No. 21-12

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

TED CRUZ FOR SENATE, *ET AL.*, APPELLEES.

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

BRIEF OF UNITED STATES SENATORS ROY BLUNT, BILL CASSIDY, KEVIN CRAMER, CINDY HYDE-SMITH, AND ROGER WICKER AS *AMICI CURIAE* SUPPORTING APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici curiae are United States Senators Roy Blunt, Bill Cassidy, Kevin Cramer, Cindy Hyde-Smith, and Roger Wicker.[1]

As fellow officeholders and candidates, *amici* share Appellees' interest in upholding the First Amendment rights of political candidates. *Amici*'s campaigns are directly burdened by Section 304 of the Bipartisan Campaign Reform Act's (BCRA) loan-repayment limits at issue here. 52 U.S.C. § 30116(j). Like Senator Cruz, *amici* can make personal loans to their campaigns for office. Moreover, *amici* have experience running for elections when they were not incumbents, so *amici* are well positioned to also discuss how this law particularly disadvantages candidates who are either new to the political field or challenging incumbents.

[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

BCRA's Section 304 prohibits campaigns from repaying a candidate's personal loans over $250,000 with post-election contributions. This limit places a significant restriction on one of the most important sources for campaign funding. Section 304 therefore unconstitutionally burdens the First Amendment rights of candidates, campaigns, and contributors. This law is not properly tailored to furthering the Federal Election Commission's (FEC) stated goal of preventing quid pro quo corruption and its appearance. And Section 304 particularly disadvantages new political candidates and those challenging incumbents.

I. This case presents a straightforward Article III case or controversy. Senator Cruz loaned his campaign more than $250,000; his campaign did not repay Senator Cruz that loan amount above $250,000 from pre-election contributions; and Section 304 unconstitutionally prohibits the campaign from repaying this loan with post-election contributions.

Regardless, standing is plain under the First Amendment's overbreadth doctrine, which Senator Cruz has also invoked. The overbreadth doctrine allows free-speech litigants to raise the interests of others not before the court and prevents the chilling of First Amendment rights. Senator Cruz therefore also has standing to vindicate *amici*'s interests in conducting their campaigns unencumbered by Section 304's unconstitutional restriction.

II. Section 304 is unconstitutional on the merits.

A. Candidates frequently loan funds to their campaigns, and candidate loans have clustered at Section 304's $250,000 limit. This confirms that Section 304 imposes a tangible burden on political speech.

Debt is the second largest source of campaign funds, after only individual contributions. And candidate loans,

in particular, comprise the greatest share of debt financing for campaigns.

After Section 304 took effect, candidate loans have clustered around the $250,000 limit. BCRA's Section 304 "had a material impact on the propensity of many politicians to make large loans," and there has been a "clear clustering of loans right at the $250,000 threshold in the post-BCRA period." D.D.C. Dkt. No. 65-1, Alexei V. Ovtchinnikov & Philip Valta, *Debt in Political Campaigns*, at 26 (2020). This is no coincidence. By increasing the risk that a candidate loan will not be repaid, this law has discouraged candidate loans beyond Section 304's limit.

B. Section 304's loan-repayment limit unconstitutionally burdens the First Amendment rights of candidates and campaigns. Electoral political speech is at the core of the First Amendment. And laws burdening free speech are subject to heightened First Amendment scrutiny, even if the laws do not outright prohibit speech. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 738-39 (2008). Section 304's artificial restriction on candidate loans hinders a campaign's robust and free expression—both by limiting the volume of campaign speech as well as by influencing how and when campaigns speak right before elections.

C. Section 304 is not properly tailored to furthering a governmental interest in preventing quid pro quo corruption or its appearance.

Section 304 is another unconstitutional "prophylaxis-upon-prophylaxis approach" to regulating campaign finance. *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 479 (2007) (controlling op. of Roberts, C.J.)). Three levels of laws already prevent quid pro quo corruption and its appearance: bribery laws, contribution limits, and contribution disclosures. Section 304's arbitrary loan-repayment

limit is yet a fourth level of prophylaxis that does not justify a burden on First Amendment rights.

