a candidate from making contributions larger than $250,000 and, therefore, it limits the amount of financial resources a committee could use for political speech.

And I will say another way that the committee is burdened by this regulation that you've cited is because it has an arbitrary 20 day lock on it.

And it affects—this regulation effectively forces a committee [62] to pay its creditors and liabilities in a certain manner—in a certain way and, therefore, it infringes upon the rights of the committee to be able to repay its debts in the manner that it chooses and in the time frame that it chooses.

Q. Okay. You can continue later. I don't want to—you've already identified a number of things that I want to follow up on.

So one of the ways that you said the law can be a burden is that it can deter a candidate from giving loans over $250,000. Is that correct?

A. Yes, sir.

Q. Did the law deter Senator Cruz from giving a loan of over $250,000 during the 2018 election cycle?

A. Generally I would say that as it relates to—to this committee and this candidate, or any committee and candidate, the way the law—the way the regulation is written it greatly decreases the chance of repayment of those loans beyond $250,000.

[63]

And, therefore, it's a large deterrent for a candidate to put in more because there is not—there is a less likely expectation that it would be repaid.

Q. Right. I understand your position, the committee's position that there is a hypothetical situation where

it might be less likely for a candidate to contribute—to donate funds due to this law and regulation.

What I'm asking you is, in 2018 did this law and regulation prevent Senator Cruz from making loans in excess of $250,000?

A. The regulation creates the environment for where a candidate has to think about that consideration when putting a candidate loan. And as I've said before, it's a big deterrent because of that $250,000 cap.

Q. Right. I understand you are continuing to speak in a general sense. But maybe this will be helpful.

I'm guessing that you are aware [64] of this, but the Plaintiffs recently stipulated to the court that the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loan and the committee's actions in waiting to repay them was to establish the factual basis for this challenge.

Given that information, is it still your position that it was—that the law was burdening Senator Cruz's ability to make a loan of over $250,000?

A. Well, as stated, the motivation behind its actions and timing were to lay the factual groundwork for this challenge.

Q. All right. So what I'm saying is my understanding of that language is that, if there were no lawsuit like this one, Senator Cruz would not have made a loan to his committee.

Does the committee agree with that position?

A. Well, again, as the committee has stated, the motivation for this candidate loan and the timing of the repayments need a factual groundwork in [65] order to challenge this.

Q. All right. So maybe I'm not making myself clear. Let's pretend there is no lawsuit, okay, just hypothetically this lawsuit was never brought.

Would Senator Cruz have made a loan to the committee during the 2018 election cycle?

A. So I think the committee views, as it relates to the loan, I don't think anything would have necessarily changed.

But I do think it's important to add that, if you agree with the motivation, which we all—interestingly enough, as it turned out, the loan to the committee ended up being important to its underlying objective of winning the election, and that's just how it happened to turn out.

I find it interesting that your hypothetical question allows us to, you know, further that conversation to show how important these types of financial resources can be to—from a candidate to a committee can be.

[66]

And in this situation these resources went to the furthering of political speech to ultimately winning election.

Q. So I don't think that you really fully answered the question that I was asking. And I'm having trouble reconciling your answer with the stipulation that I just read to you.

You said that you don't think anything would have been different with respect to the loan if there were no lawsuit.

But the stipulation says that the sole and exclusive motivation behind Senator Cruz's actions in making the loan was for the lawsuit.

How else—how can those two statements be reconciled?

A. Well, again, as you've made clear and the committee has stated, the loan's sole purpose was to create the basis for this challenge.

Q. So if there were no challenge, there would be no loan; is that correct?

[67]

A. In a hypothetical?

Q. Well, when you say "in a hypothetical," you're just talking about the hypothetical situation where there is no lawsuit; is that correct?

A. Yeah.

Q. Okay. So given that there would be no loan if it were not for this lawsuit, can you explain how it could possibly be a burden for the committee in 2018 to have disincentivized Senator Cruz from making loans that he wasn't going—

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. The question was—and I don't recall the exact wording—is how can the situation be reconciled with

this burden that you got—in 2018 the committee was burdened by the fact that Senator Cruz was disincentivized from making a loan?

A. The fact of the matter is that the loan was made. And because of the regulation the, you know, the motivation doesn't go in front of the fact that [68] beyond that $250,000 it's—it wouldn't be returned.

It's more of a deterrent—it's injured in that the candidate knows going into that situation, regardless of motivation, that they are limited to the amount that can be returned by that regulation. And so—

Q. Right. So when you said the fact of the matter is that the money was loaned, are you saying that the burdens that the committee felt were only there because this lawsuit was brought?

And in particular I'm talking about the burden, the one particular burden that we're talking about now that Senator Cruz would be disincentivized from making larger donations—larger loans to the campaign.

A. I think that the regulation as it is, is a large deterrent for a candidate to loan funds to its committee, regardless of motivation and regardless of the fact that this committee was loaned funds or not.

[69]

It is a large deterrent because there is a limited pool of funds that can go to return those funds to the—to be paid for—they were paid for by political speech.

Q. So, again, I understand that the committee's general position in this lawsuit is that this law infringes on their First Amendment rights and all these things.

But part of the lawsuit involves the committee describing to the court the burden that it actually was suffering during the 2018 campaign as a result of this law and regulation.

So what I really want, as best as possible, for us to focus on what actually happened in 2018 and not about hypothetical scenarios about what might have happened in other campaigns or under other circumstances.

Right now I'm still trying to ask—the question is how the committee was burdened by the fact that Senator Cruz was disincentivized in giving a loan when [70] it's Senator Cruz that already told the court that the only reason it gave a loan was to bring this lawsuit?

Those seem to be entirely at odds with one another in my thinking. Can you try to help me understand how those statements can be reconciled?

A. Okay. I think that—I think that the committee is burdened, or was burdened because, you know, it—the motivation behind it doesn't impact the regulation.

The committee is still burdened by the fact that it potentially has to rely on this potential source of revenue in order to further its political agenda.

And the circumstances could have been different, and that is relevant in this, in which case the committee is burdened because it would believe that it was less likely to receive more than $250,000 in candidate loans because of that deterrence. And that's a valid point.

Q. The circumstances you are [71] describing, though, did not happen during the 2018 election; is that correct?

A. I understand.

Q. The circumstances in which the committee would have expected to receive a loan from Senator Cruz did not take place during the 2018 election cycle. Is that your testimony?

A. As it played out, but it's important to say that the circumstances could have been very different. And it's also important to state that this was a very fluid election cycle for this committee.

And the committee, had there been different circumstances, would have enjoyed the financial flexibility to be able to potentially obtain those candidate loans. But because of this regulation, it—it—it was a big deterrent for the candidate to put in more than that because it limits the amount that can be repaid.

And so, yes, you can agree with the motivation and, yes, the circumstances are what they are, but they could have [72] been very different, and the thinking of the committee would have wanted to be able to use more resources for more political speech to win the election.

Q. All right. So, as I understand it, that there are circumstances in which the committee would have been burdened by this law and regulation; however, those circumstances did not happen during the 2018 election cycle. Is that what you're saying?

MR. OHLENDORF: Objection. I think that misstates Mr. Hobbs' testimony.

MR. NESIN: I'm asking him to clarify.

MR. OHLENDORF: You can answer.

THE WITNESS: What I'm saying is that, as it relates to this loan, even though the motivation was to lay the basis for this challenge, the facts still remain that the committee was burdened because it didn't necessarily believe that it would be able to receive more in candidate loans if it [73] needed them because the regulation deters the candidate from putting more in because there is a potential for a smaller pool of it to be repaid.

So the committee is still burdened by that point, that it's less likely to be repaid; therefore, under these circumstances, or different circumstances, it would be less likely that it would be put in.

And also that it would have to use pre-election funds to repay those loans under 20 days that it could have used for other political speech to be had.

BY MR. NESIN:

Q. So you say could have used. But did the committee have to make that choice about whether to use funds for speech or to repay a loan, or is the burden you are describing just a hypothetical burden?

A. The burden I'm describing is that a committee is forced to pay off its creditors in a specific manner and time frame that's not of its choosing because [74] of this regulation.

And it's burdened because of that, and it infringes on its ability to be able to pay those debts in a timely manner that it chooses.

Q. Okay. I understand.

So I guess we're moving on now from the first burden that we talked about, alleged burden, that the

law deterred Senator Cruz from making loans to the committee, and now we're moving on to a second burden that you're identifying, which is that it causes the committee to have to spend money in different ways than it otherwise would have.

Is that correct?

A. Sure.

Q. Okay. So now during—so, again, I want to try, in the same way that we tried to do sort of successfully with the previous burden, if we try to focus just on the 2018 election cycle and what actually happened.

So was there any speech that the committee chose not to make because it had [75] to pay any loan to Senator Cruz in 2018?

A. You know, as it relates to the financial situation of the campaign at that time, the campaign had net debts outstanding post the election.

And as it relates to the loan and these other committee debts, the campaign, you know, had to align its payments up with what it would have liked to have done. It needed to—

Q. Have you finished your thought?

A. Yeah. Sorry.

Q. It's okay. These are difficult questions.

I guess I'm still having trouble understanding what about the payment7 timing and about what was different in—during the 2018 election cycle because of this debt about the way that the committee conducted itself?

A. Well, the committee conducted itself under the premise of how the regulations would play out regardless of what the motivation was, and that a committee's purpose is to further the [76] candidacy and ultimately win an election.

And a committee wants resources in order to further that objective, creating political speech, discussing policy, the depth of it, and reaching ultimate voters.

And so the motivation behind it doesn't change the fact that a committee has to view the potential of getting those resources as less likely because of that deterrent on the candidate being refunded. And that doesn't change just because of what the motivation was.

The committee has that concern because, if the situation would have been different, the committee would have potentially wanted to get more resources, political activity, that it might not have received.

So the two go together. Just because of the motivation doesn't take away the fact that—that the committee—by the fact that the candidate can't put more funds in, even a single dollar, to further its [77] political objective.

Q. I'm—I'm not sure that really answered what I was asking either because really, again, I'm really trying to focus on the 2018 campaign election cycle and what changes or burden the campaign even had as a result of this law.

And you are talking generally about, oh, this could be more likely or less likely. But what I want to know is in what way was the campaign actually burdened, not it could have been burdened in this way and

it could have been burdened in that way, but how was it actually burdened.

And what you've described, one of the ways you say it was burdened is because the law forced it, the law and regulation forces the committee to pay creditors in a different way or a different timing.

Can you tell me some instances from 2018 where the law made you do that?

A. Well, the campaign paid various bills to its creditors in the post time [78] frame and the—a decision would have been made generally to—

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. Let's continue. Mr. Hobbs, so far I think you've described two burdens that you felt that the committee suffered as a result of the law and regulation.

One, that it makes a candidate generally less likely to make a large loan to the campaign. Also, you could not specify whether that actually happened in 2018.

Is that correct, for the first burden?

A. The first burden, part of what you were saying is that the committee took the position we know—we know what its motivation was in receiving the candidate loan. The committee burden had changed.

And in its desire to receive lost candidate loans to further its political purposes, the—and so it is burdened because of the large deterrent [79] and expectation that loan can be repaid to the candidate.

Q. Okay. I think we've discussed—we've discussed that one. The second burden that you described was that the law and regulation effectively forced the committee to spend money in a different manner than it otherwise would have, and that you also described as sort of a general burden.

But when I asked for specifics with respect to the 2018 campaign, I don't—I don't think that you identified any ways in which the committee spent money differently as a result of the law; is that true?

A. So as it relates to the second burden of the committee that I was describing was even with the determination of the underlying motive of the candidate loans to the committee, it doesn't change the fact that the burden was still there and that because of the 20-day requirement, the arbitrary 20-day requirement to repay up to that $250,000 [80] loan amount, it requires a committee to pay its creditors in a specific manner that's not of its choosing, also impacts the—it's a burden in that because of that 20 days it effectively forces a committee to either breach its contractual agreement with the candidate of a potential loan larger than $250,000 or it's required to realign its payments to its creditors in an order that's not of its timing or its choosing.

Q. Okay. So—but, again, in 2018 the committee did not during the 20 days repay anything to Senator Cruz; is that right?

A. Well, I would refer you to the post general FEC report for the specific dates and amounts that the committee returned campaign loans since those are—those are the ones that are on record.

Q. Are you saying that you do not know whether the committee repaid Senator Cruz any money during the first 20 days?

A. I'm not saying that. I'm simply stating that those dates and amounts are [81] on the public record and, therefore, I would refer you to the public record, as were multiple repayments on multiple dates, for accuracy purposes—

Q. I appreciate—yes.

A. —ask to see the public record as opposed to making a statement.

Q. I appreciate that. I have looked at the public record and the public record indicates to me that Senator Cruz was not repaid any money during the 20-day period immediately following the general election.

Do you disagree with my understanding as to what the public record indicates?

A. I agree with what the public record indicates.

Q. Okay. So given the fact that Senator Cruz was not repaid any money during those 20 days, how did that change anything about the manner in which other vendors or recipients of money from the campaign received money during those 20 days?

[82]

A. The period after an election, in a specific committee, that period of time, the committee had exhausted

all of its 2018 financial resources and then some to the point where the committee was in a situation of net debts outstanding at that time.

And so it's a challenging time for a committee as it's working through those daily decisions to pay off creditors that participated in political speech to further the efforts of the committee in the 2018 cycle.

And as it relates to the committee trying to pay off these various creditors, as it relates to their contract terms or their invoice terms, you know, that goes into the decision-making for—from a cash flow perspective. That's the situation we were in—(audio interference)—the committee.

Q. Right. I—I guess I—I—I still don't understand. It's always, in any campaign, whether a candidate gives a loan or not, those same circumstances [83] would be true, that those days after the campaign ends are a challenging time for the committee and they have to pay vendors and reconcile all of their various revenue streams and expenses. Isn't that right?

I'm asking what is the additional burden that is related to having a candidate loan, and in particular in 2018?

A. Well, for this specific committee, and given the financial situation of the committee at that time, and knowing that there is a long list of creditors that needed to be repaid, the committee made those decisions on a daily basis to try and pay those off knowing that it had net debts outstanding.

And that's a perilous situation for a campaign as it's making those decisions.

Q. Okay. But I'm still a little confused about the impact of the loan repayment limit that's at issue in this case and how that in 2018 changed the committee's behavior, not just that the [84] committee generally has to deal with all of these various issues that committees deal with all the time?

A. Yes, but it changed the fact that, generally speaking, a committee understands that the financial situation it's in is potentially in a likelihood of the amount that it's candidate would loan to a committee.

So you're assuming that the situation we're in is somehow different just because of the motivation. We were still of the thinking that the committee's objection —objective to win the election could potentially have resulted in asking him, hopefully receiving, more candidate loans to further its political speech.

But the committee is burdened by that because it fundamentally understood that the candidate would most likely not be able to have those loans returned beyond $250,000 and, therefore, it decreased the likelihood of that happening.

And you can't, you can't think [85] that just because of the motivation. It's still a valid thought of the committee as it's making it's financial decisions. Just because it received a loan for a purpose, and in this purpose we've discussed the motivation, doesn't mean that the committee would not have potentially sought another loan to further its political speech.

And it's burdened by the fact that, if you are not able to repay this, then the likelihood of a candidate or any—this candidate or any candidate making a future

loan to its political campaign has been deterred and that likelihood is significantly smaller.

And that sends, you know, that sends a pretty strong message across the spectrum, the deterrent, and I don't see the two as different as you do.

Q. Okay. So I think we have to move on.

Are there any other ways, other than the, I think, two ways that you have identified a burden so far on the [86] committee, are there any other ways that you believe that the law burdened the committee during the 2018 election cycle?

A. I think I'm okay right now.

Q. So let's move on to ways in which the campaign —the complaint in this case also indicates that the law potentially burdens a potential contributor or actual contributors to the campaign.

Can you explain how that happened in the 2018 election?

A. So if the—if the federal laws and FEC regulations allow for post-election contributions to be raised as it relates to net debts outstanding calculation by the committee, that net debts outstanding amount essentially is a cap on the amount of lawful post-election contributions that can be raised.

If you take that cap, and what would be defined in that net debts outstanding calculation would also include liabilities to the committee, in which case a candidate loan would be considered [87] a liability, just as a regular debt from a vendor or a commercial loan, if you are now—and I say you—say if the committee is forced to remove, as the regulation states, to remove candidate

loan liability that exceeds $250,000 from the net debts outstanding calculation, then you have, in essence, taken your original cap that you were allowed to, by law, to raise post-election funds from contributors toward, and you have lowered that cap.

And so now you have a smaller amount of post-election contributions that you can lawfully reach out to contributors for to potentially (audio interference)—

As it relates to the contributor, you now have a situation where a contributor would have potentially given a post-election contribution as the law permits, but because of the smaller cap now presented a situation where that contributor no longer has the ability to contribute to that election cycle through post-election contributions because of a [88] smaller cap.

And so the—so the contributor, the contributors' rights are infringed in terms of being able to make that contribution because of the regulation.

Q. Okay. So how—many campaigns end with no net debts outstanding at all. And in that instance contributors and potential contributors are not permitted to lawfully give money for that past election cycle after the election has taken place.

Does that infringe on their constitutional right in the same way that you're saying this law does?

MR. OHLENDORF: I would object insofar as it's asking for Mr. Hobbs' views on a question of law.

You can answer to the extent you are able.

THE WITNESS: Could you please repeat the question?

MR. NESIN: Yes.

BY MR. NESIN:

[89]

Q. So my understanding of what you said—and maybe this will help if I cantry and make sure we're on the same page—is that the law in some instances will diminish the amount of net debts outstanding and, therefore, potential contributors may, after that net debts outstanding has already been raised, potential contributors would not be able to contribute any post-election contributions to the campaign, and in your view that infringes on their constitutional rights.

Do you agree with that characterization of what you've said?

A. If what you said is a fair representation of what I said, then, yes. If what you said is not, I would say no.

Q. That's why I'm asking.

A. We could ask Karen to read us back the tape. But for the sake of time and sanity, I, you know, we can perceive that what you said is a fair and accurate representation of what I said.

Q. So now what is the difference [90] between that law and the net debts outstanding law generally which, if a campaign does not have any net debts outstanding, then contributors cannot make post-election contributions to that campaign?

It seems entirely analogous to me, and I would like you to try to explain to me what the difference is, if you think there is a difference.

A. So the regulations are written so that if a committee, as you say, does not have any net debts outstanding, then the law essentially says that no more contributions can be received and credited toward that election, and that would be after Election Day.

So there is no post-election contributions permissible under the act in your scenario, yes.

That is a different situation than the scenario that I have described and the burden on the contributor because, as the law is written, when a committee has a net debts outstanding calculation, [91] permits it to raise post-election contributions, then the laws and the regulations have presented a scenario where beyond Election Day a contributor may lawfully contribute to that previous election cycle.

So in this situation a post-election contribution would be permitted after Election Day but count toward the general 2018 election limit.

So that is an important—that's an important designation to put in there that the chance for an election don't change and a potential contributor would be required to stay within those limits.

Q. Right.

A. And so it is a different situation in that, if you are in that net debts outstanding scenario where you can raise potential debt retirement funds from donors, and you have a—and that calculation is Calculation A, and now the law or the regulation then requires us to—or that bar from A to B by the [92] amount above $250,000, then you are, in essence, decreasing that cap and you are taking away the—effectively the opportunity for a donor to make a lawful contribution in that scenario.

So they are two different scenarios that are—that—that—that you said. I don't see them as the same scenario.

Q. Maybe it would be helpful to look at this from the perspective of this potential contributor that you are describing.

So what you are saying to me is, if there is a potential contributor who wants to give money to the Ted Cruz for Senate Campaign, and that person—and—and the Ted Cruz for Senate Campaign has an outstanding debt to the candidate but it can't pay that by virtue of the loan repayment provision, that that violates the constitutional right of this potential contributor because they can't give the money to the Ted Cruz campaign.

But if the—but from the [93] perspective of the contributor, they also can't give the money if it's just that all the—(audio interference)—no net debts outstanding.

So from the contributor's perspective, why does it matter the reason that he or she cannot make this contribution, or does it matter what the reason is?

A. So as it relates to post-election contribution, the regulations and in this scenario allow a contributor to make that contribution. That's their right to do that. And—

Q. That's a constitutional right or it's a statutory right? What sort of right are we talking about here?

MR. OHLENDORF: I would object that Mr. Hobbs is being asked to give his opinion on a question of law.

THE WITNESS: I would state that it's a constitutional right for a contributor to partake in an election and having the right to contribute, and in this situation contribute [94] post-election funds is one of those.

And so by taking away their right to make that post-election contribution that's lawful, by lowering the cap that has been set by the net debts outstanding and it has been lowered again because the regulation requires that any candidate loan amount above $250,000 be taken out of that calculation, therefore, removes that right of that contributor to make that contribution.

And that's an infringement upon their ability to do so willingly.

BY MR. NESIN:

Q. Okay. So during the 2018 general election, did the law infringe on any potential contributors to the Ted Cruz for Senate Campaign?

A. Can you please clarify your question as it relates to which collection and which time frame?

Q. Well, the time frame that you're describing is post-election contributions. So I guess that's the time frame I'm [95] asking about.

Was any contributor or potential contributor's rights infringed in the post-election, you know, in the post-election time period by virtue of this new law or regulation?

A. Thank you for clarifying the time period that we were discussing. I just wanted to make sure we were on the same page.

It's my understanding that the committee did not receive any post-election contributions during that time frame.

Q. The committee did not receive any post-election contributions at any time after the election, after the general election of 2018?

A. Yes, sir, the committee did not receive any general 2018 contributions after Election Day 2018.

Q. Now, is that because the—if the committee did receive contributions after the election in 2018, that those contributions were either refunded or [96] redesignated as 2024 contributions?

A. Can you please restate that question?

Q. Right. So we both have seen the public record and that there are individuals who did make contributions to the Ted Cruz for Senate Campaign after the general election of 2018.

Do you agree with that?

A. You mean contributions that happened after the election that went toward primary—

Q. Went towards any purpose, but it was the contribution that was brought in by the campaign after the 2018 general election.

A. So, yes, I would repeat that the Campaign Committee could not receive any general 2018 contributions after Election Day, but I do agree that the committee received collections that went toward both the primary and the general 2024 election cycle after Election Day.

Q. Okay. And had the committee wanted to or had the need for it, could [97] some of those contributions

have been used to repay debt from the 2018 campaign, if necessary?

A. So the committee was in a net debts outstanding situation going into the post-election period. And it is permissible to—to use those funds and pay off those creditors if the committee deems that as prudent.

Q. Okay. So to go back to the rights of these post-election donors, if no post-election contributor gave for the purpose of the 2018 cycle, can you explain how any such contributor or potential contributor had their rights infringed by this law that—that relates to the 2018 cycle?

A. So what's your exact question?

Q. My question is, did any post-election contributor or potential contributor to the Ted Cruz campaign have rights infringed as a result of this law?

A. So, generally speaking, potential contributors' rights were infringed upon making these—making a [98] post-election contribution because of this regulation.

The situation that this committee was in where it had net debts outstanding and, therefore, provided for the lawful amount of funds to be raised by these contributors, just because that circumstance is the one that took place didn't mean that the committee had to begin or start seeking contributors for that purpose. That situation still existed.

Q. Do you know of any individual who has told the committee that they believe their rights were infringed in any way?

A. I'm not aware of a contributor that officially notified the committee of that. However, it's important

to note that just because a contributor didn't notify the committee doesn't remove the fact that the pool of funds, potential funds that could have been raised was lowered and, therefore, potential contributors' rights were ultimately [99] infringed upon because they couldn't contribute up to that limit.

Q. I understand the theoretical underpinnings of the argument. But the committee has affirmatively said in this lawsuit that potential contributors had their rights infringed in 2018.

And I'm really asking, is the only basis for that statement this sort of theoretical construct that you are describing whereby people might have had rights infringed, or is there actually a person that you can point to or a communication that you can point to in which there is concrete evidence of this infringement?

A. Well, what you say is theoretical doesn't change the way that the regulation is applied to these potential contributors.

A right of a contributor, in this case the financial situation with net debts outstanding that the committee was in, presented that right for potential contributors to make post-election [100] contributions regardless of—that right is still there regardless of whether they reached out to the committee or not, not the same.

Q. Okay. Other than the things that we've already discussed, is there any other way in which contributors or potential contributors have been burdened by the law or regulation that you can identify?

A. I'm good.

Q. Okay. Let's move on.

Did the committee ever ask Senator Cruz to loan some money for the 2018 general election or did he do it on his own initiative?

A. The—I would refer you back to my statements on the underlying motivation of these candidate loans.

And so if the underlying motive was to lay the factual groundwork for this challenge, then it seems to me that the candidate, since that's where the loans were coming from, would have started that conversation.

[101]

Q. Okay. I actually—I'm going to jump a little bit. I have questions about two particular transactions or series of transactions and that somehow relate to the amount of net debts outstanding that the committee found itself with at the end of Election Day.

So the first is the record indicates that on the day before Election Day the campaign donated $200,000 to the Texas Republican Party.

Does that seem familiar to you?

A. The transaction is familiar.

Q. Yes. Okay. So I guess my first question is, because the documents that were provided confused me a little bit, was that $200,000 always intended as a donation?

A. As opposed to what?

Q. Right. So I'm not trying to be cagey about this. I can show documents if it makes it easier.

But it appears to me from the documents produced that there was a $200,000 ad buy that was intended that [102] Friday before the general election, $200,000, there was an agreement with the consultant or vendor about a $200,000 ad buy, and you said—and the committee said they wired the money on the following Monday, is that okay, and they said sure.

And then those documents were produced in this litigation in response to questions about the $200,000 donation to the Texas Republican Party.

So I'm just a little confused about whether that's the same $200,000 or a different $200,000 for purposes of (audio interference)—

A. It's the same $200,000.

Q. Okay. What was the reason that the committee decided to donate $200,000 to the Texas Republican Party on the eve of the election?

A. Well, the wire was done on the eve of the election because that just happened to be the first banking day that that transaction could—the—it's perfectly reasonable to—to see that the Candidate Committee would be using all of [103] its resources that it could to meet its objective of winning the election, and so it's reasonable to see that a Federal Candidate Committee would be working closely with the state party in the respective state that the election was happening in.

And it's also lawful for a Federal Candidate Committee to make unlimited contributions to a federal, state or national party. And so in this situation, in an election that was extremely fluid, it makes sense that you would have a Candidate Committee that is working closely with the state party, and in—and in situations

coordinating its efforts with a state party, in order to further its political objective.

And in this situation that was—that's what happened.

Q. What I'm talking about was reported as a donation, not as a coordinated expenditure.

So you have described that, you know, on the day of the election the [104] committee had all these net debts outstanding and it was difficult to—you were worried about paying your bills, it was a high stress situation.

But, meanwhile, the day before the committee had literally given away $200,000. And I'm trying to understand the reasoning why the committee would have done that.

A. So, again, I will refer you to my previous statement of the transaction occurred on the eve of the election only because that was the first bank day where that transaction could actually take place.

Q. But the transaction didn't have to take place at all, right? Was there any obligation that the campaign had to give $200,000 to the Texas Republican Party?

A. As the committee approaches any election, in this specific case the 2018 general election, it's the responsibility of the committee and its consultants, employees, officers, what he may have, [105] it's their obligation to meet the prime objective of the Candidate Committee. And that is to win on Election Day.

And it is completely reasonable in any campaign, but specifically one of this size and scope, for a federal campaign to be working closely with the respective state

party in the state that it's running for election for because debt payable are a potential resource for the Candidate Committee to further its objectives.

And one way to do that is through coordination, which is permissible by law and by the regulations, from the state that a Federal Candidate Campaign Committee can contribute or transfer unlimited amounts of funds to a state or national party. So that's completely a reasonable transaction.

Q. So I understand that there are circumstances in which a campaign would make a donation to a state or local party.

What I'm trying to understand is what the specific purpose of this donation [106] was. It was not a coordinated expenditure, it seems like, for the Cruz campaign. This was a general donation to the Texas Republican Party to use for any purpose.

Why would the Cruz campaign that is concerned about its financing decide to right at the end give away a bunch of money to the Texas Republican Party?

And I guess just to cut to the chase, did this have anything to do with this litigation that we're talking about right now?

MR. OHLENDORF: I—I just want to object. I think that misstates Mr. Hobbs' testimony. I don't think Mr. Hobbs testified that this wasn't a coordinated expenditure.

MR. NESIN: Okay. Then I would like to understand from Mr. Hobbs what this expenditure was and why it would have been reported as a donation if, in fact, it was a coordinated expenditure.

THE WITNESS: So a federal [107] Campaign Committee files on a specific form, Form 3, and the form that the Federal Candidate Committee files on is a different form than the state party files on. They file on the Form 3X.

And so because they are different forms, there are different mechanisms for reporting. The federal Campaign Committee isn't or wouldn't be filing that transaction as a coordinated expenditure. It would be filing it as a contribution or a transfer because it is allowed to do that in a limited form as it seems fit.

The state party committee, which uses a totally different form, Form 3X, is the committee that would be reporting it as a coordinated expenditure as it related coordinating with the Candidate Committee. The Federal Candidate Committee isn't the one that reports it.

Q. Okay. Do you know if the Texas [108] Republican Party reported it as a coordinated expenditure or as a donation?

A. I would refer you to the federal record.

Q. Okay. But the specific—this is helpful, though—the specific purpose—was the $200,000 used for an ad buy to benefit Senator Cruz in the last days of the election?

A. I would refer you to what the actual invoice says. You know, it was—I believe it went toward some sort of medium to reach potential or likely voters in some capacity to further the get out to vote efforts toward the general 2018 election.

Q. Okay. And so that—

A. The wording you would have to see on the thing.

Q. Okay. So that, that $200,000 expense, whatever it was, did that have anything—was it motivated in any way by this lawsuit?

A. Again, I would respectfully refer you back to my previous statement [109] where a Candidate Committee and its consultants, employees and officers' primary objective, really its only objective, is to make decisions that move the ball further down the court to ultimately winning an election, and in this case the general 2018 election.

And the financial decisions that the committee made were made with the purpose of winning that election, and they made those the way that they saw fit to best further the committee's chances to winning that general election.

And this situation ultimately—this expenditure helped reach that objective.

Q. So the expenditure—just to get back to what my question was, and it could just be a yes or no—so the expenditure was not motivated in any way by this lawsuit. Is that correct?

If it was motivated in part by the lawsuit you can expand on your previous answer.

A. You know, I would say that the [110] committee was in a very fluid final stretch of the campaign, and it's easy for you to pinpoint one transaction because of its dollar amount.

But the situation in those final, final few days of the campaign, a lot of financial decisions were being made for the best way to use the remaining financial resources that the committee had to further its primary objective and its efforts to win the general 2018 election. And that consisted of many transactions.

Q. Okay. So without talking about that specific transaction, generally was the campaign making spending decisions prior to the election motivated in any way by this lawsuit?

A. Well, you have—you have two different situations because, as I've stated prior, and I'm pleased to state again if you would like me to go into detail.

Q. I would really prefer if you would just answer yes or no, but go ahead.

A. Well, I think it's important for [111] the record that we go into detail as we—as we did, it might have been a couple hours ago, what the motivation was for the candidate to put in loans to the committee.

And that sole motivation, as we've stated and you've made clear as well, was to lay the factual basis and groundwork for this challenge. And the mindset going into the final stretches of a campaign, generally and specifically in this case, don't fall outside of the thinking that a Candidate Committee has a—has a general sole purpose to win on Election Day.

And any individual or committee or group that is working on behalf of that committee is working to further that goal of winning the election. And, therefore, the financial decisions that the committee makes on the expenditure side are made with the intention of best use of a committee dollar knowing that it has the remaining

resources it has in that, from whatever time period through to Election [112] Day, is left to use, and what is the value of that specific dollar to further the committee's mission, winning on Election Day.

Q. So I'm really—I'm not going to move on because I feel like I've repeatedly asked very simple questions that are not being answered.

The committee has already acknowledged in those stipulations that we read that because of this lawsuit, that Senator Cruz gave the loan, that it's because of this lawsuit that the committee repaid, you know, decided not to repay Senator Cruz any money during that first 20 days.

What I'm trying to determine now is whether it's because of this lawsuit that anything else changed, and, in particular, was the committee trying to have net debts outstanding on Election Day for the purposes of this lawsuit?

A. So I would say that many campaigns' Candidate Committees—just hold on.

[113]

Q. I'm listening.

A. —find themselves in challenging financial circumstances going into Election Day following the theory that you have a finite amount of resources potentially to win that election.

As it relates to this specific Candidate Committee and the general 2018 campaign, which I believe was one of the largest U.S. Senate campaigns in the history of the United States in terms of total dollars spent, the

amount of revenue coming in and expenditures going out on any given day exceeded these small numbers.

There was such large volume coming in and going out, I like to try to think of it this way, of, you know, practically speaking, a campaign would really enjoy a situation where it were able to win an election and—and—and come out on the other side of that election and be in a healthy financial situation.

