No. 21-12

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

TED CRUZ FOR SENATE and
SENATOR RAFAEL EDWARD "TED" CRUZ, *Appellees.*

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

BRIEF OF CAMPAIGN LEGAL CENTER, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, COMMON CAUSE, AND DEMOCRACY 21 AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

PAUL M. SMITH
Counsel of Record
TARA MALLOY
MEGAN P. MCALLEN
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
Psmith@campaignlegal.org

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave. NW
Washington, DC 20036

STUART C. MCPHAIL
ADAM RAPPAPORT
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1331 F St NW, Suite 900,
Washington, DC 20004

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street NW, Suite 600
Washington, DC 20005

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

This brief[1] is filed by Campaign Legal Center, Common Cause, Citizens for Responsibility and Ethics in Washington, and Democracy 21. *Amici* are nonpartisan, nonprofit organizations that work in the areas of campaign finance, ethics, and election law to ensure that government is accountable, accessible, and transparent.

Amici have a longstanding interest in the promotion and defense of measures that protect the integrity of government, and believe this challenge threatens to erode those protections. The *amici* have participated in numerous campaign finance cases relevant here, including, for example, *McCutcheon v. FEC*, 572 U.S. 185 (2014).

SUMMARY OF ARGUMENT

"Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials . . . engage in activities which arouse suspicions of malfeasance and corruption." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (internal quotation marks omitted). Accordingly, this Court has long recognized a compelling governmental interest in combating actual and apparent *quid pro quo* corruption. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976) (per curiam). The question in this case is whether, in light of this compelling interest, Congress has the authority to limit

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[1] This brief is filed with the written consent of all parties. The brief was not authored in whole or part by counsel for any party. No person or entity other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission.

the amount of money that candidates or their campaigns can solicit and convey directly to a candidate's bank account post-election, after the campaign has come to an end. *See* 52 U.S.C. § 30116(j) (loan-repayment limit or "the Limit"). Precedent, experience, and common sense answer in the affirmative.

In holding the opposite, the district court committed two fundamental errors.

First, the court misconstrued the Limit as a restriction on campaign contributions to a candidate, or self-financing by a candidate, and therefore subjected it to heightened scrutiny. But the Limit does not meaningfully burden campaign speech or candidate self-financing, so strict scrutiny is inappropriate, and even a lesser, intermediate form of heightened scrutiny is unwarranted.

The Limit leaves candidates free to self-finance and loan personal funds to their campaigns in whatever sums they deem appropriate. And it imposes no restrictions whatsoever on contributors, who may still donate funds at any time subject only to ordinary contribution limits. By merely regulating the times at which candidates can solicit and use contributions to repay personal loans, the Limit operates as a run-of-the-mill regulation of personal gifts, not as one restricting political speech.

Indeed, the Limit is consistent with a host of state and federal laws regulating personal gifts to public officials. A payment that directly compensates a candidate—like a post-election contribution to repay a candidate's personal loan—is effectively a gift, and raises all of the same obvious corruption concerns associated with gifts to officeholders.

And the factual record here demonstrates that any First Amendment burdens imposed by the Limit are marginal at most. Few candidates lend more than $250,000 to their campaigns, and the notorious difficulty of post-election fundraising means that most who do generally cannot raise enough money after Election Day to repay the increment above $250,000. It is little surprise, then, that appellees could not identify even one candidate whose self-financing was chilled by the Limit. As applied to Senator Cruz here, in fact, the statute caused no harm at all. *See* Br. for Appellants (FEC Br.) 10-26.

Second, the district court failed to give due weight to the anti-corruption interests the Limit serves. Given the Limit's modest burdens and compelling justifications, it readily passes muster under any standard of scrutiny.

Concerns about the corruptive potential of post-election payments to candidates that function as personal gifts are neither "novel nor implausible," *Nixon*, 528 U.S. at 391; they are irrefutable. The same intuition animates numerous measures designed to avert corruption in federal and state government, and the Limit fits comfortably within this tradition. The district court failed to credit these concerns or accord appropriate weight to anti-corruption interests long recognized by this Court as both "legitimate and compelling." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496 (1985).

And the available evidence confirms that the Limit serves its objectives. The FEC substantiated the statute's aim and effectiveness as an anti-corruption

measure through its legislative history, historical experiences with post-election fundraising and corruption in the states, empirical scholarship, and polling data. Additional evidence abounds, and all points in the same direction.

Congress's predictive judgment that post-election contributions that directly and personally enrich candidates pose an acute threat of corruption aligns with both common sense and the record in this case, and is entitled to great weight. That Congress chose to regulate in this area with a relatively light hand—so as to strike an appropriate balance between the potentially competing First Amendment and anti-corruption interests at stake—is not a constitutional vulnerability but a strength.

At bottom, the Limit is a common-sense restraint on candidates' acceptance of personally enriching cash payments after Election Day, a practice that magnifies the risk of a *quid pro quo* and is "bound to . . . arouse suspicions of malfeasance and corruption." *Nixon*, 528 U.S. at 390. The First Amendment does not preclude such a basic reform.

ARGUMENT

I. Limiting Large Post-Election Payments that Personally Benefit Candidates Is Not a Burden on Campaign Speech Warranting Heightened Scrutiny.

Appellees' calls for strict scrutiny or its equivalent turn on claims that the challenged Limit has both the intent and effect of circumscribing candidate self-financing in federal elections. But the Limit neither regulates candidate self-financing nor restricts the right to make and accept campaign contributions; it

simply checks a candidate's accrual of personal financial benefits in the post-election period.

