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 FOR APPELLEES

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QUESTIONS PRESENTED

When a candidate for federal office lends money to his own election campaign, federal law imposes a $250,000 limit on the amount of post-election contributions that the campaign may use to repay the debt owed to the candidate. 52 U.S.C. § 30116(j). The questions presented are as follows:

1. Whether Appellees have standing to challenge the statutory loan-repayment limit.

2. Whether the loan-repayment limit violates the Free Speech Clause of the First Amendment.

PARTIES TO THE PROCEEDING

The Federal Election Commission ("FEC") is the appellant in this Court and was a defendant in the district court. Ted Cruz for Senate and Senator Rafael Edward "Ted" Cruz are appellees in this Court and were plaintiffs in the district court.

Appellees also named Ellen L. Weintraub, Matthew S. Petersen, Caroline C. Hunter, and Steven T. Walther, in their official capacities as Commissioners of the FEC, as defendants in the district court. Mr. Petersen and Ms. Hunter's terms of service subsequently expired, and Shana M. Broussard, Allen Dickerson, Sean J. Cooksey, and James E. Trainor III were subsequently appointed as Commissioners of the FEC. The individual Commissioners have not separately appealed.

CORPORATE DISCLOSURE STATEMENT

The disclosure statement in Appellees' Motion to Affirm or Dismiss remains accurate.

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INTRODUCTION

No First Amendment right is more vital in our constitutional democracy than "the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976). Indeed, this freedom implicates not only the candidate's own personal liberty but the deepest interests of our Nation as a whole. For under our system of democratic government "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.* at 52-53. Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), now codified at 52 U.S.C. Section 30116(j), imposes a special and significant burden on this core First Amendment freedom. The district court was right to strike it down.

Section 304, by design and effect, deters candidates from loaning money to their campaigns, through the mechanism of restricting the campaign's ability to repay those loans. It caps, at $250,000, the amount of candidate loans that a committee may repay using funds raised *after* election day. To be sure, the loans may still be repaid with funds raised *prior to* the election, but there can be no question that Section 304's limit—by substantially increasing the risk that any candidate loan will never be fully repaid—forces a candidate to think twice before making those loans in the first place. As the three-judge district court below unanimously held, this burden on a candidate's right to speak freely in favor of his own election "runs afoul of the First Amendment." J.S.App. 6a.

Appellant briefly attempts to defend Section 304 on the merits, but its lead argument is that Appellees lack standing to challenge it. Not so. Appellees have clearly been injured by the loan-repayment limit—they executed a loan during Cruz's 2018 reelection campaign that was *subject* to the limit, on which the Committee was forced to partially default *because of* the limit. Appellant argues that this injury is traceable not to Section 304 but to its implementing regulation requiring repayment within 20 days of the election of any portion of a candidate loan exceeding $250,000. This argument is wrong as a matter of law: this Court's precedent, and fundamental principles of administrative law, make clear that a plaintiff directly injured by an implementing regulation has standing to challenge the constitutionality of the statutory provision *that the regulation implements*. After all, such an injury not only is *fairly traceable* to the authorizing statute, it is *only traceable* to that statute, which is the sole and exclusive source of whatever legal force the regulation may have. And the injury is *redressable* by a judgment invalidating the statute, since the regulation implementing it necessarily must fall from the same blow. As any first-year law student knows, if there is no valid authorizing statute, there can be no valid implementing regulation. That is, if the host perishes, so also must its parasite.

Appellant's argument is also wrong on the facts: the evidence directly refutes Appellant's claim that "it is mathematically impossible for the committee to have repaid Senator Cruz $250,000 using contributions made after the date of the election." FEC Br. 15. In reality, the Committee raised more than enough in contributions between the end of the election and the time of repayment to fund all $250,000 that were repaid—so it is *both* Section 304 *and* its implementing regulation that today prevents the repayment of the remaining balance.

Appellant's argument that Appellees' injury is "self-inflicted" fares no better. Appellees' subjective "motivation" in making and waiting more than 20 days after the election to repay the 2018 loan, FEC Br. 23, "has no bearing on [Appellees'] standing to challenge the law" under longstanding and uniform precedent from this Court, J.S.App. 53a. Indeed, a contrary conclusion would cause a sea change in the modern landscape of constitutional litigation and call into question several landmark civil rights cases.

And Appellant's insistence that the Committee could have found a way to fully repay Cruz's loans using only the pre-election funds that Section 304 allows also poses no barrier to standing. For as the court below held, what this argument boils down to is that Cruz could have avoided his injury "by subjecting himself to the very framework he alleges is unconstitutional." *Id.* at 54a. This Court has never suggested that a plaintiff's standing is defeated if he could have avoided all harm by *complying with the very law he* *challenges under the First Amendment*. To the contrary, Appellant's argument turns standing law on its head: if the Committee had repaid Cruz in full in compliance with the 20-day rule, he would have avoided the very $10,000 injury *that gives him standing*.

When Appellant finally turns to the merits, it offers nothing that casts any doubt on the district court's unanimous conclusion that the Government "has failed to demonstrate that the loan-repayment limit serves an interest in preventing quid pro quo corruption, or that the limit is sufficiently tailored to serve this purpose." J.S.App. 6a. Appellant admits that Section 304 imposes *some* "burden on speech," and while it (wrongly) disputes that strict scrutiny applies, it effectively concedes that at a minimum the loan-repayment limit must be subjected to " 'closely drawn' scrutiny." FEC Br. 27, 32. Under either standard, the loan-repayment limit cannot survive.

The fundamental problem is easy to see. It is beyond dispute that Appellees are free today to accept contributions, unrestricted by any $250,000 cap, so long as those contributions are used for the upcoming election and so long as they comply with the federal $2,900 contribution limit. Indeed, Appellees are even free to use those contributions, without limit, to repay *any candidate loans* made to finance the upcoming campaign. Appellant's defense of the loan-repayment limit thus necessarily depends on the notion that a contribution made at the *same time*, in the *same amount*, from the *same contributor*, to the *same candidate*, suddenly poses a "special risk of corruption," *id.* at 39, when instead of being used to repay a loan to fund the *next* election, it is used to repay *a single dollar* over the $250,000 limit for a candidate loan from the *prior* election. To state that proposition is to refute it.

But Appellant's defense of Section 304 gets even worse. It says that contributions used to repay a candidate's campaign loan "pose an increased danger of corruption," FEC Br. 42, because the money repaid to the candidate is akin to a gift, for it "goes into the candidate's pocket," where it "can accordingly be used for personal purposes," *id.* at 33-34. This remarkable argument, which ignores the difference between a loan and a gift, also answers itself.

The district court's judgment should be affirmed.

STATEMENT OF THE CASE

I. Section 304's Limit on the Repayment of Candidate Loans.

While under federal law "a campaign may borrow an unlimited amount of money … from the candidate himself," FEC Br. 2-3, Section 304 of BCRA imposes a $250,000 limit on the *repayment* of those "candidate loans" with money contributed after the election. Federal law generally allows an individual to contribute money in support of a federal candidate's election *after* election day, so long as (a) each contribution is within the contributor's inflation-adjusted $2,900 contribution limit with respect to that candidate and election, 11 C.F.R. §§ 110.1(b)(1), (b)(3)(iii)(C); 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021), and (b) the post-election contributions received by the committee do not exceed its "net debts outstanding" from that election, 11 C.F.R. § 110.1(b)(3)(i). But Section 304 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.

52 U.S.C. § 30116(j).

FEC's regulations implement this provision by providing, *inter alia*, that any repayment of over $250,000 in candidate loans must be made "within 20 days of the election." 11 C.F.R. § 116.11(c)(1). Any amount in excess of $250,000 that is not repaid within those first 20 days cannot be repaid at all, for it must be treated "as a contribution by the candidate." *Id.* § 116.11(c)(2).

Section 304 was adopted as part of the "Millionaire's Amendment," a provision that this Court already has invalidated in substantial part, *Davis v. FEC*, 554 U.S. 724 (2008), and that was avowedly designed to "level the playing field" between self-funding candidates and their non-self-funding opponents. 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *see also* J.A. 211-13. And this was not simply the purpose of the Millionaire's Amendment as a whole: it was the purpose of *the loan-repayment limit in particular*. As the principal source the loan-repayment limit repeatedly and explicitly explained, it had "the same purpose" as the rest of the amendment, and this "purpose is to level the playing field." 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison); *see also* J.A.213-14. The legislative record further indicates that Section 304 also had an even more self-serving design: it "protects incumbents." 147 CONG. REC. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle). After all, while challengers often need to spend (or loan) significant amounts of their own money to raise name recognition even *before* they start to receive significant contributions, *see Anderson v. Spear*, 356 F.3d 651, 673 (6th Cir. 2004), incumbents "have a lot of advantages that do not come out of our personal checkbooks," 147 CONG. REC. S2465 (daily ed. Mar. 19, 2001) (statement of Sen. Dodd).