And what I mean by a healthy [114] financial situation is potentially not having debt to creditors, you know, leading into that realm.

And so, you know, from my perspective and the committee's perspective and in this specific in the committee, because of those large financial swings in those last, you know, period going into Election Day, you're really trying to land a jet on an aircraft carrier with like 100 mile per hour winds because you are making so many different financial decisions on any given day that take into the account many different factors from what's going on in that race.

And so the fluidity of that situation just required a tremendous amount of time and energy into making sure that not only are you calculating your revenue streams correctly, but also on the expenditure side that you are valuing that dollar and you are using that dollar to the best the committee can do to further its political objective of winning the election.

[115]

And so where you are asking for a just simple yes or no question, I'm stating that from a state—from the stance of the committee, it's not a yes or no question because there are thousands of financial decisions and

determinations that are made for the dollars that are used that are in that time frame.

It's the committee's position that it would be prudent for us to use those resources in the best way possible to further the mission of the Candidate Committee, which is to win the election.

Q. Right. So I guess I can try and approach it in a different way.

So you said that the ideal thing for a committee would be to come out of the, you know, finish Election Day and have no net debts outstanding. Did you say that?

A. I said practically speaking that is one possible scenario.

Q. That is a desirable goal, generally?

A. You might find that political [116] campaign people see that as a desirable outcome potentially.

Q. Okay. Now, it turns out that if the committee had no net debts outstanding, that might have been fatal to this lawsuit.

So given that information, was the committee trying to have net debts outstanding after the election?

A. So the committee spent an exorbitant amount of time working on its budget and its revenue projections and the various scenarios on the expenditure side based off of those changing projections.

And being outspent nearly 3-to-1 in this—in this specific race, the dollar had to really go a long way to reach its political objectives.

And even though we have discussed at length, and I would be happy to have those discussions again, with regards to the motivations behind the loans, the Candidate Committee doesn't get around but the Candidate Committee still benefitted from that loan and used that—[117] used those resources to further its goal of winning the election just as any other dollar would have. And that's just a fact.

Q. Well, I think we're getting further afield. Let's just try and finish up this one area of questioning and then we can get into how the $250,000 helped the campaign.

But I guess you're not denying—I mean, I've asked you multiple times and you haven't said no, which would be the simple answer—you're not denying that some spending decisions, possibly including the $200,000 to the Texas Republican Party, may have been motivated at least in part by the existence of this lawsuit. Do you agree with that?

A. As I've stated before, the—whether we're talking about the $200,000 to the Republican Party of Texas or any other of the numerous large expenditures that happened leading into Election Day or any of the other large expenditures that took place in the post-election time that [118] were related to the general 2018 election, the committee's position is that it was completely reasonable to use all resources possible to further its objectives.

And the committee deemed it necessary to work with the state party, in this case the Republican Party of Texas, that has its own resources, because it felt that that was a proper use of funds to meet its objectives.

Q. Okay. So no one is questioning whether or not a particular expense was reasonable or not, however that is defined.

The question I've asked probably six times now is whether any of those decisions were motivated by this lawsuit? That's a separate question from whether those were reasonable for other reasons.

A. I understand.

Q. And so are you able to answer whether there was any, prior to the election, whether there was any spending decisions made by the committee that were motivated at least in part by the [119] existence of this—it didn't exist yet, but the anticipation of bringing this lawsuit?

A. From the committee's perspective, receiving these funds in the form of candidate loans provided for more financial flexibility that the campaign was able to utilize to further its objective.

And from that perspective that's the sole purpose of a Candidate Committee, is to try and win that election and—and the candidate loans were applied to that.

This transaction along with any others, from the committee's perspective, were spent because it was believed that would produce the outcome for the objective of winning the campaign.

Q. Is there a reason that you are incapable of answering yes or no to whether the lawsuit motivated any of these decisions?

MR. OHLENDORF: Counsel, I wonder if we might just go off the record for a minute.

[120]

MR. NESIN: Sure.

(Discussion off the record.)

BY MR. NESIN:

Q. Mr. Hobbs, we're back on the record. So another revenue stream that I'm interested in exploring involved the Ted Cruz Victory Committee.

Are you familiar with that?

A. Yes, sir.

Q. Can you explain to me what the Ted Cruz Victory Committee is?

A. It's a Joint Fundraising Committee.

Q. It's joint between what entity?

A. Ted Cruz for Senate, the leadership PAC that is sponsored by Senator Ted Cruz' Jobs, Freedom and Security PAC.

I would have to look at the JFA, my memory doesn't serve me, but there could be a third participant. Unfortunately I saw a lots of JFA's and so they kind of mix.

Q. Can you explain what the purpose of the Ted Cruz Victory Committee was?

[121]

A. The purpose of a Joint Fundraising Committee is to raise funds for its participants.

Q. And how does it do that?

A. It follows the same federal guidelines and regulations that any other federal entity uses to raise funds, but as it relates specifically to its Joint Fundraising Agreement, specifically spelling out the waterfall.

Q. Okay. With the exception of sort of administrative expenses, did the Ted Cruz Victory Committee pay expenditures or was it just a committee that raised money and passed it on through to its members, to the, you know, Ted Cruz for Senate Committee and the independent PAC and possibly some other organization?

A. The Joint Fundraising Committee's purpose is to raise money and distribute it to its participants as the JFA stipulates.

Q. And who runs the Ted Cruz Victory Committee? Were there individuals responsible for that committee associated [122] with the Ted Cruz for Senate Committee?

A. Can you repeat that last part? I'm sorry.

Q. Was it the same people that are working for the Ted Cruz Victory Committee as the Ted Cruz for Senate Committee or was it a completely different group of people?

A. There is some overlap as it relates to the two purposes of the committee.

So if the Joint Fundraising Committee's purpose is to fund raise, then you would have a situation where you would have a potential fundraiser fundraising for that Victory Committee as well as fundraising for the Candidate Committee.

Q. Okay. So did the Ted Cruz for Senate Committee know about the financial state of the Joint Fundraising Committee during all relevant time periods?

A. Yes.

Q. Now, the purpose of the Joint Fundraising Committee was to provide funds for the Senate campaign to help get [123] Senator Cruz elected. Is that right?

A. The purpose of a Joint Fundraising Agreement is to raise funds. In this case the first participant in line in the waterfall was Ted Cruz for Senate, and so it would then in its distributions distribute funds accordingly.

Q. So the records seem to indicate that the Ted Cruz—that the Joint Fundraising Committee had well over $200,000 cash on hand on Election Day that it had not distributed to the Campaign Committee.

Can you explain why that didn't happen earlier when the campaign could have used the money to engage in election activity?

MR. OHLENDORF: I just want to object that Mr. Hobbs is obviously not here as the representative of the Joint Fundraising Committee.

He is free to answer to the extent he knows from the perspective of the Ted Cruz for Senate Committee.

THE WITNESS: The Candidate [124] Committee viewed this specific Joint Fundraising Committee as a revenue stream and attempted where possible throughout the cycle to budget for that revenue stream.

BY MR. NESIN:

Q. Who—what—is there a particular individual who makes the decision about when a distribution is made from a joint committee to the Candidate Committee?

A. Generally speaking, the Joint Fundraising Committee makes distributions on a quarterly basis, generally.

Q. Is that what happened in 2018 with respect to this particular Joint Fundraising Committee?

A. It tended to follow the reporting schedule. So that the reporting schedule of the Candidate Committee is quarterly until you get into the pre and post-general period whereby all committees participating in the general election are then required to file a pre-general and post-general report.

[125]

And so, generally speaking, the distributions would follow that schedule as it relates to the elections.

Q. As a general matter, is there any reason why the committee can hold money for a period of time from a Campaign Committee, Candidate Committee?

A. Well, you have a—you have a situation with a Joint Fundraising Committee where it's not practical to make distributions, say, on a daily or weekly time period.

It's just—I don't want to say that it's not possible. It's just very burdensome to be moving and making those—sorry, making those calculations and doing those distributions on a short iteration. So—

Q. Okay.

A. I see what you see.

Q. There may be a challenge but, for example, if the Candidate Committee, whoever is responsible for that, you know, a few weeks before the election had called up the Joint—whoever is in charge of [126] the Joint Fundraising Committee and said, hey, you know, we really could use this money, and I see that you have $300,000 just sitting in your account, can you distribute that now?

Would that have been possible for someone to make that call and, if so, what would have been the reaction?

A. So, again, the Candidate Committee saw this Joint Fundraising Committee as a revenue stream and followed the similar process as it does with other revenue streams in determining, you know, what that level of revenue would be when a distribution is done.

So in the—in your situation that you've discussed several hours ago when we were talking about fundraisers as it relates to pledges, the Candidate Committee, you know, tries to work a budget for what that amount is that could come over in a potential distribution.

And, you know, if you are looking at a Monday, and say that that's $50,000, you can rely on that $50,000 on [127] Friday. You don't—it doesn't need to be distributed, you know, again, your hope is that—not your hope—but your due diligence in determining the value of your revenue streams obviously is very important to that level of certainty.

And so that would have—that would have gone into the budget that the committee worked off of and ultimately made its financial decisions, spending decisions. It would have known—it would have known that value, just as it would have known the value of contributions that were as this, you know, could be classified as a deposit in transit.

And like I said before, there were many transactions of substantial dollar amounts going back and forth in that time. And so as it relates to Election Day, the committee budgeted for, for instance, online contributions that it knew wouldn't actually clear into its bank accounts or be distributed into its bank accounts until well after the election.

[128]

And so it's a—that is part of the normal budgeting process that a committee goes through at the end of every month. When the committee is doing its monthly bank reconciliations, you have deposits in transit as well as when you cross elections. And I would say, even more specifically, when you cross collections you have a tremendous amount of deposits in transit.

But, again, the committee worked very hard in its budget process to try to determine what its revenue streams were, knowing that—and this speaks to kind of that whole jet landing on the aircraft carrier in 50 mile per hour winds—you're making financial decisions knowing that the money isn't going to be there today but it is in transit to the Candidate Committee and at some point in the future it would be.

Q. I understand that. So when you've described how the campaign had a certain amount of net debts outstanding on Election Day, to what extent did that [129] calculation take into account money that the committee knew it would be receiving from the Cruz Victory Committee?

A. So a committee's net debts outstanding calculation takes time to calculate. It cannot be calculated on Election Day.

The budget process and all of the work that goes into, you know, the revenue and expenditure sides of those decisions, is able to get you within a ballpark of where you—where the committee thinks it will end up, but the actual net debts outstanding calculation takes significant time and effort to—to determine.

And that—that distribution from the Candidate Committee, as it is budgeted for, would go into that calculation because that distribution has general 2018 election contributions in it.

Q. So I guess maybe—I'm a little confused by your answer.

So the committee has said in pleadings here that I think it had [130] something like $400,000 of net debts outstanding on Election Day. At the same time the Texas—the Cruz Victory Committee had something like $300,000 in its account.

Were those $300,000 considered as part of revenue that the Candidate Committee already had in calculating its net debts outstanding?

A. So I think for starters the amount that you state for the net debts outstanding was not in the $400,000 range.

Q. I'm sorry. Then what was the range of the net debts outstanding?

A. I believe in our submissions we put something in the realm of $337,000 net debts outstanding.

Q. Okay.

A. And I think it's also important that when you say that a Joint Fundraising Committee or in this case Ted Cruz Victory Committee had X amount of dollars in its bank account at any given time, from a Candidate Committee's perspective that's completely irrelevant because the Joint [131] Fundraising Committee—Agreement spells out how those funds are to be distributed.

And there are other participants in the—there are other participants that will be receiving part of those distributions, as well as the Joint Fundraising Committee itself has its own obligations to pay at any given time. And so just to look at a bank balance and say they have X amount of dollars isn't fair to the conversation because it's a separate entity and it has to—it has to pay off its debts and obligations in order to make a distribution.

And practically speaking, I wouldn't say as it relates to this campaign, but practically speaking with other Joint Fundraising Committees, revenue/distributions tend to go one way.

And so you really have to spend a lot of time and energy to make sure that the calculations you're doing, that you distribute to the participants, are an accurate

financial position of the Joint [132] Fundraising Committee because most likely the fundraising committees, the distributions, are potentially making budget decisions off of what they may get in the future at the next distribution.

And if the Joint Fundraising Committee doesn't make those calculations correctly and it has to come back to one of its participants, it's a really unfortunate situation and places you, you know, in a situation where a candidate maybe doesn't have the resources to make that Victory Committee whole, it's a breach of the Joint Fundraising Agreement. It's a problem.

And so, you know, it just, you know, it's a—it's a—it's not a—it's not a proper representation of the Victory Committee by just looking at its bank balance and assuming that it can distribute those funds just to one participant.

Q. So I'm not trying to make any assumptions and I'm really trying to be concrete about the 2018 Ted Cruz Victory [133] Committee, which gave over $200,000, it distributed over $200,000 to the Candidate Committee in, I think, early December 2018 after the general election had already ended.

And what I would like to know is, during the period of time when the Candidate—you and your colleagues on the Candidate Committee were deciding about paying vendors, repaying Senator Cruz, all of these other difficult situations that you have described in the days following the general elections, were you aware that you would be receiving a distribution of over $200,000 from the Victory Committee sometime in the near future?

A. So as I have stated before, the committee saw this Joint Fundraising Committee—the Candidate Committee saw this Joint Fundraising Committee as a revenue stream.

Q. Yeah.

A. And the committee did its due diligence to determine what it thought [134] could be a potential distribution.

Q. Right.

A. And included that in its budget process—(audio interference)—other revenue streams.

Q. So it included in its internal budgeting procedures, but that internal budget is not the same thing as the calculation of net debts outstanding; is that correct?

A. That is correct, because—but it doesn't—just because they are separate things does not mean that the committee would not have included them in both because they are both very important to each calculation.

They are important to the budget. And they are also—and that distribution that you refer to is also important to the net debts outstanding calculation.

Q. Right. But even if a distribution has not actually taken place yet, it would have been included in the net debts outstanding calculation?

[135]

A. So as I stated a few moments ago, the net debts outstanding calculation takes time to ultimately determine what that true net debts outstanding calculation is and cannot be determined by a campaign Candidate Committee of this size on Election Day or the day after

the election because the amount of campaign liabilities in the form of creditors is a very substantial number.

And as those bills come in to be paid and the budgeted obligations of the committee are fulfilled, you—you narrow—you start to narrow down that number, just as on the revenue side you have—you have—I'll give you two examples.

You have online contributions from individual donors that can take upwards of five to seven days to clear in a bank account because a contributor arbitrarily uses American Express as opposed to a contributor that decides to make a payment with Visa MasterCard and their clearinghouse clears that in a one to three-day time frame.

[136]

And in a second example, you now have one scenario where you have as a revenue stream that it is monitoring, but funds that fulfill those contributions are coming in in staggered form later on in the calendar.

And in the second example we can use direct mail as it relates to how the new regulations stipulate when you are crossing election periods, the committee is able to take the financial document, that being a check, verify the check and verifying the postmark on the envelope stating when that contributor sent in that mail piece with the check. That is all happening after the fact as well for some period of time after the election.

But, again, the committee, in these two examples, worked ad nauseam to run financial models to determine what those would be, knowing that we would be going into Election Day making financial decisions for money that wasn't currently in our bank accounts.

Q. All right. So you—

[137]

A. I have given you two examples but there are multiple revenue streams and the Victory Committee is another one of those streams where you're making financial decisions when you don't currently have the money in your bank account. It doesn't mean you won't receive it, but it's not there.

Q. Right. And I'm asking about a specific number.

So you have described that the net debts outstanding—which I understand can't be calculated on Election Day, it takes some time to figure it all out—the net debts outstanding was 300 and something thousand dollars.

And all I'm trying to find out right now is, does that number account for the 200 and something thousand dollars that were ultimately received from the Joint Fundraising Committee or is that number calculated as if you don't know that there is over $200,000 coming into the committee within the month?

A. That calculation in this [138] specific instance takes into consideration that amount of the distribution.

Q. A distribution that has not occurred yet, you already—you were accounting for that in your net debts outstanding?

A. When the committee went through the process of calculating out its net debts outstanding calculation, the consideration of that distribution that was made.

Q. So had, for example, if the Ted Cruz for Senate Victory Committee did not exist, the net debts outstanding would have, instead of being $300,000, something, it would have been 500 or $600,000, is that right?

A. If you remove that specific deposit in transit in your scenario, yes, you would be removing 200 and some odd thousand in revenue from that calculation. So that would make the hole larger.

Q. Okay. Was anything about the timing or the amount of the distribution from the Joint Fundraising Committee [139] motivated by this lawsuit?

A. So as it relates to the Candidate Committee, the Candidate Committee signs a Joint Fundraising Agreement with its participants, and that is a—that is a legal contract that stipulates how funds are to be raised, disbursed and ultimately distributed to the participants in the Joint Fundraising Committee.

The Candidate Committee going into that agreement understands that the Joint Fundraising Committee would distribute you funds accordingly with the Joint Fundraising Agreement as well as the regulations that it itself is required to follow as a—as a—as a Joint Fundraising Committee.

Q. Does the Joint Fundraising Committee specify specific dates, the agreement that the Joint Fundraising Committee has with the Campaign Committee, specific dates on which distributions are supposed to occur?

A. No.

[140]

Q. So whose discretion is it to determine when those distributions take place?

A. Well, as I said before, the Joint Fundraising Committee, specifically this one, Ted Cruz Victory Committee, tended to follow the reporting calendar, which in the election year it tends to be quarterly. And as you get into October you then have a pre and post-general report.

And so the Joint Fundraising Committee because it participated in the general election by raising general funds for Ted Cruz for Senate was required to file a post-gen report.

And so it followed that schedule in order to, you know, ultimately move, you know, again, the objective of a Joint Fundraising Committee is to distribute funds that are connected to donors to its participants.

And so it did that then, to move those donors and move the distribution over to the Candidate Committee.

[141]

Q. So you are not denying that this lawsuit was potentially one factor in the timing or amount of the distribution?

A. The Candidate Committee takes all of its revenue sources into consideration when it's following its—its objective of trying to determine what those revenue streams are as it relates to its budget.

And the committee sees this as simply a separate revenue stream which it budgeted for throughout the 2018 cycle, just like it did its other revenue streams, and treated this as a—as a deposit in transit, just as it did in those other two examples that I gave you.

Q. Okay. All right. I think we're going to have to move on to some other things.

This is actually a question, just a clarification: So in one of the interrogatories that the committee responded, it said because it didn't have enough cash on hand to pay all of the debts outstanding after the 2018 general [142] election, it was required to raise funds for the 2024 primary election to make up for the deficiency in funds.

Can you walk me through what that means? I don't understand how raising money for the 2024 election helped pay any deficiency in the 2018 election cycle?

A. So the committee as it relates to its net debts outstanding calculation had debt of about 330 some odd thousand. And as the committee moved through the days leading into the election and then the days into the post-election, again, the committee had substantial—had substantially more liability that it knew about than it actually had cash in the bank that it could utilize to help pay for those bills.

We discussed briefly the situations of deposit in transit.

Q. Right.

A. But the committee leading into Election Day knew of and paying obligations and budgeted expenses well [143] north of $2 million at the time. And that amount of resources was not in the committee's bank account or in its possessions at that time.

And, therefore, the committee, you know, makes financial decisions as it moves into the post-election period.

And that post-election period, the committee, because it is in the next election cycle, is lawfully allowed

to receive contributions toward the primary 2024 election. And I would—and the committee can use those resources at its discretion.

Q. I guess I still don't really understand how raising funds for the 2024 primary election helps to pay debt from the 2018 election. That's what I'm trying to understand.

A. Well, in its simplest form you had a Candidate Committee that had debt obligations that for that election cycle, 2018, that exceeded the amount of revenue it collected for that election cycle, general, 2018.

[144]

And, therefore, the committee happened to be in a situation where contributions were made to primary 2024 that helped the cash flow position of the committee that was essentially on life support.

Q. Maybe I need to ask a more fundamental question.

So you said that there were 300 and something thousand dollars in net debts outstanding on Election Day. You've also said that you did not receive any post-election contributions that were—that went towards the 2018 general election.

Yet right now the committee does not have any net debts outstanding other than if you consider the $10,000—(audio interference)—is that right, for the 2018 campaign, the committee right now has no debt, net debts outstanding?

A. We have paid all of those bills off with the exception of the ones that you mentioned.

Q. So where did the money come from [145] if it wasn't from contributors to pay off that 300 and something thousand dollar debt?

A. The campaign was in a position, the Candidate Committee was in a position to receive contributions toward the primary 2024 election that helped with that cash flow, that cash deficiency.

Q. Right, but that's cash flow, but you paid vendor invoices. You said you didn't have enough money at the start of Election Day to make all of these payments and, in fact, you needed 300 something thousand dollars to pay off all your debts to the vendors in full. But then you didn't receive any contributions that went toward paying off those debts.

Where did the money come from that was used to pay those debts?

MR. OHLENDORF: Objection. I think that misstates Mr. Hobbs' testimony. I don't think Mr. Hobbs has testified that no money raised after Election Day was used to pay off 2018 debts.

[146]

I think he has testified that there was no money that was designated, raised after Election Day, designated towards the 2018 election in terms of contribution limits applying.

BY MR. NESIN:

Q. Can you, Mr. Hobbs, is that what your testimony is, is that it was money used—it was money raised after the election that was used to pay off 2018 debt?

A. There was primary 2024 funds that were raised that assisted in paying off those debts. There was no money raised—there was no general 2018 contributions raised post-Election Day.

Q. Okay. So—so 2024, money that was contributed towards the 2024 election was used to pay off these 2018—

A. Yes, sir.

Q. —is that right? And now is the reason that it would consider 2024 contributions because those particular contributors had already maxed out the [147] amounts that they could give for the 2018 cycle?

A. Can you please restate that question?

Q. Right. So you have 2018 debt and contributors are permitted after an election to make post-election contributions to help a campaign retire their debt. That's correct, right?

A. Yes.

Q. So why—why weren't there contributors who gave for the purpose of retiring the 2018 debt rather than giving for the ostensible purpose of helping the 2024 primary even though that's not the way the money was ultimately used?

A. So the way that a Candidate Committee solicits contributions for the general 2018 Campaign Committee, or election, is different than how a Candidate Committee, in this case Ted Cruz for Senate, would solicit post-election contributions that would go toward the general 2018 election.

Q. Can you describe the different [148] ways in which the solicitations would work?

A. Sure. So if you are, let's say the Monday before Election Day, a Candidate Committee has its general donation form asking for all appropriate contributor information that's required under the regulations, including its employer and occupation of that donor, and that's a normal contribution with all of the proper disclaimers.

When you cross through in an Election Day, so whether we're talking about the general election in 2018 or a runoff election or a primary election or a special election or a special general, any time you are crossing that election threshold, that same donor form is no longer relevant to be used in gathering post-election, in this case general 2018 contributions, from donors because a Candidate Committee has to first determine that it has net debts outstanding to raise against.

And then the committee has to [149] make a decision both practical and political whether the committee should proceed to actually raise post-election contributions from individuals as the law pertains.

And then, finally, if the committee decides it wanted to go in that direction, it has to update its donor forms and disclaimers because it is a different ask to the donor on Wednesday than it was on Monday. You have to affirmatively ask the donor to say please provide a $5 contribution that would go toward debt retirement, in this case debt retirement to pay off general 2018 debt.

That's an affirmative ask. It's very different than the standard contribution form that you would see prior to the election.

And what's also important in that time frame is you might also have, and in this situation, a committee that is updating its disclaimers for the current election that it's in, so in this case the current election would be primary, it [150] would be running for the primary 2024 election cycle.

You have a Candidate Committee now, Ted Cruz for Senate, that could potentially have two different solicitation forms.

Q. So does the Ted Cruz for Senate Committee currently have two different solicitation forms?

A. The committee decided for both practical and other reasons not to seek contributors for the purpose of obtaining general 2018 debt retirement funds.

Q. Okay. Can you articulate all of the reasons why the committee chose not to do that?

A. Well, after this question, if you don't mind, I'm going to spend 20 seconds and just fill my glass of water.

MR. OHLENDORF: I could use a, after this question, I could use a five-minute break as well.

MR. NESIN: Sounds good.

THE WITNESS: So from a practical perspective, it's very easy [151] for any Candidate Committee to say what general debt retirement funds.

My experience is that it's a challenge to do and takes time and resources as well. And, again, you are—the Candidate Committee is bound by the same election limits with regard to these potential contributors.

And so in the—in the situation of Ted Cruz for Senate being a very large campaign, you know, there were a lot of contributors that maxed out to that campaign.

And so, practically speaking, it would have been a bit of a challenge to potentially go and identify not only donors that are willing to contribute to the campaign, but to donors who are able by law and their limit to contribute to debt retirement.

And that—that's an uphill challenge. And so the committee decided not to partake in that at the [152] time.

MR. NESIN: All right. We'll take our short break and return in a few minutes.

(A recess was taken at 1:58 p.m. EST, after which the deposition resumed at 2:07 p.m. EST.)

BY MR. NESIN:

Q. Let's go back on the record and try and finish this as quickly as we possibly can.

So we ended before the break you were describing the challenges associated with raising money specifically to retire debt. And one of those challenges that you described was a maxed out donor couldn't contribute to—

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. One of the challenges in soliciting to retire debt from a previous election cycle is the problem that maxed

out donors from that election cycle would not be able to contribute; is that right?

[153]

A. Yes.

Q. But that is true also—that's true regardless of this particular law that is at issue with this lawsuit, correct?

A. Sure.

Q. What—you said there were other challenges—(audio interference)—raising debt for a particular election cycle.

What were the other challenges that you had in mind?

A. The other one that I was thinking of was exhaustion as it relates to, you know, the donor pool, you know, for that cycle.

You know, it's a pretty grueling campaign cycle. And as you can imagine, when you cross through Election Day, you know, you have a very small window of time where people are likely to kind of turn off politics and campaigns.

And so that was just that other reason, was simple just political exhaustion that stems from the entire [154] environment but also, importantly, includes the donor pool as well.

Q. So given these challenges, is there any—is there any motivation to solicit money for debt retirement rather than to just solicit money for the next election cycle and then use those (audio interference)—

A. Assuming that the candidate is going to run again, is there any motivation?

Q. Yes. Is there any reason a campaign would do that?

A. Well, a candidate campaign, in general, that has net debts outstanding cannot formally terminate with the Federal Election Commission without going through the normal procedures to retire that debt. So that could potentially be a motivation for a committee to raise debt retirement funds in order to make itself whole and ultimately terminate, if that's what you are asking.

Q. I guess so—I guess this goes to a broader question, which is that the [155] entire premise of this lawsuit is that, if these repayment restrictions were not in existence, that the campaign would be able to raise the, you know, post-election funds to repay the candidate in excess of $250,000.

But that seems a little bit inconsistent with what you are telling me now that it's very difficult to raise money post-election to repay candidate debt, or to repay any debt.

So how—how do you reconcile those two competing ideas?

A. I would say that just because you have a challenging environment to do something in doesn't mean that—that you couldn't make the—it doesn't take away the underlying ability for a contributor to make that debt retirement contribution if the appropriate ask is made.

Q. So you've also—given that the campaign did not take in post-election contributions for the purposes of

repaying 2018 campaign debt, did the money that was used to repay Senator Cruz $250,000, was [156] that from pre-election contributions?

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. Was the source of money used to repay Senator Cruz his loans after the 2018 cycle, was the source of that money pre-election contribution?

A. So I believe that the committee could repay up to that amount with those pre-election contributions. The committee in that post-election time frame paid a tremendous amount of creditors' bills in that period. So, you know, it could have been—it could have been the case.

Q. Well, if it—how would it not have been the case? Is there any way that all $250,000 that was used to repay Senator Cruz came from post-election contributions?

A. Well, the committee didn't raise post-election contributions and so the loans were paid off with either pre-election contributions general 2018. We didn't raise any post-election funds. [157] So yes.

Q. Okay. Thank you.

So because of the nature of this lawsuit, and the way the law works, had Senator Cruz been paid just $10,000 during that 20-day period after the election, he could have just paid his full debt in entirety sometime after that.

Is that your understanding of the way this works?

A. My understanding was that the motivation behind the timing of the loan repayments was to lay the factual groundwork for this challenge. That—that was my understanding at the time.

Q. So had the committee not been trying to lay the foundation for this case, would it have been possible for the committee to pay $10,000 to Senator Cruz during the 20 days immediately following the election without negatively impacting the committee's ability to pay other vendors and expenses?

A. Well, the committee had, those times in the post-election period, had [158] cash on hand or cash in the bank to be able to pay bills.

In this situation the committee would have not necessarily paid another creditor in place of that $10,000.

Q. Okay. Can you think of—are you saying it would not have been possible for you to make the same point that you already made and also have paid Senator Cruz $10,000 during that 20-day period?

A. I'm saying that the committee at any given time had—had $10,000 in the bank accounts to pay back that loan. The timing of those payments were in according with its motivations for this challenge.

However, if it had used $10,000 to repay that loan, it potentially would have not have used that $10,000 to pay other creditors that it had that facilitated political speech during the general 2018 election.

So the committee did have funds to do that but it used funds that it had to help pay off the general 2018 liabilities that it had, and they were [159] substantial.

Q. I understand that the committee did—used money to pay off vendors and other expenses during that time period.

My question is whether the committee could have also, consistent with the exact same payments you made otherwise, also have repaid Senator Cruz $10,000 in the first 20 days after the election?

A. So, again, the committee had cash on hand or cash in the bank, I think, to be able to pay its obligations and budgeted campaign expenses, just not all, not all on the same day, you know, it effectively had to triage, you know, what bills it could pay and when.

That's not to say that there wasn't cash in the bank to do that $10,000 transaction as you state, but there were—there were many other campaign bills to vendors that needed to be paid because they had already, you know, fulfilled their work obligations for the campaign.

And so that was a decision, you [160] know, the committee made to pay those other vendors at that time.

Q. Do the vendor agreements have specific payment terms about when the vendor is supposed to be paid?

A. Some do. Not all.

Q. What would you describe as typical or is it just such a wide range there's no such thing as a typical0 arrangement with a vendor about payment?

A. I would say the political environment, unfortunately, is not typical, that there's a wide range from no terms to 15 day, 30 day, you know, as it relates to—to a

media buy, you know, that same day. So it's all over the spectrum.

Q. So are those specific terms at least part of the way in which the committee determines the order in which it pays its vendors?

A. I would say that the Candidate Committee takes those where they are there, takes those into consideration.

You know, I think that a [161] committee that asks an individual or a vendor to do a service, you know, the committee tries to do its best to fulfill that payment within the terms of the agreement to the best that it can.

Q. In 2018 did the campaign fail to meet any deadlines for payment to any outside vendors that you're aware of?

A. I'm not aware of that situation. I would caveat that with the situation that arises where a payment potentially gets lost in the mail, you know, that happens actually quite frequently with the Postal Service, and so you would have a vendor that has not received payment when they really should have received it.

And so sometimes they reach out and they're friendly and sometimes they reach out and they're irate because they have payrolls to make themselves. And, you know, one of the job functions is to track down that lost payment and get a new one out there.

So that would be the caveat to what, you know, for the most part the Cruz [162] campaign, you know, really took its relationships seriously with its contractors, vendors, and the payment component of those invoices as part of that.

Q. There was no specific obligation to a particular vendor that prevented the campaign from being able to pay $10,000 to Senator Cruz during those 20 days; is that right?

A. There wasn't a specific terms of contract with a specific vendor. But the aggregate amount of vendor bills leading into Election Day, going into that post-election period was substantial.

And where the committee could, it tried to fulfill those obligations to pay those bills and according with its cash flow.

Q. Okay. Did the campaign ever make any payments earlier than it was contractually required to with the vendor?

A. Off the top of my head I don't recall any specific contracts or terms The scenario that comes to mind when you [163] ask that question would—would be, you know, paying for postage in advance for a get out to vote type mailer or a fundraising mailer that goes out.

So you would have a pre-postage arrangement made that it wouldn't necessarily be part of, you know, the contractual agreement with that vendor, specific one.

Q. You just know that certain vendors, the contracts don't specify a particular payment period.

In that event, does the committee have a practice about how long they wait before making payment?

A. With this specific committee—

Q. Yes.

A. —the general practice that we tried to clear out committee invoices on a monthly basis.

And in between those the committee would pay for its typical type operations things, or if things that were set up on the committee credit card, or if an invoice came in that required, you [164] know, payment terms that were maybe shorter than going on to the—in the collection point for the list of vendors to be paid in the next round of bills.

Q. Is that practice different from other campaigns that you've worked on or is that pretty typical for a campaign of this size?

A. I would say across the spectrum it's a little atypical. A campaign this size, it was run very efficiently as it relates to that.

And what I mean by that is if there was this—their communication, you know, for authorization to pay bills and within general time frames of when that expectation would be.

And so what I mean by atypical is—on campaigns that it's just rapid fire from whomever authorizes it, you know, they come in at 2:00 in the morning and they come in at 8:00 in the morning.