Appellees' focus on the standard of review is thus a diversion. First, the district court invalidated the Limit under "closely drawn" scrutiny, J.S.App. 30, so even if this Court elects to rule for appellees, it need not elevate the level of scrutiny to affirm the decision below.[2] And appellees' attempts to inflate the level of review also should not distract from their failure to show *any* appreciable burden imposed by the Limit on speech or association. They have not demonstrated First Amendment injury either with respect to Senator Cruz—who repaid almost the entirety of his $260,000 loan with pre-election contributions, and consequently lacks standing to maintain this action, *see* FEC Br. 10-16—or as to any other candidate or contributor. A careful, functional analysis suggests that, far from meriting strict scrutiny, the Limit does not even warrant the closely drawn scrutiny applied below.

A. The loan-repayment limit does not operate as a constraint on candidate campaign spending.

The district court's fundamental mistake was to analyze the Limit only in terms of the purpose for which the candidate ostensibly made the initial loan—to finance an election campaign, an action that indisputably receives First Amendment protection. *See* J.S.App. 11a-12a. In narrowly focusing on the pre-

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[2] There is certainly no basis for appellees' suggestion that the Court contemplate a radical reconsideration of its longstanding multi-tiered approach to the review of campaign finance laws. Mot. to Affirm or Dismiss (Mot.) 28 n.1.

election dimensions of the transaction, the court ignored the Limit's actual function: to regulate the solicitation and receipt of post-election contributions that directly accrue to the candidate's financial benefit.

Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA) provides that a federal candidate may use up to $250,000 in contributions raised after the date of an election to repay the candidate's outstanding personal loans incurred in the campaign. 52 U.S.C. § 30116(j). The statute does not limit the use of funds raised *pre*-election to repay candidate loans, regardless of timing or amount. *Id.*[3]

In the district court's estimation, the Limit "imposes a 'drag' on the candidate's First Amendment activity by discouraging the personal financing of campaign speech." J.S.App. 15a (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)). But the lower court arrived at that conclusion only because it failed to conduct a functional analysis of how the provision operates—contrary to the instructions of this Court's precedents.

When the Court analyzed BCRA's ban on spending so-called "soft money" in *McConnell v. FEC*, 540 U.S. 93 (2003), it assessed whether that regulatory "mechanism" functioned as a spending limit or a contribution limit. *Id.* at 138-39. Because it found the latter, the Court subjected what had initially appeared to be

[3] FEC regulations further provide that a campaign committee has 20 days after the election during which it can use pre-election funds to pay back the candidate's loans without limitation, 11 C.F.R. § 116.11(c)(1); if Senator Cruz suffered any injury in connection with his loans, it was traceable exclusively to this regulation, depriving him of standing to challenge the statute. *See* FEC Br. 12-20.

a spending limit to the lesser form of scrutiny reserved for contribution limits. *Id.*

The same principle holds here. The Limit restricts neither the expenditures a campaign committee may make, *contra Buckley*, 424 U.S. at 54-58 (striking down "limitations on overall campaign expenditures"), nor how much a candidate can spend on or loan to his campaign, *contra id*. at 51-54 (striking down limits on expenditures by a candidate "from his personal funds"). Likewise, the statute imposes no ceiling on the campaign's use of funds raised *before* the election to repay candidate loans, regardless of the repayment's amount or timing.

Functionally, the provision does not restrict candidate loans or their repayment; it just dictates *when* candidate loan-repayment funds must be raised. And even that limitation is only partial. Campaigns still may raise and use up to $250,000 in aggregate post-election contributions to repay candidates' personal loans. None of this limits the amount of money a candidate can raise or spend during a campaign.

Moreover, unlike the aggregate limit struck down in *McCutcheon*, 572 U.S. at 209-10, this provision does not itself place any ceiling on the amount a contributor can give, whether to individual candidates or in aggregate; it does not regulate a would-be contributor at all.[4] Section 304 thus cannot be said to represent a "prophylaxis-upon-prophylaxis approach" to

[4] Even if the Limit did burden the rights of contributors, Senator Cruz could not "identify a single potential contributor" whose giving was constrained by its operation here. J.A. 233. He should not be permitted to invoke the Court's jurisdiction on the basis of a hypothetical injury to absent would-be contributors—many of whom might well prefer that the Limit remain in place.

contribution limits or their circumvention, as the district court opined. J.S.App. 34a (quoting *McCutcheon*, 572 U.S. at 221). The Limit targets only a particular *use* of post-election contributions that heightens the risk of a corrupt *quid pro quo*, but it does so without restricting what contributors can give to any one candidate, or to all candidates, in an election.

Because the Limit does not restrain either candidate expenditures or donor contributions, it has no direct or even indirect bearing on "the amount of money" a candidate's committee "can spend on political communication during a campaign." *Buckley*, 424 U.S. at 19. It is therefore doubtful that any form of heightened First Amendment scrutiny should apply. But at a minimum, appellees' calls for strict scrutiny or its equivalent are unwarranted.

B. The Limit is functionally a ceiling on candidates' acceptance of personal gifts aggregating above $250,000.

An unconditional reimbursement to a candidate personally—like any other item of value—is a gift. The Limit simply functions as a modest check on a candidate's ability to accept gifts that reimburse personal campaign loans.

"[I]f contribution restrictions 'lie closer to the edges than to the core of political expression,' gifts of value hug the fringe." *Schickel v. Dilger*, 925 F.3d 858, 869 (6th Cir. 2019) (citation omitted). This Court has

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See FEC Br. 36-38 (noting that the post-election context sharpens the risk that donors will be pressured or coerced into contributing).

accordingly never held that a limitation on public officials' acceptance of gifts imposes a constitutionally suspect burden on speech. There is no justification to so hold here with respect to BCRA's limit.

Funds raised to repay a candidate's personal loans in a past campaign go to the candidate and thus do not finance any electoral speech. And because such funds flow directly from a patron's wallet into the candidate's pocket, the corruption risk is acute.[5] Indeed, whereas every other dollar raised by the campaign is subject to FECA's prohibition on the conversion of campaign funds to personal use, 52 U.S.C. § 30114(b), the reimbursements here are functionally personal gifts that evade this rule.