II. Senator Cruz's 2018 Loans.

Prior to the 2018 election, Cruz made two loans totaling $260,000 to the Committee to help finance his reelection campaign for the United States Senate. J.A. 217-18. At the end of election day, November 6, the Committee did not have sufficient funds to both repay these loans and satisfy the Committee's other creditors. In fact, while the Committee ended the election campaign with approximately $2.38 million deposited in, or in transit to, its bank accounts, it also owed about \$2.7 million in debts it incurred in connection with the election—including the \$260,000 it owed to Cruz—leaving it with approximately \$337,748 in "net debts outstanding," as of election day. *Id.* During the 20 days following the election, the Committee used its cash on hand to repay debts to other creditors rather than Cruz's loans. *Id.* at 219. Only in December of 2018—after 11 C.F.R § 116.11(c)'s 20-day deadline had passed—did the Committee begin to repay Cruz's personal loans. *Id.* And at that point, in compliance with the challenged limits, the Committee was permitted to repay Cruz only \$250,000, leaving a total of \$10,000 unpaid. *Id.*

III. Proceedings Below.

Appellees brought suit on April 1, 2019, challenging the constitutionality of both Section 304 and Appellant's implementing regulation under the First Amendment and requesting that a three-judge court be convened pursuant to Section 403 of BCRA. J.A. 14-18, 20. Appellant moved to dismiss, arguing, *inter alia*, that Appellees lacked standing. On December 24, 2019, the district court judge, Hon. Amit Mehta, rejected Appellant's standing argument and called for the convening of a three-judge court. J.S.App. 52a.

On June 3, 2021, the three-judge district court unanimously granted Appellees summary judgment. It held that the loan-repayment limit burdened core political speech and that it failed even "closely drawn" scrutiny, the lowest standard that potentially could apply. J.S.App. 20a-21a. Because the invalidation of

Section 304 rendered the regulatory provisions implementing it unenforceable, the court dismissed the claims separately challenging those regulatory provisions as moot. J.S.App. 38a.

SUMMARY OF THE ARGUMENT

I. Appellees have standing to challenge Section 304's loan-repayment limit. Appellant's first standing argument, that Appellees' $10,000 injury is traceable to the 20-day regulation implementing Section 304 but not 304 itself, fails as a matter of law. Even assuming Appellant's account of the facts, Section 304 *caused* Appellees' injury, by authorizing the promulgation of the implementing regulation, and the district court's judgment invalidating Section 304 *redresses* Appellees' injury, by nullifying the implementing regulation and rendering it unenforceable. Appellant's argument also fails on the facts, because the evidence demonstrates that the Committee did indeed raise sufficient money after the election to repay $250,000 of Cruz's loan—such that the current barrier to repaying the remaining $10,000 is not only Appellant's regulation, but Section 304 itself.

Appellant's second standing argument, that Appellees' injury is "self-inflicted" and therefore must be ignored, also fails. This Court's precedent squarely establishes that a plaintiff injured by the application of an unconstitutional law has standing even if he willingly subjected himself to the law to establish the basis for the challenge. And such a plaintiff's standing cannot be defeated by pointing out that he could have avoided the injury *by obeying the very law he challenges as unconstitutional.*

II. Section 304 violates the First Amendment. Its limit on the funds a committee may use to repay a loan made by the candidate to finance his own election effort imposes a special and significant burden on a candidate's First Amendment right to spend his own money advocating his own election. It also burdens the rights of committees and their contributors. Accordingly, Section 304 must be subjected to strict scrutiny—or, at a minimum, "closely drawn" scrutiny. It cannot survive either. The loan-repayment limit was impermissibly designed to "level the playing field," not to curb *quid pro quo* corruption. And even if Section 304 had an anti-corruption purpose, it cannot have any such effect, given that the $2,900 contribution limits already in place suffice to guard against any corruption concerns. And even setting aside these fatal analytical problems, the district court correctly held that Appellant has completely failed its burden of justifying Section 304 as narrowly tailored to prevent *quid pro quo* corruption.

ARGUMENT

I. The District Court Correctly Held that Appellees Have Standing.

It is undisputed that Cruz loaned the Committee $260,000 before the 2018 election and that "Senator Cruz is still owed $10,000" of that amount because in the 20 days after the election, the Committee used its limited cash on hand to repay its creditors other than Cruz. J.S.App. 51a. Appellant does not dispute that this unpaid $10,000 debt "is plainly a cognizable injury." *Id.* Instead, Appellant's standing argument focuses on the second and third standing elements—causation and redressability—which it claims Appellees have not satisfied for two distinct reasons. Neither is persuasive.

A. Appellees' Injuries Are Traceable to BCRA Section 304 And Redressed by the Judgment Holding Section 304 Unconstitutional.

First, Appellant argues that Cruz's financial injury is traceable only to the FEC regulation *implementing* Section 304, not Section 304 itself, depriving Appellees of standing to challenge Section 304. According to Appellant, the $250,000 the Committee repaid to Cruz beginning in December of 2018 came solely from "contributions made after the date of the election," and the Committee therefore "has not yet reached BCRA's $250,000 cap on the use of post-election contributions to repay candidate loans." FEC Br. 15, 16. Because Section 304 itself "thus causes

Senator Cruz and his committee no injury, and restraining its enforcement would afford them no redress," *id.* at 16, Appellees lack standing to challenge it. Instead, Appellant says, the repayment of the $10,000 balance is prevented by 11 C.F.R. Section 116.11(c)(2)'s requirement that once 20 days after election day have passed, the Committee "must treat the … outstanding balance [of the loan] … as a contribution by the candidate," rendering it un-reimbursable. Appellant concludes that Cruz's $10,000 injury is traceable only to its implementing regulation.

Appellant acknowledges that it chose not to raise this argument before the district court. *Id.* at 7; J.S. 13. That was the better choice.

The argument fails as a factual matter, because Appellant's claim that the December 2018 loan repayments must have been solely "made with pre-election funds," FEC Br. 7, is based on a misreading of the record and a misunderstanding of federal election law. But Appellant's factual errors are ultimately irrelevant, because even if one accepts its inaccurate account of the record facts, Appellees' $10,000 injury is, as a matter of law, directly traceable to the constitutional infirmity in Section 304. We turn first to this dispositive point.

1. The direct causal link between Appellee's $10,000 injury and the constitutional validity of Section 304 is conclusively established by two blackletter principles of law that Appellant has never disputed. First, because "an administrative agency's power to

regulate … must always be grounded in a valid grant of authority from Congress," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), "an agency literally has no power to act … unless and until Congress confers power upon it," *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). And second, given that "[a]n unconstitutional law is void, and is as no law," *Ex parte Siebold*, 100 U.S. 371, 376 (1879), when a statutory provision is held invalid and unenforceable, any implementing regulations that were promulgated under its authority are likewise invalid and unenforceable. *See Chicago, Indianapolis, & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913) (unconstitutional law is "as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law"); 5 U.S.C. § 706(2)(C). It follows, of course, that an agency regulation promulgated to implement a statutory requirement owes its existence to, and cannot exist independent from, its authorizing statute. Put simply: no valid authorizing statute, no valid implementing regulation.

The application of these settled principles in this case is clear. Appellant's regulation is wholly parasitic upon Section 304 itself; it was promulgated under its authority, *see* 68 Fed. Reg. 3970, 3973 (Jan. 27, 2003), and Appellant quite obviously *could not* have promulgated it were Section 304 not on the books. If Section 304 is unconstitutional, then, Appellant's 20-day limit is likewise invalid and cannot be enforced any longer.

No valid authorizing statute, no valid implementing regulation.

Indeed, that is why the district court, in initially holding Appellees' challenge to the regulation in abeyance pending resolution of Appellees' First Amendment challenge to Section 304, observed that "a decision invalidating Section 304's loan repayment limit as unconstitutional would effectively dispose of Plaintiff's regulatory claims." D. Ct. Doc. 47, 4-5 (Apr. 7, 2020) (quoting J.A. 75). And because the district court's decision invalidating Section 304 *necessarily also invalidated Appellant's regulation implementing it*, the district court dismissed Appellees' separate claims against the 20-day regulation as moot. J.S.App. 38a.