So as it relates to this campaign the regimented schedule we were on, you know, was a pretty good system.

[165]

Q. Was this timing of payments that you've described in any way motivated by this lawsuit?

A. I don't believe so.

Q. Okay. When the committee repaid Senator Cruz, it made up the, I think it was four specific payments in paying back the $250,000 to Senator Cruz, did the committee tell Cruz what he should do with that money?

A. Sorry. You cracked up there a bit. Can you just repeat that?

Q. Did the committee tell Senator Cruz anything about what he could do with the money that it repaid to him?

A. Well, the Candidate Committee's repayment of those loans to Senator Cruz essentially went to pay for political speech that had already occurred.

So, like, I am understanding of the concept that the dollar is the dollar, you know, it's fungible, but in—in this specific case the Candidate Committee's repayment of his loans were just going to repay him for political speech that [166] already occurred.

And before I go any further, did John drop off your all screens, too?

MR. NESIN: Yes, but I hadn't noticed.

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. Mr. Hobbs, we are back on the record but Mr. Gober will be taking the reins temporarily.

So we were talking about the repayment to Senator Cruz of his money. And I understand that the $250,000 was loaned originally to the committee for the

purpose of using it for the campaign (audio interference)—

When it was repaid at that time the committee was—there was no restriction on how Senator Cruz could use the money that he received from the committee; is that right?

A. Once the Candidate Committee relinquishes control of those funds in the form of a repayment, and they go back to [167] in this case the candidate, Senator Cruz, at that point the committee doesn't have any say as to what happens to those funds after.

I would say that the Candidate Committee's position is that those funds are simply going toward political speech that has already occurred.

Q. Right.

A. But what he does with the money once it is out of the Candidate Committee's accounts is a—is a decision of his.

Q. Right. So it would not—it doesn't violate any law or regulation if Senator Cruz takes that money and uses it to buy a new car or go on a vacation or something like that; is that right?

A. Well, I disagree with the premise of that statement because, yes, a dollar is a dollar, but for that period of time where he loaned the funds to the Candidate Committee, those funds went to political speech, and the Candidate Committee is simply just returning those [168] funds, repaying those loans, for that speech that has already occurred.

I don't agree, you know, again, I understand that the dollar is the dollar and so, you know.

Q. Is it true that sometimes candidates make a loan to their committee and not necessarily due to this law but due to difficulty in raising funds or whatever they are never repaid by the committee, is that true, never repaid in full?

A. Yeah, I would say that that is generally true because in a lot of the cases, specifically because of this regulation, the regulation requires you to write off north of $250,000 of a loan.

So if you have anything above that, then you are required to convert that to a contribution. And in the instance that Candidate Committee doesn't, it is reminded in a friendly manner from the Reports and Analysis Division that it needs to do that. And at that point that's, you know, he would be in the [169] situation that you described.

Q. Right. But for the moment let's step aside from this particular law and just speak generally.

Is it sometimes true that a candidate will loan money under $250,000 to a committee and not be fully repaid?

It's not a function of this law. It's a function of fundraising or priorities or something else. Is that sometimes true?

A. Yeah, I'm sure you could find situations like that out with other Candidate Committees.

Q. Right. So there was a moment in 2018 where it was possible that Senator Cruz would not be repaid his $250,000; is that right?

A. Yes.

Q. Okay. And so when you did repay him the money, that represented a benefit to Senator Cruz's financial, personal financial interests, is that right, as compared to the way he was prior to receiving it?

[170]

A. I disagree with that. The loan repayments to any candidate, but in specifically this situation, the loan repayments that went back to Senator Cruz went back to making him whole for political speech that he engaged in, that he already engaged in.

There's not a financial benefit to him for that. We are making him whole for speech that already occurred.

Q. Well, let me ask you: Would it be a financial detriment to him if you did not pay him back?

A. Well, I think that your question as it relates to the financial detriment goes back to one of the burdens that this committee suffered from, and that what you describe as a situation where, you know, you have a potential for not being able to repay these loans, or the situation where the regulations were—where the regulations require you to convert anything north of that $250,000, your, you know, the committee is in a situation where it's burdened because a candidate [171] isn't necessarily going to put those funds in in the future. And so that—that in itself burdens the campaign.

Q. Again so—

A. Just as it would in the 2018 cycle.

Q. But you've acknowledged that in the 2018 cycle in particular that the committee's position is that the loans were made specifically for this lawsuit, the sole purpose of which was for this lawsuit.

So that burden was not a burden during the 2018 cycle. It may be a burden in other circumstances. Is that correct?

A. Well, I believe what I said before was that the motivation behind this loan did not remove the underlying burden that the Candidate Committee potentially feels in not being able to receive candidate loans because the candidate doesn't feel there's a likelihood that it will be refunded.

Q. Okay. I think we've been over that a number of times.

[172]

If there were a potential donor who expressed a desire to make a contribution to the committee but want it to be used for a specific purpose, would the committee grant that request?

A. It's my understanding that the committee doesn't receive those types of contributions. I certainly don't recall a situation like that.

Q. Okay. So if there were a contributor—so you are not aware of any contributor, for example, who would want to give to the campaign to help retire Senator Cruz' debt but would not want to contribute to the campaign for other purposes?

A. Well, the Candidate Committee decided not to solicit for debt retirement. And so, you know, that means, just stemming from that, the pool of contributors is zero. And so I don't—I don't foresee—I don't have a donor as you mentioned that would potentially contribute to debt retirement but wouldn't have contributed pre-election.

[173]

Because we decided—since we decided not to solicit debt retirement, there are donors that fit that category, to my knowledge.

Q. Just briefly, let's go back. You mentioned earlier that the 2012 loans that were taken out, that were given by Senator Cruz, do you know what the source of the funds were for those loans?

A. The sources of the loans were—they were mixed. Some of the loans were from his personal funds and some were commercial loans from financial institutions.

Q. They were commercial loans through Senator Cruz, like Senator Cruz took out commercial loans and then donated it right to the committee, or the committee itself took out the commercial loan?

A. Senator Cruz took the loans out and then put that into the committee. It wasn't directly from the bank to the committee.

Q. And do you know what bank those [174] loans were from?

A. One of the banks was Citibank. And the other bank was Goldman Sachs.

Q. Okay. Did the campaign at any time, either during the 2012 cycle or even afterwards, have any concerns about public perception if the sources of those loans were widely disclosed to people?

A. Well, I think that the—where there was public perception stemmed from—sorry, my screen kept going back and forth.

Q. No problem.

A. The perception stemmed more from political opponents of Senator Cruz and using those loans to criticize him and score political points.

But it's my understanding in campaign communications that any public perception concerns or specifically any criticism from that that would have come with regards to these loans arose solely because of the source of the loans.

And in this specific case one of the loans, Goldman Sachs, in that it was [175] the employer of Senator Cruz' spouse.

In my review of the committee's communications, it—I did not find any indication that any of these concerns or criticisms would have come about had these loans come from, say, First National Bank, or if they had come from Senator Cruz' own pocketbook.

Q. Okay.

A. It fully wasn't the fact that they came from Goldman Sachs, which was the employer of his spouse, and different from what you would have found if they had originated from any number of banks across the country.

Q. Did the committee take any actions at any time to determine whether taking loans from Goldman Sachs would be or had been politically damaging to Senator Cruz?

A. To my understanding, the committee didn't take any action. It just happened to be the bank that he banked with.

Q. The committee never took any [176] polls or conducted any focus groups or anything to determine

whether there would be—it would be politically damaging to have taken a loan from Goldman Sachs or it would have been perceived as corrupt in some way, anything like that?

A. Again, to my understanding in reviewing all of the communications, the committee did not take any of those actions or do anything of the sort.

Q. Okay. So I've gotten through my entire outline now, but I would like—can we take a five-minute break just so I can talk to Harry and I may come back with a few questions that I missed, and then Mr. Ohlendorf can ask his questions and then, hopefully, we can wrap this all up pretty quickly.

Is that all right with everyone? Okay. So we'll take a five-minute break. Thank you.

(A recess was taken at 2:58 p.m. EST, after which the deposition resumed at 3:03 p.m. EST.)

BY MR. NESIN:

[177]

Q. One question that we asked earlier, but I just want to make sure that we have the answer in complete form.

I had read you the language from the filing that the Plaintiff made in this case just recently, it was in the reply to their Motion For Consideration, that said the following: "Plaintiff hereby stipulates 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 to Section 304."

Is that still the committee's position?

A. Yes.

Q. Okay. I don't have any additional questions now, but I may after Mr. Ohlendorf asks his questions.

EXAMINATION BY COUNSEL
FOR THE PLAINTIFFS

BY MR. OHLENDORF:

Q. All right. Mr. Hobbs, earlier this afternoon Mr. Nesin asked you a [178] series of questions about a $200,000 transaction that was recorded as a donation to the Texas Republican Party.

Do you recall that line of questions?

A. Yes, sir.

Q. To your knowledge, was—was that or any other disbursement in the run-up to the 2018 election in any way motivated by a desire to have net debts outstanding for purposes of this lawsuit?

A. No, I don't—I don't believe so.

MR. NESIN: Is it possible for Mr. Ohlendorf —it broke up at the end and I couldn't hear the end of the question.

MR. OHLENDORF: Apologies. Let me—let me start over again.

BY MR. OHLENDORF:

Q. To your knowledge, Mr. Hobbs, was that $200,000 transaction or any other disbursement made by the committee in the run-up to the 2018 general election motivated in any way by the desire to have [179] net debts outstanding for purposes of this lawsuit?

A. No, to my understanding it didn't.

Q. He also—Mr. Nesin also asked a series of questions about the Joint Fundraising Committee, or Cruz Victory Committee, I believe it's called.

A. Yes, sir.

Q. To your knowledge—

(Audio interference.)

(Discussion off the record.)

BY MR. OHLENDORF:

Q. To your knowledge, following the 2018 general election, were the payments to the Ted Cruz for Senate Committee in any way motivated by this lawsuit or a desire to change the net debts outstanding calculation for purposes of this lawsuit?

A. To my understanding it was not, so no.

MR. OHLENDORF: Did everybody hear that line of questioning okay? All right.

No further questions from me.

[180]

EXAMINATION BY COUNSEL
FOR THE DEFENDANTS

BY MR. NESIN: (Further)

Q. I just want to follow up again because it seemed like Mr. Ohlendorf and I were asking identical questions but receiving very different responses.

(Audio interference.)

(Discussion off the record.)

BY MR. NESIN:

Q. When I asked—when I asked whether any of those transactions were motivated at least in part by this lawsuit, you did not say no; you let out sort of lengthy explanations about a variety of things. But when Mr. Ohlendorf asked you, you just said no.

Is there something about the way that we asked the questions that made it different, or is it just your thinking about the questions that changed?

A. I would say that I just apologize to you for wasting your time and that I just was confused, as you had asked the same question multiple times and I had [181] given the same response.

I was just unclear and confused and I apologize for wasting your time.

Q. No apologies necessary. That happens all the time. And I really appreciate your being able to deal with this whole situation.

I think we are done here and thank you for your time. I know we went a little bit over what I said we would.

(Whereupon, at 3:09 p.m. EST, the deposition was concluded.)

ERRATA SHEET

I, CABELL HOBBS, the witness herein, have read the transcript of my testimony and the same is true and correct, to the best of my knowledge, with the exception of the following changes noted below, if any:

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_____
CABELL HOBBS

Sworn to and subscribed before me, this the _____ day of _____, 2020.

_____
Notary Public

My commission expires: _____

DISTRICT OF COLUMBIA, to wit:

I, RAYMOND G. BRYNTESON, the officer before whom the foregoing deposition was taken, do hereby certify that the within-named witness appeared before me at the time and place herein set out, and after having been duly sworn by me, according to law, was examined by counsel.

I further certify that the examination was recorded stenographically by me and this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any of the parties, nor an employee of counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.

As witness my hand and notarial seal this 27th day of May, 2020.


Raymond G. Bryntesson

RAYMOND G. BRYNTESON

RMR-CRR-RDR and Notary Public

Notary Public

My Commission Expires: Mar. 31, 2024.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 19-908

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL.
DEFENDANTS

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Tues., May 26, 2020

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**TRANSCRIPT OF ASHLEY CHRISTINE GROSSE, Ph.D.**

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* * * * *

[55]

* * * They decided to change what they wanted. And so if you can scroll on to FEC 193 to the next page, this list, we did not need to provide consulting advice on the questionnaire design. So we eliminated that portion. That usually comes with a fee, so that was removed.

Q. Is that—before you continue, please, is that why it was removed, because it would come with a fee as you put it?

A. No. My understanding was they decided they could do it in-house and they were okay.

Q. And you had a conversation with counsel for the FEC on that?

A. Yes, I did. We spoke by phone. She said it was—that they did not need that any longer.

Q. And so YouGov did not provide advice on the questionnaire design?

A. Not on the design, no.

Q. And what is included with design of the questionnaire?

A. Sometimes—well, I would say probably 5 percent of my clients come to me and they'll say, I [56] want to measure, you know, whether—what percentage of the gay and lesbian population are interested in X, right? And they don't have the ability to write questions. They don't have the experience and so I'll write their questionnaire for them.

So providing advice on a questionnaire design, whether it's—you know, sometimes it's writing the questionnaire from scratch. I often do that for clients. But for academics and some clients, they come to me with the questionnaire—the questionnaire already designed. In this case, that's what happened.

* * * * *

[64]

Q. * * * So the items—the profile items there, you're saying that in a political survey, these are boilerplate. These are the things that are typically the profile items in such a political survey; is that correct?

A. Yes.

* * * * *

Q. Okay. Okay. And—but you omitted idealogy. Do you recall why that was?

[65]

A. That must have been from another survey for someone or maybe I was typing the list out fairly quickly. Like I said, I—and you've heard me—I can roll these off in my sleep.

Q. Let me ask this. Is—is the presidential—is the vote cast for a presidential candidate in the last presidential election also often a profile item used in such political surveys?

A. It is. We try to post-stratify on it, so that the sample is representative of what the vote was in 2016 for our political clients.

* * * * *

[81]

A. So the sample is supposed to be representative of U.S. adults, though it's only meant to reflect U.S. adults' public opinion on this. Obviously, Republicans do not make up the majority in U.S. adults identification, so it's not going to be even.

Q. Well, no. But if—if your survey results had—if the respondents among your survey panel, if you will, had a significant majority of Republicans, would you regard that as representative of U.S. adults 18 and over?

A. If we had some sort of a partisan bias in our data. We shouldn't have a partisan bias in the data. We are—if it is idealogically—we try not to—there's not a weight or a control for party ID.

Like I said, we do try to post-stratify to vote in 2016, although we removed that for this to remove those certain political variables. I think * * *

* * * * *

[104]

A. I asked her about the cross tabulations, what she wanted to have in place of party ID and did she want idealogy. That was the nature of my conversation with her.

Q. Okay. And you say that FEC—"they don't want PID for sure."

A. Right.

Q. And then underneath that in all caps, "No PID." That seems emphatic. Why did they not want PID?

A. Well, PID is always—I don't know why I capped it, but I thought for sure do not put that in because we don't want any sort of political—there's no need to politicize this issue.

* * * * *

[119]

Q. So immediately under that, there's dialogue between you and Rebecca for about nine lines over the course of about four or five minutes. A [120] short exchange that's been redacted.

Now, why is that redacted?

MS. SENANAYAKE: Objection. As we've explained in our privilege log, it pertains to other litigation. So I'm objecting on the basis of work product.

MR. COOPER: Is the point that this pertains to other litigation by the FEC?

MS. SENANAYAKE: Yes.

MR. COOPER: Okay.

MS. SENANAYAKE: And so I'm instructing the witness not to answer any questions about the redacted material.

* * * * *

[128]

Had you been instructed by the FEC not to include idealogy or vote in 2016 as well as party ID?

A. No. I can't remember how we came about this. They were not interested in the political variables that we do that are standard. So just like my health researchers are not interested in the minor.

* * * * *

[149]

Q. Earlier you said—I think you offered the example of access as a favor. What do you understand a political favor to mean in this question?

A. I can only give you my opinion as a potential respondent who's reading this.

Q. I'd like to have that.

A. Political favors. I would think access is a pretty big one. But I don't think my views are representative of the U.S. electorate by any stretch of the imagination. I'm 1 percent. I have a Ph.D. I'm not normal.

* * * * *

[151]

A. Political favors, I mean, for the point of the survey question is whatever it means to the respondent who's reading it. That's what we tell people when they—the respondents, when they ask us. Whatever it means to you, whatever you think. So it means something individual to each person.

Is there a common thread? Yes. And, you know, it means either access or policy interest or policy outcomes. It could mean a whole wide stretch of things that—a favor is something that other people don't get, right? So maybe that's—

Q. What would—what do you mean when you say access? Describe access.

A. Let's say, for example, I would like a small business loan from this new legislation that's come out to relieve the situation. I might call my member of Congress and say, you know, who do I talk to? I might ask for special directions on how to navigate the system that other people might not do and other people might not get their phone call answered. That would be the only example I can think off the top of my head.

* * * * *

[154]

Q. Well, did you know that there is no limit on how much money a federal campaign can raise before the election to repay a candidate loan? So that if a candidate, for example, loaned his campaign $5 million, the campaign could pay back the candidate all $5 million before the election? Did you know that?

A. No.

* * * * *

Q. Yes. Well, let me ask you this. Let me give you another hypothetical question framed like the one that is in question 6.

And the question would be this. "Currently, there is no limit on how much money a federal campaign may raise before the election day to [157] repay a candidate loan. If there were a limit on how much money a federal campaign could raise before election day to repay a candidate, would donors be more likely to expect political favors, less likely to expect political favors, or would it make no difference?"

Would you expect that question to elicit similar responses in terms of these cross tabs?

MS. SENANAYAKE: Objection. Calls for speculation.

THE WITNESS: I—I don't know. But I think in general, this whole topic is incredibly complex for the average American and this questionnaire did a very nice job of weighing out something that's quite complex.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-908-NJR-APM-TJK

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: June 9, 2020

**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to FED. R. CIV. P. 56(c) and LCvR 7(h)(1), Plaintiffs Ted Cruz for Senate and Rafael Edward ("Ted") Cruz hereby submit this statement of material facts as to which there is no genuine dispute:

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

1. Section 304 of BCRA, currently codified at 52 U.S.C. § 30116(j), provides:

> 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. BCRA Section 304 was enacted as part of the so-called "Millionaire's Amendment," which was designed to "level the playing field" between wealthy and non-wealthy candidates by making it more difficult for wealthy candidates to spend money on behalf of their own election. 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine) (attached as Exhibit 1 to Declaration of John D. Ohlendorf (June 9, 2020) ("Ohlendorf Decl.")); *Davis v. FEC*, 554 U.S. 724, 729, 741-44 (2008).

3. The debate over the adoption of the Millionaire's Amendment is replete with statements that the Amendment was, as Senator Feinstein put it, "an attempt to level the playing field." 147 CONG. REC. S2459 (Mar. 19, 2001) (statement of Sen. Feinstein).

4. For example, Senator DeWine, who opposed the Amendment as initially proposed but ultimately supported the final, compromise version that he helped to draft, stated that the Amendment "identified a real problem," because "[a]s a practical matter, a person who has [$10 to $60 million of an opponent's own money] spent against them has a very difficult time competing, making it a level playing field or even close to being a level playing field." *Id.* at S2463 (statement of Sen. DeWine).

5. The Millionaire's Amendment, Senator DeWine explained, would "begin to level the playing field." *Id.*

6. Senator DeWine later stated that "[w]hat this amendment is aimed at dealing with is the perception, and the perception that someone can buy a seat in the Senate with their own money. It begins to level that playing field." 147 CONG. REC. S2547 (daily ed. Mar.

20, 2001) (statement of Sen. DeWine) (attached to Ohlendorf Decl. as Exhibit 2).

7. Likewise, Senator Domenici—the author and principal sponsor of the Amendment—explained that the goal of his Amendment was to "better balance the playing field." 147 CONG. REC. S2460 (Mar. 19, 2001) (statement of Sen. Domenici).

8. Senator Hutchison, another supporter of the Amendment, explained that "[o]ur purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. S2541 (Mar. 20, 2001) (statement of Sen. Hutchison).

9. Similarly, Senator Durbin, an enthusiastic cosponsor of the Amendment, stated that "What we are trying to address with this amendment is to level the playing field so that if someone shows up in the course of the campaign who is independently wealthy and is willing to spend $10, $20, $30, $40, $50, $60 million of their own money . . . then at least the other candidate has a fighting chance." *Id.* at S2540 (statement of Sen. Durbin).

10. And then-Senator Sessions, an opponent of BCRA more generally, spoke in favor of the Millionaire's Amendment because current law "makes it difficult for candidates to run on a level playing field." 147 CONG. REC. S2464 (Mar. 19, 2001).

11. Then-Senator Sessions stated: "[A] wealthy candidate can waltz in out of left field with hundreds and hundreds of millions of dollars in his account and can

just overwhelm their opponent, and it creates, I believe, an unfair situation." *Id.*

12. This was not only the purpose of the Millionaire's Amendment generally; it was also the purpose of the loan-repayment limit in particular. *See id.* at S2461 (statement of Sen. Durbin); *id.* at 2462 (statement of Sen. Durbin); *id.* at 2465 (statement of Sen. Sessions); *id.* at S2463 (statement of Sen. Domenici); 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine).

13. Many comments on the Amendment drew no distinction between wealthy candidates financing their own campaigns through direct spending and through candidate loans. *See infra*, ¶¶ 14-18.

14. Senator Durbin, for example, explained that "a lot of people who are very wealthy do not give money to their campaign; they loan it and say they will be repaid later." 147 CONG. REC. S2461 (Mar. 19, 2001) (statement of Sen. Durbin).

15. Minutes later, Senator Durbin referred to candidate spending and candidate loans interchangeably: "Think about what this institution will become if that is what one of the rules is to be part of the game: That you have to be loaning or contributing literally millions of dollars in order to be a candidate for public office." *Id.* at 2462 (statement of Sen. Durbin).

16. Senator Sessions made a similar point, explaining that the Amendment "also prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate." *Id.* at 2465 (statement of Sen. Sessions).

17. As Senator Domenici put the point, the Amendment's loan-repayment limit was "very fair," because "it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents." *Id.* at S2462 (statement of Sen. Domenici).

18. As Senator DeWine explained, the Amendment was designed to "create greater fairness and accountability in the Federal election process by addressing the inequity that arises when a wealthy candidate pays for his or her campaign with personal funds—personal funds that are defined, by the way, to include cash contributions and any contributions arising from personal or family assets such as personal loans or property used for collateral for a loan to the campaign." 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine).

19. In addition to "levelling the playing field," the legislative record indicates that the Millionaire's Amendment was also designed to "protect[ ] incumbents." *Id.* at S2544 (statement of Sen. Daschle).

20. Senator Dodd, for example, opposed the Amendment's attempt to curb the ability of wealthy candidates to finance their own campaigns because "we are talking, in many instances, about challengers. We are incumbents. As incumbents, we have a lot of advantages that do not come out of our personal checkbooks." 147 CONG. REC. S2465 (Mar. 19, 2001) (statement of Sen. Dodd).

21. Senator Dodd later explained that while "[w]hat [the sponsors of the Amendment] are trying to do is level the playing field," it "isn't exactly level, in a sense,

when we are talking about incumbents who have treasuries of significant amounts and the power of the office which allows us to be in the press every day, if we want." 147 CONG. REC. S2542 (Mar. 20, 2001) (statement of Sen. Dodd).

22. Senator Dodd rejected "[t]he idea that somehow we are sort of impoverished candidates when facing a challenger who may decide they are going to take out a loan, and not necessarily even have the money in the account but may decide to mortgage their house." *Id.*

23. Similarly, Senator Levin, who initially opposed the Amendment but ultimately voted in its favor, feared that the Amendment in fact "Creates an unlevel field" because "The incumbent who already has the financial advantage and the incumbency advantage is then also given the advantage of having the higher contribution limits." *Id.* at S2548 (statement of Sen. Levin).

24. Senator Reid, another opponent of the Amendment, declared that "[The Millionaire's Amendment] is an incumbent advantage measure in this underlying bill." 147 CONG. REC. S2853 (daily ed. Mar. 26, 2001) (statement of Sen. Reid) (attached to Ohlendorf Decl. as Exhibit 3).

25. Senator Daschle likewise feared that "this protects incumbents." 147 CONG. REC. S2544 (Mar. 20, 2001) (statement of Sen. Daschle).

26. Indeed, in a remarkably forthright statement, Senator McCain—a supporter of the Amendment—noted that the provision "addresses, in all candor, a concern that literally every nonmillionaire Member of this body has, and that is that they wake up some morning

and pick up the paper and find out that some multimillionaire is going to run for their seat, and that person intends to invest 3, 5, 8, 10, now up to $70 million of their own money in order to win." *Id.* at S2540 (statement of Sen. McCain).

27. Federal campaign finance law also imposes limits on the amount any individual may contribute, per election cycle, to any federal candidate or his authorized committee. 52 U.S.C. Section 30116(a)(1)(A) provides that "no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000."

28. Since the enactment of BCRA in 2002, federal law has directed the Commission to periodically increase these limits to account for inflation. *Id.* § 30116(c).

29. On February 7, 2019, the Commission established an inflation-adjusted limit of $2,800 per individual, per election cycle, effective November 7, 2018 through November 3, 2020. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019) (attached to Ohlendorf Decl. as Exhibit 4).

30. The Commission periodically recommends to Congress certain amendments to the federal campaign finance laws, of both a substantive and technical nature. *See infra* ¶ 31.

31. The Commission has never included in these formal recommendations, from the enactment of those inflation-adjusted limits in BCRA until the present, any proposal or suggestion that the base limits on individual

campaign contributions be lowered. *See* Federal Election Commission, Legislative Recommendations: 2003 (attached to Ohlendorf Decl. as Exhibit 5); Federal Election Commission, Legislative Recommendations: 2004 (attached to Ohlendorf Decl. as Exhibit 6); Federal Election Commission, Legislative Recommendations: 2005 (attached to Ohlendorf Decl. as Exhibit 7); Legislative Recommendations of the Federal Election Commission: 2007 (attached to Ohlendorf Decl. as Exhibit 8); Legislative Recommendations of the Federal Election Commission: 2009 (attached to Ohlendorf Decl. as Exhibit 9); Legislative Recommendations of the Federal Election Commission: 2011 (attached to Ohlendorf Decl. as Exhibit 10); Legislative Recommendations of the Federal Election Commission: 2012 (attached to Ohlendorf Decl. as Exhibit 11); Legislative Recommendations of the Federal Election Commission: 2013 (attached to Ohlendorf Decl. as Exhibit 12); Legislative Recommendations of the Federal Election Commission: 2014 (attached to Ohlendorf Decl. as Exhibit 13); Legislative Recommendations of the Federal Election Commission: 2015 (attached to Ohlendorf Decl. as Exhibit 14); Legislative Recommendations of the Federal Election Commission: 2016 (Dec. 1, 2016) (attached to Ohlendorf Decl. as Exhibit 15); Legislative Recommendations of the Federal Election Commission: 2017 (Dec. 14, 2017) (attached to Ohlendorf Decl. as Exhibit 16); Legislative Recommendations of the Federal Election Commission: 2018 (Dec. 13, 2018) (attached to Ohlendorf Decl. as Exhibit 17).

**II. Senator Cruz's 2018 Loans.**

32. Prior to the November 6, 2018 election, Senator Cruz made or incurred two loans totaling $260,000 to the

Cruz Committee to help finance his reelection campaign for the United States Senate. Declaration of Cabell Hobbs at ¶¶ 3-5 (June 9, 2020) ("Hobbs Decl.").

33. One loan, in the amount of $255,000, came from a third-party-lender margin account secured by Senator Cruz's personal assets. Hobbs Decl. ¶ 4.

34. The other loan, in the amount of $5,000, was made directly from Senator Cruz's personal bank account. Hobbs Decl. ¶ 5.

35. At the end of November 6, the Cruz Committee did not have sufficient funds to both repay these loans and satisfy the Committee's other creditors. Hobbs Decl. ¶ 6-8.

36. In particular, the Committee ended the election campaign with approximately $2,380,277 deposited in, or in transit to, its bank accounts. Hobbs Decl. ¶ 6.

37. As of the end of the election, the Committee also owed approximately $2,718,025 in debts for expenses incurred in connection with the election, including bills and obligations to vendors and the $260,000 it owed Senator Cruz. Hobbs Decl. ¶ 7.

38. Accordingly, the Committee's "net debts outstanding," as of election day, were approximately $337,748. Hobbs Decl. ¶ 8.

39. It is common for campaign committees, like the Cruz Committee, to take out debt to finance their campaign speech and other operations. According to one recent analysis, "debt is a major source of funding of U.S. political campaigns. At $1.9 billion or 10.6 percent of the total, debt constitutes the second largest source

of campaign funds trailing only total individual contributions and is larger than total contributions from corporate, labor and trade Political Action Committees (PACs). Almost half of all campaigns (46.75 percent) rely on some form of debt, and, conditional on borrowing, campaigns borrow almost a third of total raised funds." Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* at 2 (May 2020) (available at https://ssrn.com/abstract=2804474) (attached to Ohlendorf Decl. as Exhibit 18).

40. During the 20 days following the election, the Committee used its cash on hand to pay other creditors, but it did not repay any portion of Senator Cruz's loans. Hobbs Decl. ¶ 9.

41. The Committee began to repay Senator Cruz's loans in December of 2018. Hobbs Decl. ¶ 10.

42. The Committee has made four repayments of Senator Cruz's margin loan, totaling $250,000: (i) $25,000 on December 4, 2018; (ii) $100,000 on December 11, 2018; (iii) $75,000 on December 18, 2018; and (iv) $50,000 on December 24, 2018. Hobbs Decl. ¶ 10.

43. The Committee has not repaid any portion of Senator Cruz's personal loan. Hobbs Decl. ¶ 11.

44. Accordingly, a total of $10,000 of Senator Cruz's 2018 loans remains unpaid: $5,000 of the margin loan and the entirety of the $5,000 loan from Senator Cruz's own bank accounts. Hobbs Decl. ¶ 12.

Dated: June 9, 2020 Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-908-NJR-APM-TJK

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

**DECLARATION OF CABELL HOBBS**

I, Cabell Hobbs, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a citizen of the United States and a resident and citizen of Virginia. I make this declaration in support of Plaintiffs' Motion for Summary Judgment in the above-captioned case.

2. I am an Assistant Treasurer for Plaintiff Ted Cruz for Senate (the "Cruz Committee"), Plaintiff Senator Cruz's Authorized Campaign Committee. I make the following statements on personal knowledge.

3. Prior to the November 6, 2018 election, Senator Cruz made or incurred two loans to the Cruz Committee to help finance his reelection campaign for the United States Senate.

4. One loan, in the amount of $255,000, came from a third-party-lender margin account secured by Senator Cruz's personal assets.

5. The other loan, in the amount of $5,000, was made directly from Senator Cruz's personal bank account.

6. The Cruz Committee ended the November 6, 2018 election campaign with approximately $2,380,277 deposited in, or in transit to, its bank accounts.

7. The Cruz Committee closed election day with approximately $2,718,025 in debts for expenses incurred in connection with the election, including bills and obligations to vendors and the $260,000 it owed Senator Cruz.

8. The Cruz Committee's "net debts outstanding," as of election day, were approximately $337,748.

9. During the 20 days following November 6, 2018, the Cruz Committee used cash on hand to pay other creditors, but it did not repay any portion of either of Senator Cruz's loans.

10. The Cruz Committee has to date made four repayments of Senator Cruz's loans: (i) a December 4, 2018 payment of $25,000; (ii) a December 11, 2018 payment of $100,000; (iii) a December 18, 2018 payment of $75,000; and (iv) a December 24, 2018 payment of $50,000.

11. All of these payments were made towards the margin loan secured by Senator Cruz's assets. The Committee has not repaid any portion of Senator Cruz's personal loan.

12. Accordingly, a total of $10,000 of Senator Cruz's 2018 loans remains unpaid: $5,000 of the margin loan and the entirety of the $5,000 loan from Senator Cruz's own bank accounts.

13. I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ CABELL HOBBS
CABELL HOBBS

[6/9/2020]
Date

Executed in [MCLEAN/VIRGINIA]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: July 14, 2020

**DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

**DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the Federal Election Commission ("Commission" or "FEC") submits the following statement of material facts not in genuine dispute in support of its Motion for Summary Judgment.

## I. THE PARTIES

### A. Defendant Federal Election Commission

1. The FEC is an independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-146 ("FECA"). Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

### B. Plaintiffs

2. Plaintiff Rafael Edward ("Ted") Cruz is a United States Senator from the state of Texas. (United States Senate, Senators, https://www.senate.gov/senators/index.htm.) Senator Cruz was first elected to represent Texas in the U.S. Senate in 2012, and he won re-election in 2018. (Official Election Results for United Senate, 2012 U.S. Senate Campaigns at 71, https://www.fec.gov/

resources/cms-content/documents/2012congresults.pdf; Federal Elections 2018, Election Results for the U.S. Senate and the U.S. House of Representatives at 29, https://www.fec.gov/resources/cms-content/documents/federalelections2018.pdf.)