Properly understood in this light, the Limit does nothing more than complement the gift rules to which federal officials in all three branches of government are already subject. Members of Congress, the Judiciary, and the Executive Branch are generally prohibited from accepting gifts worth more than $50. *See* Standing Rules of the Senate, 113th Cong., 1st Sess. 46-56 (2013) (Rule XXXV) (Senate Rules); Rules of the House of Representatives, 116th Cong. 42-46 (2019) (Rule XXV.5) (House Rules); U.S. Courts, *Guide to Judiciary Policy*, Vol. 2C, Ch. 6, § 620.35(b)(8) (July 27, 2021); 5 C.F.R. § 2635.204(a) ($20 Executive Branch limit).[6] Moreover, the rules of each branch define a

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[5] To be sure, contributions raised for this purpose are first deposited into the candidate's campaign committee, but they are then disbursed to the candidate's personal account.

[6] *See also, e.g.*, 2 U.S.C. § 4725; 5 U.S.C. §§ 7342, 7351, 7353; Judicial Conference, Code of Conduct for United States Judges, Canon 4(D)(4).

gift as anything of value, including the "reimbursement" of many officeholder expenses. Senate Rules, *supra*, at 47 (Rule XXXV(1)(b)(1)); House Rules, *supra*, at 42-43 (Rule XXV.5(a)(2)(A)); 5 C.F.R. § 2635.203(b); *see* U.S. Courts, *supra*, Vol. 2C, Ch. 6, § 620.25.

BCRA's limit targets the same concern: it caps payments that reimburse candidates after an election and add to their personal wealth. Compared to analogous gift limits applicable to federal and state officeholders, the $250,000 ceiling this law imposes on post-election repayments is generous. But the safeguards it provides are no less vital. Like the ethics rules, it prevents the actual and apparent impropriety that inheres when a candidate pockets excessive reimbursements from outside sources.

Many officeholder gift rules go much farther. Whereas the repayment limit applies narrowly to reimbursements to candidates for their personal loans, and even there, offers a generous ceiling, federal ethics rules impose stringent limits and sweep broadly. Under federal congressional and judicial ethics rules, for instance, officials may accept no more than $100 in reimbursements from a single source in a calendar year; for the Executive Branch, that limit sinks to $50. Senate Rules, *supra*, at 47 (Rule XXXV(1)(a)(2)(A)); House Rules, *supra*, at 42 (Rule XXV.5(a)(1)(B)(i)); U.S. Courts, *supra*, Vol. 2C, Ch. 6, § 620.35(b)(8); 5 C.F.R. § 2635.204(a).

In contrast, the BCRA provision permits candidates to accept up to $250,000 in post-election reimbursements—a threshold most candidates never reach. *See* J.A. 238-39. And unlike the officeholder gift

rules, which apply to a broad range of reimbursements, *see, e.g.*, Senate Rules, *supra*, at 47 (Rule XXXV(1)(b)(1)), this Limit is confined to a single category of repayments that Congress recognized were particularly ripe for abuse.

C. Cruz has not identified a single candidate whose self-financing activity has been chilled by the Limit—not even himself.

Although the First Amendment injury asserted by appellees and accepted below rests entirely on the Limit's purported chilling effect on candidate self-financing, the record lacks any evidence of such chill. Instead, the evidence indicates that the Limit imposes at most a minor burden on a very small handful of candidates, and nothing of a constitutional magnitude. Appellees have not identified any candidates dissuaded from self-financing their campaigns because of the Limit. Even Senator Cruz himself was not, as the FEC's standing argument makes clear.

1. There is no evidence that the loan-repayment limit appreciably chills candidate self-financing. The Limit—and any chilling effect it potentially produces—affects only those candidates who lend their campaigns $250,000 or more. *See* 52 U.S.C. § 30116(j); 11 C.F.R. § 116.11. Candidates who lend less than that amount experience no First Amendment burden, even under appellees' theory of injury. Moreover, absent the Limit, there is no reason to believe that candidates who currently engage in self-lending in amounts under $250,000 would choose instead to lend their campaigns more than $250,000. Current law already allows those candidates to increase their self-

lending to $250,000 without any limitation on repayment; that they have chosen not to do so necessarily means they were motivated by reasons other than the Limit.

But candidates who engage in that magnitude of self-lending are rare. Among House and Senate campaigns from 1983 to 2014, the average amount of total borrowing—including both personal and outside loans—was $87,137, well short of the $250,000 threshold even including outside lending, to which the Limit does not apply. Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* (May 2020), D. Ct. Doc. 65-1, at 10 ("Ovtchinnikov & Valta (2020)"). Loans of $250,000 or more are the exception even in the subset of candidates who engage in self-lending: from 2010 to 2018, just 11.4% of loans by House candidates and 22.8% of loans by Senate candidates reached that threshold. *See* J.A. 237-39. The Limit is therefore entirely irrelevant to the vast majority of campaigns.

Likewise, even for the sliver of candidates who might lend their campaigns more than $250,000, a larger deterrent than the Limit is the sheer difficulty of post-election fundraising. Most candidates cannot hope to raise anywhere near $250,000 after an election. Empirical research shows that most campaigns fail to pay off candidates' personal loans in any amount at any time: from 2003 to 2018, only 15.6% of losing campaigns and 49.5% of winning campaigns did so. Alexei Ovtchinnikov & Philip Valta, *Self-Funding of Political Campaigns*, 16-17 (HEC Paris, Research Paper No. FIN-2016-1165, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2804474

("Ovtchinnikov & Valta (2021)"). Among the few losing campaigns that managed to repay candidate loans, 86% did so before the election; after Election Day, repayment becomes nearly impossible. *See id.* at 17. The majority of campaigns, especially losing campaigns, simply do not have the post-election fundraising capacity to trigger the $250,000 limit.