Accordingly, Appellant's contention that Appellees' $10,000 injury is not "traceable to the statutory loan-repayment limit," FEC Br. 11, is obviously wrong. Section 304 is plainly the *but-for cause* of Appellees' $10,000 injury: the 20-day regulation was *promulgated to implement* Section 304, and because Section 304 is the *only statutory provision that authorizes* the regulatory 20-day rule, Appellant "literally has no power" to impose that rule if Section 304 is unconstitutional. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374.

Further, while "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct," *Lexmark Int'l, Inc. v. Static*

Control Components, Inc., 572 U.S. 118, 134 n.6 (2014), Section 304 *is the proximate cause* of Appellees' injury. For the only intermediate link in the chain of causation between Appellees' injury and Section 304 is a parasitic regulatory provision that derived all of its legal authority—its very existence—from the statute that it implements. *See id.* at 133 (a single "intervening step … is not fatal to the showing of proximate causation").

Appellant is also clearly wrong to claim that invalidating Section 304 as unconstitutional would not "redress appellees' injury." FEC Br. 19. Not only is Appellees' injury "redressable" by a decision invalidating Section 304, *the district court's decision has in fact redressed it*. Given the district court's final judgment holding that "the loan-repayment limit, Section 304 of BCRA, is unconstitutional because it violates the First Amendment," J.S.App. 37a, Appellant is obviously precluded from taking any action to enforce its regulatory 20-day limit, and the only thing preventing the Committee from repaying Cruz's outstanding $10,000 balance, unimpeded by Appellant's 20-day rule, is the pendency of this appeal.

Appellant attempts to elide this legal reality by repeatedly arguing that an order "restraining [section 304's] enforcement would not redress the injury" caused by the 20-day regulation's prohibition on the Committee's repayment of the outstanding $10,000 debt to Cruz. *E.g.*, FEC Br. 9, 11, 16. But the necessary predicate of any such *order* would be a *judgment* invalidating Section 304 as unconstitutional, thus rendering it "as inoperative as if it had never been passed." *Chicago, Indianapolis, and Louisville Railway*, 228 U.S. at 566. And the regulatory branch cannot survive the death of the statutory tree. Again, no valid authorizing statute, no valid implementing regulation.

2. This Court's cases have long held that plaintiffs in exactly these circumstances have standing to challenge not just the regulation or agency action that immediately caused their injury but the statutory provision that authorized it. Just last Term in *Collins v. Yellen*, for example, the Court held that shareholders injured by agency action taken by the Federal Housing Finance Agency had standing to challenge the constitutionality of the agency's structure, expressly concluding that "the traceability requirement is satisfied" even though "the shareholder's concrete injury flows directly from [the agency action]" rather than "the [statutory] removal restriction." 594 U.S. ---, 141 S. Ct. 1761, 1779 (2021).

Similarly, the Court found standing in *Clinton v. City of New York* to challenge the Line Item Veto Act even though the plaintiffs were immediately injured by the President's cancellation of certain tax benefits to which they were otherwise entitled, not the Act's general provision *authorizing* that cancellation, explaining that "traceability" was "easily satisfied" since their "injury is traceable to the President's cancellation of [the benefits]." 524 U.S. 417, 433 n.22 (1998). And in *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, the Court allowed homeowners near

Washington National Airport who alleged injury from the risk of "increased noise, pollution, and danger of accidents" posed by the "increased air traffic" that would result from a master plan imposed by the Metropolitan Washington Airports Authority ("MWAA") to challenge the constitutionality of the MWAA's composition, specifically rejecting the argument that the plaintiffs' "injuries are caused by factors independent of" the alleged constitutional violation. 501 U.S. 252, 264-65 (1991); *see also Seila Law LLC v. CFPB*, 591 U.S. ---, 140 S. Ct. 2183, 2195-96 (2020); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *INS v. Chadha*, 462 U.S. 919, 936 (1983); *Buckley v. Valeo*, 424 U.S. 1, 12, 118 (1976).

Indeed, separation-of-powers challenges to the constitutionality of agency actions commonly bear this host-parasite character. In the typical case, for example, where a party injured by agency action challenges the appointment or removal process of the official who promulgated it, the causal link is less direct than here. For in those cases, it is the general statutory provision governing the official's appointment or removal, rather than the specific statutory provision being implemented, that is alleged to be invalid. Yet in these types of cases the Court has routinely proceeded directly to the merits of the constitutional challenge, because no one *even considered* arguing that the plaintiff's injury was not fairly traceable to the alleged constitutional violation. *See, e.g.*, *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. ---, 140 S. Ct. 1649 (2020); *Gundy v. United States*, 588

U.S. ---, 139 S. Ct. 2116 (2019); *DOT v. Association of Am. R.R.s*, 575 U.S. 43 (2015); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Mistretta v. United States*, 488 U.S. 361 (1989); *Schneider v. Smith*, 390 U.S. 17 (1968); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). These decisions illustrate the sea change that acceptance of Appellant's standing argument would cause in the standard model of constitutional litigation.

Although we cited each of these decisions in our Motion to Affirm or Dismiss, Appellant has completely ignored them—both in its Opposition to our Motion and in its Brief on the Merits. If Appellant has any answer to these cases at all, apparently we must await the filing of its Reply Brief—when Appellees will no longer have an opportunity to respond.

3. Appellant suggests that its novel standing argument is supported by this Court's recent decision in *California v. Texas*, 593 U.S. ---, 141 S. Ct. 2104 (2021), but that case has no application here.

In *California*, several States (alongside two individuals) challenged Section 5000A(a) of the Affordable

Care Act—the "minimum essential coverage requirement" (or "individual mandate")—as unconstitutional. But the alleged injuries that gave rise to their standing (as relevant here) were inflicted by "other provisions of the Act, not the minimum essential coverage provision." 141 S. Ct. at 2108, 2119. And as the Court repeatedly explained, the statutory provisions that had injured the State plaintiffs "*operate independently* of § 5000A(a)," and "[n]othing in the text" of those provisions "suggests that they would not operate without § 5000A(a)." *Id.* at 2119, 2120 (emphasis added). Accordingly, "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions violates the Constitution," and the States' injuries were thus "not fairly traceable to enforcement of the allegedly unlawful provision of which the plaintiffs complain—§ 5000A(a)." *Id.* at 2119 (quotation marks omitted).

Appellees' claims in this case are crucially different from the claims in *California*—and they differ for *precisely* the reasons that the Court singled out as *depriving the State plaintiffs of standing* in that case. While *California* emphasized that the statutory provisions that had injured the State plaintiffs "operate independently" of the separate provision they challenged as unconstitutional, *id.* at 2120, here Appellant's 20-day rule that has cost Cruz $10,000 *cannot operate at all* without the statutory provision it implements, Section 304. The key problem for the State plaintiffs in *California*, then, was that "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions [causing the States' injuries] violates the Constitution." 141 S. Ct. at 2119. But here the unconstitutionality of Section 304 obviously renders Appellant's 20-day rule invalid and unenforceable as well.

Appellant says the host-parasite basis of Appellees' standing in this case "resembles the 'standing-through-inseverability argument' advanced in *California*," FEC Br. 19, but the analogy in fact cements *California*'s inapplicability here. The plaintiff States in *California* argued that their injuries *were* "traceable to the individual mandate" because the separate provisions that inflicted those injuries "cannot be severed from the mandate." 141 S. Ct. at 2131 (Alito, J., dissenting). The Court characterized this severability argument as "novel" and ultimately "decline[d] to consider" it on the ground that it had been forfeited. *Id.* at 2116 (majority); *see also id.* at 2122 (Thomas, J., concurring).

But the chain of causation for the standing-through-severability theory requires a court to decide (1) that the statutory provision causing the plaintiff's injury is *not* itself unconstitutional; (2) that a separate statutory provision causing no injury to the plaintiff and operating independently of the injuring provision *is* unconstitutional; and (3) that the injuring statutory provision *cannot be severed* from the harmless unconstitutional statutory provision and so both must fall. Whether or not this hip-bone-connected-to-the-thighbone-connected-to-the-shin-bone theory of standing satisfies Article III, it bears no resemblance at all to a standing theory that simply relies on the fundamental truth that an implementing regulation cannot survive the death of its authorizing statute. At a bare minimum, however, there can be no claim that *California forecloses* Appellees' standing when it explicitly *declined to address* the standing-through-severability theory.

Appellant lards its *California* argument with citations to three other cases, but one need only look at Appellant's own description of them to see that they have no application here. In each of these cases, a plaintiff who was injured by one government action sought to leverage that injury to challenge a *completely unrelated* government action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 350-53 (2006); *Lewis v. Casey*, 518 U.S. 343, 357-60 (1996); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 165-68 (1972). If Appellees sought to leverage the injury inflicted by the 20-day regulation to challenge, say, BCRA's prohibition of fundraising on federal property in Section 302, 18 U.S.C. § 607, or some other distant provision of BCRA, these cases might have some relevance. They have none to Appellees' challenge to Section 304.