3. Plaintiff Ted Cruz for Senate (the "Committee") is the principal campaign committee for Senator Cruz. (Ted Cruz for Senate FEC Form 1, https://docquery.fec.gov/pdf/975/201810159125135975/201810159125135975.pdf). FECA requires federal candidates to designate at least one "authorized committee," which may receive contributions and make expenditures on the candidate's behalf, to serve as its "principal campaign committee." 52 U.S.C. §§ 30101(5)-(6), 30102(e)(1)-(2).

4. FECA limits the amount individual contributors may give to a campaign committee to an inflation-adjusted $2,800 per election. 52 U.S.C. § 30116(a); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

## II. CONGRESSIONAL CONCERN ABOUT CORRUPTION IN ELECTIONS

5. In the first half of the twentieth century, Congress became particularly concerned about corruption arising from contributions to federal candidate campaigns and political parties. In 1907, it passed the Tillman Act, providing "'[t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.'" *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*,

352 U.S. 567, 575 (1957) (quoting 34 Stat. 864 (1907)) ("*UAW*"). That legislation declared that "'[i]t shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.'" *Id.* (quoting 34 Stat. 864).

6. The Tillman Act "was merely the first concrete manifestation of a continuing congressional concern for elections free from the power of money." *UAW*, 352 U.S. at 575 (internal quotation marks omitted). Congress soon enacted amendments requiring disclosures of "committees operating to influence the results of congressional elections in two or more States" and "persons who spent more than $50 annually for the purpose of influencing congressional elections in more than one State." *Id.* at 575-76 (citing 36 Stat. 822 (1907)). "The amendment also placed maximum limits on the amounts that congressional candidates could spend in seeking nomination and election, and forbade them from promising employment for the purpose of obtaining support." *Id.* at 576 (citing 37 Stat. 25 (1907)). In 1925, Congress passed FECA's precursor, the Federal Corrupt Practices Act of 1925, 43 Stat. 1070. One senator explained that "'[w]e all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions,'" adding that that such "'large contributions'" lead to "'consideration by the beneficiaries . . . which not infrequently is harmful to the general public interest.'" *UAW*, 352 U.S. at 576 (quoting 65

Cong. Rec. 9507-08 (1924) (statement of Sen. Robinson) (alteration in original)).

7. In 1939, Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. 101-165 at *18; *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560 (1973); 84 Cong. Rec. 9597-9600 (1939).

8. Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office, to any committee "advocating" the election of such a candidate, or to any national political party. *Id.* § 13(a), 54 Stat. 770.

9. The limit was sponsored by Senator John H. Bankhead, who expressed his hope that it would help "bring about clean politics and clean elections": "We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation. . . . " 86 Cong. Rec. 2720 (1940) (statement of Senator Bankhead); *see also* 84 Cong. Rec. 9616 (daily ed. July 20, 1939) (statement of Rep. Ramspeck) (stating that what "is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power").

10. From the start, the 1940 individual contribution limit was "ineffective." Robert E. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 66 (Praeger 1988). Individuals circumvented the $5,000 limit by routing additional contributions through other committees supporting the same candidate, *see* Louise Overacker, Presidential Campaign Funds 36 (Boston University Press 1946), and the Hatch Act amendments allowed donors to make unlimited contributions to state and local parties, *see* 86 Cong. Rec. 2852-53 (1940) (amending bill to exempt state and local parties from contribution limit).

11. By 1971, when Congress began debating the initial enactment of FECA, the $5,000 individual contribution limit was being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug).

12. In 1974, shortly after the Watergate scandal, Congress substantially revised FECA. These amendments established new contribution limits, including a $1,000 base limit on contributions to candidates. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 § 101(b)(3), 88 Stat. 1263. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court upheld FECA's contribution limits on the basis that they furthered the government's important interest in preventing corruption and the appearance of corruption. *Id.* at 23-38.

13. The *Buckley* Court itself noted the "deeply disturbing examples surfacing after the 1972 election" of "large contributions . . . given to secure a political quid pro quo from current and potential office holders." 424 U.S. at 26-27 & n.28.

14. During the 1972 presidential campaign, President Nixon's personal attorney and a principle fundraiser, Herbert Kalmbach, described the price-point for ambassadorships, relaying that "[a]nybody who wants to be an ambassador must give at least $250,000." Reeves at 462. This amount would be equal to over $1.4 million in 2016 dollars. *CPI Inflation Calculator*, Bureau of Labor Statistics, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited July 10, 2020).

15. On February 25, 1974, Herbert Kalmbach pled guilty to violating 18 U.S.C. § 600 by promising a more "prestigious" ambassadorship to an individual, J. Fife Symington, in return for "a $100,000 contribution to be split between" various third parties—"1970 senatorial candidates designated by the White House"—"and [President] Nixon's 1972 campaign." *Buckley v. Valeo*, 519 F.2d 821, 840 n.38 (D.C. Cir. 1975); Final Report of the Select Committee on Presidential Campaign Activities at 492, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974); *see also id.* at 501 ("De Roulet agreed to split his $100,000 contribution between the 1970 Senate races and Mr. Nixon's 1972 campaign—as Symington had done."); *id.* at 493-494 (listing individuals who contributed to President Nixon's campaign and became or sought to become ambassadors, some of whom gave hundreds of thousands of dollars).

## III. BCRA AND THE LOAN REPAYMENT LIMIT

16. In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), which amended FECA.

17. BCRA's most prominent change to FECA were its prohibition of the use in federal campaigns of "soft

money" raised outside FECA's restrictions, which was intended to prevent the circumvention of important elements of FECA. *McConnell v. FEC*, 540 U.S. 93, 132 (2003).

18. Another element of BCRA was the so-called "Millionaire's Amendment." Under that part of the law, if a candidate for Congress spent in excess of a certain amount of personal funds in support of his or her campaign and additional criteria were met, the law would increase the contribution limits for the self-funding candidate's opponent to help the opponent keep pace. *See Davis v. FEC*, 554 U.S. 724, 729-30 (2008).

19. Although the primary governmental interest in the passage of BCRA as a whole was to deter corruption and its appearance, extensive legislative history of the Millionaire's Amendment indicates that it had a different purpose—to level the playing field in federal campaigns. *See Davis*, 554 U.S. at 741-42.

20. The Loan Repayment Limit challenged in this case was a distinct provision from the limit-shifting provision described above that was originally introduced on its own and later combined into a bill that also included the Millionaire's Amendment during the amendment process. 147 Cong. Rec. S2541 (Mar. 20, 2001) (statement of Sen. Hutchison).

21. The Loan Repayment Limit states that a candidate "who incurs personal loans . . . in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such

candidate after the date of such election." 52 U.S.C. § 30116(j).

22. The Loan Repayment Limit does not restrict the repayment of candidate loans with contributions made *before* an election, but under the provision, a campaign committee may use contributions raised *after* an election to repay "personal loans" that a candidate "incurs . . . in connection with the candidate's campaign" only up to a limit of $250,000. 52 U.S.C. § 30116(j).

23. Multiple legislative statements indicate that the Loan Repayment Limit was intended to mitigate the heightened risk of quid pro quo corruption and its appearance resulting from already-elected officeholders soliciting contributions for their own personal benefit. For example, Senator Domenici stated that "[i]f you incur debt from a personal loan and then you get elected as Senator, and then you go around and say, now I am Senator, I want you to get me money so I can pay back what I used of my own money to run for election. It is clear in this amendment that you cannot do that in the future." *See* 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici).

24. Senator Domenici also stated that a candidate who incurred personal loans for his campaign should not be able "to get it back from [his or her] constituents under fundraising events that [he or she] would hold and then ask them: How would you like me to vote now that I am a Senator?" *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

25. Senator Domenici further stated that "[t]his (amendment) limits candidates who incur personal loans in connection with their campaign in excess of $250,000.

They can do $250,000 and then reimburse themselves with fundraisers. But anything more than that, they cannot repay it by going out and having fundraisers once they are elected with their own money." *Id.* at S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

26. Senator Durbin stated that "[the] language [of the Loan Repayment Limit] makes it clear there will not be any effort after the election to raise money to repay those loans. . . . " *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin).

27. Senator Hutchison stated that "[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, so a candidate can spend his or her own money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back." *Id.* at S2541 (Mar. 20, 2001) (statement of Sen. Hutchison). While Senator Hutchison also stated a hope "to level the playing field," those comments contrasted a self-lending candidate's ability to "go out and repay themselves" "when they win" with persons running with a "variety of support from his or her constituents," *i.e.* people who do not have the same opportunity for post-election fundraising for self-payment. *Id.* at S2541-42. Senator Hutchison belabored the points that she "want[ed] people to be able to spend their own money," as she previously had, and that "[n]o one argues" against candidates like her having "a constitutional right to spend our money." *Id.* at S2541.

28. Following the passage of BCRA, the Commission issued regulations implementing the new statute,

including the Loan Repayment Limit. One such regulation establishes a 20-day period following an election during which a committee can use the cash it has on hand as of the day after the election to pay back all or part of the candidate's personal loans, without limitation ("20-Day Repayment Period"). 11 C.F.R. § 116.11(c)(1). After a general election, a campaign committee must file a report with the FEC reporting its receipts and disbursements for a period expiring 20 days after the election. FEC, Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003). Thus, after the 20-day post-election period has elapsed, a campaign committee must "treat the remaining balance of the candidate's personal loan that exceeds $250,000 as a contribution from the candidate to the authorized committee, given that this amount could never be repaid, and given that the amount must be accounted for on the authorized committee's next report." *Id.* (citing 11 C.F.R. § 116.11(c)).

29. In 2008, the Supreme Court struck down the Millionaire's Amendment, holding that leveling the playing field was not a compelling government interest sufficient to justify the burden the Amendment imposed. *Davis*, 554 U.S. at 741-42. Specifically, the Court found that the Amendment's "asymmetrical" contribution limits burdened a candidate's First Amendment right to make "unlimited expenditures of his personal funds" by "enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of [the self-funder's] speech." *Id.* at 734, 736.

30. Following the Supreme Court's decision in *Davis*, the FEC engaged in a rulemaking in which it revised its regulations. FEC, Notice 2008-14; Repeal of Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 73 Fed. Reg. 79597 (Dec. 30, 2008). The FEC determined that the *Davis* decision did not impact the Loan Repayment Limit or its regulations. *Id.* at 79599-600. The Commission reached this determination because it found that the Loan Repayment Limit "has a wider application than other provisions of the Millionaires' Amendment," explaining that the Limit "applies equally to all candidates and regardless of whether the Millionaires' Amendment provisions also apply to those candidates." *Id.* at 79600. Furthermore, the Commission noted that "while other provisions of the Millionaires' Amendment apply only to Senate and House of Representatives candidates, the loan repayment provision applies to candidates for all Federal offices, including presidential candidates" and that the original regulations for the Loan Repayment Limit and the Millionaire's Amendment had been placed in completely different sections of the Code of Federal Regulations, because the two provisions were distinct. *Id.*

## IV. HOW FEDERAL CANDIDATES HAVE USED PERSONAL LOANS TO THEIR CAMPAIGNS IN RECENT ELECTION CYCLES

31. "Almost half of all campaigns (46.75 percent) rely on some form of debt, and, conditional on borrowing, campaigns borrow almost a third of total raised funds." Alexei Ovtchinnikov & Philip Valta, Debt in Political Campaigns at 2 (May 2020) (*available at* https://ssrn.com/abstract=2804474) (FEC Exh. 1). "The majority

of campaign debt comes in the form of personal loans that candidates make to their own campaigns, with eight percent of campaigns relying on outside loans." *Id.* at 2-3.

32. Federal campaigns have made extensive use of loans from candidates before and after the passage of BCRA. (Declaration of Paul C. Clark II at ¶¶ 4-5 (July 14, 2020) ("Clark Decl.") (FEC Exh. 2).) Although difficult to quantify, many of these loans were in essence contributions with limited expectations of repayment. *See, e.g.,* Corzine 2000, Inc. Year End Report, available at https://docquery.fec.gov/pdf/755/21020031755/210200 31755.pdf (showing over $56 million in candidate loans for a New Jersey Senate race); Anne Baker, *Are Self-Financed House Members Free Agents?,* 35:1 Congress & the Presidency: A Journal of Capital Studies, 53, 56 (2008) ("Baker") (FEC Exh. 3) ("[M]ost self-financing takes the form of personal loans.").

33. During the five most recent election cycles, a total of 588 loans were made by Senate candidates to their campaigns (some candidates made loans in multiple election cycles). (Clark Decl. at ¶ 4 (FEC Exh. 2).) Twelve of those loans were for exactly $250,000, which represents 2.0% of the loans. (*Id.*) By comparison, during the five election cycles immediately before BCRA became effective, a total of 441 loans were made by Senate candidates to their campaigns. (*Id.*) One of those candidates made a loan of exactly $250,000, which represents 0.2% of the loans. (*Id.*)

34. During the five most recent election cycles, 3,444 loans were made by House candidates to their campaigns (some candidates made loans in multiple election cycles). (*Id.* at ¶ 5.) Twenty-six of those loans were

for exactly $250,000, which represents 0.7% of the loans. (*Id.*) By comparison, during the five election cycles immediately before BCRA became effective, 2,868 loans were made by House candidates to their campaigns. (*Id.*) Four of those loans were for exactly $250,000, which represents 0.1% of the loans. (*Id.*)

35. During the five most recent election cycles, forty-six loans made by Senate candidates were between $200,000 and $300,000, which represents 7.8% of the loans. (*Id.* at ¶ 6.) By comparison, during the five election cycles immediately before BCRA became effective, thirty such loans were between $200,000 and $300,000, which represents 6.8% of the loans. (*Id.*)

36. During the five most recent election cycles, one hundred and ninety loans made by House candidates were between $200,000 and $300,000, which represents 5.5% of the loans. (*Id.* at ¶ 7.) By comparison, during the five election cycles immediately before BCRA became effective, eighty-five such loans were between $200,000 and $300,000, which represents 3.0% of the loans. (*Id.*)

37. One independent study that looked only at federal candidate loans between $100,000 and $1,000,000 indicates that from 1983 until BCRA became effective, 3.6% of such loans were between $240,000 and $250,000, while from the time BCRA became effective until 2014, 7% of such loans were at that threshold. Ovtchinnikov & Valta, at 24-25, 38 (FEC Exh. 1).

38. A large majority of recent loans made by federal candidates to their campaigns are for $250,000 or less. Of the 588 loans made by Senate candidates to their campaigns during the five most recent election cycles,

466 of those loans were for $250,000 or less, which represents 79.3% of the loans. (Clark Decl. at ¶ 8 (FEC Exh. 2).) Therefore, only 20.7% of the loans were for more than $250,000.

39. Similarly, of the 3,444 loans made by House candidates to their campaigns during the five most recent election cycles, 3,076 of those loans were for $250,000 or less, which represents 89.3% of the loans. (*Id.* at ¶ 10.) Therefore, only 10.7% of the loans were for more than $250,000.

40. The ratio of loans below $250,000 has not changed substantially from what the ratio was prior to BCRA. Of the 441 loans made by Senate candidates to their campaigns during the five election cycles immediately before BCRA became effective, 335 of those loans were for $250,000 or less, which represents 76.0% of the loans. (*Id.* at ¶ 9.) Therefore, only 24.0% of the loans were for more than $250,000.

41. Of the 2,868 loans made by House candidates to their campaigns during the five election cycles immediately before BCRA became effective, 2,658 of those loans were for $250,000 or less, which represents 92.7% of the loans. (*Id.* at ¶ 11.) Therefore, only 7.3% of the loans were for more than $250,000.

42. Historically, losing candidates have had a more difficult time repaying loans than winning candidates do. (Ovtchinnikov & Valta at 2 & n.3 (FEC Exh. 1) ("When you wake up a loser [in a political campaign], you have a deficit. When you wake up a winner, you have a deficit retirement party." (quoting Roberts, S., "Debt Retirement Party Becoming an Institution." The New York Times, November 29. 1982)); Peter

Overby, *How Will Clinton Resolve Campaign Debt?*, National Public Radio (May 14, 2018, 6:00 AM), *available at* https://www.npr.org/templates/story/story.php?storyId=90425733 (last visited July 14, 2020) (noting the comment of a former FEC Commissioner and counsel to a losing presidential campaign that "only winners have an easy time dealing with debt" and that debt retirement in the context of those not taking office "'is the hardest task in American politics'").

43. Candidates provide loans to their campaigns for various reasons, such as for messaging that the candidate will not be beholden to special interests once elected. Linda McMahon loaned nearly $100 million to her 2010 and 2012 U.S. Senate campaigns. Peter Applebome, *Personal Cost for 2 Senate Bids: $100 Million*, N.Y.Times (Nov. 2, 2012) (FEC Exh. 4), *available at* https://www.nytimes.com/2012/11/03/nyregion/linda-e-mcmahon-has-spent-nearly-100-million-in-senate-races.html. One article reported that "Ms. McMahon says that spending her own money leaves her—unlike [her opponent] Mr. Murphy—in no one's debt." *Id.* The article quoted one of Ms. McMahon's campaign ads: "In the Senate I will owe you, not the special interests who corrupt so many career politicians from Hartford to Washington." *Id.*; *see also* Ari Melber, *Trump Campaign Could Use New Donations to Pay Donald Trump $36M for Loan*, nbcnews.com (May 13, 2016, 6:03 AM EDT), https://www.nbcnews.com/politics/2016-election/trump-campaign-may-use-new-donations-pay-donald-trump-36- n573291 (last visited July 14, 2020) (quoting then-candidate President Trump as saying, "I'm self-funding my campaign" and "Let me tell you, the politicians will never do the job because they're bought and paid for, folks").

## V. THE CAMPAIGN LOANS OF SENATOR CRUZ

44. In 2012, Senator Cruz ran for a U.S. Senate seat to represent Texas for the first time, and as part of the campaign, he made multiple loans to his authorized committee, totaling $1,064,000. *See* FEC, Conciliation Agreement with Ted Cruz for Senate, *et al.*, ¶ 2, https://www.fec.gov/files/legal/murs/7455/19044461484.pdf.

45. The largest loan of approximately $800,000 came from a margin account with Senator Cruz's wife's employer, Goldman Sachs, and was at the low interest rate level of 3%. *Id.* ¶ 3; Mike McIntire, *Ted Cruz Didn't Report Goldman Sachs Loan in a Senate Race*, N.Y. Times (Jan. 13, 2016), *available at* https://www.nytimes.com/2016/01/14/us/politics/ted-cruz-wall-street-loan-senate-bid-2012.html. Senator Cruz has publicly stated that the loan represented the entire liquid net worth and savings of his household. *Id.*

46. Goldman Sachs is a large, multinational bank that had recently received approximately $10 billion in public bailout funds and has an extensive stake in federal policies for which Senators have responsibility. Paritosh Bansal, *Goldman's share of AIG bailout money draws fire,* Reuters (Mar. 17, 2009), available at https://www.reuters.com/article/us-aig-goldmansachs-sb/goldmans-share-of-aig-bailout-money-draws-fire-idUSTRE52H0B520090318.

47. Senator Cruz was not repaid in full prior to the 2012 general election, and as a result of the Loan Repayment Limit, his campaign was prohibited from repaying the full amount of the loan using funds raised after that election. Email from Senator Cruz attaching Andrea Drusch, *Cruz says he ate a big 2012 campaign loan, but*

*he's still listing it as a top asset,* Fort Worth Star-Telegram (Aug. 15, 2018) (FEC Exh. 5).

48. When the full details of the loans later came under scrutiny, public concerns were raised regarding the susceptibility of a candidate to exchanges of favors where their personal finances are impacted and whether Senator Cruz's positions on issues of importance to Goldman like the availability of H-1B visas had been altered. *See* Jennifer Rubin, *10 Reasons that Goldman Sachs Loan is a Nightmare for Ted Cruz*, Wash. Post (Jan. 14, 2016), https://www.washingtonpost.com/blogs/right-turn/wp/2016/01/14/10-reasons-that-goldman-sachs-loan-is-a-nightmare-for-ted-cruz/ (associating Senator Cruz's loans with Goldman's positions on H-1B visas and quoting a Republican Senate staff member's allegations of "crony capitalism"). Senator Cruz circulated many of these media reports to his staff. (*See, e.g.*, Email from Senator Ted Cruz to Jeff Roe, et al. (May 26, 2017, 12:18:38 PM EDT) (with tweet linking Fox News story) (FEC Exh. 6); Email from Senator Ted Cruz to Prerak Shah, et al. (Aug. 15, 2018, 5:52:03 PM) (attaching article from Fort Worth Star-Telegram (FEC Exh. 5); Email from Senator Ted Cruz to Catherine Frazier (May 26, 2017 4:29:51 PM) (with tweet from Salon.com) (FEC Exh. 7); Email from Senator Ted Cruz to Jeff Roe, et al. (May 26, 2017, 3:25:36 PM EDT) (with tweet linking Texas Tribune) (FEC Exh. 8).)

49. One such article circulated by Senator Cruz quoted a Republican campaign finance attorney noting: "The law is designed to prevent people from giving their campaign a bunch of money and then raising money from donors years later when they're in office to pay themselves back personally." (Email from Senator

Ted Cruz to Prerak Shah, *et al.* (Aug. 15, 2018, 5:52:03 PM) (FEC Exh. 5).)

50. Starting shortly after the 2012 election and into the following year, the Cruz campaign began having discussions about the possibility of bringing a lawsuit to strike down the Loan Repayment Limit. (Deposition Transcript of Cabell Hobbs (May 13, 2020) at 51-52 ("30(b)(6) Dep.") (FEC Exh. 9).)

51. Those discussions continued for several years, concurrently with Senator Cruz's preparation to run for reelection in 2018. (30(b)(6) Dep. at 57-59 (FEC Exh. 9).)

52. By a significant margin, the 2018 Texas Senate campaign between Senator Cruz and Beto O'Rourke was the most expensive Senate campaign in U.S. history. Most Expensive Races, OpenSecrets.org,https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcands (last viewed July 10, 2020).

53. The Cruz Committee raised more than $35 million in the 2018 election cycle. (FEC, Ted Cruz for Senate Financial Summary, https://www.fec.gov/data/committee/C00492785/?cycle=2018).

54. Nonetheless, on the day before the November 6, 2018 general election, Senator Cruz loaned his campaign $260,000. *See* Ted Cruz for Senate, FEC Form 3 at 401-02 (Jan. 31, 2019, http://docquery.fec.gov/pdf/325/201901319145235325/201901319145235325.pdf. This was the only loan received by the Cruz Committee for the 2018 election. FEC, Ted Cruz for Senate Financial Summary, https://www.fec.gov/data/committee/C00492785/?cycle=2018.

55. Of the total loan amount, $255,000 originated from Senator Cruz's margin-approved brokerage account, and $5,000 originated from his personal bank accounts. (Compl. ¶ 28; Pls.' Statement of Undisputed Material Facts ("Pls.' SOF") ¶¶ 33-34.)

56. The 2018 loans were made for the sole purpose of providing a basis to bring this lawsuit. (*See* 30(b)(6) Dep. at 177 (FEC Exh. 9) (confirming the Committee's previously-stated position that "Plaintiff hereby stipulates 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 to [the Loan Repayment Limit].").)

57. At the end of election day, November 6, 2018, the Committee had approximately $2.38 million cash on hand. (Pls.' SOF ¶ 36.)

58. Pursuant to the 20-Day Repayment Period, the Committee had until November 26, 2018 to use that cash on hand to repay Senator Cruz all or part of the $260,000 he had loaned it the day before the election. *See* 11 C.F.R. § 116.11(c)(1). Because the Committee is permitted to repay candidate loans up to $250,000 after the 20-Day Period using any source of funds, the Committee only needed to repay $10,000 of the loan in that 20-day period to assure that the Loan Repayment Limit would not be an impediment to repaying Senator Cruz in full. (*Id.*)

59. The plaintiffs repaid no money during that period, however, because they wanted to bring this lawsuit. (*See* 30(b)(6) Dep. at 177 (FEC Exh. 9) (confirming the Committee's previously-stated position that

"Plaintiff hereby stipulates 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 to [the Loan Repayment Limit].").)

60. In addition, during the 20 days after the election and later, the Committee continued receiving post-election contributions, but rather than using those contributions to pay vendors or to pay any of Senator Cruz's debt, the campaign designated the contributions for Senator Cruz's 2024 re-election effort. (*See* 30(b)(6) Dep. at 96-97 (FEC Exh. 9).)

61. Starting on November 27, 2018, the Committee was required to treat the $10,000 of Senator Cruz's personal loans that exceeded the $250,000 Loan Repayment Limit, and which the Committee did not use its cash on hand to repay during the 20-Day Repayment Period, as a contribution from Senator Cruz to his Committee. *See* 11 C.F.R. § 116.11(c)(2).

62. Two days after the 20-day deadline elapsed, Senator Cruz emailed his campaign staff, stating: "Since more than 20 days have passed, it would be REALLY good if we could pay back at least some of the $250k now. Our cash is really getting stretched." (*See* Email from Senator Ted Cruz to Jeff Roe, Nov. 28, 2018, 12:46:26 PM (FEC Exh. 10).)

63. Less than a week after that email, the Committee started repaying Senator Cruz, and it completed paying $250,000 in four payments within the month. Pls.' SOF ¶ 42; Ted Cruz for Senate FEC Form 3 at 398-99, https://docquery.fec.gov/pdf/526/201908239163101526/201908239163101526.pdf (showing loan repayments

totaling $250,000 on Dec. 4, 2018, Dec. 11, 2018, Dec. 18, 2018 and Dec. 24, 2018).

64. None of the $250,000 of the loan that was repaid was from contributions raised after the election. (30(b)(6) Dep. at 95 (FEC Exh. 9) ("the committee did not receive any general 2018 contributions after Election Day 2018.").)

65. All of the funds that comprised the repaid $250,000 went toward Senator Cruz's personal loan that originated from his margin account. (Pls.' SOF ¶ 30.) As a result, of the remaining $10,000 of Cruz's personal loan that was converted to a contribution to his Committee, $5,000 originated from Cruz's personal bank account and $5,000 originated from his margin loan. *Id.* ¶¶ 31-32; Ted Cruz for Senate FEC Form 3 at 401-02, https://docquery.fec.gov/pdf/526/201908239163101526/201908239163101526.pdf (showing $5000 balance on each loan).

66. Plaintiffs are unable to identify a single potential contributor that was unable to make contributions to enable the Committee to repay Senator Cruz using more than $250,000 in post-election funds. (30(b)(6) Dep. at 98-99 (FEC Exh. 9).)

## VI. SPECIAL RISKS OF QUID PRO QUO CORRUPTION AND ITS APPEARANCE EXIST IN THE CONTEXT OF CANDIDATE LOANS

### A. Considerable Research, Experience, and Reporting Point to Dangers of Corruption and its Appearance in Candidate Loans

67. The repayment of large federal candidate loans has fueled corruption concerns. One 2020 study that

analyzed data regarding debt concluded that federal officeholders that are in debt are more likely to make decisions in accord with the interests of PACs and other special interest groups that can contribute to their campaigns. Ovtchinnikov & Valta at 26 (FEC Exh. 1). The study found that "indebted politicians, relative to their debt-free counterparts, are significantly more likely to switch their votes if they receive contributions from those special interests between the votes." *Id.* at 29.

68. The same study concluded, however, "that politicians with large loans to their campaigns become significantly less responsive to contemporaneous labor contributions following the passage of BCRA and behave remarkably similar to their debt free counterparts." *Id.* at 26. The authors of the study attribute this change to the Loan Repayment Limit. *Id.* Consistent with those findings, another study examined certain self-funding federal candidates, including those carrying candidate-loan debt beyond an election cycle, and concluded that the self-funding candidates did not vary their votes any more or less than other candidates as a result of interest-group contributions. (Baker at 54).) "A probable explanation . . . is that instead of being free agents, self-financed members feel pressure to court other sources of campaign contributions so they can be less reliant on their own money in the next election." (Baker at 65.)

69. A 2009 press report stated that U.S. Representative Grace F. Napolitano had held several fundraisers to solicit donations to pay down a $150,000 loan that she had made to her campaign in 1998. Andrew Zajac, *Interest on Campaign Loan Pays*, L.A. Times

(Feb. 14, 2009), https://www.latimes.com/archives/la-xpm-2009-feb-14-me-napolitano14-story.html (last visited July 14, 2020). These fundraisers were hosted by "a Capitol Hill lobbying firm whose clients include several transportation interests," while Napolitano served as "a member of the House Transportation and Infrastructure Committee and [] chairwoman of the water and power subcommittee of the Natural Resources Committee." *Id.* The invitation for one of these fundraisers "invited political action committee checks of $1,500 or personal donations of $500, payable to the 'Napolitano for Congress '1998 Primary Debt Retirement.'" *Id.* One retired campaign finance specialist noted that lobbyists assist with debt retirement fundraisers because they know it is really of benefit to the member. *Id.*

70. Some members of Congress used personal loans in a manner that appeared to some to circumvent the per election contribution limit in recent years. Karl Evers-Hillstrom, *Ted Cruz's FEC lawsuit could give special interests more power in federal elections,* Opensecrets.org (Apr. 1, 2019) (FEC Exh. 11), *available at* https://www.opensecrets.org/news/2019/04/ted-cruzs-fec-lawsuit/.

71. For example, Senate candidate Matt Rosendale's 2014 campaign debt was repaid in 2018 by "nine wealthy donors," eight of whom had already given the maximum to his 2018 campaign. *Id.* at 3. Rosendale then loaned his 2018 campaign more money, "effectively creating a cycle of loans and repayments that bypasses traditional contribution limits." *Id.*

72. Senator Mike Braun also allegedly used the tactic in 2018 by "taking contributions for the purpose of

paying down his personal campaign debts from the Republican primary" and then "loan[ing] his general election campaign the exact same sums, effectively allowing his donors to bypass contribution limits. *Id.* at 4.

73. Concerns about the appearance of corruption with regard to candidate loans have also roiled state election systems. For example, in an investigative report in February 2012, the *Dayton Daily News* reported that Mike DeWine had loaned his campaign for Ohio Attorney General $2 million in an attempt to unseat Richard Cordray in 2010, and then "after winning the election [] began raising money to help retire the debt." The article reports that "[w]riting checks to the DeWine campaign last year were hundreds of lawyers from dozens of law firms, many of which hold special counsel contracts awarded by the attorney general's office to represent public pensions, colleges, state agencies and more." In the year following the election, DeWine raised $1.47 million to pay off the debt, including, reportedly, $194,830 in contributions from ten law firms and their lawyers that received $9.6 million in legal fees for 225 assignments from the Attorney General's office. An analyst at the Center for Governmental Studies observed that "Money given after the election that goes into the candidate's pocket provides the contributor with even more influence over the candidate since the candidate is benefiting personally from the contribution." *See* Bischoff, Laura, "Donations Helping DeWine Pay Down Campaign Loan," *Dayton Daily News* (Feb. 12, 2012) (FEC Exh. 12), *available at* https://www.springfieldnewssun.com/news/national-govt--politics/donations-helping-dewine-pay-down-campaign-loan/UAkVmO6kothwHSzC6tNJiP/.