Conventional wisdom supports this conclusion—post-election fundraising is considered notoriously difficult, especially for losing candidates.[7] Even high-profile candidates can struggle to fundraise after Election Day. John Glenn, the astronaut and former U.S. Senator, spent 20 years attempting to pay off debt from a 1984 presidential campaign; the FEC eventually allowed him to terminate his campaign committee without repaying the full amount. *See* Michael Luo, *For Clinton, Millions in Debt and Few Options*, N.Y. Times (June 10, 2008), https://www.nytimes.com/2008/06/10/us/politics/10clinton.html. Hillary Clinton similarly needed years to pay off debt from her 2008 presidential campaign; lower-profile

[7] *See, e.g.*, Kitty Eisele, *Presidential Campaign Debt Can Linger for Decades*, NPR (July 5, 2011), https://www.npr.org/2011/07/05/137615746/presidential-campaign-debt-can-linger-for-decades; Thomas Burr, *McMullin Owes Nearly $670,000 for His Failed Presidential Bid*, Salt Lake City Trib. (Apr. 19, 2017), https://archive.sltrib.com/article.php?id=5191365&itype=cmsid; Dan Hoover, *Year After Election, Debt Lingers for Some*, Greenville News, Nov. 28, 2003, at B1, 2003 WLNR 18176238; Fredreka Schouten, *Repaying Campaign Debt Hard for Losing Side*, ABC News (May 15, 2008), https://abcnews.go.com/Politics/story?id=4853292; Leslie Wayne, *The Nation; Raising Money for Losers*, N.Y. Times (June 13, 1999), https://www.nytimes.com/1999/06/13/weekinreview/the-nation-raising-money-for-losers.html.

candidates face even steeper hurdles.[8] Campaigns simply cannot count on being able to raise $250,000 after an election to repay loans.

2. The insubstantial, hypothetical nature of the "burden" posited by appellees is underscored by their own experience: the statute did not injure them. The panel below assumed appellees' standing based on the single-judge district court's conclusion that "the Cruz Committee's inability to repay the $10,000 balance is due to the law's restrictions on the amount of post-election contributions a campaign can use to repay a candidate's loans." J.S.App. 51a. But as the FEC has explained (Br. 12-16), the Cruz campaign did not use post-election contributions to repay Senator Cruz's $260,000 loan. Rather, appellees admitted below that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election," J.A. 329, and FEC filings confirm that it was "mathematically impossible" for the campaign to have repaid Cruz with $250,000 in post-election funds. FEC Br. 15. As a result, the statute did not prevent appellees from repaying the remaining $10,000 with post-election contributions. *See* 52 U.S.C. § 30116(j). Appellees accordingly lack standing to raise their constitutional claim here.

This material error in the district court's findings not only undermines appellees' standing but also undercuts their claims of undue "burden" arising from

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[8] *See, e.g.*, Catalina Camia, *Hillary Clinton Pays off 2008 Campaign Debt*, USA Today (Jan. 23, 2013), https://www.usatoday.com/story/onpolitics/2013/01/23/hillary-clinton-campaign-debt-free/1857991; Stephen Rosenfeld, *Campaign Debt*, NPR (Feb. 14, 1999), https://www.npr.org/1999/02/14/1045548/campaign-debt.

the Limit. Senator Cruz could safely lend his campaign $260,000 immediately before the election because he knew his campaign had sufficient *pre*-election funds to pay off the debt; he was not himself subject to the vagaries of post-election fundraising, which would likely deter most candidates from making a loan of that size regardless of the Limit. As appellees have admitted, Senator Cruz made the loan and the campaign failed to fully repay him only to manufacture this test challenge. J.A. 325-27. To the extent the Limit affected Senator Cruz's self-lending at all, therefore, it appears to have *increased* it.

II. The Loan-Repayment Limit Is Amply Justified by the Compelling Anti-Corruption Interests It Serves.

The risk of corruption posed by what is functionally a personal gift to a candidate is not only self-evident, but also confirmed by experiences across the states, empirical evidence, and the record here. Congress wisely chose to ameliorate that risk by limiting candidate loan repayments in the post-election period, when the risk is most pronounced, and its decision is due substantial deference.

A. The Limit alleviates the risk of *quid pro quo* corruption in a setting where that concern is widely recognized and particularly acute.

BCRA Section 304 regulates a kind of transaction that forms the heartland of most public corruption and conflict-of-interest laws—prospective and current public officials accepting money for their own personal benefit. Nevertheless, the lower court deemed the FEC's asserted anti-corruption interest novel and

unfounded, and concluded that the Commission had failed to meet its "burden of demonstrating that the loan-repayment limit serves a sufficiently important interest." J.S.App. 21a. This conclusion contradicts both precedent and common sense.

Post-election funds raised solely to reimburse candidates for their personal campaign loans pose an obvious and acute danger of *quid pro quo* corruption. There is copious evidence that contributors direct post-election funding to winners who can advance their agendas, and bypass losing candidates because they "don't legislate." Steven V. Roberts, *Debt Retirement Party Becoming an Institution*, N.Y. Times (Nov. 29, 1982), https://www.nytimes.com/1982/11/29/us/debt-retirement-party-becoming-an-institution.html. *See infra* Part II.B. And these payments go directly into a candidate's pocket for personal use—not into campaign coffers to fund political communications. Whereas candidates and their campaigns are strictly prohibited from using campaign funds for personal, non-campaign expenses, *see* 52 U.S.C. § 30114(b); 11 C.F.R. § 113.1(g), a candidate may immediately use loan repayments to pay down a personal mortgage or underwrite "personal expenses for a new outfit and a gym membership." J.S.App. 18a n.6. While the district court saw candidate loan repayments as categorically distinct from a candidate's personal use of campaign funds, *see id.*, the practices are functionally identical.