III. Finally, Section 304's loan-repayment limit especially harms new political candidates and challengers who rely more heavily on candidate loans than incumbents do. *Amici* are all incumbents, but they all ran for office at some point as new political candidates or challengers. They are keenly aware of the difficulties for new candidates and challengers to obtain campaign financing. Candidate loans help alleviate this barrier to entry, but Section 304 infringes their ability to make candidate loans.

ARGUMENT

I. Appellees Have Standing Under Both Traditional Principles And The First Amendment's Overbreadth Doctrine.

Appellees present an Article III case or controversy under traditional standing principles. Appellees' Br. 11-39. Section 304 currently prohibits Senator Cruz's campaign from repaying a loan made by Senator Cruz. But for Section 304, the campaign could repay Senator Cruz now. This ongoing financial injury is thus caused by—and can be redressed by enjoining—Section 304.

Moreover, Appellees have standing under the First Amendment's overbreadth doctrine, which Senator Cruz invokes. *See* Appellees' Br. 45, 54-55 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 613, 615 (1973)). The "overbreadth" doctrine recognizes a "departure from traditional rules of standing in the First Amendment area," allowing litigants to challenge a statute and prevent the chilling of others' free-speech rights. *Broadrick*, 413 U.S. at 612-13; *see Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2387 (2021). "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial

prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

Amici provide a perfect example of others whose free speech is impeded by Section 304. The overbreadth doctrine thus permits Senator Cruz to challenge Section 304 and prevent this unconstitutional provision from chilling *amici*'s free-speech rights.

II. Section 304's Loan-Repayment Limit Burdens The Right Of Candidates To Finance Campaign Speech Through Loans And Does Not Advance The Government's Anti-Corruption Interest.

Section 304's loan-repayment limit hinders a candidate's ability to finance campaign speech through loans, thus burdening the First Amendment rights of candidates and campaigns. Debt is the second largest source of campaign funds in U.S. political campaigns, and candidate loans cluster around Section 304's $250,000 limit. This practical burden on First Amendment rights cannot survive whatever level of heightened First Amendment scrutiny applies. Three levels of prophylaxis (bribery laws, contribution caps, and contribution disclosures) already prevent quid pro quo corruption and its appearance. Section 304 is a wholly unnecessary infringement on political speech.

A. Candidates frequently loan funds to their campaigns for political speech, and the amount of these candidate loans has clustered around Section 304's $250,000 limit.

As a practical matter, candidates frequently loan their campaigns funds, and the amount of these loans has clustered around Section 304's $250,000 limit. This confirms that Section 304 has a palpable burden on

candidates' and campaigns' First Amendment rights. The FEC incorrectly minimalizes both the importance of candidate loans in campaign spending, as well as the tangible impact Section 304's limit has had. *See* FEC Br. 27-32.

1. Debt is the second largest source of political campaign funds in the United States, after only total individual direct contributions. *See* Ovtchinnikov & Valta, *Debt in Political Campaigns*, at 11-12; *see also* Alexei V. Ovtchinnikov & Philip Valta, *Self-Funding of Political Campaigns*, HEC Paris Research Paper No. FIN-2016-1165 (2021), https://bit.ly/3E03gCD.

Debt "significantly exceed[s]" contributions from corporate, labor, and trade Political Action Committees (PACs); trade, membership, and health organizations' contributions; independent expenditures; and labor contributions. Ovtchinnikov & Valta, *Debt in Political Campaigns*, at 4, 11-12. On average, campaigns raise $50,000 more from personal and outside loans than they do from corporate PACs. *Id.* at 12. Nearly half of all campaigns rely on some form of debt financing. *Id.* Campaigns borrow almost one out of every three dollars of total raised funds. *Id.*

Candidate personal loans comprise the largest source of campaign debt. *Id.* One study found that, from 1983 to 2018, candidates made "personal loans" to their campaigns totaling "$2.28 billion." Ovtchinnikov & Valta, *Self-Funding of Political Campaigns*, at 8. These statistics illustrate that debt, and candidate loans in particular, finance a huge part of the national conversation about elections. Despite the FEC's tenuous assertion that Section 304's burden is "modest," FEC Br. 27, the scope of affected funding is vast.