74. Another report from 2014 stated that, "In the three years since winning a close race for attorney general, Mike DeWine and his political team have been raising hundreds of thousands of dollars—often from lawyers who want state business—and then using that campaign cash to pay off a $2 million personal loan that DeWine made to his committee in 2010 and to build up a war chest for his 2014 re-election bid." *See* Bischoff, Laura, "Firms Gave Heavily to DeWine, GOP," *Dayton Daily News* (Jan. 26, 2014) (FEC Exh. 13), *available at* https://www.daytondailynews.com/news/state--regional-govt--politics/firms-gave-heavily-dewine-gop/RV4vShQrE3qzJVij8rp2tN/. The report found that as attorney general, DeWine was responsible for selecting law firms for a securities fraud advisory panel that had 27 firms, with 12 of those firms from Ohio, and whose members received special counsel work. *Id.* The report "found huge campaign contributions from some of the members of the panel, including some that came as DeWine was deliberating on which firms to put on the panel." *Id.* In addition, the report found that, "[o]f the 27 law firms assigned to the cases that pay on contingency, 19 serve on DeWine's panel," "[m]ost of them also contributed via PACs or employees to the Ohio GOP, Mike DeWine and/or [Mike DeWine's son] Pat DeWine—more than $1.3 million from 2010 to 2013," and "[a]bout half of the donations came from firms whose main office is outside Ohio." *Id.* And the report noted that "[t]he Ohio Republican Party, which received the bulk of the campaign contributions from firms seeking outside work with DeWine's office, has funneled $977,537 to DeWine's campaign fund since he took over as AG in January 2011." *Id.*

75. A 2018 report also included concerns about an appearance of corruption related to the Ohio Attorney General's office in this period. An investigation by the Ohio Center for Investigative Journalism reported that debt collection firms who contracted with the Ohio Attorney General's Office "whose contracts were not renewed during the DeWine years were skeptical about the political purity of the contracting process." James McNair, *Unlike Neighboring States, Ohio Lacks Transparent, Merit Process For Debt Collection Outsourcing; Campaign Contributors Much More Likely To Get Contracts*, Eye on Ohio: Ohio Center for Investigative Journalism (June 25, 2018), https://eyeonohio.com/ag_collections/ (last visited July 14, 2020). The report cited the example of one contractor that had received contracts under five prior attorneys general before its contract was not renewed under Attorney General DeWine. *Id.* The report noted that the founder of the company believed the non-renewal stemmed from "his lack of financial support for the DeWine campaign." *Id.* The report quoted the founder as saying, "This is what they all do. . . . This is their business, and they'll pay to play. I don't pay to play. I do good work." *Id.* The report also quoted the founder of another debt collection company whose contract was not renewed as saying, "I always thought what they were looking for was someone to perform, and I thought our record spoke for itself. . . . We had done it under both parties and for a number of years. It's not like we didn't make campaign contributions. We may have not made them of the size that a lobbyist might have suggested." *Id.*

76. Oklahoma Governor Kevin Stitt made $5 million in personal loans to his campaign in 2018. In the year after winning the election, Governor Stitt raised over

$800,000 in contributions, with "more than $100,000 from political action committees funded by industries or special interests." Trevor Brown, *After Election, Stitt Continues to Rake in Campaign Donations*, OklahomaWatch.org (Nov. 11, 2019), https://oklahomawatch.org/2019/11/11/after-election-stitt-continues-to-rake-in-campaign-donations/ (last visited July 14, 2020).

77. In another example at the state level, the Kentucky Registry of Election Finance in 1994 observed that, "[i]n the last fifteen years, Kentuckians have endured the consequences of millionaires 'loaning' their campaigns millions of dollars, only to be repaid by contributors seeking no-bid contracts." Def.'s Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 9, *Wilkinson v. Jones*, Civ. No. 94-0664, at 9 (W.D. Ky. Dec. 22, 1994) (FEC Exh. 14). According to the Registry, "[o]bservers argued that Kentucky's gubernatorial races were already publicly financed by the profit margins on the state contracts awarded to those who helped repay the Governors' campaign debts." *Id.* at 10 (citing Penny Miller, Kentucky Politics & Government: Do We Stand United? 219 (Lincoln: University of Nebraska Press (1994))).

78. Kentucky Governors John Y. Brown, Jr. and Wallace Wilkinson provided loans to their campaigns of $3.55 million, "only to be repaid after the election by contributors seeking no-bid contracts." Jennifer A. Moore, *Campaign Finance Reform in Kentucky: The Race for Governor*, 85 Ky. L.J. 723, 746 (1997) (citing Penny Miller, Kentucky Politics & Government: Do We Stand United? 219 (Lincoln: University of Nebraska Press (1994))). In 1987, for instance, Governor Wilkinson loaned $3.2 million to his campaign and then,

"[a]fter the election, Wilkinson spent a great deal of time raising money to reimburse himself for the loans he made to the campaign." *Id.* at 754. Governor Wilkinson's loan repayments and solicitation practices reportedly incentivized Kentucky's 1992 campaign finance reforms. *Id.*

79. In 1991 the *Courier-Journal* in Louisville, Kentucky reported: "The Addington family of Catlettsburg and their employees contributed at least $215,000 to Wallace Wilkinson's gubernatorial campaign and political action committee during a six-month period following Wilkinson's primary victory in May 1987." Tom Loftus, *Big-Money Politic$*, The Courier-Journal, Dec. 29, 1991, at 2 (FEC Exh. 15). The article continued: "The Addingtons, who have vast coal operations in the state, were seeking a state permit to open what would become the state's largest landfill." *Id.*

### C. The Dangers of Corruption and its Appearance in the Context of Post-Election Contributions and Donations

80. In 1989, "a majority of the [Alaska Public Offices Commission] commissioners stated strong support for barring post-election contributions, and hoped such a ban would curtail contributions 'intended to influence a successful candidate rather than the outcome of an election.'" *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 628 (Alaska 1999) (quoting Alaska Public Offices Commission, *Ann. Rep. to the Legislature* 10 (1989)).

81. In that case, the court observed that "Former Alaska Governor [Walther] Hickel affied that 'post-election contributions can too easily be viewed as an attempt

to purchase influence and are one of the most troubling kinds of contribution.'" *Id.*

**D. The Public's Perceptions of the Potential for Corruption in Candidate Loan Repayment 1. YouGov Survey Timeline**

82. In April 2020, the global public opinion and data firm YouGov conducted a survey, at the request of the FEC in connection with this case, that yielded responses from 1,000 adults in the United States over the age of 18 years. (Decl. of Ashley Grosse ¶ 5 (Apr. 24, 2020) ("Grosse Decl.") (FEC Exh. 16).) Following its ordinary practice, "YouGov interviewed 1202 respondents who were then matched down to a sample of 1000 to produce the final dataset," using "a sampling frame on gender, age, race, and education." (Grosse Decl. Exh. C at 1 (FEC Exh. 16).) YouGov followed the accepted methodology of constructing a nationally-representative sample using the 2017 American Community Survey. (*Id.*) This survey was paid for by the FEC and was managed by Ashley Grosse, Senior Vice President of Client Services at YouGov. (Grosse Decl. ¶¶ 3, 5, 6 (FEC Exh. 16).)

83. The FEC supplemented its initial disclosures in this matter pursuant to Federal Rule of Civil Procedure 26(e)(1) on April 27, 2020, providing plaintiffs with the name, address and telephone number of Ms. Grosse. (Email from Tanya Senanayake, FEC counsel, to John Ohlendorf, plaintiffs' counsel (Apr. 27, 2020) (FEC Exh. 17); Def. FEC Supplement to Its Initial Disclosures (Apr. 27, 2020) (FEC Exh. 18).) At this time, the FEC also provided to plaintiffs a declaration by Ms. Grosse and the results and methodology of the survey. (*Id.*)

84. On May 7, 2020, plaintiffs sent to the FEC a request for "all documents relating to the survey, including (but not limited to) any communications between Defendants and YouGov relating to the survey." (Pls.' First Req. for Prod. (May 7, 2020) (FEC Exh. 19).) At the same time, plaintiffs noticed a deposition of Ms. Grosse for May 26, 2020. (Notice of Dep. for Ashley Grosse (May 7, 2020) (FEC Exh. 20).) On May 20, 2020, the FEC produced to plaintiffs non-privileged documents responsive to plaintiffs' request that were in the FEC's possession, custody, or control and a log of withheld privileged documents. (Def. FEC's Resps. To Pls.' First Req. for Prod. (May 20, 2020) (FEC Exh. 21); Def. FEC's Docs and Info. Withheld In Connection With Pls.' First Req. for Prod. (FEC Exh. 22).) In addition, while the FEC objected that documents not in its possession, custody, or control at the time that plaintiffs served the discovery request were not properly sought, the FEC did obtain and produce responsive documents that had been in YouGov's possession at that time. (Def. FEC's Resps. To Pls.' First Req. for Prod. (May 20, 2020) (FEC Exh. 21).)

85. On May 26, 2020, plaintiffs deposed Ms. Grosse. (Dep. of Ashley Grosse (May 26, 2020) ("Grosse Dep.") (FEC Exh. 23)) During this deposition, Ms. Grosse confirmed that the FEC did not seek and YouGov did not provide to the FEC any information about the party identification and ideology of survey respondents. (Grosse Dep. at 63:21-22, 64:1-4, 12-22.) Plaintiffs' counsel questioned Ms. Grosse about party identification and whether respondents who identified with various political parties have different opinions about campaign finance laws. (Grosse Dep. at 76:3-80:7.)

Ms. Grosse testified that she did not know. (Grosse Dep. at 77:13; 78:12-13; 80:6-7.)

86. Plaintiffs' counsel also asked Ms. Grosse, "If my proposition was accurate and that party affiliation was significantly correlated with one's views about restrictions on campaign fundraising and expenditures, would that be an important profile item to include in a survey?" (Grosse Dep. at 80:8-13.) Ms. Grosse responded, "No." (Grosse Dep. at 80:14.) Plaintiffs' counsel questioned Ms. Grosse on whether political party identification affected the representativeness of the respondent sample for the survey, and Ms. Grosse testified that this variable did not affect representativeness. (Grosse Dep. at 80:20-82:13.)

87. During the deposition, Plaintiffs' counsel also asked Ms. Grosse about quality control questions in the script for the survey. (Grosse Dep. 110:13-17.) Ms. Grosse explained that, though the quality control questions were presented to survey respondents, the quality control questions and responses had not been provided to the FEC. (Grosse Dep. at 110:19) Ms. Grosse explained that the responses to the quality control questions are limited in their utility for addressing the quality of the FEC's survey because respondents typically answer the questions after taking multiple surveys in one sitting. (Grosse Dep. at 111:3-19.)

88. On June 2, 2020, plaintiffs sent to the FEC another request for production of documents regarding the YouGov survey, including "all documents containing the data, information, or results that YouGov obtained from respondents to the survey relating to respondents' Three-Point Party ID." (E-mail from Charles Cooper

to FEC Counsel (June 2, 2020) (FEC Exh. 24 (unrelated e-mails deleted)).)

89. On July 9, 2020 the FEC, while preserving its objection to producing material not in its possession, custody, or control and other objections, provided to plaintiffs "the responses that YouGov collected from respondents in the survey that it conducted for the FEC, or in some places responses that respondents had previously provided . . . , that the FEC obtained." (FEC Exh. 25.) The FEC provided to plaintiffs additional raw data related to the survey. (*Id.*) This included responses to the survey, as well as information previously provided by respondents for the additional questions that were discussed during Ms. Grosse's deposition and that YouGov had not previously provided to the FEC, such as party identification, ideology, and reported 2016 vote for president, in addition to numerical responses to quality control questions. Further, "to comprehensively address suggestions made in questions at Ms. Grosse's deposition," the FEC provided to plaintiffs survey results that are weighted by 2016 presidential vote and cross-tabulations of the survey results that contain reported 2016 presidential vote choice, three-point party identification, and ideology. (FEC Exh. 25; Declaration of Tanya Senanayake (July 14, 2020) ("Senanayake Decl.") (FEC Exh. 26) & Exh. A-B.)

**2. Survey Results**

90. In the April 2020 YouGov poll of 1,000 nationally-representative Americans aged 18 and over, 81% of respondents stated that they believed it was "very likely" or "likely" that individuals who donate money to a federal candidate's campaign after an election expect a po-

litical favor in return from candidates who later take office. (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. A (Question 5) (FEC Exh. 16).)

91. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that post-election contributors expect a political favor in return from candidates who later take office was consistent across different demographics. With regard to education, for instance, 75% of respondents with a high school education or less, 85% of respondents with some college, 86% of respondents who had graduated college, and 82% of respondents with post-graduate education said that it was "very likely" or "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Grosse Decl. Exh. B (Question 5) (FEC Exh. 16).)

92. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that post-election contributors expect a political favor in return from candidates who later take office is similar among respondents who identify with different political parties. In fact, 78% of respondents who identified as Democrat, 78% of respondents identifying as Republican, and 84% of respondents identifying as Independent said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

93. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that contributors who donate money to a candidate's campaign after

the election expect a political favor in return from candidates who later take office is also similar among respondents with different political ideologies. In fact, 83% of respondents who identified as liberal, 76% of respondents identifying as moderate, and 81% of respondents identifying as conservative said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

94. According to the poll, the public's overwhelming perception that it is likely that contributors who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office is also similar among respondents who reported casting different presidential votes in 2016. In fact, 85% of respondents who voted for Senator Hillary Clinton and 80% of respondents who voted for President Donald Trump said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

95. In this 2020 YouGov poll, 67% of respondents believed that, if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors from candidates to whom they make contributions. (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. A (Question 6) (FEC Exh. 16).) Specifically, respondents were asked the following: "Currently, there is a limit on how much money a federal campaign may raise after Election Day to repay a candidate loan. If there were no limit on how much money a federal campaign could raise after

Election Day to repay a candidate, would donors be more likely to expect political favors? Less likely to expect political favors? Or would it make no difference?" (*Id.*) In response, 67% of respondents answered that they believed that donors are more likely to expect political favors if there were no limit; 6% of respondents answered that they believed that donors are less likely to expect political favors if there were no limit; and only 27% of respondents believed that there would be no difference. (*Id.*)

96. According to the 2020 YouGov poll, the public's overwhelming perception that if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors, was also consistent across different demographics. With regard to education, for instance, 61% of respondents with a high school education or less, 67% of respondents with some college, 75% of respondents who had graduated college, and 74% of respondents with post-graduate education said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. B (Question 6) (FEC Exh. 16).)

97. The public's overwhelming perception that, if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors is similar among respondents identifying with different political parties. For instance, 67% of respondents identifying as Democrat, 63% of respondents identifying as Republican, and 68% of respondents identifying as Independent said that it was more likely that donors would expect political favors in return for contributions "[i]f there

were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

98. The public's perception that, if a loan repayment limit did not exist, donors would be more likely to expect political favors is similar for respondents identifying with different political ideologies as well. For instance, 72% of respondents identifying liberal, 67% of respondents identifying moderate, and 64% of respondents identifying as conservative said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

99. Finally, the public's perception that, if a loan repayment limit did not exist, donors would be more likely to expect political favors is similar for respondents with different candidate preferences in the 2016 presidential election. For instance, 74% of respondents who voted for Senator Hillary Clinton and 67% of respondents who voted for President Donald Trump said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

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July 14, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: July 14, 2020

**STATEMENT OF GENUINE ISSUES**

**FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES**

Pursuant to Federal Rule of Civil Procedure 56(c), Local Civil Rule 7(h)(1), and paragraphs IV.F & G of the Court's Order on scheduling (Jan. 29, 2020) (Docket No. 40), defendant Federal Election Commission ("FEC") hereby submits this statement of genuine issues in response to plaintiffs' Statement of Undisputed Material Facts (Docket No. 61-2):

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

1. Section 304 of BCRA, currently codified at 52 U.S.C. § 30116(j), provides:

> 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.

**FEC Response to Statement 1**: ADMIT.

2. BCRA Section 304 was enacted as part of the so-called "Millionaire's Amendment," which was designed to "level the playing field" between wealthy and non-wealthy candidates by making it more difficult for wealthy candidates to spend money on behalf of their own election. 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine) (attached as Exhibit 1 to Declaration of John D. Ohlendorf (June 9, 2020) ("Ohlendorf Decl.")); *Davis v. FEC*, 554 U.S. 724, 729, 741-44 (2008).

**FEC Response to Statement 2:** ADMIT that 52 U.S.C. § 30116(j) (the "Loan Repayment Limit") was enacted along with the Millionaire's Amendment as part of BCRA, but DENY that the Loan Repayment Limit was designed to "'level the playing field' between wealthy and non-wealthy candidates by making it more difficult for wealthy candidates to spend money on behalf of their own election."

3. The debate over the adoption of the Millionaire's Amendment is replete with statements that the Amendment was, as Senator Feinstein put it, "an attempt to level the playing field." 147 CONG. REC. S2459 (Mar. 19, 2001) (statement of Sen. Feinstein).

**FEC Response to Statement 3:** ADMIT. The Commission DENIES that this is a "material fact," however, because, with one apparent exception, none of these statements were made about the Loan Repayment Limit at issue in this case, and other legislative history

indicates that "leveling the playing field" was not the purpose behind the Loan Repayment Limit.

4. For example, Senator DeWine, who opposed the Amendment as initially proposed but ultimately supported the final, compromise version that he helped to draft, stated that the Amendment "identified a real problem," because "[a]s a practical matter, a person who has [$10 to $60 million of an opponent's own money] spent against them has a very difficult time competing, making it a level playing field or even close to being a level playing field." *Id.* at S2463 (statement of Sen. DeWine).

**FEC Response to Statement 4:** ADMIT. The Commission DENIES that this is a "material fact," however, because these statements were not made about the Loan Repayment Limit at issue in this case. This is evident from the next paragraph of Senator DeWine's speech, where he explains that he is talking about the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2463 (Mar. 19, 2001) (statement of Sen. DeWine) ("The amendment I will be proposing raises the dollar amounts a person can give to an individual candidate.").

5. The Millionaire's Amendment, Senator DeWine explained, would "begin to level the playing field." *Id.*

**FEC Response to Statement 5:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. This is evident from earlier in Senator DeWine's speech, where he ex-

plains that he is talking about the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2463 (Mar. 19, 2001) (statement of Sen. DeWine) ("The amendment I will be proposing raises the dollar amounts a person can give to an individual candidate.").

6. Senator DeWine later stated that "[w]hat this amendment is aimed at dealing with is the perception, and the perception that someone can buy a seat in the Senate with their own money. It begins to level that playing field." 147 CONG. REC. S2547 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine) (attached to Ohlendorf Decl. as Exhibit 2).

**FEC Response to Statement 6:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. This is evident from earlier in Senator DeWine's speech, where he explains that he is talking about the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2546-47 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine) ("[W]hat it means is that the candidate who is facing that multimillionaire will also have the opportunity to have a bigger megaphone, to grow that megaphone if, in fact, he or she can go out and convince enough people to make individual contributions. That is what this amendment does.").

7. Likewise, Senator Domenici—the author and principal sponsor of the Amendment—explained that the goal of his Amendment was to "better balance the

playing field." 147 CONG. REC. S2460 (Mar. 19, 2001) (statement of Sen. Domenici).

**FEC Response to Statement 7:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. This is evident from the remainder of Senator Domenici's speech, where he explains that he is talking about the part of the Millionaire Amendment's permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2460 (Mar. 19, 2001) (statement of Sen. Domenici) ("My first draft of this amendment was to take everything off the [candidate facing a wealthy self-funder], no limits. They could do whatever they would like, just as they used to years ago, as long as they listed it. Others have said, no, leave some limitations. So we are in the process . . . of working with other Senators who would like to refine the Domenici amendment.").

8. Senator Hutchison, another supporter of the Amendment, explained that "[o]ur purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. S2541 (Mar. 20, 2001) (statement of Sen. Hutchison).

**FEC Response to Statement 8:** ADMIT that the Senator Hutchison made the statement in connection with the merged amendment combining a contribution limit-shifting provision with a loan repayment provision, but DENY that the excerpt fairly and accurately conveys

Senator Hutchison's views regarding the loan repayment provision specifically. At the quoted point in her remarks, Senator Hutchison was discussing both the limit-shifting and loan repayment provisions. Later, when more specifically discussing the loan repayment provision, Senator Hutchison stated that the purpose of that provision was to prevent a candidate from "reselling" the office, a clear reference to corruption. 147 Cong. Rec. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison) ("[Candidates] have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it. That is what my part of this amendment attempts to prevent, so a candidate can spend his or her own money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back."). While Senator Hutchison does say the provision is intended "to level the playing field," those comments contrasted a self-lending candidate's ability to "go out and repay themselves" "when they win" with persons running with a "variety of support from his or her constituents," *i.e.*, people who do not have the same opportunity for post-election fundraising for self-payment. *Id.* at S2451-S2452 (statement of Sen. Hutchison). Senator Hutchison belabored the points that she "want[ed] people to be able to spend their own money," as she previously had, and that "[n]o one argues" against candidates like her having "a constitutional right to spend our money." *Id.* at S2451.

9. Similarly, Senator Durbin, an enthusiastic cosponsor of the Amendment, stated that "What we are trying to address with this amendment is to level the playing field so that if someone shows up in the course of the campaign who is independently wealthy and is willing to spend $10, $20, $30, $40, $50, $60 million of

their own money . . . then at least the other candidate has a fighting chance." *Id.* at S2540 (statement of Sen. Durbin).

**FEC Response to Statement 9:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. This is evident from the very next paragraph of Senator Durbin's speech, where he explains that he is talking about the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2540 (Mar. 20, 2001) (statement of Sen. Durbin). ("How do we do it? Currently you can only accept $1,000 per person per election. We have said: If you run into the so-called self-financing candidate who is going to spend millions of dollars, then you can accept a larger contribution from an individual.").

10. And then-Senator Sessions, an opponent of BCRA more generally, spoke in favor of the Millionaire's Amendment because current law "makes it difficult for candidates to run on a level playing field." 147 CONG. REC. S2464 (Mar. 19, 2001).

**FEC Response to Statement 10:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement does not appear to have been made about the Loan Repayment Limit at issue in this case. This is evident from the remainder of Senator Sessions's speech, where he speaks in great detail about the part of the Millionaire Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2464-65 (Mar. 19, 2001) (statement of Sen. Sessions)

("If a wealthy candidate declares his or her intent to spend in excess of $500,000, the opponent of that candidate can increase individual and PAC contribution limits threefold."); *id.* at 2465 (If the candidate says in his declaration that he or she intends to spend more than $750,000, his or her opponent can increase individual and PAC contribution limits by five times.); *id.* ( If the wealthy candidates exceed $1 million in personal expenditures . . . the direct party contribution limit and party coordinated expenditure limits are eliminated."). After discussion of that provision of the Millionaire's Amendment, Senator Sessions did briefly mention two other provisions of the law, including the Loan Repayment Limit, but he did not tie either provision to a motivation to level the playing field. *Id.* (mentioning both: 1) a "give-back" provision whereby candidates that receive excess funds as a result of increased contribution limits under the Millionaire's Amendment must return such funds to the contributor; and 2) the Loan Repayment Limit).

11. Then-Senator Sessions stated: "[A] wealthy candidate can waltz in out of left field with hundreds and hundreds of millions of dollars in his account and can just overwhelm their opponent, and it creates, I believe, an unfair situation." *Id.*

**FEC Response to Statement 11:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement does not appear to have been made about the Loan Repayment Limit at issue in this case. This is evident from the remainder of Senator Sessions's speech, where he speaks in great detail about the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions

when opposing self-funding candidates. 147 CONG. REC. S2464-65 (Mar. 19, 2001) (statement of Sen. Sessions) ("If a wealthy candidate declares his or her intent to spend in excess of $500,000, the opponent of that candidate can increase individual and PAC contribution limits threefold."); *id.* at 2465 (If the candidate says in his declaration that he or she intends to spend more than $750,000, his or her opponent can increase individual and PAC contribution limits by five times.); *id.* ( If the wealthy candidates exceed $1 million in personal expenditures . . . the direct party contribution limit and party coordinated expenditure limits are eliminated."). After discussion of that provision, Senator Sessions did briefly mention two other provisions of the law, including the Loan Repayment Limit, but did not tie either provision to a motivation to level the playing field. *Id.* (mentioning both: 1) a "give-back" provision whereby candidates that receive excess funds as a result of increased contribution limits under the Millionaire's Amendment must return such funds to the contributor; and 2) the Loan Repayment Limit).

12. This was not only the purpose of the Millionaire's Amendment generally; it was also the purpose of the loan-repayment limit in particular. See *id.* at S2461 (statement of Sen.Durbin); *id.* at 2462 (statement of Sen. Durbin); *id.* at 2465 (statement of Sen. Sessions); id. at S2463 (statement of Sen. Domenici); 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine).

**FEC Response to Statement 12:** DENY. None of the five citations to the legislative history provides any support for plaintiffs' statement that leveling the playing field was the purpose of the Loan Repayment Limit. As described in the FEC's responses to Statements 10

and 11, Senator Sessions's reference to the Loan Repayment provision appears only in a recitation of provisions of the proposed amendment, and it is in no way tied to the purpose of leveling the playing field. 147 CONG. REC. S2464-65 (Mar. 19, 2001) (statement of Sen. Sessions). Senator DeWine's words make no reference to the Loan Repayment Limit. 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine). Senator DeWine does reference "personal loans," but that is in context of his discussion of contribution limit increases associated with the Millionaire's Amendment. 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine) ("Specifically, our amendment would raise the contribution limits for candidates facing wealthy opponents to fund their own campaigns."). Loans were included in that other provision of the Millionaire's Amendment to prevent a wealthy candidate from avoiding the intended increase in an opponent's contribution limits by making a "loan" to the first candidate's campaign and then have that loan converted to a contribution after the election. Neither of the two cited statements of Senator Durbin support plaintiffs' statement. In the first citation, Senator Durbin merely asked Senator Domenici to explain the amendment, without Durbin expressing his view on its purpose. 147 CONG. REC. S2461 (Mar. 19, 2001) (statement of Sen. Durbin) ("Will the Senator be good enough to explain the provision he has on loan repayment?"). Senator Domenici then goes on to explain that the Loan Repayment Limit is needed because candidates that loan large sums to their campaign "are not in office 1 month and [they] are interested in the special interests. Why? Because [they] want to pay the loan off." *Id.* at S2462 (state-

ment of Sen. Domenici); *see also id.* (Sen. Domenici expressing concern about fundraising events to pay off a personal loan where an officeholder asks his contributors "'How would you like me to vote now that I am a Senator?"). After Senator Domenici's explanation, Senator Durbin briefly addresses the Loan Repayment Limit again and states, "The Senator from New Mexico [Domenici] is right on that point." *Id.* at S2462 (statement of Sen. Durbin). Senator Durbin then discusses several other unrelated provisions of the amendment. Plaintiffs' citation to Senator Domenici's statements on 147 CONG. REC. S2463 appears to be an error—Senator Domenici does not speak on that page of the Congressional Record, and as noted above, his descriptions of the purpose of the Loan Repayment Limit do not support plaintiffs' statement.

13. Many comments on the Amendment drew no distinction between wealthy candidates financing their own campaigns through direct spending and through candidate loans. *See infra*, ¶¶ 14-18.

**FEC Response to Statement 13:** ADMIT. The Commission DENIES that this is a "material fact," however, because none of these statements were made about the Loan Repayment Limit at issue in this case. Each of these statements were referring to the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates, because under that provision of the statute, candidate loans were treated as contributions for the purpose of calculating an opponent's contribution limits.

14. Senator Durbin, for example, explained that "a lot of people who are very wealthy do not give money to their campaign; they loan it and say they will be repaid

later." 147 CONG. REC. S2461 (Mar. 19, 2001) (statement of Sen. Durbin).

**FEC Response to Statement 14:** ADMIT. The Commission DENIES that this is a "material fact," however, in part because Senator Durbin's quoted statement makes no reference to loans being treated differently or similarly to contributions, and in part because it does not appear that the quoted statement is about the Loan Repayment Limit. After this statement, Senator Durbin asks Senator Domenici to explain the Loan Repayment Limit, as explained in the FEC's Response to Statement 13.

15. Minutes later, Senator Durbin referred to candidate spending and candidate loans interchangeably: "Think about what this institution will become if that is what one of the rules is to be part of the game: That you have to be loaning or contributing literally millions of dollars in order to be a candidate for public office." *Id.* at 2462 (statement of Sen. Durbin).

**FEC Response to Statement 15:** ADMIT. The Commission DENIES that this is a "material fact," however, because there is no indication that Senator Durbin's quote is referencing the Loan Repayment Limit. As described in the FEC's Response to Statement 12, loans were treated the same as contributions for the purpose of determining an opponent's contribution limit increases in accord with the Millionaire's Amendment.

16. Senator Sessions made a similar point, explaining that the Amendment "also prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those

loans from any contributions made to the candidate." *Id.* at 2465 (statement of Sen. Sessions).

**FEC Response to Statement 16:** ADMIT. The Commission DENIES that this is a "material fact," however, because in this quote Senator Sessions is merely describing how the Loan Repayment Limit works; here he does not express any view as to the purpose behind the provision.

17. As Senator Domenici put the point, the Amendment's loan-repayment limit was "very fair," because "it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents." Id. at S2462 (statement of Sen. Domenici).

**FEC Response to Statement 17:** ADMIT that this is a partial quote from Senator Domenici's statement, but deny that the statement failed to distinguish between loans and spending. Only loans would enable a Senator to "get [money] back." The full quote is:

> I think that is very fair. In fact, it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents under fundraising events that you would hold and then ask them: How would you like me to vote now that I am a Senator?
>
> That is what we are talking about. I think you are absolutely right on that.

147 CONG. REC. S2462 (Mar. 19, 2001) (statement of Sen. Domenici).

18. As Senator DeWine explained, the Amendment was designed to "create greater fairness and accountability in the Federal election process by addressing the inequity that arises when a wealthy candidate pays for his or her campaign with personal funds—personal funds that are defined, by the way, to include cash contributions and any contributions arising from personal or family assets such as personal loans or property used for collateral for a loan to the campaign." 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine).

**FEC Response to Statement 18:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. In this passage Senator DeWine was explaining the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. 147 CONG. REC. S2538 (Mar. 20, 2001) (statement of Sen. DeWine) ("Specifically, our amendment would raise the contribution limits for candidates facing wealthy opponents to fund their own campaigns.").

19. In addition to "levelling the playing field," the legislative record indicates that the Millionaire's Amendment was also designed to "protect[ ] incumbents." *Id.* at S2544 (statement of Sen. Daschle).

**FEC Response to Statement 19:** DENY. Senator Daschle opposed the Millionaire's Amendment. 147 CONG. REC. S2544 (Mar. 20, 2001) (statement of Sen. Daschle) ("I support McCain-Feingold, but I do not support this."). However, the Commission DENIES that this is a "material fact," because Senator Daschle's

statement was not made about the Loan Repayment Limit at issue in this case.

20. Senator Dodd, for example, opposed the Amendment's attempt to curb the ability of wealthy candidates to finance their own campaigns because "we are talking, in many instances, about challengers. We are incumbents. As incumbents, we have a lot of advantages that do not come out of our personal checkbooks." 147 CONG. REC. S2465 (Mar. 19, 2001) (statement of Sen. Dodd).

**FEC Response to Statement 20:** ADMIT that Senator Dodd opposed the Millionaire's Amendment. 147 CONG. REC. S2465-66 (Mar. 19, 2001) (statement of Sen. Dodd) ("So I urge my colleagues who are thinking about supporting this amendment, who simultaneously want to see McCain-Feingold become the law of the land, to think twice about this amendment."). However, the Commission DENIES that this is a "material fact," because Senator Dodd's statement was not made about the Loan Repayment Limit at issue in this case.

21. Senator Dodd later explained that while "[w]hat [the sponsors of the Amendment] are trying to do is level the playing field," it "isn't exactly level, in a sense, when we are talking about incumbents who have treasuries of significant amounts and the power of the office which allows us to be in the press every day, if we want." 147 CONG. REC. S2542 (Mar. 20, 2001) (statement of Sen. Dodd).

**FEC Response to Statement 21:** ADMIT that Senator Dodd opposed the Millionaire's Amendment. 147 CONG. REC. S2465-66 (Mar. 19, 2001) (statement of Sen. Dodd) ("So I urge my colleagues who are thinking

about supporting this amendment, who simultaneously want to see McCain-Feingold become the law of the land, to think twice about this amendment."). However, the Commission DENIES that this is a "material fact," because Senator Dodd's statement was not made about the Loan Repayment Limit at issue in this case.

22. Senator Dodd rejected "[t]he idea that somehow we are sort of impoverished candidates when facing a challenger who may decide they are going to take out a loan, and not necessarily even have the money in the account but may decide to mortgage their house." *Id.*

**FEC Response to Statement 22:** ADMIT that Senator Dodd opposed the Millionaire's Amendment. 147 CONG. REC. S2465-66 (Mar. 19, 2001) (statement of Sen. Dodd) ("So I urge my colleagues who are thinking about supporting this amendment, who simultaneously want to see McCain-Feingold become the law of the land, to think twice about this amendment."). However, the Commission DENIES that this is a "material fact," because Senator Dodd's statement was not made about the Loan Repayment Limit at issue in this case.

23. Similarly, Senator Levin, who initially opposed the Amendment but ultimately voted in its favor, feared that the Amendment in fact "Creates an unlevel field" because "The incumbent who already has the financial advantage and the incumbency advantage is then also given the advantage of having the higher contribution limits." Id. at S2548 (statement of Sen. Levin).

**FEC Response to Statement 23:** ADMIT that Senator Levin was critical of the Millionaire's Amendment at least in part due to concerns that it could help incum-

bents. 147 CONG. REC. S2548 (Mar. 20, 2001) (statement of Sen. Levin) ("It seems to me that is a significant flaw which we should attempt to address. . . . ."). However, the Commission DENIES that this is a "material fact," because Senator Levin's statement was not made about the Loan Repayment Limit at issue in this case.

24. Senator Reid, another opponent of the Amendment, declared that "[The Millionaire's Amendment] is an incumbent advantage measure in this underlying bill." 147 CONG. REC. S2853 (daily ed. Mar. 26, 2001) (statement of Sen. Reid) (attached to Ohlendorf Decl. as Exhibit 3).

**FEC Response to Statement 24:** ADMIT that Senator Reid was critical of the Millionaire's Amendment at least in part due to concerns that it could help incumbents. 147 CONG. REC. S2852 (daily ed. Mar. 26, 2001) (statement of Sen. Reid) ("In my opinion, the 'millionaire' amendment was a guise to help incumbents."). However, the Commission DENIES that this is a "material fact," because Senator Reid's statement was not made about the Loan Repayment Limit at issue in this case.