The notion that a payment that personally benefits a candidate in this way might give rise to actual or apparent corruption is neither "novel nor implausible." *Nixon*, 528 U.S. at 391. The government's evidentiary burden should have been correspondingly

light. Yet the lower court required the FEC to substantiate its anti-corruption interest as if working from a blank slate, divorced from four decades of campaign finance precedents establishing that contribution restrictions further a compelling interest in combating *quid pro quo* corruption and its appearance. *See* J.S.App. 21a-24a.

Indeed, *Buckley* itself recognized as a matter of law that a campaign finance system reliant on private contributions created an "inherent" problem of actual or apparent corruption. 424 U.S. at 27-28. If contributions to a candidate's campaign treasury present an inherent risk, then it is beyond dispute that contributions to a candidate's personal bank account present an even greater inherent risk.

And it is hardly novel to recognize in this context that donating money or other items of value to candidates and officeholders for their personal benefit poses corruption risks. The same rationale animates a wide range of state and federal laws, from regulations of gifts and loans to officeholders to prohibitions on the personal use of campaign funds—reflecting the strength of Congress's determination that providing direct financial benefits to a candidate or officeholder creates a serious and inherent risk of abuse.

Numerous states have adopted provisions that closely parallel the Limit or otherwise target the same concerns about candidate loan repayments, casting serious doubt on the lower court's characterization of the Limit as "obscure." J.S.App. 6a.

At least one fifth of the states regulate candidate loans and loan repayments in a manner that equals or goes beyond the federal provision. Georgia and

South Carolina follow the BCRA model precisely: both cap post-election contributions to repay candidate loans, with Georgia employing the same $250,000 limit and South Carolina setting lower limits. Ga. Code Ann. § 21-5-41(h); S.C. Code § 8-13-1328. Florida prohibits post-election contributions for any purpose, Fla. Stat. § 106.08(3)(b), and Alaska, Rhode Island, Texas, and Washington limit candidate loan repayment not only in the post-election context, but pre-election as well, Alaska Stat. § 15.13.078(b)(1); 17 R.I. Gen. Laws § 17-25-7.4; Tex. Elec. Code Ann. § 253.042(a); Wash. Rev. Code § 42.17A.445(3). Lastly, California, Massachusetts, and Nebraska tackle the problem by directly limiting the amounts that candidates may lend their campaigns. Cal. Gov't Code § 85307(b); Mass. Gen. Laws ch. 55, § 7; Neb. Rev. Stat. § 49-1446.04. Unlike their federal counterpart, many states also bar candidates from charging interest on loans to their campaigns. *See, e.g.*, Cal. Gov't Code § 85307(b).[9]

Concerns about corruption and its appearance are also the basis for state and federal rules limiting officeholders' acceptance of gifts. Legislative gift and

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[9] While FEC rules strictly regulate commercial loans—which must, *inter alia*, bear the lender's "usual and customary interest rate" and be made "on a basis that assures repayment," 11 C.F.R. § 100.82—candidate loans are generally free of these requirements. Interest rates charged by candidates must be commercially reasonable, but that has not been a meaningful constraint in practice. *E.g.*, 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 (noting self-lending candidate who charged 18% interest and repaid herself almost twice the original principal in interest alone over more than a decade).

conflict-of-interest rules are a "long-established tradition" at both the federal and state levels. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (citation omitted). Indeed, when Congress in 1958 adopted a government service code of ethics for the first time, a gift rule was one of only ten requirements included. *See* H.R. Con. Res. 175, 72 Stat. B12 (1958). To this day, the federal government strictly limits the gifts that officials in all three branches may accept. *See supra* at 9-11 (describing federal gift restrictions). And state ethics laws have evolved in parallel; like the federal government, at least 40 states restrict gifts to legislators.[10] Federal campaign finance law, too, evinces concern for self-dealing in provisions independent of the Limit, including the prohibition on candidates' personal use of campaign funds. 52 U.S.C. § 30114(b).

The prevalence and range of these laws—spanning jurisdictions across the country—bespeaks a shared recognition of their importance in combating corruption and self-dealing by elected officials. BCRA's limit fits comfortably among these counterparts. That the financial benefit here takes the form of a campaign contribution to repay a candidate's loans does not render it any less potentially corruptive.

Moreover, as this mosaic of anti-corruption laws attests, the concerns underlying the Limit are "neither novel nor implausible," *Nixon*, 528 U.S. at 391, but well established and widely shared. The district

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[10] *See Legislator Gift Restrictions*, Nat'l Conf. of State Legislatures (Sept. 13, 2021), https://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx.

court failed to credit these concerns or accord the appropriate weight to anti-corruption interests long recognized by this Court as both "legitimate and compelling." *Nat'l Conservative PAC*, 470 U.S. at 496; *see also Buckley*, 424 U.S. at 26-27.

B. The Limit's anti-corruption objectives are borne out by the record, empirical evidence, and long experience.

The district court's unreasonable demand for evidence of rampant *quid pro quo* bribery tied to loan repayments demonstrates a broader disregard for anti-corruption measures that target a patent threat of abuse and are designed to be "preventative." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). The validity of contribution limits, for example, does not rest on a factual showing that all or even most contributions amount to illicit bribes; on the contrary, "few if any contributions to candidates will involve *quid pro quo* arrangements." *Id*. But the Court has nevertheless repeatedly accepted Congress's determination, based on "common sense" and the "ample record" compiled over time, that contribution limits prevent corruption and its appearance. *McConnell*, 540 U.S. at 145. So too here.

And regardless, there was such a record. The district court not only set an unduly onerous standard for the evidentiary showing it required, but also then disregarded, without justification, the legislative record and other evidence offered by the FEC to substantiate the law's anti-corruption purposes. *See* J.S.App. 21a-30a. Other publicly available information further demonstrates the important ends the Limit serves.