2. Candidate personal loans to their campaigns have clustered around Section 304's $250,000 cap. This

confirms Section 304 has a tangible burden on candidates' and campaigns' free-speech rights to fund political speech.

BCRA's Section 304 "had a material impact on the propensity of many politicians to make large loans," and there has been a "clear clustering of loans right at the $250,000 threshold in the post-BCRA period." Ovtchinnikov & Valta, *Debt in Political Campaigns*, at 26. Before BCRA, there was no clustering around the $250,000 limit, or around any other amount for that matter. *Id.* "BCRA created a binding constraint for many politicians in the supply of large loans." *Id.* at 27.

In other words, Section 304's restriction significantly decreases the likelihood that a candidate will be repaid for any loan made above $250,000. Section 304 so strongly disincentivizes loans outside its $250,000 limit that the law has altered candidate spending.

The FEC examines the wrong loans when asserting that most candidate loans are under $250,000. *See* FEC Br. 30. The proper inquiry would examine how many loans are made precisely at Section 304's $250,000 limit versus how many *exceed* that amount. The FEC has no other explanation for the "clear clustering of loans right at the $250,000 threshold in the post-BCRA period"—and certainly no explanation that satisfies heightened First Amendment scrutiny. Ovtchinnikov & Valta, *Debt in Political Campaigns*, at 26.

B. Section 304's loan-repayment limit unconstitutionally burdens candidates' and campaigns' First Amendment rights.

Section 304 burdens the rights of candidates and campaigns to fund electoral political speech, which strikes at the core of the First Amendment. This Court's precedents—both in and outside the campaign-finance

context—make clear that heightened First Amendment scrutiny must be satisfied for laws that burden free-speech rights even if those laws do not outright prohibit speech.

Campaign financing for electoral political speech is "an area of the most fundamental First Amendment activities." *McCutcheon*, 572 U.S. at 196 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)). "The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

As in previous BCRA challenges, while Section 304 "does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right." *Davis*, 554 U.S. at 738-39. Here, the penalty extracted is a significant risk that a candidate loan will not be repaid after the election if a candidate chooses to loan his campaign more than $250,000. Just as in *Davis*, some candidates might choose to exceed the limit anyway, but "they must shoulder a . . . burden if they make that choice." *Id.* at 739; *see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 737 (2011). The limit therefore penalizes candidates who choose to exercise their right to robust expression through candidate loans, while leaving unaffected candidates who seek to fund campaign speech through other means.

Consequently, First Amendment heightened scrutiny applies to laws burdening free-speech rights even if these laws do not outright prohibit speech. This is not a special campaign-finance doctrine created by *Davis*. Rather, this Court has repeatedly recognized this across

many different free-speech contexts. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 556 (2011) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575 (1983)). This is why the "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000); *accord, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988).

The FEC downplays Section 304's loan-repayment limit by asserting that it "neither prohibits candidate loans nor restricts the size of such loans." FEC Br. 29. But Section 304 still burdens First Amendment rights, so heightened First Amendment scrutiny applies. *See, e.g.*, *Davis*, 554 U.S. at 738-39; *Sorrell*, 564 U.S. at 556. The First Amendment defect is not cured just because a candidate can make a loan greater than $250,000, as the candidate still shoulders the substantial risk that the loan will not be repaid because of Section 304's restriction. And as discussed above, Section 304 has caused a clustering of candidate loans at its $250,000 limit. So Section 304 has burdened political speech, even though the law is not an outright prohibition.

This limit interferes with the "'open marketplace' of ideas protected by the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience

reached." *Buckley*, 424 U.S. at 19. Here, the loan-repayment limit places an artificial ceiling on a particular exercise of speech.

Aside from affecting the total volume of candidate loans, the loan-repayment limit also necessarily affects when and how campaigns speak. Since any unpaid amount of a candidate's loan becomes a candidate's contribution after an election, candidates could alter their spending leading up to the election. For example, right before election day, a candidate might choose to retain more cash on hand to repay outstanding candidate loans, rather than spend more on campaign activities. Section 304's repayment limit makes candidates dependent on the cash on hand at the end of the campaign and might discourage them from spending their campaign funds elsewhere. *See* Ovtchinnikov & Valta, *Debt in Political Campaign*, at 9, 26. And typically, three-quarters of the political campaigns that borrow funds have outstanding debt at the end of the campaign. *Id.* at 12. Thus, Section 304 tangibly alters a candidate's spending decisions.