4. Appellant claims that the host-parasite "basis for standing [is] unavailable here, since the district court lacked independent subject-matter jurisdiction to hear appellees' challenge to the regulation." FEC Br. 19. Appellant's theory is that BCRA Section 403's

three-judge court provision grants jurisdiction over challenges to provisions of BCRA itself but not "challenges to the Commission's regulations." *Id.* It concludes that "because [the district court] lacked jurisdiction over the challenge to the regulation, it could not consider the alleged unconstitutionality of the statute as a ground for invalidating the regulation." *Id.* at 20.

But again, Appellees *do not* claim that they have standing only to challenge the 20-day regulation and that "in adjudicating their challenge *to the regulation*, the district court could assess the constitutionality of the statute itself." *Id.* at 18-19 (emphasis added). Rather, our argument is that the $10,000 injury inflicted by the 20-day rule *is traceable to Section 304 itself*, for the reasons discussed above, and that this plainly confers standing on Appellees *to challenge Section 304*. To be sure, Appellees' complaint also pleaded three separate counts challenging the regulation, J.A. 25-26, but the presence of those separate regulatory claims is entirely irrelevant to Appellees' standing *to challenge Section 304 itself*, and Appellees' standing would have been just as secure if those regulatory claims had never been added at the end of the complaint.

Appellees' profile is analogous to that of a plaintiff who sues the government based on injury caused by the intervening actions of a third party. Where the third-party's actions are "produced by [the] determinative or coercive effect" of government action, the injury is traceable to the government itself and the plaintiff has standing to sue the government directly.

Bennett v. Spear, 520 U.S. 154, 169 (1997). There is no requirement, in such a case, that the plaintiff *also* bring—or that the court *also* have independent subject-matter jurisdiction over—a claim against the third party. *See id.* at 159 ("Neither the Bureau nor any of its officials is named as defendant."). So too here. Appellees have standing to challenge *Section 304 itself* because their injury is fairly traceable to that provision, and there is no basis for Appellant's demand that they *also* bring—or that the district court *also* have independent subject-matter jurisdiction over—a claim against the 20-day rule that most immediately caused the injury.

Appellant cites *McConnell v. FEC*, 540 U.S. 93 (2003), but when the actual nature of our challenge is understood, it becomes obvious that that case *supports Appellees*. In *McConnell*, certain plaintiffs challenged Section 214(c) of BCRA, which directed the FEC to promulgate new regulations governing coordinated expenditures that "shall not require agreement or formal collaboration to establish coordination." 52 U.S.C. § 30116 note. The plaintiffs challenged Section 214(c) as unconstitutionally overbroad, but this Court upheld the statute on the merits. 540 U.S. at 221.

Appellant focuses on the concluding paragraph of *McConnell*'s discussion, which held that "issues concerning the regulations [implementing Section 214] are not appropriately raised in this facial challenge to BCRA, but must be pursued in a separate proceeding." *Id.* at 223. But in a passage of the opinion that Appellant neglects to quote, *McConnell* makes clear that the only portion of the plaintiffs' challenge "not appropriately raised" was the portion targeting "alleged constitutional infirmities … *found in the implementing regulations rather than the statute itself*." *Id.* (emphasis added). To the extent the *McConnell* plaintiffs instead challenged constitutional infirmities that, as here, were traceable to the statutory authorizing provision, this Court, far from questioning the existence of subject-matter jurisdiction, *resolved the challenge on the merits*. *Id.* at 219-23. Indeed, the opinion as a whole, and that of the district court, leave no doubt that if the Court had instead concluded that Section 214(c)'s expansion of "coordination" violated the First Amendment, the FEC implementing regulations would have been rendered invalid by the same blow. No valid authorizing statute, no valid implementing regulation.

5. Accordingly, Appellant's novel challenge to Appellees' standing is meritless as a matter of law, and the Court may safely reject it without reading any further. But the argument is also based on an incorrect *factual* predicate. For contrary to Appellant's assertion that "it is mathematically impossible for the committee to have repaid Senator Cruz $250,000 using contributions made after the date of the election," FEC Br. 15, the facts before the Court demonstrate precisely the opposite conclusion.

As explained in our Motion To Affirm or Dismiss, the contributions a committee raises after an election must be sorted, by Appellant's regulations, into two separate pools. First, such contributions may be specifically designated by the donor for the repayment of debts still outstanding from the previous election, in which case they will be tallied towards the contributor's base contribution limits for that past election. *See* 11 C.F.R. § 110.1(b)(3). These contributions are known in the argot of campaign-finance law as "post-election contributions." Second, in the absence of such a post-election designation, a contribution made after an election will instead automatically be designated for the candidate's *next upcoming election*, and will instead count towards the contributor's base contribution limit for *that upcoming* election. *Id.* § 110.1(b)(2)(ii). Both of these types of contributions made after an election may be used to repay debts outstanding from that election, including debts to the candidate, *see* 52 U.S.C. § 30114(a); 11 C.F.R. § 116.12(a) and both are subject to Section 304's $250,000 cap on repaying candidate loans with contributions "made … after the date of [the] election," 52 U.S.C. § 30116(j).

In this case, as the evidence and testimony cited by Appellant shows, Appellees did not raise any of the first type of contributions—"post-election contributions" specifically designated to pay off debt left over from the 2018 election. J.A. 144-45, 245. However, the evidence conclusively demonstrates that Appellees *did* receive contributions of the *second* type after the 2018 election, in amounts sufficient to repay $250,000 of Cruz's loans.

The Committee made four repayments of Cruz's loan, between December 4 and December 24, 2018.

J.A. 219. Appellant acknowledges, based on the Committee's public FEC filings, that Appellees received approximately $166,547.01 in contributions, designated for 2024, between election day and December 24.[1] What Appellant misses is that the Committee *also* received, during this same period, another $278,603.82 in "redesignated" contributions.

This second set of contributions came from contributors who originally donated towards the 2018 election in amounts that exceeded their base contribution limit and who—pursuant to 11 C.F.R. § 110.1(b)(5)—subsequently redesignated the over-limit amount as contributions to the 2024 election, during the period between election day and December 24. These redesignated contributions are not recorded in the Summary Pages that Appellant's calculations are based on, but they do appear as "memo transactions" in the publicly filed Itemized Receipts that follow the initial Summary Pages. *See, e.g.*, *Ted Cruz for Senate*, FEC Form 3: Report of Receipts and Disbursements at 16, 17 (Dec. 6, 2018) (memo items reporting two refunds and redesignated contributions in the

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[1] As Appellant notes, the Committee's filings establish $45,880 in itemized contributions (contributions exceeding $200) clearly received by December 24 and another $120,667.01 in unitemized contributions (contributions of $200 or less) received between election day and December 31, 2018. FEC Br. 15-16 & n.*. Appellees' records show that the actual amount of unitemized contributions received by December 24 was $102,906.79, making the total of 2024 contributions received by December 24 and recorded on the summary pages of the Committee's filings $148,786.79, not $166,547.01.

amounts of $600 and $50, respectively). And each redesignation constitutes, as a matter of fact and law, a contribution "made … after the date of [the 2018] election." 52 U.S.C. § 30116(j); *see* 11 C.F.R. § 110.1(b)(5)(iii) (providing that redesignated contribution counts towards the contribution limit of the new election it is redesignated towards); *Ted Cruz for Senate*, FEC Form 3, *supra*, at 16, 17 (recording redesignations as simultaneous refunds, and then contributions, of the redesignated amount). Once the $278,603.82 in "redesignated" contributions received by December 24 are counted, it is clear that the Committee had more than enough in contributions "made … after the date of [the] election" to repay $250,000 to Cruz. Indeed, the $278,603.82 in redesignated contributions ignored by Appellant *are alone* enough to cover the $250,000, without even adding in the roughly $150,000 in other contributions received between election day and December 24 that Appellant does acknowledge.

The undisputed Statement of Facts ("SOF") filed by the parties below does not contradict this conclusion. Appellant first quotes its statement that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." J.A. 246. But Appellant only quotes half of the SOF, omitting the following deposition testimony on which it was expressly based: "(30(b)(6) Dep. at 95 (FEC Exh. 9) ('the committee did not receive any *general 2018 contributions* after Election Day 2018.')." *Id.* The cited SOF must be read, of course, in conjunction with the *expressly quoted* deposition testimony on which it was based, and it is only in that qualified context that Appellees admitted it. And that quoted deposition testimony makes clear that what the record actually shows, and what Appellees actually admitted, was that no portion of the loan was repaid *with post-election contributions designated for 2018*—what the SOF refers to interchangeably as "contributions raised after the election" and "general 2018 contributions," and what are known in campaign-finance law by the term of art "post-election contributions." That same deposition testimony establishes, however, that the Committee *did receive* contributions after the 2018 election, that those contributions were *designated for the 2024 election*, and that those contributions were available to pay 2018 election debts. J.A. 145-46.