1. *First*, BCRA's legislative history supports the Limit's anti-corruption objectives and does not evince any improper legislative purpose. As the FEC's evidence below showed, multiple members of Congress explained during debate on BCRA that the Limit aimed to address the obvious risk of *quid pro quo* corruption inherent in candidates' acceptance of post-election contributions that go directly into their bank accounts. *See* J.A. 233-34. Senator Hutchison, for example, described the Limit as codifying the principle that candidates "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." J.A. 234 (quoting 147 Cong. Rec. S2541 (daily ed. Mar. 20, 2001)). Senator Domenici similarly observed that "a candidate who incurred personal loans for his campaign should not be able 'to get it back from [his or her] constituents . . . [by] ask[ing] them: How would you like me to vote now that I am a Senator?'" J.A. 233 (quoting 147 Cong. Rec. at S2462).

The district court failed to credit this legislative history, instead focusing on the background of BCRA's "Millionaire's Amendment," a separate provision addressing a distinct area of campaign finance law. J.S.App. 27a. Importing the motivations behind one legislative provision into the evaluation of a wholly separate provision was clear error.

Second, abundant record evidence drawn from jurisdictions across the country substantiates the reality and seriousness of Congress's judgment that the post-election context heightens the risk of *quid pro quo* corruption, and certainly of its appearance. *See* J.A. 249-54. In Ohio, former Attorney General and

current Governor Mike DeWine drew significant media scrutiny by repeatedly making substantial personal campaign loans and then reimbursing himself with millions of dollars of post-election contributions from entities seeking—and often obtaining—state contracts administered by DeWine's office. J.A. 249-51. News outlets and good-government organizations expressed concern that DeWine's activities involved corruption, or at least generated an appearance thereof. *See id.*

Ohio was not alone in this regard: the summary judgment record also evidenced concerns about corruption tied to candidate loan repayment in other states, including Oklahoma, Kentucky, and Alaska. J.A. 251-54. For example, after winning office in 2018, Oklahoma Governor Kevin Stitt, who had personally loaned his campaign over $5 million, recouped over $800,000 in post-election contributions, including at least $100,000 from state-regulated industries and special interests. J.A. 251-52.

Moreover, "[d]espite years of enforcement" under the Limit, the record makes clear that candidates and donors continue to "test the limits of the current law," demonstrating "beyond serious doubt" how a system of unlimited post-election reimbursements to candidates might be abused. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001). The FEC showed that inappropriate uses of personal loans persist in federal races, including apparent attempts to structure loans so as to evade individual contribution

limits.[11] The Limit mitigates the risk of such manipulation in the post-election context, where concerns about *quid pro quo* corruption and its appearance are naturally heightened.

Although the district court failed to accord them much weight, these examples from other jurisdictions evidence the corruptive potential of candidate loans and justify Congress's decision to limit their post-election repayment. A jurisdiction may defend its contribution restrictions by "rel[ying] on the evidence and findings accepted in *Buckley*," *Nixon*, 528 U.S. at 393, or "[t]he experience of states with and without similar laws," *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (citing *McCutcheon*, 572 U.S. at 209 n.7). Here, the FEC pointed to a long, multistate history of struggles with corruption or the appearance of corruption. The district court's demands for a more exhaustive record overstated the government's burden.

Third, an empirical study in the summary judgment record shows not only that indebted candidates display a systematically greater likelihood of "selling" their legislative votes to special-interest contributors, but also that the loan-repayment provision has ameliorated that tendency. Based on an analysis of con-

[11] During the 2018 election cycle, Senate candidates Matt Rosendale and Mike Braun accepted contributions to repay earlier personal campaign loans, then loaned their current campaigns additional funds, thereby effectively allowing donors to circumvent the base contribution limits. J.A. 248-49. An FEC audit later found that Braun's campaign violated the Limit. Memorandum from Ryan Krogen, Lead Auditor, to FEC 33-35 (Nov. 3, 2021), https://www.fec.gov/resources/cms-content/documents/mtgdoc_21-39-A.pdf.

gressional fundraising and voting data, the study concluded 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." J.A. 247 (quoting Ovtchinnikov & Valta (2020), *supra*, at 29).[12] In other words, the data show that post-election contributions to officeholders—that is, winning candidates—with outstanding personal campaign loans pose a measurably greater susceptibility to *quid pro quo* corruption.

The study's analysis shows that the loan-repayment limit directly addresses this risk: after BCRA's passage in 2002, legislators with outstanding personal loans of $250,000 or less, whom the Limit does not affect, remained particularly responsive to post-election contributions, while officeholders with loans over $250,000 lost their contribution sensitivity and effectively behaved like their debt-free peers. J.A. 247 (citing Ovtchinnikov & Valta (2020), *supra*, at 26). The analysis thus offers empirical proof of the Limit's effectiveness in serving the anti-corruption interest. Arguably, it suggests that the Limit could have been set even lower—but courts do not strike down laws because they "conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). *See also infra* at 32-33.

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[12] More recent scholarship confirms that these conclusions hold for *self-lending* candidates in particular, in addition to indebted candidates generally. *See* Ovtchinnikov & Valta (2021), *supra*, at 20-23, 26-27.

The district court, however, dismissed the study for not specifically proving that its findings were the result of widespread, illicit *quid pro quo* exchanges. *See* J.S.App. 25a. In so doing, it erroneously ignored the analysis's clear implications and held the government to an impossibly high standard of proof. *Cf. Nixon*, 528 U.S. at 393 n.6 (noting that "[t]he First Amendment does not require . . . conduct[ing] new studies or produc[ing] evidence independent of that already generated" elsewhere) (citation omitted); *Buckley*, 424 U.S. at 27 (acknowledging that "the scope of such pernicious practices [as *quid pro quo* exchanges] can never be reliably ascertained").

Fourth, the FEC demonstrated the Limit's role in reducing the appearance of corruption through survey results showing that a broad majority of the public perceives use of post-election campaign contributions as corruptive. *See* J.A. 257-61. Most notably, "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." J.A. 259. This empirical evidence directly and affirmatively answers the key factual question of whether the conduct proscribed by the Limit creates the appearance of corruption. Yet the district court failed to recognize as much, dismissing the polling data as "generic." J.S.App. 28a. This disregard of direct factual evidence was clear error.