25. Senator Daschle likewise feared that "this protects incumbents." 147 CONG. REC. S2544 (Mar. 20, 2001) (statement of Sen. Daschle).

**FEC Response to Statement 25:** ADMIT. Senator Daschle opposed the Millionaire's Amendment. 147 CONG. REC. S2544 (Mar. 20, 2001) (statement of Sen. Daschle) ("I support McCain-Feingold, but I do not support this.") However, the Commission DENIES that this is a "material fact," because Senator Daschle's

statement was not made about the Loan Repayment Limit at issue in this case.

26. Indeed, in a remarkably forthright statement, Senator McCain—a supporter of the Amendment—noted that the provision "addresses, in all candor, a concern that literally every nonmillionaire Member of this body has, and that is that they wake up some morning and pick up the paper and find out that some multimillionaire is going to run for their seat, and that person intends to invest 3, 5, 8, 10, now up to $70 million of their own money in order to win." *Id.* at S2540 (statement of Sen. McCain).

**FEC Response to Statement 26:** ADMIT. The Commission DENIES that this is a "material fact," however, because this statement was not made about the Loan Repayment Limit at issue in this case. Instead, Senator McCain was discussing the part of the Millionaire's Amendment permitting candidates to receive larger campaign contributions when opposing self-funding candidates. This is evident from the paragraph just before the portion plaintiffs quote, in which Senator McCain stated that the Amendment "lifts some restraints on hard money." 147 CONG. REC. S2540 (Mar. 20, 2001) (statement of Sen. McCain).

27. Federal campaign finance law also imposes limits on the amount any individual may contribute, per election cycle, to any federal candidate or his authorized committee. 52 U.S.C. Section 30116(a)(1)(A) provides that "no person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000."

**FEC Response to Statement 27:** ADMIT that this accurately states the relevant per-election contribution limit in the statute, but DENY that the limit applies per election cycle. For example, the limit applies separately to primary elections and general elections.

28. Since the enactment of BCRA in 2002, federal law has directed the Commission to periodically increase these limits to account for inflation. Id. § 30116(c).

**FEC Response to Statement 28:** ADMIT.

29. On February 7, 2019, the Commission established an inflation-adjusted limit of $2,800 per individual, per election cycle, effective November 7, 2018 through November 3, 2020. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019) (attached to Ohlendorf Decl. as Exhibit 4).

**FEC Response to Statement 29:** ADMIT that this accurately states the per-election contribution limit that applies during the 2019-2020 election cycle, but DENY that the limit applies per election cycle.

30. The Commission periodically recommends to Congress certain amendments to the federal campaign finance laws, of both a substantive and technical nature. See infra ¶ 31.

**FEC Response to Statement 30:** ADMIT.

31. The Commission has never included in these formal recommendations, from the enactment of those inflation-adjusted limits in BCRA until the present, any proposal or suggestion that the base limits on individual campaign contributions be lowered. See Federal Election Commission, Legislative Recommendations: 2003

(attached to Ohlendorf Decl. as Exhibit 5); Federal Election Commission, Legislative Recommendations: 2004 (attached to Ohlendorf Decl. as Exhibit 6); Federal Election Commission, Legislative Recommendations: 2005 (attached to Ohlendorf Decl. as Exhibit 7); Legislative Recommendations of the Federal Election Commission: 2007 (attached to Ohlendorf Decl. as Exhibit 8); Legislative Recommendations of the Federal Election Commission: 2009 (attached to Ohlendorf Decl. as Exhibit 9); Legislative Recommendations of the Federal Election Commission: 2011 (attached to Ohlendorf Decl. as Exhibit 10); Legislative Recommendations of the Federal Election Commission: 2012 (attached to Ohlendorf Decl. as Exhibit 11); Legislative Recommendations of the Federal Election Commission: 2013 (attached to Ohlendorf Decl. as Exhibit 12); Legislative Recommendations of the Federal Election Commission: 2014 (attached to Ohlendorf Decl. as Exhibit 13); Legislative Recommendations of the Federal Election Commission: 2015 (attached to Ohlendorf Decl. as Exhibit 14); Legislative Recommendations of the Federal Election Commission: 2016 (Dec. 1, 2016) (attached to Ohlendorf Decl. as Exhibit 15); Legislative Recommendations of the Federal Election Commission: 2017 (Dec. 14, 2017) (attached to Ohlendorf Decl. as Exhibit 16); Legislative Recommendations of the Federal Election Commission: 2018 (Dec. 13, 2018) (attached to Ohlendorf Decl. as Exhibit 17).

**FEC Response to Statement 31:** ADMIT.

**II. Senator Cruz's 2018 Loans.**

32. Prior to the November 6, 2018 election, Senator Cruz made or incurred two loans totaling $260,000 to the Cruz Committee to help finance his reelection campaign

for the United States Senate. Declaration of Cabell Hobbs at ¶¶ 3-5 (June 9, 2020) ("Hobbs Decl.").

**FEC Response to Statement 32:** ADMIT that Senator Cruz made the two loans described above. DENY that those loans were made "to help finance his reelection campaign for the United States Senate." *See* Dep. Tr. of Cabell Hobbs at 177 (May 13, 2020) (confirming plaintiffs' previous stipulation that "the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loans and the Committee's actions in waiting to repay them was to establish the factual basis for this challenge to Section 304.") (attached to FEC Statement of Undisputed Material Facts, FEC Exh. 9).)

33. One loan, in the amount of $255,000, came from a third-party-lender margin account secured by Senator Cruz's personal assets. Hobbs Decl. ¶ 4.

**FEC Response to Statement 33:** ADMIT.

34. The other loan, in the amount of $5,000, was made directly from Senator Cruz's personal bank account. Hobbs Decl. ¶ 5.

**FEC Response to Statement 34:** ADMIT.

35. At the end of November 6, the Cruz Committee did not have sufficient funds to both repay these loans and satisfy the Committee's other creditors. Hobbs Decl. ¶ 6-8.

**FEC Response to Statement 35:** ADMIT that the Cruz Committee did not have sufficient funds in its bank account on November 6, 2018 to repay Senator Cruz's loans in full and also to satisfy all of the Committee's other creditors. The Commission notes, however, that

this does not paint a complete picture of the Committee's financial situation for two reasons. First, because the Committee could pay $250,000 of Senator Cruz's loans using funds raised after the election, it only needed to pay the remaining $10,000 of the loans using its cash on hand on November 6. Second, the Cruz Committee was aware on November 6 that it would soon be receiving a substantial transfer of cash from the Ted Cruz Victory Committee, the campaign's joint fundraising committee. Hobbs Dep. at 122 ("Q. Okay. So did the Ted Cruz for Senate Committee know about the financial state of the Joint Fundraising Committee during all relevant time periods? A. Yes."). That expected transfer of $234,400.93 was made from the Ted Cruz Victory Committee to the Cruz Committee on December 10, 2018. The funds in the Cruz Committee's bank account on November 6 plus the amount it knew it would receive from the Ted Cruz Victory Committee was sufficient to satisfy all of the Committee's other creditors and to repay Senator Cruz over $100,000 of his loans, which would have allowed Senator Cruz to be repaid in full using post-election contributions.

Furthermore, the Commission DENIES that the Cruz Committee's failure to repay any of Senator Cruz's loans immediately after the election was due to lack of funds. *See* Hobbs Dep. at 177 (confirming plaintiffs' previous stipulation "that the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loans and the Committee's actions in waiting to repay them was to establish the factual basis for this challenge to Section 304.").

36. In particular, the Committee ended the election campaign with approximately $2,380,277 deposited in, or in transit to, its bank accounts. Hobbs Decl. ¶ 6.

**FEC Response to Statement 36:** ADMIT.

37. As of the end of the election, the Committee also owed approximately $2,718,025 in debts for expenses incurred in connection with the election, including bills and obligations to vendors and the $260,000 it owed Senator Cruz. Hobbs Decl. ¶ 7.

**FEC Response to Statement 37:** ADMIT.

38. Accordingly, the Committee's "net debts outstanding," as of election day, were approximately $337,748. Hobbs Decl. ¶ 8.

**FEC Response to Statement 38:** ADMIT that the Cruz Committee's "net debts outstanding" on election day 2018 were approximately $337,748. The Commission notes, however, that the Cruz Committee was aware that it would soon be receiving a substantial transfer of cash from the Ted Cruz Victory Committee. Hobbs Dep. at 122 (May 13, 2020) ("Q. Okay. So did the Ted Cruz for Senate Committee know about the financial state of the Joint Fundraising Committee during all relevant time periods? A. Yes."). That expected transfer of $234,400.93 was made from the Ted Cruz Victory Committee to the Cruz Committee on December 10, 2018.

39. It is common for campaign committees, like the Cruz Committee, to take out debt to finance their campaign speech and other operations. According to one recent analysis, "debt is a major source of funding of U.S. political campaigns. At $1.9 billion or 10.6 percent of the total, debt constitutes the second largest source

of campaign funds trailing only total individual contributions and is larger than total contributions from corporate, labor and trade Political Action Committees (PACs). Almost half of all campaigns (46.75 percent) rely on some form of debt, and, conditional on borrowing, campaigns borrow almost a third of total raised funds." Alexei Ovtchinnikov & Philip Valta, Debt in Political Campaigns at 2 (May 2020) (available at https://ssrn.com/abstract=2804474) (attached to Ohlendorf Decl. as Exhibit 18).

**FEC Response to Statement 39:** ADMIT.

40. During the 20 days following the election, the Committee used its cash on hand to pay other creditors, but it did not repay any portion of Senator Cruz's loans. Hobbs Decl. ¶ 9.

**FEC Response to Statement 40:** ADMIT that during the 20 days following the 2018 general election, the Committee paid some creditors but did not repay any portion of Senator Cruz's loans. DENY that the Committee's lack of repayment during that time was due to financial considerations. *See* Hobbs Dep. at 177 (confirming plaintiffs' previous stipulation "that the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loans and the Committee's actions in waiting to repay them was to establish the factual basis for this challenge to Section 304.").

41. The Committee began to repay Senator Cruz's loans in December of 2018. Hobbs Decl. ¶ 10.

**FEC Response to Statement 41:** ADMIT.

42. The Committee has made four repayments of Senator Cruz's margin loan, totaling $250,000: (i) $25,000 on December 4, 2018; (ii) $100,000 on December 11, 2018;

(iii) $75,000 on December 18, 2018; and (iv) $50,000 on December 24, 2018. Hobbs Decl. ¶ 10.

**FEC Response to Statement 42:** ADMIT.

43. The Committee has not repaid any portion of Senator Cruz's personal loan. Hobbs Decl. ¶ 11.

**FEC Response to Statement 43:** ADMIT.

44. Accordingly, a total of $10,000 of Senator Cruz's 2018 loans remains unpaid: $5,000 of the margin loan and the entirety of the $5,000 loan from Senator Cruz's own bank accounts. Hobbs Decl. ¶ 12.

**FEC Response to Statement 44:** ADMIT.

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July 14, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 19-908-NJR-APM-TJK

TED CRUZ FOR SENATE, ET AL., PLAINTIFFS

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

Filed: Aug. 11, 2020

**PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to FED. R. CIV. P. 56(c), LCvR 7(h)(1), and paragraph IV(F)-(H) of the Court's Scheduling Order,[1] Plaintiffs Ted Cruz for Senate and Rafael Edward ("Ted") Cruz hereby submit this response to Defendant's Statement of Undisputed Material Facts:

[1] Plaintiffs note that the Court's Scheduling Order specifically provides that each numbered paragraph in a statement of material facts must "contain[ ] only one fact assertion." Scheduling Order IV(E). The FEC's Statement of Facts repeatedly flouts this rule; virtually all of its paragraphs contain more than one factual statement, and some contain as many as *six or seven*. Plaintiffs respond to each of FEC's statements below, but the FEC's failure to clearly separate each distinct factual assertion has unfortunately made it more difficult for the Court to determine which specific facts are actually undisputed.

## I. THE PARTIES

### A. Defendant Federal Election Commission

1. The FEC is an independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-146 ("FECA"). Congress authorized the Commission to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

**Response:** Admitted.

### B. Plaintiffs

2. Plaintiff Rafael Edward ("Ted") Cruz is a United States Senator from the state of Texas. (United States Senate, Senators, https://www.senate.gov/senators/index.htm.) Senator Cruz was first elected to represent Texas in the U.S. Senate in 2012, and he won re-election in 2018. (Official Election Results for United Senate, 2012 U.S. Senate Campaigns at 71, https://www.fec.gov/resources/cms-content/documents/2012congresults.pdf; Federal Elections 2018, Election Results for the U.S. Senate and the U.S. House of Representatives at 29, https://www.fec.gov/resources/cms-content/documents/federalelections2018.pdf.)

**Response:** Admitted.

3. Plaintiff Ted Cruz for Senate (the "Committee") is the principal campaign committee for Senator Cruz. (Ted Cruz for Senate FEC Form 1, https://docquery.fec.gov/pdf/975/201810159125135975/201810159125135975.pdf). FECA requires federal candidates to designate at least one "authorized committee," which may receive contributions and make expenditures on the candidate's behalf, to serve as its "principal campaign committee." 52 U.S.C. §§ 30101(5)-(6), 30102(e)(1)-(2).

**Response:** Admitted.

4. FECA limits the amount individual contributors may give to a campaign committee to an inflation-adjusted $2,800 per election. 52 U.S.C. § 30116(a); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

**Response:** Admitted.

## II. CONGRESSIONAL CONCERN ABOUT CORRUPTION IN ELECTIONS

5. In the first half of the twentieth century, Congress became particularly concerned about corruption arising from contributions to federal candidate campaigns and political parties. In 1907, it passed the Tillman Act, providing "'[t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.'" *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 575 (1957) (quoting 34 Stat. 864 (1907)) ("*UAW*"). That legislation declared that "'[i]t shall

also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.'" *Id.* (quoting 34 Stat. 864).

**Response:** Admitted that the Tillman Act was passed in 1907. Further admitted that the Tillman Act included the stated language. Plaintiffs otherwise state that the quoted materials speak for themselves and that none of the facts in this paragraph are material.

6. The Tillman Act "was merely the first concrete manifestation of a continuing congressional concern for elections free from the power of money." *UAW*, 352 U.S. at 575 (internal quotation marks omitted). Congress soon enacted amendments requiring disclosures of "committees operating to influence the results of congressional elections in two or more States" and "persons who spent more than $50 annually for the purpose of influencing congressional elections in more than one State." *Id.* at 575-76 (citing 36 Stat. 822 (1907)). "The amendment also placed maximum limits on the amounts that congressional candidates could spend in seeking nomination and election, and forbade them from promising employment for the purpose of obtaining support." *Id.* at 576 (citing 37 Stat. 25 (1907)). In 1925, Congress passed FECA's precursor, the Federal Corrupt Practices Act of 1925, 43 Stat. 1070. One senator explained that "'[w]e all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal cam-

paign contributions,'" adding that that such "'large contributions'" lead to "'consideration by the beneficiaries . . . which not infrequently is harmful to the general public interest.'" *UAW*, 352 U.S. at 576 (quoting 65 Cong. Rec. 9507-08 (1924) (statement of Sen. Robinson) (alteration in original)).

**Response:** Admitted that Congress enacted the provisions referenced in the second, third, and fourth sentences. Admitted that a Senator made the statements quoted in the fifth sentence. Plaintiffs otherwise state that the quoted materials speak for themselves and that none of the facts in this paragraph are material.

7. In 1939, Senator Carl Hatch introduced, and Congress passed, S. 1871, officially titled "An Act to Prevent Pernicious Political Activities" and commonly referred to as the Hatch Act. S. Rep. 101-165 at *18; *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560 (1973); 84 Cong. Rec. 9597-9600 (1939).

**Response:** Admitted but immaterial.

8. Congress established individual contribution limits in the 1940 amendments to the Hatch Act, Pub. L. No. 76-753, 54 Stat. 767 (1940). That legislation prohibited "any person, directly or indirectly" from making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to any candidate for federal office, to any committee "advocating" the election of such a candidate, or to any national political party. *Id.* § 13(a), 54 Stat. 770.

**Response:** Admitted but immaterial.

9. The limit was sponsored by Senator John H. Bankhead, who expressed his hope that it would help

"bring about clean politics and clean elections": "We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation. . . . " 86 Cong. Rec. 2720 (1940) (statement of Senator Bankhead); *see also* 84 Cong. Rec. 9616 (daily ed. July 20, 1939) (statement of Rep. Ramspeck) (stating that what "is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power").

**Response:** Admitted that Senator Bankhead sponsored the legislation in question and made the quoted statement. Admitted that Representative Ramspeck made the quoted statement. Denied that the facts stated in this paragraph are material, given that contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014).

10. From the start, the 1940 individual contribution limit was "ineffective." Robert E. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 66 (Praeger 1988). Individuals circumvented the $5,000 limit by routing additional contributions through other committees supporting the same candidate, *see* Louise Overacker, Presidential Campaign Funds 36 (Boston University Press 1946), and the Hatch Act amendments allowed donors to make unlimited contributions to state and local parties, *see* 86 Cong. Rec. 2852-53 (1940) (amending bill to exempt state and local parties from contribution limit).

**Response:** Admitted that the book by Mr. Mutch contains the quoted statement. The Hatch Act speaks for itself. Plaintiffs otherwise state that the quoted materials speak for themselves and that none of the facts in this statement are material, given that contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210.

11. By 1971, when Congress began debating the initial enactment of FECA, the $5,000 individual contribution limit was being "routinely circumvented." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug).

**Response:** Admitted that Congress began debating the enactment of FECA in 1971. Further admitted that Representative Abzug made the quoted statement. Plaintiffs otherwise state that the Congressional Record speaks for itself and that none of the facts in this statement are material, given that contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210.

12. In 1974, shortly after the Watergate scandal, Congress substantially revised FECA. These amendments established new contribution limits, including a $1,000 base limit on contributions to candidates. Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443 § 101(b)(3), 88 Stat. 1263. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court upheld FECA's contribution limits on the basis that they furthered the government's important interest

in preventing corruption and the appearance of corruption. *Id.* at 23-38.

**Response:** Admitted. Denied that the temporal proximity of the enactment of the FECA Amendments and the Watergate scandal has any relevance to this case.

13. The *Buckley* Court itself noted the "deeply disturbing examples surfacing after the 1972 election" of "large contributions . . . given to secure a political quid pro quo from current and potential office holders." 424 U.S. at 26-27 & n.28.

**Response:** Admitted that the opinion in *Buckley* contains the quoted statements. Denied that the facts stated in this paragraph are material, given that contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210.

14. During the 1972 presidential campaign, President Nixon's personal attorney and a principle fundraiser, Herbert Kalmbach, described the price-point for ambassadorships, relaying that "[a]nybody who wants to be an ambassador must give at least $250,000." Reeves at 462. This amount would be equal to over $1.4 million in 2016 dollars. *CPI Inflation Calculator*, Bureau of Labor Statistics, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited July 10, 2020).

**Response:** Plaintiffs deny the statement in the first sentence because they are unable to discern or identify the FEC's citation. Admitted that the BLS CPI calculator yields the referenced figures. Denied that the facts stated in this paragraph are material, given that

contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210.

15. On February 25, 1974, Herbert Kalmbach pled guilty to violating 18 U.S.C. § 600 by promising a more "prestigious" ambassadorship to an individual, J. Fife Symington, in return for "a $100,000 contribution to be split between" various third parties—"1970 senatorial candidates designated by the White House"—"and [President] Nixon's 1972 campaign." *Buckley v. Valeo*, 519 F.2d 821, 840 n.38 (D.C. Cir. 1975); Final Report of the Select Committee on Presidential Campaign Activities at 492, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974); *see also id.* at 501 ("De Roulet agreed to split his $100,000 contribution between the 1970 Senate races and Mr. Nixon's 1972 campaign—as Symington had done."); *id.* at 493-494 (listing individuals who contributed to President Nixon's campaign and became or sought to become ambassadors, some of whom gave hundreds of thousands of dollars).

**Response:** Admitted that the D.C. Circuit's opinion in *Buckley* contains the cited statements. Admitted that the Select Committee's report contains the cited statements. Plaintiffs otherwise state that the quoted materials speak for themselves and that none of the facts in this paragraph are material, given that contributions are now governed by an inflation-adjusted $2,800 limit, which indicates Congress's "belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210.

## III. BCRA AND THE LOAN REPAYMENT LIMIT

16. In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), which amended FECA.

**Response:** Admitted.

17. BCRA's most prominent change to FECA were its prohibition of the use in federal campaigns of "soft money" raised outside FECA's restrictions, which was intended to prevent the circumvention of important elements of FECA. *McConnell v. FEC*, 540 U.S. 93, 132 (2003).

**Response:** Admitted but immaterial.

18. Another element of BCRA was the so-called "Millionaire's Amendment." Under that part of the law, if a candidate for Congress spent in excess of a certain amount of personal funds in support of his or her campaign and additional criteria were met, the law would increase the contribution limits for the self-funding candidate's opponent to help the opponent keep pace. *See Davis v. FEC*, 554 U.S. 724, 729-30 (2008).

**Response:** Admitted that the Millionaire's Amendment was one element of BCRA. Denied that the Millionaire's Amendment was limited to the asymmetric contribution-limit scheme described in this paragraph, since the Millionaire's Amendment also included the Loan-Repayment Limit at issue in this litigation. *See* 147 CONG. REC. S2450 (daily ed. Mar. 19, 2001).

19. Although the primary governmental interest in the passage of BCRA as a whole was to deter corruption and its appearance, extensive legislative history of the

Millionaire's Amendment indicates that it had a different purpose—to level the playing field in federal campaigns. *See Davis*, 554 U.S. at 741-42.

**Response:** Admitted that extensive evidence shows that the purpose of the Millionaire's Amendment was to level the playing field. Denied that the primary governmental interest in the passage of BCRA as a whole was to deter corruption and its appearance, as that assertion is not supported by the cited source, and in any event is immaterial.

20. The Loan Repayment Limit challenged in this case was a distinct provision from the limit-shifting provision described above that was originally introduced on its own and later combined into a bill that also included the Millionaire's Amendment during the amendment process. 147 Cong. Rec. S2541 (Mar. 20, 2001) (statement of Sen. Hutchison).

**Response:** Denied. In fact, the Loan-Repayment Limit was included in the Millionaire's Amendment from the moment it was first introduced by Sen. Domenici on March 19. *See* 147 CONG. REC. S2450 (daily ed. Mar. 19, 2001).

21. The Loan Repayment Limit states that a candidate "who incurs personal loans . . . in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election." 52 U.S.C. § 30116(j).

**Response:** Admitted.

22. The Loan Repayment Limit does not restrict the repayment of candidate loans with contributions made *before* an election, but under the provision, a campaign committee may use contributions raised *after* an election to repay "personal loans" that a candidate "incurs . . . in connection with the candidate's campaign" only up to a limit of $250,000. 52 U.S.C. § 30116(j).

**Response:** Admitted.

23. Multiple legislative statements indicate that the Loan Repayment Limit was intended to mitigate the heightened risk of quid pro quo corruption and its appearance resulting from already-elected officeholders soliciting contributions for their own personal benefit. For example, Senator Domenici stated that "[i]f you incur debt from a personal loan and then you get elected as Senator, and then you go around and say, now I am Senator, I want you to get me money so I can pay back what I used of my own money to run for election. It is clear in this amendment that you cannot do that in the future." *See* 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici).

**Response:** Admitted that Senator Domenici made the referenced statement. Denied that "multiple" legislative statements indicate that this was the Loan-Repayment Limit's purpose. Only two or three of the statements identified by the FEC even remotely supports this view. Moreover, the evidence is overwhelming that (1) the Millionaire's Amendment as a whole was instead motivated by the purpose of levelling the playing field, *see* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine) (Amendment was designed to "level the playing field" between self-funding candidates and their non-self-funding opponents); *id.* at

S2459 (statement of Sen. Feinstein) (Amendment "an attempt to level the playing field"); *id.* at S2464 (statement of Sen. Sessions) ("I believe we have an unfair situation. It makes it difficult for candidates to run on a level playing field."); *id.* at S2461 (statement of Sen. Durbin); 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Durbin) ("What we are trying to address with this amendment is to level the playing field."); and (2) that the Loan-Repayment Limit had "the same purpose" as the rest of the Amendment: "to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." *Id.* at 2541 (statement of Sen. Hutchison); *see also* 147 CONG. REC. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin) ("Think about what this institution will become if that is what one of the rules is to be part of the game: That you have to be loaning or contributing literally millions of dollars in order to be a candidate for public office."); *id.* at S2465 (statement of Sen. Sessions) (amendment "prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate."); *id.* at S2462 (statement of Sen. Domenici) ("it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents").

24. Senator Domenici also stated that a candidate who incurred personal loans for his campaign should not be able "to get it back from [his or her] constituents under fundraising events that [he or she] would hold and then ask them: How would you like me to vote now

that I am a Senator?" *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

**Response:** Admitted that Senator Domenici made the referenced statement. Denied that preventing corruption or its appearance was any significant part of the Loan-Repayment Limit's purpose, given the overwhelming evidence that (1) the Millionaire's Amendment as a whole was instead motivated by the purpose of levelling the playing field, *see* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *id.* at S2459 (statement of Sen. Feinstein); *id.* at S2540 (statement of Sen. Durbin); *id.* at S2464 (statement of Sen. Sessions); 147 CONG. REC. S2461 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); and (2) that the Loan-Repayment Limit had "the same purpose" as the rest of the Amendment: "to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison); *see also* 147 CONG. REC. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); *id.* at S2465 (statement of Sen. Sessions); *id.* at S2462 (statement of Sen. Domenici).

25. Senator Domenici further stated that "[t]his (amendment) limits candidates who incur personal loans in connection with their campaign in excess of $250,000. They can do $250,000 and then reimburse themselves with fundraisers. But anything more than that, they cannot repay it by going out and having fundraisers once they are elected with their own money." *Id.* at S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

**Response:** Admitted that Senator Domenici made the referenced statement. Denied that this statement even remotely supports the FEC's theory that the Loan-Repayment Limit was motivated by the purpose of preventing corruption. Further denied that preventing corruption or its appearance was any significant part of the Loan-Repayment Limit's purpose, given the overwhelming evidence that (1) the Millionaire's Amendment as a whole was instead motivated by the purpose of levelling the playing field, *see* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *id.* at S2459 (statement of Sen. Feinstein); *id.* at 2461 (statement of Sen. Durbin); *id.* at S2464 (statement of Sen. Sessions); 147 CONG. REC. S2540 (daily ed. Mar. 20, 2001) (statement of Sen. Durbin); and (2) that the Loan-Repayment Limit had "the same purpose" as the rest of the Amendment: "to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001); *see also* 147 CONG. REC. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); *id.* at S2465 (statement of Sen. Sessions); *id.* at S2462 (statement of Sen. Domenici).

26. Senator Durbin stated that "[the] language [of the Loan Repayment Limit] makes it clear there will not be any effort after the election to raise money to repay those loans. . . . " *Id.* at S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin).

**Response:** Admitted that Senator Durbin made the referenced statement. Denied that this statement even remotely supports the FEC's theory that the Loan-

Repayment Limit was motivated by the purpose of preventing corruption. Further denied that preventing corruption or its appearance was any significant part of the Loan-Repayment Limit's purpose, given the overwhelming evidence that (1) the Millionaire's Amendment as a whole was instead motivated by the purpose of levelling the playing field, *see* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *id.* at S2459 (statement of Sen. Feinstein); *id.* at S2464 (statement of Sen. Sessions); *id.* at S2461 (statement of Sen. Durbin); 147 CONG. REC. S2540 (daily ed. Mar. 20, 2001); and (2) that the Loan-Repayment Limit had "the same purpose" as the rest of the Amendment: "to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." *Id.* at 2541 (statement of Sen. Hutchison); *see also* 147 CONG. REC. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); *id.* at S2465 (statement of Sen. Sessions); *id.* at S2462 (statement of Sen. Domenici).

27. Senator Hutchison stated that "[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, so a candidate can spend his or her own money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back." *Id.* at S2541 (Mar. 20, 2001) (statement of Sen. Hutchison). While Senator Hutchison also stated a hope "to level the playing field," those comments contrasted a self-lending candidate's ability to "go out and repay themselves" "when they win" with persons running with a "variety of

support from his or her constituents," *i.e.* people who do not have the same opportunity for post-election fundraising for self-payment. *Id.* at S2541-42. Senator Hutchison belabored the points that she "want[ed] people to be able to spend their own money," as she previously had, and that "[n]o one argues" against candidates like her having "a constitutional right to spend our money." *Id.* at S2541.

**Response:** Admitted that Senator Hutchison made the referenced statements. Denied that these statements even remotely support the FEC's theory that the Loan-Repayment Limit was motivated by the purpose of preventing corruption. There is no need to resort to the FEC's tortured interpretation of Senator Hutchison's remarks, because she made no attempt to hide her understanding of the purpose behind the Loan-Repayment Limit: "It has the same purpose [as the rest of the Millionaire's Amendment], and I hope when everything is worked out, our purpose will succeed. Our purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. S2541 (statement of Sen. Hutchison); *see also id.* ("We pride ourselves in our country on trying to have a level playing field to keep our democracy balanced."); *id.* ("I think we need to have the level playing field."); *id.* at S2541-42 ("I do believe a retired police office or retired teacher should be able to run for public office on a level playing field and get the variety of support from his or her constituents and have as level a playing field as we can have protecting the rights of the wealthy candidate to spend that money, but limiting what could be paid back."); *id.*

at 2542 ("[The Millionaire's] amendment includes other ways of leveling the playing field by letting the other candidates have no limits or bigger limits. I think that is fine, too. The point is, everyone would like to see the most level playing field we can find. . . . That is what my part of this amendment does."). Senator Hutchison's understanding of the leveling purpose behind the Loan-Repayment Limit is further confirmed by the overwhelming evidence that (1) the Millionaire's Amendment as a whole was instead motivated by the purpose of levelling the playing field, *see* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *id.* at S2459 (statement of Sen. Feinstein); *id.* at S2461 (statement of Sen. Durbin); *id.* at S2464 (statement of Sen. Sessions); 147 CONG. REC. S2540 (daily ed. Mar. 20, 2001) (statement of Sen. Durbin); and (2) that the Loan-Repayment Limit had the same levelling purpose as the rest of the Amendment. *See* 147 CONG. REC. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); *id.* at S2465 (statement of Sen. Sessions); *id.* at S2462 (statement of Sen. Domenici).

28. Following the passage of BCRA, the Commission issued regulations implementing the new statute, including the Loan Repayment Limit. One such regulation establishes a 20-day period following an election during which a committee can use the cash it has on hand as of the day after the election to pay back all or part of the candidate's personal loans, without limitation ("20-Day Repayment Period"). 11 C.F.R. § 116.11(c)(1). After a general election, a campaign committee must file a report with the FEC reporting its receipts and disbursements for a period expiring 20 days after the election. FEC, Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing

Self-Financed Candidates, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003). Thus, after the 20-day post-election period has elapsed, a campaign committee must "treat the remaining balance of the candidate's personal loan that exceeds $250,000 as a contribution from the candidate to the authorized committee, given that this amount could never be repaid, and given that the amount must be accounted for on the authorized committee's next report." *Id.* (citing 11 C.F.R. § 116.11(c)).

**Response:** Admitted.

29. In 2008, the Supreme Court struck down the Millionaire's Amendment, holding that leveling the playing field was not a compelling government interest sufficient to justify the burden the Amendment imposed. *Davis*, 554 U.S. at 741-42. Specifically, the Court found that the Amendment's "asymmetrical" contribution limits burdened a candidate's First Amendment right to make "unlimited expenditures of his personal funds" by "enabling his opponent to raise more money and to use that money to finance speech that counteracts and thus diminishes the effectiveness of [the self-funder's] speech." *Id.* at 734, 736.

**Response:** Admitted.

30. Following the Supreme Court's decision in *Davis*, the FEC engaged in a rulemaking in which it revised its regulations. FEC, Notice 2008-14; Repeal of Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 73 Fed. Reg. 79597 (Dec. 30, 2008). The FEC determined that the *Davis* decision did not impact the Loan Repayment Limit or its regulations. *Id.* at

79599-600. The Commission reached this determination because it found that the Loan Repayment Limit "has a wider application than other provisions of the Millionaires' Amendment," explaining that the Limit "applies equally to all candidates and regardless of whether the Millionaires' Amendment provisions also apply to those candidates." *Id.* at 79600. Furthermore, the Commission noted that "while other provisions of the Millionaires' Amendment apply only to Senate and House of Representatives candidates, the loan repayment provision applies to candidates for all Federal offices, including presidential candidates" and that the original regulations for the Loan Repayment Limit and the Millionaire's Amendment had been placed in completely different sections of the Code of Federal Regulations, because the two provisions were distinct. *Id.*

**Response:** Admitted that the FEC engaged in the referenced rulemaking following the decision in *Davis*, and that it made the quoted statements, which speak for themselves.