Appellant also cites another SOF, asserting that "during the 20 days after the election and later, the Committee continued receiving postelection 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." J.A. 245. But like the first SOF, this statement—in language that Appellant again omits from its quotation—is expressly based on the same deposition testimony, so Appellees' admission of it must also be understood in that same light. *See id.* (citing "30(b)(6) Dep. at 96-97"). And again, that deposition testimony clearly shows that the contributions received after election day and designated towards the 2024 election *were* used to repay debt outstanding from the 2018 campaign. *See* J.A. 176-77 ("There was primary 2024 funds that were raised that assisted in paying off those debts.").

Accordingly, the Committee *did* receive contributions "after the date of [the 2018] election" sufficient to repay $250,000 of Cruz's loans, 52 U.S.C. § 30116(j), thereby "exhaust[ing] the $250,000 cap on the use of post-election funds," such that it is "the statutory loan-repayment limit"—not merely the regulatory 20-day rule—that now "prevents it from using post-election funds to repay the remaining $10,000," FEC Br. 13.

To be sure, Appellees did not undertake the meaningless task of attempting to trace which fungible dollars were used to repay Cruz's loans, rather than the Committee's other outstanding 2018 debts. But this Court's case law has repeatedly recognized the obvious proposition that "[m]oney is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010). The Article III analysis surely cannot turn on whether Appellees engaged in such a senseless and futile formalism. *See Rothstein v. UBS AG*, 708 F.3d 82, 93 (2d Cir. 2013); *cf. Carney v. Adams*, 592 U.S. ---, 141 S. Ct. 493, 503 (2020) (standing does not depend on whether plaintiff engaged in "a 'futile gesture' " (quoting *Teamsters v. United States*, 431 U.S. 324, 365-66 (1977)).

B. Appellees' Unpaid Loan, whether "Self-Inflicted" or Not, Establishes Their Standing.

Appellant also argues that Cruz's $10,000 injury is not traceable to the loan-repayment limit because it "was self-inflicted." FEC Br. 20. This argument fails too. Where the government is engaged in an ongoing violation of constitutional or statutory rights and a would-be plaintiff simply exercises the right that exposes himself to that violation, the injury is caused by the government, not the plaintiff.

1. Appellant repeatedly cites our stipulation before the district court that "the sole and exclusive motivation" behind Appellees' loans "was to establish the factual basis for this challenge." FEC Br. 5, 23. As the district court correctly held, this reliance on Appellees' subjective intent "is easily disposed of," for under this Court's case-law, Appellees' motives are utterly irrelevant. J.S.App 52a.

For example, in *Havens Realty Corp. v. Coleman*, two plaintiffs—one black and one white—inquired of the defendant landlord about the availability of apartments. 455 U.S. 363, 368 (1982). The black plaintiff did so "fully expecting that he would receive false information" and had no "intention of buying or renting a home." *Id.* at 374. The defendant, in violation of the Fair Housing Act, consistently told the black plaintiff that there were no apartments available and told the white plaintiff that there were vacancies. *Id.* at 368. Despite the fact that the black plaintiff was a "tester" who merely "pose[d] as [a] renter[ ]," this Court held that he had standing. *Id.* at 373.

Similarly, in *Evers v. Dwyer*, the Court held that an African-American plaintiff had standing to challenge Memphis's segregated bus system even though he was only exposed to the challenged discrimination because he purposefully boarded a bus and sat in the whites-only section "for the purpose of instituting this litigation." 358 U.S. 202, 203 (1958). The district court dismissed the challenge for lack of an "actual controversy," but this Court reversed, holding that the fact that the plaintiff "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.* at 204.

Accordingly, as one of Appellant's own supporting amici explains, '[d]enying standing based on the characterization of such harm as 'self-inflicted' would represent a significant, and unwarranted, extension of standing doctrine." Public Citizen Br. 9. Indeed, such an extension would call into question several landmark cases striking down racial segregation and other forms of unconstitutional discrimination. The plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), would not have had standing to challenge racial segregation unless they had been "personally denied equal treatment by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quotation marks omitted); *see also Warth v. Seldin*, 422 U.S. 490, 502 (1975). They therefore voluntarily sought, and were denied, "admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown*, 347 U.S. at 488. Contrary to Appellant's logic, the fact that the *Brown* plaintiffs willfully exposed themselves to their constitutional injury by voluntarily seeking admission to a segregated school did not *defeat* their standing; it *created* their standing. For the same reasons, Appellees' subjective motivations in making and repaying the 2018 loan are completely irrelevant to the standing analysis.

Appellant does not address *Evers* or *Havens Realty* in its opening brief, but it did attempt to distinguish them in its Reply to our Motion To Affirm or Dismiss. "The problem here," Appellant said, "is not simply that Senator Cruz sought to lay the groundwork for a lawsuit when he lent his campaign committee $260,000." Rather "the crucial point" is that Appellees chose not to follow "the FEC's proposed alternative"—namely, "simply … using available pre-election funds to repay Senator Cruz $10,000 or more during the 20-day post-election window rather than waiting until just after the deadline had lapsed." FEC Reply 7-8.

First, the FEC's 20-day rule is a "proposed alternative" in the same sense that Don Corleone proposed an alternative by making "an offer he can't refuse": the candidate either accepts the FEC's "alternative" or loses his money. Second, had Appellees complied with the 20-day rule, the campaign's debt to Cruz would have been paid in full, and Appellant would no doubt then argue that Appellees had not suffered the "concrete injury" necessary to confer standing. Both the initial loan and Appellees' defiance of the government's repayment demands were part of the same effort to "lay the groundwork for a lawsuit." Under Appellant's theory of self-inflicted injury, Mr. Evers could have "laid the groundwork" for his lawsuit by boarding a segregated bus, but would have forfeited his standing if he refused to give up his seat and move to the back. Mr. Evers did not forfeit standing merely because he refused to conform his conduct to *the very action he challenged as unlawful*.

2. The bottom line was put well by the district court below: "The flaw in the FEC's argument is that it would require Senator Cruz to avoid an injury by subjecting himself to the very framework he alleges is unconstitutional." J.S.App. 54a; *see also* Public Citizen Br. 10. Appellees' whole claim is that the Government may not, consistent with the First Amendment, burden a candidate's right to finance his own campaign through loans by limiting the types of funds that may be used to repay those loans. Appellees suffered a $10,000 injury because they refused to repay Cruz in conformity with Appellant's unconstitutional restrictions. Appellant cannot defeat Appellees' standing by pointing out that they could have avoided that financial injury *if only they had obeyed the very governmental commands they are challenging as unconstitutional*.

Nor is Appellant's "self-inflicted-injury" theory of standing supported by the three cases Appellant cites. Appellant's principal authority, *Clapper v. Amnesty International*, 568 U.S. 398 (2013), is not remotely apposite. The plaintiffs there challenged the constitutionality of provisions of the Foreign Intelligence Surveillance Act ("FISA") authorizing government surveillance of certain international electronic communications. FISA had never been enforced against the plaintiffs, and so they brought a pre-enforcement challenge. In an attempt to make up for their inability to show any imminent likelihood that the Act *would* be employed to surveil them, they sought to ground their standing on costly measures (e.g., travel costs for in-person meetings) they had taken to avoid making international electronic communications and thus to eliminate the risk of government interception. The Court rejected the argument. Because the threat of any particular government interception was highly speculative rather than "certainly impending," the self-imposed costs they incurred were "simply the product of their fear of surveillance, and … such a fear is insufficient to create standing." *Id.* at 417.

Clapper thus did not involve plaintiffs who suffered an injury that was caused by the government but that they could have avoided by *forgoing* their claimed constitutional right; it involved plaintiffs who suffered an injury that was caused by themselves and that they could have avoided by *exercising* their claimed constitutional right (the right to engage in confidential international electronic communications). This case would at least be parallel to *Clapper* if Cruz had limited his loan to $250,000 to avoid the risk of nonpayment created by Section 304, and then had brought a pre-enforcement challenge to Section

304 on the theory that the risk of the statute's enforcement had deterred him from exercising his constitutional right to loan his campaign more than $250,000. Even in that circumstance, *Clapper* would be beside the point given that FEC's enforcement of Section 304 against any given violation is not speculative at all, let alone in the multiple ways that FISA surveillance of any given international communication is. In the *actual* circumstances of this case—where Appellees could have avoided their $10,000 injury only by obeying a government command to *forgo* the constitutional right at issue—*Clapper* is doubly beside the point.