2. Although the record in this case alone makes clear that the Limit serves compelling anti-corruption interests, other publicly available information buttresses that conclusion.

First, differences in winning and losing campaigns' fundraising capacity show the risk of corruption inherent in post-election contributions used to repay candidates' personal loans. While post-election fundraising is often challenging for any candidate, victorious ones usually find the process much easier. As noted *supra* in Part I.C, from 2003 to 2018, 49.5% of winning campaigns successfully repaid candidates' personal loans, while only 15.6% of losing campaigns did so (almost exclusively through *pre*-election contributions). Ovtchinnikov & Valta (2021), *supra*, at 16-17; *see also, e.g.*, Wayne, *supra* note 7 (contrasting post-election fundraising experiences of winning and losing candidates). At minimum, this stark difference in repayment rates creates the appearance that post-election contributors target winning candidates with personal debts to achieve policy influence by potentially illicit means.[13] *See also, e.g.*, *Donnelly Finds PAC Money Flows to a Winner*, Indianapolis Star, Feb. 19, 2013, at B1, 2013 WLNR 4295436 (discussing common practice among lobbyists of funneling contributions to winning candidates after Election Day); Roberts, *Debt Retirement Party Becoming an Institution*, *supra* (same). The Limit moderates the risk of

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[13] This differential fundraising ability also undermines appellees' speculation that the Limit benefits incumbents. *See* Mot. 30-31. The evidence shows that it does the opposite: the Limit primarily restrains winning candidates, disproportionately incumbents, as to whom the risk of *quid pro quo* exchanges is most acute. Because losing candidates are much less likely to succeed in repaying personal loans after an election—particularly in any amount approaching $250,000—the Limit is practically irrelevant to them.

actual and apparent corruption in this context by capping the amount that victorious candidates can pocket from post-election contributors.

In addition, while the FEC provided a sampling of corruption concerns arising from post-election fundraising to repay candidates' personal loans, additional instances abound. States and localities across the country have long grappled with the dangers of actual and apparent corruption in this context, amply justifying Congress's decision to enact the Limit.

In Alaska, for example, corruption concerns arising from post-election fundraising led to a 1985 impeachment inquiry into Governor Bill Sheffield. A grand jury recommended impeachment after concluding that Sheffield's office had steered a $9 million state contract to a group including a lobbyist who had raised $92,000 to help the Governor repay personal campaign loans after his election. *See* Wallace Turner, *Impeachment Inquiry Begins in Alaska*, N.Y. Times, July 23, 1985, at A12; Storer Rowley, *New Heat on Alaska Governor*, Chi. Trib., Aug. 2, 1985, at 10. Although legislators ultimately declined to impeach Sheffield, voters considered the matter serious enough to remove him from office, declining to renominate him in 1986 in a result observers attributed to the scandal. *See, e.g.*, *Alaska Governor Rejected; Hickel Loses GOP Primary*, L.A. Times, Aug. 28, 1986, at A24.

Similarly, in Oklahoma in 2003, media and watchdog organizations raised concerns about a new Governor retiring personal campaign loans with post-election contributions from interest groups with business

before him, state officers potentially seeking reappointment, and individuals who later accepted positions in his office or state agencies. *See* Randy Ellis, *Postelection Donors Help Henry Pay Debt*, Oklahoman, Feb. 23, 2003, at 1, 2003 WLNR 16553218. In particular, the Governor appointed one post-election donor Secretary of State and named another to a high-ranking policy post. *Id.* Press reports questioned the timing of, and motivations behind, the contributions. *See id.*

In Louisiana, reporters highlighted "lavish" fundraisers following the election of Governor Edwin Edwards that allowed him to retire personal campaign loans "in a spray of champagne," with "[m]any participants turn[ing] up in subsequent Edwards administrations." Bill Walsh & Jack Wardlaw, *Campaign Debt Tactic Questioned: Lavish Fund-Raisers Pay Off Self Loans*, New Orleans Times-Picayune, Oct. 9, 1995, at A1, 1995 WLNR 986185.

Similar concerns have arisen at the local level. In San Diego, for example, local media noted questions about corruption or the appearance of corruption after three City Council members cast decisive votes in favor of interests whose lobbyists had fundraised to retire their campaign debts. *See* Craig Gustafson, *Lobbyists See Benefit from Three City Officials: Fundraisers Followed by Favorable Votes*, San Diego Union-Trib., June 13, 2009, at A1, 2009 WLNR 11433591. Two of the candidates used the funds to repay personal loans. *See id.* As the chair of the city's Ethics Commission observed, even "[i]n the best scenario," the councilmembers' actions "look[ed] bad and erode[d] public confidence." *Id.* Similarly, post-election fundraising by lobbyists to help the Mayor of Los

Angeles repay campaign debts including personal loans provoked conflict-of-interest concerns in the local press. *See* Patrick McGreevy, *Lobbyists Help Mayor Retire Campaign Debt*, Daily News (L.A.), Nov. 11, 1993, at N8, 1993 WLNR 1294659.