## IV. HOW FEDERAL CANDIDATES HAVE USED PERSONAL LOANS TO THEIR CAMPAIGNS IN RECENT ELECTION CYCLES

31. "Almost half of all campaigns (46.75 percent) rely on some form of debt, and, conditional on borrowing, campaigns borrow almost a third of total raised funds." Alexei Ovtchinnikov & Philip Valta, Debt in Political Campaigns at 2 (May 2020) (*available at* https://ssrn.com/abstract=2804474) (FEC Exh. 1). "The majority of campaign debt comes in the form of personal loans that candidates make to their own campaigns, with eight percent of campaigns relying on outside loans." *Id.* at 2-3.

**Response:** Admitted.

32. Federal campaigns have made extensive use of loans from candidates before and after the passage of BCRA. (Declaration of Paul C. Clark II at ¶¶ 4-5 (July 14, 2020) ("Clark Decl.") (FEC Exh. 2).) Although difficult to quantify, many of these loans were in essence contributions with limited expectations of repayment. *See, e.g.,* Corzine 2000, Inc. Year End Report, available at https://docquery.fec.gov/pdf/755/21020031755/21020031755.pdf (showing over $56 million in candidate loans for a New Jersey Senate race); Anne Baker, *Are Self-Financed House Members Free Agents?,* 35:1 Congress & the Presidency: A Journal of Capital Studies, 53, 56 (2008) ("Baker") (FEC Exh. 3) ("[M]ost self-financing takes the form of personal loans.").

**Response:** Admitted that federal campaigns have made use of candidate loans both before and after the passage of BCRA. Plaintiffs deny that "many" of these loans were in essence contributions with limited expectations of repayment, as the cited sources do not come close to establishing that proposition—although Plaintiffs certainly admit that Section 304's Loan-Repayment Limit significantly diminishes the likelihood of repayment for loans that exceed $250,000.

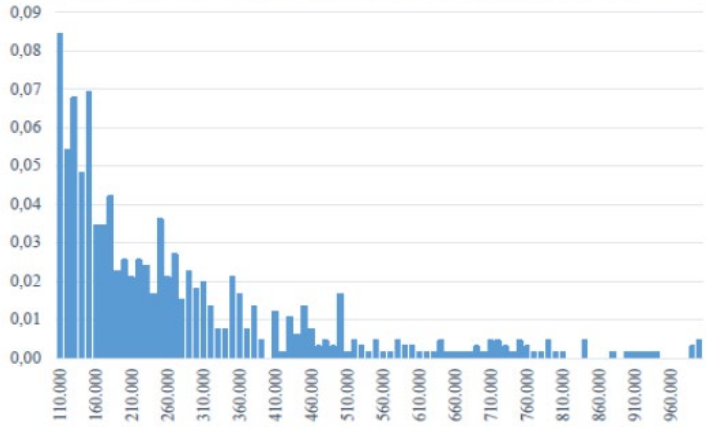
Plaintiffs deny any suggestion that BCRA has not burdened the right to make personal loans. The Ovtchinnikov and Valta study relied upon by the FEC refutes the Government's suggestion that Section 304 has not had a deterrent effect on candidate lending:

> [T]he implementation of BCRA had a material impact on the propensity of many politicians to make large loans. While the distribution of loans in the

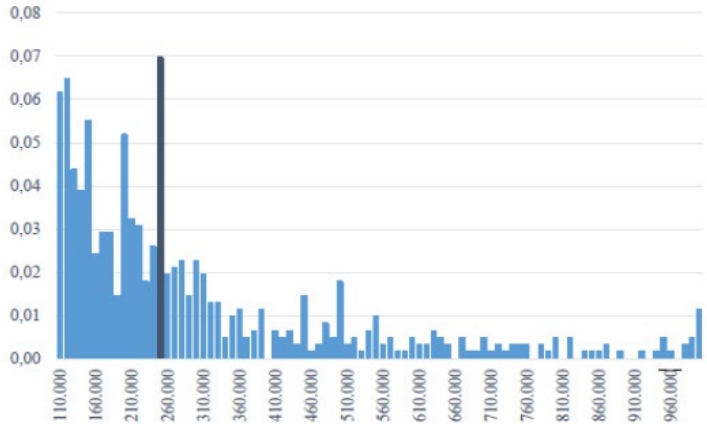
> $100,000-$1 million range shows no discernible anomalies prior to the passage of BCRA, there is a clear clustering of loans right at the $250,000 threshold in the post-BCRA period. These loans account or seven percent of all loans in the $100,000-$1 million range post-BCRA exceeding the frequency of any other loan during the same period. The loans right at the $250,000 threshold are also much more common during the post-BCRA period compared to the pre-BCRA period where they account for only 3.6 percent of all loans. *The results show that BCRA created a binding constraint for many politicians in the supply of large loans*.

Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* at 24-25 (May 2020) (available at https://ssrn.com/abstract=2804474) (emphasis added). Figure 3 in the paper dramatically illustrates this effect:

*Panel A: Distribution of candidates' personal loans between $100,000 and $1 Million, 1983 - 2002*




*Panel B: Distribution of candidates' personal loans between $100,000 and $1 Million, 2003 - 2014*




*Id.* at 38 fig.3.

Moreover, the informal analysis conducted by Mr. Clark—which finds that the rate of larger-than-$250,000 candidate loans remained roughly the same between (1) the five election cycles prior to the enactment of BCRA and (2) the five most-recent cycles—in fact *conclusively*

*confirms* the existence of Section 304's burden on candidate lending, given that overall spending *skyrocketed* between the two periods in question. During the five *pre*-BCRA cycles in question, aggregate total spending by Senate candidates equaled $1,794,767,010 ($341,541,932 in 1994, $304,368,839 in 1996, $320,132,956 in 1998, $479,173,785 in 2000, and $349,549,498 in 2002); and aggregate total spending by House candidates was $2,495,308,009 ($404,935,192 in 1994, $467,907,402 in 1996, $434,931,452 in 1998, $557,955,424 in 2000, and $629,578,539 in 2002). *See* FEC, *Spending: by the numbers*, https://www.fec.gov/data/spending-bythenumbers/ (select "Senate candidates" and "House candidates," and years 1994-2002, respectively). By contrast, during the five *post*-BCRA cycles analyzed by Mr. Clark, aggregate total spending by Senate candidates was about 2.2 times higher: $3,955,579,053 ($764,123,362 in 2010, $777,769,393 in 2012, $687,037,466 in 2014, $662,573,532 in 2016, and $1,064,075,300 in 2018); and aggregate total spending by House candidates was about 2.3 times higher: $5,773,972,539 ($1,095,631,726 in 2010, $1,090,304,134 in 2012, $960,046,788 in 2014, $974,464,588 in 2016, and $1,653,525,303 in 2018). *See id.* (select "Senate candidates" and "House candidates," and years 2010-2018, respectively).

33. During the five most recent election cycles, a total of 588 loans were made by Senate candidates to their campaigns (some candidates made loans in multiple election cycles). (Clark Decl. at ¶ 4 (FEC Exh. 2).) Twelve of those loans were for exactly $250,000, which represents 2.0% of the loans. (*Id.*) By comparison, during the five election cycles immediately before BCRA became effective, a total of 441 loans were made by Senate candidates to their campaigns. (*Id.*) One

of those candidates made a loan of exactly $250,000, which represents 0.2% of the loans. (*Id.*)

**Response:** Admitted. The fact that the percentage of Senate-candidate loans in the exact amount of $250,000 increased tenfold between the two periods strongly confirms Section 304's burden on candidate spending. Denied that Mr. Clark's finding that Senate-candidate loans at exactly the $250,000 level constitute only 2% of candidate loans paints a representative picture of candidate lending after BCRA, however, given that Ovtchinnikov and Valta's far more comprehensive study finds that $250,000 loans in fact constitute 7% of all candidate loans, and conclusively shows "a clear clustering of loans right at the $250,000 threshold in the post-BCRA period" that did not exist in the years before BCRA's enactment. *See* Response to Statement 32.

34. During the five most recent election cycles, 3,444 loans were made by House candidates to their campaigns (some candidates made loans in multiple election cycles). (*Id.* at ¶ 5.) Twenty-six of those loans were for exactly $250,000, which represents 0.7% of the loans. (*Id.*) By comparison, during the five election cycles immediately before BCRA became effective, 2,868 loans were made by House candidates to their campaigns. (*Id.*) Four of those loans were for exactly $250,000, which represents 0.1% of the loans. (*Id.*)

**Response:** Admitted. The fact that the percentage of House-candidate loans in the exact amount of $250,000 increased sevenfold between the two periods strongly confirms Section 304's burden on candidate spending. Denied that Mr. Clark's finding that House-candidate

loans at exactly the $250,000 constitute only 0.7% of candidate loans paints a representative picture of candidate lending after BCRA, however, given that Ovtchinnikov and Valta's far more comprehensive study finds that $250,000 loans in fact constitute 7% of all candidate loans, and conclusively shows "a clear clustering of loans right at the $250,000 threshold in the post-BCRA period" that did not exist in the years before BCRA's enactment. *See supra*, Response to Paragraph 32.

35. During the five most recent election cycles, forty-six loans made by Senate candidates were between $200,000 and $300,000, which represents 7.8% of the loans. (*Id.* at ¶ 6.) By comparison, during the five election cycles immediately before BCRA became effective, thirty such loans were between $200,000 and $300,000, which represents 6.8% of the loans. (*Id.*)

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. Given that overall spending more than doubled between the two periods under comparison, the fact that the proportion of greater-than-$250,000 candidate loans remained roughly the same in fact strongly confirms the existence of such a burden. *See supra*, Response to Paragraph 32.

36. During the five most recent election cycles, one hundred and ninety loans made by House candidates were between $200,000 and $300,000, which represents 5.5% of the loans. (*Id.* at ¶ 7.) By comparison, during the five election cycles immediately before BCRA became effective, eighty-five such loans were between $200,000 and $300,000, which represents 3.0% of the loans. (*Id.*)

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. Given that overall spending more than doubled between the two periods under comparison, the fact that the proportion of greater-than-$250,000 candidate loans remained roughly the same in fact strongly confirms the existence of such a burden. *See supra*, Response to Paragraph 32.

37. One independent study that looked only at federal candidate loans between $100,000 and $1,000,000 indicates that from 1983 until BCRA became effective, 3.6% of such loans were between $240,000 and $250,000, while from the time BCRA became effective until 2014, 7% of such loans were at that threshold. Ovtchinnikov & Valta, at 24-25, 38 (FEC Exh. 1).

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. In fact, Ovtchinnikov and Valta themselves concluded that "The[se] results show that BCRA created a binding constraint for many politicians in the supply of large loans." *See supra*, Response to Paragraph 32.

38. A large majority of recent loans made by federal candidates to their campaigns are for $250,000 or less. Of the 588 loans made by Senate candidates to their campaigns during the five most recent election cycles, 466 of those loans were for $250,000 or less, which represents 79.3% of the loans. (Clark Decl. at ¶ 8 (FEC Exh. 2).) Therefore, only 20.7% of the loans were for more than $250,000.

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not

burden candidate spending. *See supra*, Response to Paragraph 32.

39. Similarly, of the 3,444 loans made by House candidates to their campaigns during the five most recent election cycles, 3,076 of those loans were for $250,000 or less, which represents 89.3% of the loans. (*Id.* at ¶ 10.) Therefore, only 10.7% of the loans were for more than $250,000.

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. *See supra*, Response to Paragraph 32.

40. The ratio of loans below $250,000 has not changed substantially from what the ratio was prior to BCRA. Of the 441 loans made by Senate candidates to their campaigns during the five election cycles immediately before BCRA became effective, 335 of those loans were for $250,000 or less, which represents 76.0% of the loans. (*Id.* at ¶ 9.) Therefore, only 24.0% of the loans were for more than $250,000.

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. Given that overall spending more than doubled between the two periods under comparison, the fact that the proportion of greater-than-$250,000 candidate loans remained roughly the same in fact strongly confirms the existence of such a burden. *See supra*, Response to Paragraph 32.

41. Of the 2,868 loans made by House candidates to their campaigns during the five election cycles immediately before BCRA became effective, 2,658 of those loans were for $250,000 or less, which represents 92.7%

of the loans. (*Id.* at ¶ 11.) Therefore, only 7.3% of the loans were for more than $250,000.

**Response:** Admitted. Plaintiffs deny the suggestion that these figures show that Section 304 does not burden candidate spending. Given that overall spending more than doubled between the two periods under comparison, the fact that the proportion of greater-than-$250,000 candidate loans remained roughly the same in fact strongly confirms the existence of such a burden. *See supra*, Response to Paragraph 32.

42. Historically, losing candidates have had a more difficult time repaying loans than winning candidates do. (Ovtchinnikov & Valta at 2 & n.3 (FEC Exh. 1) ("When you wake up a loser [in a political campaign], you have a deficit. When you wake up a winner, you have a deficit retirement party." (quoting Roberts, S., "Debt Retirement Party Becoming an Institution." The New York Times, November 29. 1982)); Peter Overby, *How Will Clinton Resolve Campaign Debt?*, National Public Radio (May 14, 2018, 6:00 AM), *available at* https://www.npr.org/templates/story/story.php?storyId=90425733 (last visited July 14, 2020) (noting the comment of a former FEC Commissioner and counsel to a losing presidential campaign that "only winners have an easy time dealing with debt" and that debt retirement in the context of those not taking office "'is the hardest task in American politics'").

**Response:** Admitted that losing candidates have a more difficult time repaying loans than winning candidates do. Further admitted that the cited sources contain the quoted statements.

43. Candidates provide loans to their campaigns for various reasons, such as for messaging that the candidate will not be beholden to special interests once elected. Linda McMahon loaned nearly $100 million to her 2010 and 2012 U.S. Senate campaigns. Peter Applebome, *Personal Cost for 2 Senate Bids: $100 Million*, N.Y.Times (Nov. 2, 2012) (FEC Exh. 4), *available at* https://www.nytimes.com/2012/11/03/nyregion/linda-e-mcmahon-has-spentnearly-100-million-in-senate-races.html. One article reported that "Ms. McMahon says that spending her own money leaves her—unlike [her opponent] Mr. Murphy—in no one's debt." *Id.* The article quoted one of Ms. McMahon's campaign ads: "In the Senate I will owe you, not the special interests who corrupt so many career politicians from Hartford to Washington." *Id.*; *see also* Ari Melber, *Trump Campaign Could Use New Donations to Pay Donald Trump $36M for Loan*, nbcnews.com (May 13, 2016, 6:03 AM EDT), https://www.nbcnews.com/politics/2016-election/trump-campaign-may-use-new-donations-pay-donald-trump-36-n573291 (last visited July 14, 2020) (quoting then-candidate President Trump as saying, "I'm self-funding my campaign" and "Let me tell you, the politicians will never do the job because they're bought and paid for, folks").

**Response:** Admitted that candidates have various reasons for making loans to their campaigns. Further admitted that the reason identified in this paragraph is one such reason. Further admitted that the cited sources contain the quoted statements. Plaintiffs deny that the facts stated in this paragraph are material, given that whatever their motivation, candidate loans are by definition one form of candidate spending, *see* 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a), and the First

Amendment protects the fundamental right of a candidate to "to speak without legislative limit on behalf of his own candidacy," *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

## V. THE CAMPAIGN LOANS OF SENATOR CRUZ

44. In 2012, Senator Cruz ran for a U.S. Senate seat to represent Texas for the first time, and as part of the campaign, he made multiple loans to his authorized committee, totaling $1,064,000. *See* FEC, Conciliation Agreement with Ted Cruz for Senate, *et al.*, ¶ 2, https://www.fec.gov/files/legal/murs/7455/19044461484.pdf.

**Response:** Admitted but immaterial.

45. The largest loan of approximately $800,000 came from a margin account with Senator Cruz's wife's employer, Goldman Sachs, and was at the low interest rate level of 3%. *Id.* ¶ 3; Mike McIntire, *Ted Cruz Didn't Report Goldman Sachs Loan in a Senate Race*, N.Y. Times (Jan. 13, 2016), *available at* https://www.nytimes.com/2016/01/14/us/politics/ted-cruz-wallstreetloan-senate-bid-2012.html. Senator Cruz has publicly stated that the loan represented the entire liquid net worth and savings of his household. *Id.*

**Response:** Admitted that the largest loan of approximately $800,000 came from a Goldman Sachs margin account, that Goldman Sachs was Sen. Cruz's wife's employer, and that the interest rate on the loan was 3%. Denied that that the interest late was "low," given that the cited source in fact states that 3% was "generally in line" with other available rates at the time. Admitted that Sen. Cruz made the quoted statement. Denied that the statements in this paragraph are material.

46. Goldman Sachs is a large, multinational bank that had recently received approximately $10 billion in public bailout funds and has an extensive stake in federal policies for which Senators have responsibility. Paritosh Bansal, *Goldman's share of AIG bailout money draws fire,* Reuters (Mar. 17, 2009), available at https://www.reuters.com/article/us-aig-goldmansachssb/goldmans-share-of-aig-bailout-money-draws-fire-idUSTRE52H0B520090318.

**Response:** Admitted but immaterial. Plaintiffs further state that given the existence of federal banking law, *every* "large, multinational bank" has "an extensive stake in federal policies for which Senators have responsibility."

47. Senator Cruz was not repaid in full prior to the 2012 general election, and as a result of the Loan Repayment Limit, his campaign was prohibited from repaying the full amount of the loan using funds raised after that election. Email from Senator Cruz attaching Andrea Drusch, *Cruz says he ate a big 2012 campaign loan, but he's still listing it as a top asset,* Fort Worth Star-Telegram (Aug. 15, 2018) (FEC Exh. 5).

**Response:** Admitted but immaterial.

48. When the full details of the loans later came under scrutiny, public concerns were raised regarding the susceptibility of a candidate to exchanges of favors where their personal finances are impacted and whether Senator Cruz's positions on issues of importance to Goldman like the availability of H-1B visas had been altered. *See* Jennifer Rubin, *10 Reasons that Goldman Sachs Loan is a Nightmare for Ted Cruz*, Wash. Post (Jan. 14, 2016), https://www.washingtonpost.com/blogs/

right-turn/wp/2016/01/14/10-reasons-that-goldmansachs-loan-is-a-nightmare-for-ted-cruz/ (associating Senator Cruz's loans with Goldman's positions on H-1B visas and quoting a Republican Senate staff member's allegations of "crony capitalism"). Senator Cruz circulated many of these media reports to his staff. (*See, e.g.*, Email from Senator Ted Cruz to Jeff Roe, et al. (May 26, 2017, 12:18:38 PM EDT) (with tweet linking Fox News story) (FEC Exh. 6); Email from Senator Ted Cruz to Prerak Shah, et al. (Aug. 15, 2018, 5:52:03 PM) (attaching article from Fort Worth Star-Telegram (FEC Exh. 5); Email from Senator Ted Cruz to Catherine Frazier (May 26, 2017 4:29:51 PM) (with tweet from Salon.com) (FEC Exh. 7); Email from Senator Ted Cruz to Jeff Roe, et al. (May 26, 2017, 3:25:36 PM EDT) (with tweet linking Texas Tribune) (FEC Exh. 8).)

**Response:** Admitted that the loans became a point of public controversy. Denied that this controversy was significantly motivated by concerns over "exchanges of favors." Rather, as evidenced by the very "media reports" cited by the FEC, the source of the "public concerns" over these loans was that they were incurred from Goldman Sachs, where Senator Cruz's wife is employed. *See* Email from Ted Cruz to Catherine Fazier (May 26, 2017 4:29 PM), Doc. 65-7 (forwarding Salon article noting that "Ted Cruz used Goldman Sachs, where his wife worked, to help fund his 2012 campaign"); Dep. of Cabell Hobbs at 174:19-175:1 (May 13, 2020), Doc. 65-9 (any public perception concerns . . . with regards to these loans arose solely because of the source of the loans. And in this specific case one of the loans, Goldman Sachs, in that it was the employer of Senator Cruz's spouse."). Plaintiff therefore denies that the facts stated in this paragraph are material.

49. One such article circulated by Senator Cruz quoted a Republican campaign finance attorney noting: "The law is designed to prevent people from giving their campaign a bunch of money and then raising money from donors years later when they're in office to pay themselves back personally." (Email from Senator Ted Cruz to Prerak Shah, *et al.* (Aug. 15, 2018, 5:52:03 PM) (FEC Exh. 5).)

**Response:** Admitted that the cited source contains the quoted statement. Denied that the controversy over Senator Cruz's 2012 loans was significantly motivated by concerns over corruption. Rather, as evidenced by the very "media reports" cited by the FEC, the source of the "public concerns" over these loans was that they were incurred from Goldman Sachs, where Senator Cruz's wife is employed. *See* Doc. 65-7 (forwarding Salon article noting that "Ted Cruz used Goldman Sachs, where his wife worked, to help fund his 2012 campaign"); Doc. 65-9 (any public perception concerns . . . with regards to these loans arose solely because of the source of the loans. And in this specific case one of the loans, Goldman Sachs, in that it was the employer of Senator Cruz's spouse."). Plaintiff therefore denies that the facts stated in this paragraph are material.

50. Starting shortly after the 2012 election and into the following year, the Cruz campaign began having discussions about the possibility of bringing a lawsuit to strike down the Loan Repayment Limit. (Deposition Transcript of Cabell Hobbs (May 13, 2020) at 51-52 ("30(b)(6) Dep.") (FEC Exh. 9).)

**Response:** Admitted but immaterial, given that the Supreme Court has squarely held that a plaintiff's sub-

jective intent is irrelevant to the merits of their constitutional claim. *See Pierson v. Ray*, 386 U.S. 547, 558 (1967) (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.").

51. Those discussions continued for several years, concurrently with Senator Cruz's preparation to run for reelection in 2018. (30(b)(6) Dep. at 57-59 (FEC Exh. 9).)

**Response:** Admitted but immaterial, given that the Supreme Court has squarely held that a plaintiff's subjective intent is irrelevant to the merits of their constitutional claim. *See Pierson*, 386 U.S. at 558 (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.").

52. By a significant margin, the 2018 Texas Senate campaign between Senator Cruz and Beto O'Rourke was the most expensive Senate campaign in U.S. history.

Most Expensive Races, OpenSecrets.org, https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcands (last viewed July 10, 2020).

**Response:** Admitted.

53. The Cruz Committee raised more than $35 million in the 2018 election cycle. (FEC, Ted Cruz for Senate Financial Summary, https://www.fec.gov/data/committee/ C00492785/?cycle=2018).

**Response:** Admitted.

54. Nonetheless, on the day before the November 6, 2018 general election, Senator Cruz loaned his campaign $260,000. *See* Ted Cruz for Senate, FEC Form 3 at 401-02 (Jan. 31, 2019, http://docquery.fec.gov/pdf/325/201901319145235325/201901319145235325.pdf. This was the only loan received by the Cruz Committee for the 2018 election. FEC, Ted Cruz for Senate Financial Summary, https://www.fec.gov/data/committee/C00492785/?cycle=2018.

**Response:** Admitted. Denied that the timing of the 2018 Loans is material, given that the Supreme Court has squarely held that a plaintiff's subjective intent is irrelevant to the merits of their constitutional claim. *See Pierson*, 386 U.S. at 558 (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does

not disqualify them from seeking damages under s 1983.").

55. Of the total loan amount, $255,000 originated from Senator Cruz's margin-approved brokerage account, and $5,000 originated from his personal bank accounts. (Compl. ¶ 28; Pls.' Statement of Undisputed Material Facts ("Pls.' SOF") ¶¶ 33-34.)

**Response:** Admitted.

56. The 2018 loans were made for the sole purpose of providing a basis to bring this lawsuit. (*See* 30(b)(6) Dep. at 177 (FEC Exh. 9) (confirming the Committee's previously-stated position that "Plaintiff hereby stipulates 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 to [the Loan Repayment Limit].").)

**Response:** Admitted but immaterial, given that the Supreme Court has squarely held that a plaintiff's subjective intent is irrelevant to the merits of their constitutional claim. *See Pierson*, 386 U.S. at 558 (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.").

57. At the end of election day, November 6, 2018, the Committee had approximately $2.38 million cash on hand. (Pls.' SOF ¶ 36.)

**Response:** Admitted.

58. Pursuant to the 20-Day Repayment Period, the Committee had until November 26, 2018 to use that cash on hand to repay Senator Cruz all or part of the $260,000 he had loaned it the day before the election. *See* 11 C.F.R. § 116.11(c)(1). Because the Committee is permitted to repay candidate loans up to $250,000 after the 20-Day Period using any source of funds, the Committee only needed to repay $10,000 of the loan in that 20-day period to assure that the Loan Repayment Limit would not be an impediment to repaying Senator Cruz in full. (*Id.*)

**Response:** Plaintiffs admit the statement contained in the first sentence. Plaintiffs further admit that if $10,000 of Senator Cruz's loans had been repaid during the first 20 days after election day, the remaining $250,000 balance could have been repaid with post-election contributions, under Section 304. Plaintiffs deny that in this scenario the Loan-Repayment Limit would not have posed an impediment to the repayment of the loans. The Committee's outstanding obligations exceeded its cash by over $300,000. *See* FEC's Statement of Genuine Issues ¶ 38 (July 14, 2020), Doc. 65 ("FEC's SOF Response"). Accordingly, even a $10,000 partial re-payment to Senator Cruz would have meant foregoing the repayment of $10,000-worth of other outstanding campaign debts. Moreover, the foundation of Plaintiffs' First Amendment challenge is that the Government constitutionally *cannot* require committees to repay candidate loans with pre-election money rather

than post-election money. The fact that Plaintiffs chose to stand on their constitutional rights, rather than complying with the terms of a law that violates the First Amendment, hardly shows that they have suffered no First Amendment harm.

59. The plaintiffs repaid no money during that period, however, because they wanted to bring this lawsuit. (*See* 30(b)(6) Dep. at 177 (FEC Exh. 9) (confirming the Committee's previously-stated position that "Plaintiff hereby stipulates 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 to [the Loan Repayment Limit].").)

**Response:** Admitted but immaterial, given that the Supreme Court has squarely held that a plaintiff's subjective intent is irrelevant to the merits of their constitutional claim. *See Pierson*, 386 U.S. at 558 (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.").

60. In addition, during the 20 days after the election and later, the Committee continued receiving post-election contributions, but rather than using those contributions to pay vendors or to pay any of Senator Cruz's debt, the campaign designated the contributions for

Senator Cruz's 2024 re-election effort. (*See* 30(b)(6) Dep. at 96-97 (FEC Exh. 9).)

**Response:** Admitted but immaterial, given that the expenditure of money on Senator Cruz's 2024 re-election effort is no less constitutionally protected than the payment of vendors or the repayment of Senator Cruz's loans.

61. Starting on November 27, 2018, the Committee was required to treat the $10,000 of Senator Cruz's personal loans that exceeded the $250,000 Loan Repayment Limit, and which the Committee did not use its cash on hand to repay during the 20-Day Repayment Period, as a contribution from Senator Cruz to his Committee. *See* 11 C.F.R. § 116.11(c)(2).

**Response:** Admitted.

62. Two days after the 20-day deadline elapsed, Senator Cruz emailed his campaign staff, stating: "Since more than 20 days have passed, it would be REALLY good if we could pay back at least some of the $250k now. Our cash is really getting stretched." (*See* Email from Senator Ted Cruz to Jeff Roe, Nov. 28, 2018, 12:46:26 PM (FEC Exh. 10).)

**Response:** Admitted but immaterial, given that the Supreme Court has squarely held that a plaintiff's subjective intent is irrelevant to the merits of their constitutional claim. *See Pierson*, 386 U.S. at 558 (dismissing "the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested" since "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations . . . [t]he petitioners had the right to use the waiting room of the

Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.").

63. Less than a week after that email, the Committee started repaying Senator Cruz, and it completed paying $250,000 in four payments within the month. Pls.' SOF ¶ 42; Ted Cruz for Senate FEC Form 3 at 398-99, https://docquery.fec.gov/pdf/526/201908239163101526/201908239163101526.pdf (showing loan repayments totaling $250,000 on Dec. 4, 2018, Dec. 11, 2018, Dec. 18, 2018 and Dec. 24, 2018).

**Response:** Admitted.

64. None of the $250,000 of the loan that was repaid was from contributions raised after the election. (30(b)(6) Dep. at 95 (FEC Exh. 9) ("the committee did not receive any general 2018 contributions after Election Day 2018.").)

**Response:** Admitted.

65. All of the funds that comprised the repaid $250,000 went toward Senator Cruz's personal loan that originated from his margin account. (Pls.' SOF ¶ 30.) As a result, of the remaining $10,000 of Cruz's personal loan that was converted to a contribution to his Committee, $5,000 originated from Cruz's personal bank account and $5,000 originated from his margin loan. *Id.* ¶¶ 31-32; Ted Cruz for Senate FEC Form 3 at 401-02, https://docquery.fec.gov/pdf/526/201908239163101526/201908239163101526.pdf (showing $5000 balance on each loan).

**Response:** Admitted.

66. Plaintiffs are unable to identify a single potential contributor that was unable to make contributions to enable the Committee to repay Senator Cruz using more than $250,000 in post-election funds. (30(b)(6) Dep. at 98-99 (FEC Exh. 9).)

**Response:** Admitted but immaterial. Plaintiffs did not make any effort to identify contributors willing to contribute money to repay the outstanding balance of Senator Cruz's loans, given that such repayment is illegal under the challenged Loan-Repayment Limit.

## VI. SPECIAL RISKS OF QUID PRO QUO CORRUPTION AND ITS APPEARANCE EXIST IN THE CONTEXT OF CANDIDATE LOANS

### A. Considerable Research, Experience, and Reporting Point to Dangers of Corruption and its Appearance in Candidate Loans

67. The repayment of large federal candidate loans has fueled corruption concerns. One 2020 study that analyzed data regarding debt concluded that federal officeholders that are in debt are more likely to make decisions in accord with the interests of PACs and other special interest groups that can contribute to their campaigns. Ovtchinnikov & Valta at 26 (FEC Exh. 1). The study found that "indebted politicians, relative to their debt-free counterparts, are significantly more likely to switch their votes if they receive contributions from those special interests between the votes." *Id.* at 29.

**Response:** Admitted that the cited source contains the finding and statement referenced in the first and second sentences, but denied that the repayment of can-

didate loans pose any special risk of corruption. Because Ovtchinnikov and Valta's study shows only "partial correlations" and not "a causal effect of campaign debt on politicians' voting behavior," Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 21, their findings are incapable of showing actual *quid pro quo* corruption, as opposed to "the appearance of mere influence or access"—which under the First Amendment the Government "may not seek to limit." *McCutcheon*, 572 U.S. at 208. Moreover, because the study does not distinguish between post-election contributions and pre-election contributions—and explicitly examines debt of any kind, rather than just candidate loans—it does not show even a correlation between changes and voting behavior and the specific loan-repayments limited by Section 304. Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 13-14. Finally, Ovtchinnikov and Valta's conclusion that the "price" for "a typical indebted politician" to make a "marginal labor vote" is "$37,615," *id.* at 16, in fact confirms Congress's judgment that limiting the maximum contribution to $2,800 —*a small fraction* of this amount—fully protects against any "cognizable risk of corruption," *McCutcheon*, 572 U.S. at 210.

68. The same study concluded, however, "that politicians with large loans to their campaigns become significantly less responsive to contemporaneous labor contributions following the passage of BCRA and behave remarkably similar to their debt free counterparts." *Id.* at 26. The authors of the study attribute this change to the Loan Repayment Limit. *Id.* Consistent with those findings, another study examined certain self-funding federal candidates, including those carrying

candidate-loan debt beyond an election cycle, and concluded that the self-funding candidates did not vary their votes any more or less than other candidates as a result of interest-group contributions. (Baker at 54).) "A probable explanation . . . is that instead of being free agents, self-financed members feel pressure to court other sources of campaign contributions so they can be less reliant on their own money in the next election." (Baker at 65.)

**Response:** Admitted that the Ovtchinikov and Valta study contains the statements referenced in the first and second sentences. Denied that their study demonstrates that the Loan-Repayment Limit had any effect on voting behavior in Congress. By the authors' admission, their study shows only correlation, not "a causal effect." Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 21. Moreover, since their analysis of voting behavior after BCRA once again does not distinguish between (1) officeholders with outstanding candidate loans as opposed to other forms of debt, and (2) post-election debt-retirement contributions and pre-election contributions designated for the next election, *id.* at 25, it cannot show even a correlation between changes in voting behaviors and the specific conduct actually restricted by Section 304. Finally, Ovtchinikov and Valta's astonishing conclusion that any change in behavior after the enactment of BCRA may be attributed to the Loan-Repayment Limit in particular is completely unsupported. The authors elsewhere acknowledge that "the two major provisions of BCRA focused on the role of soft money in campaign financing and the proliferation of issue advocacy, while the candidate personal loan provision received much less attention and was inserted in the miscellaneous section of the

bill." *Id.* at 27. Accordingly, any change in voting behavior that may have occurred when BCRA went into effect could just as likely be attributed to *one of BCRA's numerous other provisions*, rather than Section 304.