McConnell v. FEC, 540 U.S. 93 (2013), is also distinguishable. *McConnell* held that plaintiffs could not challenge BCRA's contribution limits as *too high* based on the supposed "competitive injury" they suffered because, unlike other candidates, they did not "wish to solicit or accept large campaign contributions as permitted by BCRA." *Id.* at 228. That "alleged inability to compete," the Court explained, "stems not from the operation of [BCRA], but from their own personal 'wish' not to solicit or accept large contributions." *Id.* By contrast, Appellees' $10,000 injury does not stem from their "personal 'wish' " to repay Cruz's loans with post-election money; it stems from their decision to *exercise their constitutional right* to repay the loans in a manner unlimited by Appellant's unconstitutional restrictions. *McConnell* is thus irrelevant here.

The per curiam decision in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), is irrelevant too, and for the same reason. There, several States challenged taxes that New Jersey and New Hampshire imposed on income earned within their borders by residents of the plaintiff States, arguing that the taxes violated the Privileges and Immunities Clause. But the plaintiff States (as opposed to their residents) were injured by the challenged taxes only because of their choice "to extend a tax credit to their residents for income taxes paid" to the defendant States, which (combined with the challenged taxes) resulted in tax income being "diverted from their respective treasuries." *Id.* at 663-64. And critically, none of the plaintiff States claimed a constitutional right to extend such tax credits. Here, by contrast, the whole point of Appellees' First Amendment claim is that *they do* have a constitutional right to repay candidate loans with post-election contributions.

Appellant's only response to this argument fundamentally misconceives it. Appellant implicitly claims that where a plaintiff has the ability to avoid his injury-in-fact by complying with the law or action he challenges as invalid, his standing is preserved *only* if "taking the action needed to avoid that injury would subject the plaintiff to a different harm." FEC Br. 23-24. Put differently, a plaintiff faced with the dilemma of suffering a concrete injury or abiding by the very governmental command he challenges as unlawful only has standing, by Appellant's lights, if *both* horns of the dilemma would *result in the infliction of an injury-in-fact*. That is not the law.

Appellant's theory of standing is once again flatly inconsistent with *Havens Realty*. There, the African-American "tester" plaintiff plainly would not have "suffered any concrete harm," *id.* at 24, if instead of inquiring about the availability of apartments in the defendant's complex, he *had simply stayed home*. After all, it was undisputed that he had no "intention of buying or renting a home." *Havens Realty*, 455 U.S. at 374. Under Appellant's theory, the availability of an option that would have avoided any cognizable harm would have deprived the "tester" plaintiff of standing. But this Court expressly rejected that approach, holding instead that "the Art. III requirement of injury in fact is satisfied." *Id.*

More generally, Appellant's argument that a plaintiff must show the absence of any injury-free, law-abiding alternative would effectively make a plaintiff's standing to bring a *post-enforcement* challenge contingent on his ability to *also* demonstrate *pre-enforcement* standing. While many of this Court's precedents deal with the "recurring issue" of "when the threatened enforcement of a law creates an Article III injury," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), it has never been doubted that a plaintiff who has *actually been penalized by the application of the law* has standing to challenge it.

Yet under Appellant's approach, such a plaintiff would *also* have to show that had he "avoid[ed] that injury" by refraining from the proscribed conduct, he would nonetheless have been subject "to a different harm" that would *also* have given him standing, FEC

Br. 24—*i.e.*, that he could have brought a pre-enforcement challenge. Appellees are not aware of a single case that has required a plaintiff already injured by the application of a law to make such a showing.

When the basic flaw in Appellant's approach is seen, its specific arguments fall apart. Appellees are complaining of a specific, $10,000 injury-in-fact they have *actually suffered*, not a generalized interest in "seeing that the law is obeyed," *FEC v. Akins*, 524 U.S. 11, 24 (1998), or "some day" intentions that do not show any " 'actual or imminent' injury," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Since plaintiffs need not negate the possibility of any "injury-free" law-abiding alternative course of action, it is utterly irrelevant that Appellees could have instead chosen to *avoid* any financial injury by repaying Cruz's loan in compliance with the challenged limits.

Finally, even if this Court's precedent did demand such a showing, the record in this case readily satisfies it. Given that the Committee ended the 2018 election with a $337,748 shortfall, J.A. 218, if it *had* chosen to repay $10,000 or more in pre-election contributions to Cruz within 20 days, that would have entailed forgoing, or at least delaying, by a like amount, the payment of specific vendors and other creditors that engaged in campaign speech on its behalf. Appellant responds that there could have been no injury because "sufficient [pre-election] funds for repaying the $10,000 were in the committee's possession" and were ultimately "used to repay Senator Cruz $250,000." FEC Br. 25. That argument assumes (incorrectly, as explained above) that the $250,000 came from pre-election funds; and in any event, it simply *ignores* the harm imposed by the *delay* in repaying other creditors that would have been entailed by putting Cruz at the front of the creditor queue. *See* J.A. 137.

II. The District Court Correctly Held that the Loan-Repayment Limit Is Unconstitutional.

A. Because the Loan-Repayment Limit Burdens Core Political Speech, It Is Subject to Strict Scrutiny.

Section 304 intrudes deeply on the rights of candidates and their campaign committees to make constitutionally protected decisions about when and how much to speak during an election. During the heat of a campaign, a candidate may determine that she must give or loan her own money to her campaign to fund additional speech. And in the critical days before an election, a campaign's creditors are in an especially precarious position, since any debts they are owed as of election night are inherently subject to a risk of default. Section 304 intensifies and distorts these inherent risks, deliberately curbing the funding, and thus the speech, of candidates, their campaigns, and their contributors.

Appellant *concedes* that the loan-repayment limit imposes *some* "burdens on political speech," but it downplays these burdens as "minimal" and asks for the application of "at most … 'closely drawn' scrutiny." FEC Br. 32. Although Section 304 is doomed under any heightened standard of review, *see infra*, pp. 46-55, strict scrutiny is required.

1. As this Court has repeatedly made clear, because "the First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy," any governmental burden placed "on personal expenditures by a candidate in furtherance of his own candidacy" may be upheld only if it satisfies the strictest judicial scrutiny. *Buckley*, 424 U.S. at 53, 54.

A candidate who makes a loan to his campaign is exercising this core First Amendment freedom. While lending money to support one's own candidacy is different in some respects from spending personal funds outright, it is nonetheless the conveyance of a "[ ]thing of value," so it plainly qualifies as an "expenditure." 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.110. In fact, both BCRA and Defendants' implementing regulations *explicitly define* "expenditure" to *include loans*. 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a) & (b); *see also Anderson*, 356 F.3d at 673. Accordingly, under Congress's and the FEC's own definitions, not to mention common sense, a candidate who lends money to his own campaign is exercising his core First Amendment right "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley*, 424 U.S. at 52.

Section 304 imposes a direct and significant burden on the exercise of this fundamental First

Amendment right. By significantly limiting the sources of funding that committees can use to repay candidate loans, the $250,000 cap necessarily increases the risk that these loans will not be repaid in full, or perhaps at all. As Appellant itself explained before the district court, when Section 304 applies, "a candidate deciding to loan his or her campaign money in advance of the election [will] not be able to accurately determine the likelihood he or she might be repaid." J.A. 33. For a candidate who wishes to spend more than $250,000 on behalf of his own election but can afford to do so only if he is reasonably assured of repayment after election day, the loan-repayment limit, by design and inevitable effect, will deter the candidate from making the expenditure at all.

True, Section 304 does not directly "prohibit[ ] candidate loans [or] restrict[ ] the size of such loans." FEC Br. 29; *see also* CAC Br. 4. But as this Court's decision in *Davis* makes clear, it is far too late in the day to argue that the Government is free to burden the right to spend money on speech so long as it refrains from *directly capping* those expenditures. 554 U.S. at 738-40 (applying strict scrutiny to law that burdened, but did not cap, candidate spending); *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 737, 740, 742 (2011) (same).

Two of Appellant's *amici* attempt to distinguish *Davis* on its facts, contending that Section 304 does not "penalize[e] the political speech of candidates and others by granting a direct competitive advantage to their opponents." Brennan Br. 10; *see also* CAC Br. 21-

22. This Court in *Bennett* explicitly rejected a precisely parallel argument:

> The State correctly points out that our decision in *Davis* focused on the asymmetrical contribution limits imposed by the Millionaire's Amendment. But that is not because—as the State asserts—the reach of that opinion is limited to asymmetrical contribution limits. It is because that was the particular burden on candidate speech we faced in *Davis*.