Given this history, it is little wonder that legislators, media, and other commentators across the nation have been troubled by the corruptive potential of post-election fundraising for loan repayment. A *Philadelphia Inquirer* editorial, for example, opined that the practice "offends our sense of democracy." Editorial, *Mr. Shapp's 1970 Funds: What* Is *There to Hide?*, Phila. Inq., Oct. 3, 1974, at 8-A. A North Carolina paper explained that "when a U.S. Senator puts the bite on lobbyists for money that is to go into his personal bank account, the implication of a quid pro quo is simply unavoidable." Editorial, *Faircloth's Fundraising Raises Ethical Question*, Greensboro News & Rec., Apr. 16, 1996, at A4, 1996 WLNR 5828596.[14]

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[14] *See also, e.g.*, Laurie Roberts, Opinion, *Want to Put Money into Doug Ducey's Pocket? You Can.*, Ariz. Republic (Sept. 9, 2014), https://www.azcentral.com/story/laurieroberts/2014/09/09/doug-ducey-primary-debt-retirement-plan/15335053; *Contributions to Fischer Flow In*, Courier-J. (Ky.), Dec. 5, 2011, at A1, 2011 WLNR 25299560; Ellis, *supra*; Editorial, *Money Train Rolls Through Big Loopholes*, Corpus Christi Caller Times, Dec. 21, 2002, at A15, 2002 WLNR 16097051; Walsh & Wardlaw, *supra*; Editorial, *Ethics Twist: Legislative Tactics Work Against Reform*, Memphis Com. Appeal, Apr. 6, 1995, at A6, 1995 WLNR 3187063; Editorial, *Misplaced Generosity: Alabama Needs to End the Sleazy Practice of Giving Money to Candidates After the Election*, Birmingham News, Nov. 15, 1994, at 8, 1994 WLNR 4812766; *Regulated Firms Help Pay Debt of DEQ Secretary*, New Orleans Times-Picayune, Mar. 8, 1993, at B8, 1993 WLNR 855015.

Both sides of the aisle have recognized these dangers. In West Virginia, for instance, Democrats and Republicans alike have raised concerns about post-election fundraising to repay personal campaign loans. *See* Eric Eyre, *Morrisey Campaign Saddled with $1.28M Debt*, Charleston Gazette & Daily Mail (W. Va.) (Apr. 19, 2015), https://www.wvgazettemail.com/news/morrisey-campaign-saddled-with-1-28m-debt/article_1a43c412-0483-5396-b13a-0871f40f1c98.html; Paul J. Nyden, *Lawyers' Fete for Workman Gets Criticism*, Charleston Gazette (W. Va.), Dec. 17, 2008, at 1C, 2008 WLNR 24179665. And Senator Mitch McConnell once referred to post-election fundraising to retire personal debts as an "unethical practice of shaking down special interests." Phil Kuntz, Editorial, *Sanford Leads Field in Recouping Investment*, Greensboro News & Rec., July 21, 1991, at D3, 1991 WLNR 4287944. These diverse actors all agree that use of post-election contributions to repay candidates' personal campaign loans creates an inherent and severe risk of abuse.

Congress shared those concerns—and crafted this narrowly targeted Limit to alleviate them. The record in this case, empirical literature, historical experience, and common sense all confirm the soundness of that judgment.

C. Congress's unique expertise with respect to post-election fundraising entitles the Limit to deference.

"Where a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments." *Nixon*, 528 U.S. at 402. The issues addressed by the Limit fall squarely

within Congress's institutional expertise and outside of this Court's: post-election debt and efforts to retire debt have no federal judicial analogues yet are commonplace on Capitol Hill, rendering legislators uniquely familiar with the risks and pressures of post-election fundraising. Their judgment that addressing that risk requires a limit on post-election fundraising therefore merits the Court's respect.

Indeed, this Court has long recognized that, in establishing contribution limits or solicitation restrictions, legislators must make empirical judgments about how best to balance the government's compelling anti-corruption interest with candidates' ability to finance their campaigns—judgments within Congress's institutional expertise to which courts must show deference. *See Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *McConnell*, 540 U.S. at 137; *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); *Nixon*, 528 U.S. at 391, 397; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 30. That deference is no less warranted here, where Congress performed the same legislative balancing act.

That Congress chose to tackle the problem with a compromise measure, rather than a blanket ban on post-election contributions, does not undermine the need for deference—rather, it reinforces it. The "careful legislative adjustment of . . . federal election laws, in a 'cautious advance, step by step,' . . . warrants considerable deference." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citation omitted). In crafting the Limit, Congress employed exactly such a "step by step" approach, seeking to accommodate First Amendment interests while still addressing the

corruption risks inherent in post-election fundraising. The Limit facilitates electoral participation by allowing candidates to repay substantial amounts of loans with post-election funds, but heads off the most egregious risks of corruption associated with officeholders desperate to unburden themselves of deep personal debt.

This compromise approach merits judicial deference. The district court erred in characterizing Congress's careful balancing as a strike *against* the Limit's constitutionality, and in finding a First Amendment problem in legislators' decision *not* to regulate more broadly than was necessary. *See* J.S.App. 32a-33a (describing the Limit as "substantially underinclusive"). As this Court has repeatedly observed, "the First Amendment imposes no freestanding 'underinclusiveness limitation,'" and "policymakers may focus on their most pressing concerns." *Williams-Yulee*, 575 U.S. at 449 (citation omitted). Congress did so in formulating this Limit, and its empirical judgments about how best to balance the competing interests involved are entitled to great weight.

* * *

Under the challenged law, candidates remain free to spend personal funds without limit in support of their campaigns for federal office. They are likewise free to provide personal loans of any amount to their campaigns, and to have those loans repaid in full before the election. What they cannot do is mortgage the public offices they aspire to hold in the expectation that their personal campaign loans aggregating above $250,000 can be repaid entirely *after* the election—

with contributions raised not to facilitate any campaign messaging but to line their own pockets. This Limit, in other words, operates in a setting where the candidate's expressive interests are marginal and the threat of abuse is profound. The First Amendment does not compel citizens to tolerate such risks to the integrity of their representative institutions.

CONCLUSION

The judgment below should be vacated and the case remanded with instructions to dismiss for lack of standing, or in the alternative, it should be reversed on the merits.

Respectfully submitted,

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

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave. NW
Washington, DC 20036

DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street NW, Suite 600
Washington, DC 20005

Stuart C. McPhail
Adam Rappaport
Citizens for Responsibility
and Ethics in Washington
1331 F St NW, Suite 900,
Washington, DC 20004

Counsel for Amici Curiae

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