Admitted that the Baker study contains the statements referenced in the third and fourth sentences. Denied that this study is "consistent" with any suggestion that Section 304 is necessary to prevent corruption. Baker's findings cannot support that proposition because they do not distinguish between pre- and post-election contributions, or between the first $250,000 of contributions and the next dollar. Moreover, Baker's study of whether the "ideological distance" between Members of Congress and their districts was affected by the degree to which the Member's election was self-financed (including with candidate loans made before Section 304 went into effect) in fact confirmed that the degree of self-financing made *no statistically significant difference* in the distance between a Member's ideology and that of his or her district. "If self-financing interfered in the relationship between a member and constituents by making a member's ideology less reflective of constituent ideology, the [regression result] would be negative and significant. However, *the results imply the opposite*." Anne Baker, *Are Self-Financed House Members Free Agents?*, 35 CONG. & THE PRESIDENCY 63 (2008), Doc. 65-3; *see also id.* at 64 (regression result for the other measure of ideological distance "is minute or nonexistent" which "serves to bolster [the] argument that self-financing does not affect member responsiveness to district ideological preferences."). To justify the Loan-Repayment Limit, it plainly does not suffice to show Members with outstanding candidate loans are *equally* as corruptible as other members who have no

such loans; rather, the FEC must show that Members with outstanding candidate loans labor under *a greater* risk of corruptibility. The Baker study strongly confirms that no such greater risk exists.

69. A 2009 press report stated that U.S. Representative Grace F. Napolitano had held several fundraisers to solicit donations to pay down a $150,000 loan that she had made to her campaign in 1998. Andrew Zajac, *Interest on Campaign Loan Pays*, L.A. Times (Feb. 14, 2009), https://www.latimes.com/archives/la-xpm-2009-feb-14-me-napolitano14-story.html (last visited July 14, 2020). These fundraisers were hosted by "a Capitol Hill lobbying firm whose clients include several transportation interests," while Napolitano served as "a member of the House Transportation and Infrastructure Committee and [] chairwoman of the water and power subcommittee of the Natural Resources Committee." *Id.* The invitation for one of these fundraisers "invited political action committee checks of $1,500 or personal donations of $500, payable to the 'Napolitano for Congress '1998 Primary Debt Retirement.'" *Id.* One retired campaign finance specialist noted that lobbyists assist with debt retirement fundraisers because they know it is really of benefit to the member. *Id.*

**Response:** Admitted that the cited press report states that the referenced fundraising events occurred, were hosted by the lobbying firm in question, and solicited lawful contributions within the Congressionally-prescribed limits. Admitted that the press report quotes a former FEC employee asserting that lobbyists make debt-retirement contributions (like *all* contributions) because they believe the contribution will benefit

the Member who receives it. Denied that a 2009 newspaper article's quotation of a single former FEC employee stating the obvious proposition that donors believe their contributions will benefit the recipient establishes that the repayment of candidate loans poses any special risk of corruption. Plaintiffs accordingly deny that the facts stated in this paragraph are material.

70. Some members of Congress used personal loans in a manner that appeared to some to circumvent the per election contribution limit in recent years. Karl Evers-Hillstrom, *Ted Cruz's FEC lawsuit could give special interests more power in federal elections,* Opensecrets.org (Apr. 1, 2019) (FEC Exh. 11), *available at* https://www.opensecrets.org/news/2019/04/ted-cruzs-fec lawsuit/.

**Response:** Admitted that the cited article on Opensecrets.com—which criticizes the filing of this lawsuit because the invalidation of Section 304 could "potentially lead[ ] to new campaign finance strategies that could benefit wealthy candidates"—quotes an employee of Common Cause stating his belief that two Republican Senate candidates took out personal loans that "effectively allow[ed] [their] donors to bypass contribution limits." Karl Evers-Hillstrom, *Ted Cruz's FEC lawsuit could give special interests more power in federal elections,* OPENSECRETS.ORG (Apr. 1, 2019), Doc. 65-11. Denied that there is any record evidence that the candidates in question were attempting to circumvent contribution limits. Indeed, given that a candidate can only accept debt-retirement funds to the extent it is *genuinely carrying debt from a prior campaign*, any such attempted "circumvention" is by definition incapable of improving a candidate's net financial position—and

would also be utterly pointless, since the candidate could achieve *precisely the same result* by simply having the donor make the contribution *during the first campaign* and then rolling the contribution over to the next cycle after election day. *See* 11 C.F.R. § 110.3(c)(4). Plaintiffs' accordingly deny that the statements in this paragraph are material.

71. For example, Senate candidate Matt Rosendale's 2014 campaign debt was repaid in 2018 by "nine wealthy donors," eight of whom had already given the maximum to his 2018 campaign. *Id.* at 3. Rosendale then loaned his 2018 campaign more money, "effectively creating a cycle of loans and repayments that bypasses traditional contribution limits." *Id.*

**Response:** Admitted that the cited article on Opensecrets.com contains the quoted statements. Denied that a contributor's simultaneous, within-limit contributions to two separate election campaigns gives rise to any cognizable risk of corruption, or appearance of corruption. Further denied that there is any record evidence that Montana Auditor Rosendale was attempting to circumvent contribution limits. *See* Response to Paragraph 70. Plaintiffs' accordingly deny that the statements in this paragraph are material.

72. Senator Mike Braun also allegedly used the tactic in 2018 by "taking contributions for the purpose of paying down his personal campaign debts from the Republican primary" and then "loan[ing] his general election campaign the exact same sums, effectively allowing his donors to bypass contribution limits. *Id.* at 4.

**Response:** Admitted that the cited article on Opensecrets.com contains the quoted statements. Denied

that there is any record evidence that Sen. Braun was attempting to circumvent contribution limits. *See* Response to Paragraph 70. Plaintiffs' accordingly deny that the statements in this paragraph are material.

73. Concerns about the appearance of corruption with regard to candidate loans have also roiled state election systems. For example, in an investigative report in February 2012, the *Dayton Daily News* reported that Mike DeWine had loaned his campaign for Ohio Attorney General $2 million in an attempt to unseat Richard Cordray in 2010, and then "after winning the election [] began raising money to help retire the debt." The article reports that "[w]riting checks to the DeWine campaign last year were hundreds of lawyers from dozens of law firms, many of which hold special counsel contracts awarded by the attorney general's office to represent public pensions, colleges, state agencies and more." In the year following the election, DeWine raised $1.47 million to pay off the debt, including, reportedly, $194,830 in contributions from ten law firms and their lawyers that received $9.6 million in legal fees for 225 assignments from the Attorney General's office. An analyst at the Center for Governmental Studies observed that "Money given after the election that goes into the candidate's pocket provides the contributor with even more influence over the candidate since the candidate is benefiting personally from the contribution." *See* Bischoff, Laura, "Donations Helping DeWine Pay Down Campaign Loan," *Dayton Daily News* (Feb. 12, 2012) (FEC Exh. 12), *available at* https://www.springfieldnewssun.com/news/national-govt--politics/donations-helping-dewine-pay-downcampaign-loan/UAkVmO6kothwHSzC6tNJiP/.

**Response:** Admitted that the *Dayton Daily News* article contains the quoted statements. Plaintiffs deny that the article supports the blanket assertion that "Concerns about the appearance of corruption with regard to candidate loans have also roiled state election systems," and they further deny the implication that the FEC has provided *any evidence* that "corruption with regard to candidate loans" has "roiled" the *federal* election system. *See* Responses to Paragraphs 69-72. While the cited newspaper article reports that the law-firms in question made $194,830 in debt-retirement contributions, the subsequent article discussed in Paragraph 74 indicates that the firms gave far more "to build up a war chest for [DeWine's] 2014 re-election bid" and to support the judicial campaign of DeWine's son, Laura A. Bischoff, *Firms gave heavily to DeWine, GOP*, Dayton Daily News (Jan. 26, 2014), Doc. 65-13—contributions that have nothing to do with the repayment of candidate loans. Moreover, many of the law firms received the state assignments in question from "previous attorneys general," Laura A. Bischoff, *Donations helping DeWine pay down campaign loan*, SPRINGFIELD NEWS-SUN (Feb. 2, 2012), Doc. 65-12, and any attempt to strip them of their assignments would be "rare" and "subject to court approval," Bischoff, *supra*, *Firms gave heavily to DeWine*. Finally, the 2018 Report cited by the FEC in Paragraph 75 found that DeWine's predecessor in office, Richard Cordray, had a similar pattern of favoring donors for legal contracts, even though he apparently made no loans to his campaign—refuting the FEC's suggestion that any corruption in the Ohio Attorney General's contracting process is attributable to the exist-

ence of candidate loans or their repayment. Accordingly, Plaintiffs deny that the statements in this paragraph are material.

74. Another report from 2014 stated that, "In the three years since winning a close race for attorney general, Mike DeWine and his political team have been raising hundreds of thousands of dollars—often from lawyers who want state business—and then using that campaign cash to pay off a $2 million personal loan that DeWine made to his committee in 2010 and to build up a war chest for his 2014 re-election bid." *See* Bischoff, Laura, "Firms Gave Heavily to DeWine, GOP," *Dayton Daily News* (Jan. 26, 2014) (FEC Exh. 13), *available at* https://www.daytondailynews.com/news/state--regional-govt--politics/firms-gave-heavily-dewinegop/RV4vShQrE3qzJVij8rp2tN/. The report found that as attorney general, DeWine was responsible for selecting law firms for a securities fraud advisory panel that had 27 firms, with 12 of those firms from Ohio, and whose members received special counsel work. *Id.* The report "found huge campaign contributions from some of the members of the panel, including some that came as DeWine was deliberating on which firms to put on the panel." *Id.* In addition, the report found that, "[o]f the 27 law firms assigned to the cases that pay on contingency, 19 serve on DeWine's panel," "[m]ost of them also contributed via PACs or employees to the Ohio GOP, Mike DeWine and/or [Mike DeWine's son] Pat DeWine—more than $1.3 million from 2010 to 2013," and "[a]bout half of the donations came from firms whose main office is outside Ohio." *Id.* And the report noted that "[t]he Ohio Republican Party, which received the bulk of the campaign contributions from firms seeking outside work with DeWine's office, has funneled $977,537 to DeWine's

campaign fund since he took over as AG in January 2011." *Id.*

**Response:** Admitted that the cited newspaper article contains the quoted statements. Denied that the statements in this paragraph provide any evidence whatsoever of corruption specifically related to the repayment of candidate loans. *See* Response to Paragraph 73. Plaintiffs accordingly deny that the statements in this paragraph are material.

75. A 2018 report also included concerns about an appearance of corruption related to the Ohio Attorney General's office in this period. An investigation by the Ohio Center for Investigative Journalism reported that debt collection firms who contracted with the Ohio Attorney General's Office "whose contracts were not renewed during the DeWine years were skeptical about the political purity of the contracting process." James McNair, *Unlike Neighboring States, Ohio Lacks Transparent, Merit Process For Debt Collection Outsourcing; Campaign Contributors Much More Likely To Get Contracts*, Eye on Ohio: Ohio Center for Investigative Journalism (June 25, 2018), https://eyeonohio.com/ag_collections/ (last visited July 14, 2020). The report cited the example of one contractor that had received contracts under five prior attorneys general before its contract was not renewed under Attorney General DeWine. *Id.* The report noted that the founder of the company believed the non-renewal stemmed from "his lack of financial support for the DeWine campaign." *Id.* The report quoted the founder as saying, "This is what they all do. . . . This is their business, and they'll pay to play. I don't pay to play. I do good

work." *Id.* The report also quoted the founder of another debt collection company whose contract was not renewed as saying, "I always thought what they were looking for was someone to perform, and I thought our record spoke for itself. . . . We had done it under both parties and for a number of years. It's not like we didn't make campaign contributions. We may have not made them of the size that a lobbyist might have suggested." *Id.*

**Response:** Admitted that the cited source contains the quoted statements. Denied that the speculation of disgruntled companies that were not selected for state contracts constitutes meaningful evidence of corruption, and further denied that the statements in this paragraph provide any evidence whatsoever of corruption specifically related to the repayment of candidate loans. *See* Response to Paragraph 73. Plaintiffs accordingly deny that the statements in this paragraph are material.

76. Oklahoma Governor Kevin Stitt made $5 million in personal loans to his campaign in 2018. In the year after winning the election, Governor Stitt raised over $800,000 in contributions, with "more than $100,000 from political action committees funded by industries or special interests." Trevor Brown, *After Election, Stitt Continues to Rake in Campaign Donations*, Oklahoma Watch.org (Nov. 11, 2019), https://oklahomawatch.org/2019/11/11/after-election-stitt-continues-to-rake-in-campaign-donations/ (last visited July 14, 2020).

**Response:** Admitted that the cited source contains the statements referenced. Denied that the fact that political action committees made lawful post-election donations for the repayment of candidate loans provides

any evidence whatsoever that the repayment of candidate loans poses a heightened risk of corruption. Plaintiffs accordingly deny that the statements in this paragraph are material.

77. In another example at the state level, the Kentucky Registry of Election Finance in 1994 observed that, "[i]n the last fifteen years, Kentuckians have endured the consequences of millionaires 'loaning' their campaigns millions of dollars, only to be repaid by contributors seeking no-bid contracts." Def.'s Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 9, *Wilkinson v. Jones*, Civ. No. 94-0664, at 9 (W.D. Ky. Dec. 22, 1994) (FEC Exh. 14). According to the Registry, "[o]bservers argued that Kentucky's gubernatorial races were already publicly financed by the profit margins on the state contracts awarded to those who helped repay the Governors' campaign debts." *Id.* at 10 (citing Penny Miller, Kentucky Politics & Government: Do We Stand United? 219 (Lincoln: University of Nebraska Press (1994))).

**Response:** Admitted that the cited brief by the Kentucky Registry of Election Finance contains the quoted statements. Denied that the Kentucky Registry's litigation position in defending state restrictions on the post-election repayment of candidate loans from a constitutional challenge, or the opinion of the quoted "observers," constitute meaningful evidence of corruption. Plaintiffs further note that the state limits in question were invalidated as unconstitutional in *Anderson v. Spear*, 356 F.3d 651, 670-71, 672-73 (6th Cir. 2004). Plaintiffs accordingly deny that the statements in this paragraph are material.

78. Kentucky Governors John Y. Brown, Jr. and Wallace Wilkinson provided loans to their campaigns of $3.55 million, "only to be repaid after the election by contributors seeking no-bid contracts." Jennifer A. Moore, *Campaign Finance Reform in Kentucky: The Race for Governor*, 85 Ky. L.J. 723, 746 (1997) (citing Penny Miller, Kentucky Politics & Government: Do We Stand United? 219 (Lincoln: University of Nebraska Press (1994))). In 1987, for instance, Governor Wilkinson loaned $3.2 million to his campaign and then, "[a]fter the election, Wilkinson spent a great deal of time raising money to reimburse himself for the loans he made to the campaign." *Id.* at 754. Governor Wilkinson's loan repayments and solicitation practices reportedly incentivized Kentucky's 1992 campaign finance reforms. *Id.*

**Response:** Admitted that the cited student law-journal note contains the quoted statements. Denied that the student note provides any evidence of actual *quid pro quo* corruption, and further denied that the fact that Kentucky gubernatorial candidates "spent a great deal of time raising money to reimburse" candidate loans constitutes evidence of corruption. Plaintiffs accordingly deny that the statements in this paragraph are material.

79. In 1991 the *Courier-Journal* in Louisville, Kentucky reported: "The Addington family of Catlettsburg and their employees contributed at least $215,000 to Wallace Wilkinson's gubernatorial campaign and political action committee during a six-month period following Wilkinson's primary victory in May 1987." Tom Loftus, *Big-Money Politic$*, The Courier-Journal, Dec. 29, 1991, at 2 (FEC Exh. 15). The article continued:

"The Addingtons, who have vast coal operations in the state, were seeking a state permit to open what would become the state's largest landfill." *Id.*

**Response:** Admitted that the cited newspaper article contains the quoted statements. Denied that the article provides any evidence whatsoever of corruption specifically relating to the repayment of candidate loans. As the article makes clear, the contribution in question was made *before the election* and had nothing to do with the repayment of candidate loans. Tom Loftus, *Big-Money Politic$*, COURIER-JOURNAL, at 2 (Dec. 29, 1991), Doc. 65-15. This article further confirms that any corruption in Kentucky politics has nothing to do with the repayment of candidate loans in particular. *See* Responses to Paragraphs 77-78. Plaintiffs accordingly deny that the statements in this paragraph are material.

**C. [sic] The Dangers of Corruption and its Appearance in the Context of Post-Election Contributions and Donations**

80. In 1989, "a majority of the [Alaska Public Offices Commission] commissioners stated strong support for barring post-election contributions, and hoped such a ban would curtail contributions 'intended to influence a successful candidate rather than the outcome of an election.'" *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 628 (Alaska 1999) (quoting Alaska Public Offices Commission, *Ann. Rep. to the Legislature* 10 (1989)).

**Response:** Admitted that the cited source contains the quoted statement. Denied that the opinion of some members of the Alaska Commission constitutes any meaningful evidence of corruption arising from post-

election contributions. Further denied that the opinions of the Alaska commissioners provide any support whatsoever for Section 304, since the commissioners were plainly concerned by *all* post-election contributions, not loan-repayment contributions in particular. Plaintiffs accordingly deny that the statements in this paragraph are material.

81. In that case, the court observed that "Former Alaska Governor [Walther] Hickel affied that 'post-election contributions can too easily be viewed as an attempt to purchase influence and are one of the most troubling kinds of contribution.'" *Id.*

**Response:** Admitted that the cited source contains the quoted statement. Denied that the opinion of former-Governor Hickel constitutes any meaningful evidence of corruption arising from post-election contributions. Further denied that Governor Hickel's opinion provides any support whatsoever for Section 304, since it plainly relates to *all* post-election contributions, not loan-repayment contributions in particular. Plaintiffs accordingly deny that the statement in this paragraph is material.

### D. The Public's Perceptions of the Potential for Corruption in Candidate Loan Repayment

#### 1. YouGov Survey Timeline

82. In April 2020, the global public opinion and data firm YouGov conducted a survey, at the request of the FEC in connection with this case, that yielded responses from 1,000 adults in the United States over the age of 18 years. (Decl. of Ashley Grosse ¶ 5 (Apr. 24, 2020) ("Grosse Decl.") (FEC Exh. 16).) Following its ordinary practice, "YouGov interviewed 1202 respondents

who were then matched down to a sample of 1000 to produce the final dataset," using "a sampling frame on gender, age, race, and education." (Grosse Decl. Exh. C at 1 (FEC Exh. 16).) YouGov followed the accepted methodology of constructing a nationally-representative sample using the 2017 American Community Survey. (*Id.*) This survey was paid for by the FEC and was managed by Ashley Grosse, Senior Vice President of Client Services at YouGov. (Grosse Decl. ¶¶ 3, 5, 6 (FEC Exh. 16).)

**Response:** Plaintiffs admit the statements in the first and third sentences. Plaintiffs deny that it is YouGov's "ordinary practice" to control for representativeness based solely on gender, age, race, and education. In surveys of this kind, YouGov's "standard" practice is to also control for "political variables," such as political party ID, ideology, or Presidential vote, but it did not do so for the FEC's survey. Dep. of Ashley Christine Grosse at 64:5-10; 65:9-11; 81:19-22; 128:4-5 (May 26, 2020), Doc. 65-23 ("Grosse Depo."). Indeed, FEC specifically requested that the survey results not include any data on political ID or ideology, *id.* 104:3-9—though a substantial portion of YouGov's internal conversation regarding this decision was redacted from the FEC's discovery responses on the issue, and the FEC objected to any testimony by Dr. Grosse concerning the redacted material, *id.* at 119:20-120:6. Plaintiffs also deny that the FEC's only involvement with the survey was that it "paid" for it, and that the survey was "managed" by Dr. Grosse. While Dr. Grosse supervised the fielding of the survey and the compilation of the results, the survey questions were written entirely by the FEC, with no advice or input from Dr. Grosse or YouGov. *Id.* at 55:4-56:12.

83. The FEC supplemented its initial disclosures in this matter pursuant to Federal Rule of Civil Procedure 26(e)(1) on April 27, 2020, providing plaintiffs with the name, address and telephone number of Ms. Grosse. (Email from Tanya Senanayake, FEC counsel, to John Ohlendorf, plaintiffs' counsel (Apr. 27, 2020) (FEC Exh. 17); Def. FEC Supplement to Its Initial Disclosures (Apr. 27, 2020) (FEC Exh. 18).) At this time, the FEC also provided to plaintiffs a declaration by Ms. Grosse and the results and methodology of the survey. (*Id.*)

**Response:** Admitted.

84. On May 7, 2020, plaintiffs sent to the FEC a request for "all documents relating to the survey, including (but not limited to) any communications between Defendants and YouGov relating to the survey." (Pls.' First Req. for Prod. (May 7, 2020) (FEC Exh. 19).) At the same time, plaintiffs noticed a deposition of Ms. Grosse for May 26, 2020. (Notice of Dep. for Ashley Grosse (May 7, 2020) (FEC Exh. 20).) On May 20, 2020, the FEC produced to plaintiffs non-privileged documents responsive to plaintiffs' request that were in the FEC's possession, custody, or control and a log of withheld privileged documents. (Def. FEC's Resps. To Pls.' First Req. for Prod. (May 20, 2020) (FEC Exh. 21); Def. FEC's Docs and Info. Withheld In Connection With Pls.' First Req. for Prod. (FEC Exh. 22).) In addition, while the FEC objected that documents not in its possession, custody, or control at the time that plaintiffs served the discovery request were not properly sought, the FEC did obtain and produce responsive documents that had been in YouGov's possession at that time. (Def. FEC's Resps. To Pls.' First Req. for Prod. (May 20, 2020) (FEC Exh. 21).)

**Response:** Plaintiffs admit the statements in the first and second sentences. Plaintiffs further admit that the FEC produced some responsive documents, along with a privilege log of purportedly privileged documents. Plaintiffs deny that the objection referenced in the fourth sentence is well founded, but they admit that it accurately characterizes the FEC's position, and that the FEC did produce some responsive documents that it stated "were in YouGov's possession."

85. On May 26, 2020, plaintiffs deposed Ms. Grosse. (Dep. of Ashley Grosse (May 26, 2020) ("Grosse Dep.") (FEC Exh. 23)) During this deposition, Ms. Grosse confirmed that the FEC did not seek and YouGov did not provide to the FEC any information about the party identification and ideology of survey respondents. (Grosse Dep. at 63:21-22, 64:1-4, 12-22.) Plaintiffs' counsel questioned Ms. Grosse about party identification and whether respondents who identified with various political parties have different opinions about campaign finance laws. (Grosse Dep. At 76:3-80:7.) Ms. Grosse testified that she did not know. (Grosse Dep. at 77:13; 78:12-13; 80:6-7.)

**Response:** Admitted.

86. Plaintiffs' counsel also asked Ms. Grosse, "If my proposition was accurate and that party affiliation was significantly correlated with one's views about restrictions on campaign fundraising and expenditures, would that be an important profile item to include in a survey?" (Grosse Dep. at 80:8-13.) Ms. Grosse responded, "No." (Grosse Dep. at 80:14.) Plaintiffs' counsel questioned Ms. Grosse on whether political party identification affected the representativeness of the respondent sample

for the survey, and Ms. Grosse testified that this variable did not affect representativeness. (Grosse Dep. at 80:20-82:13.)

**Response:** Admitted that Plaintiffs' asked the referenced questions and that Ms. Grosse gave the referenced testimony.

87. During the deposition, Plaintiffs' counsel also asked Ms. Grosse about quality control questions in the script for the survey. (Grosse Dep. 110:13-17.) Ms. Grosse explained that, though the quality control questions were presented to survey respondents, the quality control questions and responses had not been provided to the FEC. (Grosse Dep. at 110:19) Ms. Grosse explained that the responses to the quality control questions are limited in their utility for addressing the quality of the FEC's survey because respondents typically answer the questions after taking multiple surveys in one sitting. (Grosse Dep. at 111:3-19.)

**Response:** Admitted that Plaintiffs' asked the referenced questions and that Ms. Grosse gave the referenced testimony.

88. On June 2, 2020, plaintiffs sent to the FEC another request for production of documents regarding the YouGov survey, including "all documents containing the data, information, or results that YouGov obtained from respondents to the survey relating to respondents' Three-Point Party ID." (E-mail from Charles Cooper to FEC Counsel (June 2, 2020) (FEC Exh. 24 (unrelated e-mails deleted)).)

**Response:** Admitted.

89. On July 9, 2020 the FEC, while preserving its objection to producing material not in its possession,

custody, or control and other objections, provided to plaintiffs "the responses that YouGov collected from respondents in the survey that it conducted for the FEC, or in some places responses that respondents had previously provided . . . , that the FEC obtained." (FEC Exh. 25.) The FEC provided to plaintiffs additional raw data related to the survey. (*Id.*) This included responses to the survey, as well as information previously provided by respondents for the additional questions that were discussed during Ms. Grosse's deposition and that YouGov had not previously provided to the FEC, such as party identification, ideology, and reported 2016 vote for president, in addition to numerical responses to quality control questions. Further, "to comprehensively address suggestions made in questions at Ms. Grosse's deposition," the FEC provided to plaintiffs survey results that are weighted by 2016 presidential vote and crosstabulations of the survey results that contain reported 2016 presidential vote choice, three-point party identification, and ideology. (FEC Exh. 25; Declaration of Tanya Senanayake (July 14, 2020) ("Senanayake Decl.") (FEC Exh. 26) & Exh. A-B.)

**Response:** Plaintiffs deny that the objection referenced in the first sentence is well founded, but they admit that it accurately characterizes the FEC's position, and that the FEC provided the referenced material. Plaintiffs admit the statements contained in the second and third sentences. Plaintiffs further admit that the quotation in the fourth sentence is contained in the referenced Declaration and that the FEC provided the referenced materials.

**2. Survey Results**

90. In the April 2020 YouGov poll of 1,000 nationally-representative Americans aged 18 and over, 81% of respondents stated that they believed it was "very likely" or "likely" that individuals who donate money to a federal candidate's campaign after an election expect a political favor in return from candidates who later take office. (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. A (Question 5) (FEC Exh. 16).)

**Response:** Admitted but immaterial. The FEC's survey failed to ask—for purposes of comparison—whether respondents believed it likely that donors who contribute to a campaign *before the election* are likely to expect political favors in return. Nor did the survey define what it meant by the term "political favor," or explain whether it was limited to *quid pro quo* corruption or also extended to the "influence or access" that the Government may not constitutionally seek to limit. *McCutcheon*, 572 U.S. at 208. The term "political favor" is naturally read to include such influence or access —indeed, *that is how Dr. Grosse herself interpreted it*. *See* Grosse Depo. 149:8-16 ("Political favors. I would think access is a pretty big one."); *see also id.* at 151:7-22. Nor did the survey inform respondents that post-election contributions are subject to the very same limits as pre-election contributions. In any event, while these poll results, even if taken at face value, might support a limit on *all* post-election contributions—as well as *all contributions of any kind to incumbents*—it utterly fails to support the proposition that *the specific conduct restricted by Section 304* is especially corrupting.

91. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that post-election

contributors expect a political favor in return from candidates who later take office was consistent across different demographics. With regard to education, for instance, 75% of respondents with a high school education or less, 85% of respondents with some college, 86% of respondents who had graduated college, and 82% of respondents with post-graduate education said that it was "very likely" or "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Grosse Decl. Exh. B (Question 5) (FEC Exh. 16).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 90.

92. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that post-election contributors expect a political favor in return from candidates who later take office is similar among respondents who identify with different political parties. In fact, 78% of respondents who identified as Democrat, 78% of respondents identifying as Republican, and 84% of respondents identifying as Independent said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 90.

93. According to the 2020 YouGov poll, the public's overwhelming perception that it is likely that contributors who donate money to a candidate's campaign after

the election expect a political favor in return from candidates who later take office is also similar among respondents with different political ideologies. In fact, 83% of respondents who identified as liberal, 76% of respondents identifying as moderate, and 81% of respondents identifying as conservative said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 90.

94. According to the poll, the public's overwhelming perception that it is likely that contributors who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office is also similar among respondents who reported casting different presidential votes in 2016. In fact, 85% of respondents who voted for Senator Hillary Clinton and 80% of respondents who voted for President Donald Trump said that it was "likely" that "those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office." (Senanayake Decl. Exh. B (Question 5) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 90.

95. In this 2020 YouGov poll, 67% of respondents believed that, if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors from candidates to whom they make contributions. (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. A (Question 6)

(FEC Exh. 16).) Specifically, respondents were asked the following: "Currently, there is a limit on how much money a federal campaign may raise after Election Day to repay a candidate loan. If there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate, would donors be more likely to expect political favors? Less likely to expect political favors? Or would it make no difference?" (*Id.*) In response, 67% of respondents answered that they believed that donors are more likely to expect political favors if there were no limit; 6% of respondents answered that they believed that donors are less likely to expect political favors if there were no limit; and only 27% of respondents believed that there would be no difference. (*Id.*)

**Response:** Admitted but immaterial. The wording of this key question is blatantly misleading in a way that utterly vitiates the reliability of the responses. While the FEC's question asked whether the expectation of "political favors" would be more or less likely "[i]f there were *no limit* on how much money a federal campaign could raise after Election Day to repay a candidate," (emphasis added), it neglected to mention that such post-election fundraising would *remain limited by the federal contribution limit*—the *very same limit* that applies to *pre*-election fundraising. It cannot be assumed that the FEC's survey respondents were *implicitly aware* that federal contribution limits would still apply, since *over two thirds* of the survey respondents were unaware or unsure that post-election loan-repayment contributions were permissible under current law *at all*. *See* Decl. of Ashley Grosse ex. A at q.4 (Apr. 24, 2020), Doc. 65-16. This question thus solicited the public's opinion on a scenario that *would not exist even if Section*

*304 were invalidated*. In addition, the FEC's survey *also* failed to inform the survey respondents that federal campaigns could *already* repay candidate loans *before* the election, without any limit other than the base contribution limits. Once again, it is unrealistic to expect the respondents to be aware of that fact—indeed, Dr. Grosse, the YouGov political scientist who supervised the survey, *was herself unaware* of it. Grosse Depo. 154:14-21. Nor did the survey ask about post-election fundraising for the repayment of *other* types of campaign debt. Nor did the survey define what it meant by the term "political favor," or explain whether it was limited to *quid pro quo* corruption or also extended to the "influence or access" that the Government may not constitutionally seek to limit. *McCutcheon*, 572 U.S. at 208. The term "political favor" is naturally read to include such influence or access—and again, *that is how Dr. Grosse herself interpreted it*. *See* Grosse Depo. 149:8-16 ("Political favors. I would think access is a pretty big one."); *see also id.* at 151:7-22. It would not be at all surprising to learn that the opinions of respondents to questions about these matters do not perfectly map on to the federal campaign finance regime Congress has enacted; after all, as Dr. Grosse acknowledged, "this whole topic is incredibly complex for the average American." *Id.* at 157:12-13. What is clear, however, is that Congress has determined that all of this conduct (apart from the narrow set of repayments limited by Section 304) "do[es] not create a cognizable risk of corruption" so long as the contributions are made within the federal $2,800 limit. *McCutcheon*, 572 U.S. at 210.

96. According to the 2020 YouGov poll, the public's overwhelming perception that if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors, was also consistent across different demographics. With regard to education, for instance, 61% of respondents with a high school education or less, 67% of respondents with some college, 75% of respondents who had graduated college, and 74% of respondents with post-graduate education said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Grosse Decl. ¶¶ 1-2 & Grosse Decl. Exh. B (Question 6) (FEC Exh. 16).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 95.

97. The public's overwhelming perception that, if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors is similar among respondents identifying with different political parties. For instance, 67% of respondents identifying as Democrat, 63% of respondents identifying as Republican, and 68% of respondents identifying as Independent said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 95.

98. The public's perception that, if a loan repayment limit did not exist, donors would be more likely to expect

political favors is similar for respondents identifying with different political ideologies as well. For instance, 72% of respondents identifying liberal, 67% of respondents identifying moderate, and 64% of respondents identifying as conservative said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 95.

99. Finally, the public's perception that, if a loan repayment limit did not exist, donors would be more likely to expect political favors is similar for respondents with different candidate preferences in the 2016 presidential election. For instance, 74% of respondents who voted for Senator Hillary Clinton and 67% of respondents who voted for President Donald Trump said that it was more likely that donors would expect political favors in return for contributions "[i]f there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate." (Senanayake Decl. Exh. B (Question 6) (FEC Exh. 26).)

**Response:** Admitted but immaterial. *See* Response to Paragraph 95.

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