564 U.S. at 740 (citations omitted).

Appellant, for its part, tries to diminish the "burden imposed by the loan-repayment limit" through an analogy to "contribution limits," which it says could also have a "deterrent effect on candidate lending" by "reduc[ing] the amount of money that a campaign can amass for … repaying loans." FEC Br. 31. There is nothing to this. *Buckley* subjected FECA's generic contribution limits to lesser "closely drawn" scrutiny because it concluded that they would have no "dramatic adverse effect on the funding of campaigns." 424 U.S. at 21. But *Davis* shows that where—as here—a contribution limit imposes a "special and potentially significant burden" on a candidate's "First Amendment right to spend his own money for campaign speech," strict scrutiny applies. 554 U.S. at 738, 739. And because Section 304's special limit is layered *on top* of the generic contribution limits already in place, the proper comparison is not, as Appellant imagines, between one limit and the other—it is between the base contribution limits standing alone and those limits *plus* Section 304's special limit on loan-repayment contributions.

Appellant's attempt to defend the loan-repayment limit as "akin to a time, place, and manner regulation" fails for similar reasons. FEC Br. 28. This Court has upheld such regulations only where they "are justified without reference to the content of the regulated speech," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Because Section 304 imposes a "special and potentially significant burden" on a candidate's political speech, *Davis*, 554 U.S. at 739, it by definition is content-based and plainly falls outside the "time, place, and manner" category.

Finally, Appellant argues that as a *factual* matter, Section 304 "has not appreciably deterred candidate lending." FEC Br. 30. That argument, even if true, is irrelevant, since the burden imposed on candidate spending by the loan-repayment limit is plain on its face as a matter of law. That is the clear holding of *Bennett*, which, yet again, squarely rejected this exact approach:

> [T]he burden imposed by the [challenged] provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups.... As in *Davis,* we do not need empirical evidence to determine that the law at issue is burdensome. See 554 U.S., at 738-

> 40 (requiring no evidence of a burden whatsoever).

564 U.S. at 745-46 (citations and quotation marks omitted).

In any event, Appellant is also wrong on the facts. As the district court explained, "since the enactment of BCRA and the loan-repayment limit, there is a clear clustering of loans right at the $250,000 threshold." J.S.App. 14a-15a; *see also* J.A. 310. Accordingly, the fact that "the great majority of candidate loans are for less than $250,000," FEC Br. 30, far from "underscore[ing] the modesty of the burden imposed," *id.* at 29, *conclusively demonstrates it*; *see also* J.S.App. 15a (showing that proportion of greater-than-$250,000 candidate loans has remained stable even though "spending on Senate and House campaigns has more than doubled" since the enactment of BCRA).

2. In addition to candidates, the loan-repayment limit also burdens the rights of committees and contributors. By limiting a committee's ability to repay candidate loans with post-election funds, the limit forces it to choose between using its limited cash on hand to: (1) repay the over-$250,000 balance of candidate loans (thereby foregoing, or at least delaying, funding First Amendment expression), or (2) repay other vendors (thereby *deterring* the candidate from loaning money in the future). And the loan-repayment limit also burdens the rights of contributors, by effectively creating a ceiling on overall post-election

contributions. *See* 11 C.F.R. § 110.1(b)(3)(ii)(C). At a minimum, these burdens necessitate *Buckley*'s "closely drawn" scrutiny. 424 U.S. at 25.

3. Finally, Appellant argues that "[a]s applied in this case," the loan-repayment limit "imposes no burden at all on [political] speech." FEC Br. 27. That claim is irrelevant even if true, given the settled doctrine allowing facial overbreadth challenges in the First Amendment context, even by a plaintiff whose "own rights of free expression" are not violated. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 613 (1973).

But the claim is not true. It is undisputed that the Committee ended the election with $337,748 more in debts for campaign speech than its cash-on-hand, and that in the weeks following the election, it repaid other campaign creditors but not the $260,000 owed to Cruz. J.A. 285, 286. As an economic matter, then, there can be no question that Cruz's loans were "used … to fund speech." FEC Br. 31. And Section 304 (and the 20-day rule) barred the Committee from repaying $10,000 of Cruz's loans with any post-election contributions. Appellant again trots out its arguments about the motivation behind the loan, *id.* at 31-32, but as with standing, a plaintiff's subjective motivation is irrelevant to the merits of his constitutional challenge. *See Pierson v. Ray*, 386 U.S. 547, 558 (1967).

Section 304 is thus subject to strict scrutiny.

B. The Loan-Repayment Limit Fails Even "Closely-Drawn" Scrutiny Because It Does Not Further any Anti-Corruption Interest.

Even under "closely-drawn" scrutiny—which Appellant effectively concedes applies, FEC Br. 33—the district court correctly held that Section 304 must fall.

1. Section 304 was not *designed* as an anti-corruption measure, so if it *did* serve that interest, it would be pure happenstance. Instead, as noted above, *supra*, pp. 6-7, it was *actually* designed to "level the playing field" between competing candidates of different wealth, 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison), and to "protect[ ] incumbents," *id.* at S2544 (statement of Sen. Daschle). Both of these purposes are plainly illegitimate. *See Bennett*, 564 U.S. at 749-50; *Randall v. Sorrell*, 548 U.S. 230, 248, 249 (2006) (opinion of Breyer, J). Appellant cites three statements that "discussed the dangers" of post-election loan repayments, FEC Br. 38, but there is no indication that any anti-corruption motivation was widely shared, or that it was anything other than second-fiddle to the provision's virtuoso First Violin: Congress's desire to level the playing field. *See* J.S.App. 26a.

2. Moreover, Section 304 *cannot* be justified as an anti-corruption measure, because the federal $2,900 contribution limit *already* serves to adequately address any corruption risk. The only effect of striking down the loan-repayment limit would be to place *post-*

election contributions on equal footing with *pre-election* contributions—such that both sets of contributions must still total no more than $2,900 per contributor. That eliminates any anti-corruption justification under this Court's decision in *McCutcheon v. FEC*, 572 U.S. 185 (2014).

The plaintiffs in *McCutcheon* challenged FECA's "aggregate" contribution limits, which capped the amount any individual could "contribute in total to all candidates or committees"—even though each contribution within the total could not exceed $2,900. *Id.* at 192 (plurality). The Government defended the aggregate limits as an additional layer of protection against the same risk of corruption targeted by the base limits, but this Court rejected this "prophylaxis-upon-prophylaxis approach." *Id.* at 221. "Congress's selection of a [$2,900] base limit indicates its belief that contributions of that amount or less *do not create a cognizable risk of corruption*." *Id.* at 209, 210 (emphasis added). And "[i]f there is no corruption concern" in donating the maximum allowable amount to each candidate until the aggregate limit is met, there can be no anti-corruption interest in preventing any *further* donations that *also* comply with the limit selected by Congress—donations that cannot be "regarded as corruptible" as a matter of law. *Id.*; *see also Davis*, 554 U.S. at 741; *Bennett*, 564 U.S. at 751-52.

So too here. Section 304's "prophylaxis-upon-prophylaxis" limit prevents post-election contributions "of *any* amount" that go to repay candidate loans in excess of $250,000—contributions that likewise cannot be regarded as corrupting as a matter of law. *McCutcheon*, 572 U.S. at 210, 221 (plurality); *see also Anderson*, 356 F.3d at 673.

3. Appellant nonetheless argues that the loan repayments restricted by Section 304 pose "a special risk of corruption," primarily because a contribution used to repay a candidate loan "goes into the candidate's pocket," thereby directly "add[ing] to [his] personal assets" funds that "can accordingly be used for personal purposes" such as "paying off mortgages and buying clothes." FEC Br. 33-34, 40. Because such loan repayments "predictably result in personal financial gain for a candidate," they are, Appellant says, akin to "a gift made directly to the candidate." *id.* at 35, 42. *See also* CLC Br. 4-6; CAC Br. 18-19.

This line of argument depends on viewing the two halves of a credit transaction—the making and the repaying of the loan—entirely in isolation, as though they were independent and unrelated. One need not have an advanced degree in economics, or accounting, to see the patent flaw in this analysis. Even a child knows the difference between lending a toy to a playmate and gifting the toy, and when the loaned toy is returned, the child knows that he has not received a gift and that his "personal assets" have not increased.

Likewise, when a candidate loans money to his committee, that money "goes [out of] the candidate's pocket," where it could have been used by the candidate for "personal purposes," and into the committee's pocket, where it will be used to communicate the candidate's message to the voters. And it is of course tautologically true that the contributions used by the committee to repay the loan "go[ ] into the candidate's pocket," exactly where the money came from and where it can, once again, be used for the candidate's personal purposes. But the loan repayment is not a gift, it does not "result in personal financial gain for [the] candidate," and it does not "add to [his] personal assets." FEC Br. 33, 42. Every homeowner understands that when they make their monthly mortgage payment they are not giving the bank a gift that adds to its "personal assets."

Appellant's secondary reason for treating the loan-repayment contributions limited by Section 304 as specially "concerning"—that "they are made after the election," *id.* at 35—fares no better. Appellant maintains that "[a] post-election contributor … usually will know whether the recipient of the contribution has prevailed in the election," supposedly increasing the risk that the contributor will seek "official favors" or "will contribute out of perceived compulsion." *Id.* at 35, 36. Indeed, Appellant claims that a "post-election contribution serves none" of the "main *legitimate* rationales for donating money to campaigns." *Id.* at 36. By Appellant's lights, then, *any* post-election contribution poses a "special risk of corruption." *Id.* at 40. Yet federal law generally *allows* those contributions, up to $2,900, 52 U.S.C. § 30116(a)(1)(A); *see* 11 C.F.R. § 110.1(b)(3)(i), so this supposedly heightened risk of corruption *cannot* justify Section 304's limit on a small, arbitrary subset of them.

Even more fundamentally, as the district court explained, Appellant's argument would also doom *all contributions, pre- or post-election, to incumbent officeholders*. J.S.App. 33a. There is no dispute that any given contributor could have given Cruz $2,800 (the prevailing limit then) on November 7, 2018, if he had designated it for the *upcoming* election cycle. The notion that the same contribution would suddenly become corrupting if it were instead designated for *the 2018* election is, to put it charitably, not reasonable.

4. In addition to these fatal analytical problems, the district court correctly found that Appellant has failed to provide "any evidence" that post-election contributions used to repay candidate loans have given rise to any "actual corruption." J.S.App. 25a. Appellant puts forward two types of supposed evidence, but neither comes close to satisfying its burden to justify Section 304.

a. Appellant points to a handful of anecdotes that supposedly "illustrate" the corruption risk of post-election loan repayments. FEC Br. 37. But as the district court found, they all "involve only concerns that candidates will be too responsive to the influence of special interests or concerns about contributions unrelated to the repayment of candidate loans." J.S.App. 23a-24a. For instance, the fact that a House member raised contributions in 1998 to pay off a candidate loan from "fundraisers hosted by a lobbying firm," FEC Br. 37, shows, at most, that some contributors donate money (whether pre- or post-election) not only to support the candidate's policy agenda, but also to gain "influence or access"—not the type of dollars-for-vote corruption that the First Amendment allows the Government to target. *McCutcheon*, 572 U.S. at 208 (plurality).

Appellant's state election examples get it no further. It mentions debt-retirement contributions to "two governors" in Kentucky by donors seeking government benefits, FEC Br. 37, but again, the fact that contributors gave money in the hopes of obtaining "access to elected officials does not mean that these officials are corrupt," absent some evidence of an actual or apparent *quid pro quo*. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010). Appellant also highlights debt-retirement contributions in Ohio to an attorney general who "routed 225 state contracts" to the donors, FEC Br. 37, but it does not mention the evidence in the record showing (1) that the previous attorney general similarly favored donors for contracts (even though he apparently made no loans to his campaign), and (2) that the donors gave far more "to build up a war chest for [the attorney general's] 2014 re-election bid" and to support the judicial campaign of his son—contributions that have nothing to do with the repayment of candidate loans. J.A. 338.

Finally, Appellant cites "make up" contributions by donors to losing candidates who subsequently give to the winner, FEC Br. 37-38, but it makes no claim that such contributions are related to the specific conduct limited by Section 304—the use of post-election contributions *to repay candidate loans*. And again, such contributions show, at most, contributors seeking "influence over or access to elected officials"—something that "the Government may not seek to limit." *McCutcheon*, 572 U.S. at 208 (plurality) (quotation marks omitted).

Appellant's failure to identify any meaningful evidence of *quid quo pro* corruption is highly significant. As the district court noted, "many states impose no restriction on using post-election contributions to repay candidate loans"—by Appellees' count (and that of the Campaign Legal Center, Br. 17-18), 40 States plus the District of Columbia—yet "the Commission fails to identify any problems with quid pro quo corruption or its appearance in these states." J.S.App. 23a.

b. Appellant also relies on two pieces of indirect evidence. First, it cites a "study of campaign debt and voting patterns" purportedly showing "that indebted politicians were significantly more likely than debt-free counterparts to switch their votes if they received contributions from special interests," and that this behavior was more stark before the enactment of BCRA. FEC Br. 38-39 (alterations and quotation marks omitted). But as the district court found, the unpublished, non-peer-reviewed paper Appellant cites "does not distinguish between voting pattern changes as a consequence of donor influence or access and voting pattern changes as part of quid pro quo corruption." J.S.App. 25a.

What is more, the paper *does not even purport* to analyze the sole question that is relevant in this litigation: whether post-election contributions used to repay candidate loans in excess of $250,000 pose some heightened risk of corruption. To the contrary, the paper (1) is *not* limited to *candidate* loans; (2) is *not* limited to *post-election* contributions; and (3) *does not* distinguish between the first $250,000 of candidate loan-repayment contributions and the two-hundred, fifty-thousand-and-first dollar. J.A. 330-33.

Appellant's second piece of indirect evidence—an online poll that "was conducted at the FEC's behest for this litigation," J.S.App. 27a—also falls risibly short. Appellant says its poll "showed that 81% of respondents" thought it likely "that a person who donates money to a campaign after the election expects a political favor in return." FEC Br. 39. But Appellant's poll misleadingly asked how respondents would feel "[i]f there were *no limit* on how much money a federal campaign could raise after Election Day to repay a candidate," J.A. 354, without mentioning that base contribution limits *still apply*. Moreover, the survey failed to ask about post-election fundraising for the repayment of *other* types of campaign debt; and it also failed to "define the term 'political favor,' so the poll's responses are not evidence that the public associates such contributions with quid pro quo corruption, which Congress may regulate, or simply increased influence and access, which Congress may not." J.S.App. 28a. Indeed, the pollster who supervised the poll admitted that *she herself understood the phrase "political favor" to include access*. J.A. 355.

5. Unable to muster any meaningful evidence that Section 304 actually addresses a risk of corruption, Appellant asks the Court to defer to Congress's supposed "legislative judgment" to that effect. FEC Br. 39. But even if such a "legislative judgment" actually supported Section 304—and it did not, *see supra*, pp. 6-7, 46—Appellant's plea for deference should be declined. Section 304 must be subjected to heightened scrutiny, and "[t]he whole point of strict scrutiny is to test the government's assertions," not defer to them. *South Bay United Pentecostal Church v. Newsom*, 592 U.S. ---, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., concurring).

C. The Loan-Repayment Limit Is Not Sufficiently Tailored.

Even if the loan-repayment limit *did* somehow further an anti-corruption interest, it is not "narrowly tailored to achieve [that] objective." *McCutcheon*, 572 U.S. at 218. The premise of Appellant's justifications for the limit—that a post-election donor knows "that the recipient will be in a position to do him official favors," FEC Br. 35—obviously has *no* purchase with respect to *losing* candidates. J.S.App. 32a; *see also Anderson*, 356 F.3d at 673. Appellant argues that Appellees cannot raise this complaint because Cruz "won his election," FEC Br. 45, but as noted, a plaintiff may bring a First Amendment challenge to a law that is "substantially overbroad" on its face whether or not "their own rights of free expression are violated." *Broadrick*, 413 U.S. at 612, 615. That standard is met here because there are far more losing candidates than winning ones, rendering Section 304's overbreadth substantial *even if* "post-election contributions are much more often made to winning candidates than to losing ones." FEC Br. 45.

Finally, as discussed repeatedly above, the loan-repayment limit is also dramatically *underinclusive*, given that post-election loan-repayment contributions are *indistinguishable* from many other types of pre- and post-election contributions that are subject only to general base-contribution limits. *See supra*, pp. 49-50. That underinclusiveness "raise[s] doubts about whether the law advances the interests invoked by the government," J.S.App. 32a, and it also dooms Section 304 under *McCutcheon*, by demonstrating that the specific post-election contributions it targets *do not* give rise to any special risk of *quid pro quo* corruption that is not addressed by the $2,900 limit on ordinary contributions. 572 U.S. at 210.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

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Respectfully submitted,

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