C. Section 304's loan-repayment limit is not properly tailored to furthering a governmental interest in preventing quid pro quo corruption and its appearance.

Section 304 fails any level of heightened First Amendment scrutiny. Appellees' Br. 39-55. Curbing the use of post-election funds to repay candidate loans is not properly tailored to furthering a governmental interest in preventing quid pro quo corruption and its appearance.

Section 304 is yet another example of an unconstitutional "prophylaxis-upon-prophylaxis approach" to regulating campaign finance. *McCutcheon*, 572 U.S. at 221 (quoting *Wis. Right to Life*, 551 U.S. at 479 (controlling op. of Roberts, C.J.)). Congress has already enacted

bribery laws criminalizing quid pro quo arrangements among public officials and contributors. *See Citizens United*, 558 U.S. at 356-57 (citing 18 U.S.C. § 201). Congress has further enacted a monetary cap on an individual's direct contributions to campaigns, which this Court upheld in *Buckley*, 424 U.S. at 23-29. Congress has gone even further, requiring the public disclosure of direct contributions exceeding certain monetary thresholds—which this Court also upheld in *Buckley*. *Id.* at 66-68, 79, 83.

There is no reason a fourth level of prophylaxis is needed to address whatever miniscule, marginal amount of potential for quid pro quo corruption might arise from campaigns using post-election contributions to repay candidate loans. Post-election campaign contributions are still subject to the individual contribution limit—which is currently $2,900, *see* Appellees' Br. 5. And any sizeable contributions still must be publicly disclosed. These limits are already designed to prevent the "few if any" contributions that might involve quid pro quo arrangements. *McCutcheon*, 572 U.S. at 221 (quoting *Citizens United*, 558 U.S. at 357). Here, Section 304's loan-repayment limit needlessly hinders the rights of candidates, and "if a law that restricts political speech does not avoid unnecessary abridgement of First Amendment rights, it cannot survive rigorous review." *Id.* at 218 (internal quotation marks and citation omitted).

There are various other constitutional infirmities with Section 304. For example, the FEC fails to explain why a campaign can repay a candidate loan with the first 86 individual post-election contributions at the $2,900 cap (that is, 86 contributions nearly totaling Section 304's $250,000 limit)—but receipt of that 87th or additional contributions suddenly renders these $2,900 contributions more susceptible to quid pro quo corruption.

Moreover, Section 304 applies equally to election winners and losers. So the cap applies even to candidates who lose their races and therefore could not possibly offer an official act in a quid pro quo exchange.

The FEC argues that post-election contributions are more likely to result in quid pro quo corruption because they "go[] into a candidate's pocket." FEC Br. 33. But when looking at the entire transaction, the repayment of previously loaned money does not result in a candidate obtaining more money than he had before making the loan. Moreover, the FEC's justification is based on speculation that the only motivation for a post-election contribution is an impermissible one and that the timing makes an otherwise permissible donation suspect. The FEC's "mere conjecture" about a contribution's improper motive is inadequate "to carry [its] First Amendment burden." *McCutcheon*, 572 U.S. at 210 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)). The FEC's conjectures fail to account for the existing three levels of campaign finance laws, discussed above, that already protect against quid pro quo corruption. Put bluntly, it is incredibly unlikely that a candidate will sell "the exercise of an officeholder's official duties" for a mere $2,900, especially when bribery and disclosure laws exist. *Id.* at 208.

Section 304's limit "intrude[s] without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'" *Id.* at 227 (quoting *Buckley*, 424 U.S. at 14). There is a "substantial mismatch" between Section 304 and an interest in preventing quid pro quo corruption and its appearance. *Id.* at 199.

III. Section 304's Loan-Repayment Limit Particularly Disadvantages New Political Candidates and Challengers.

Section 304's loan-repayment limit burdens all covered political campaigns, but it particularly disadvantages new political candidates and challengers. *Amici* are incumbent officeholders, but they all at one point were new political candidates and challengers. So they are particularly well positioned to address the acute burden Section 304 imposes on new political candidates and challengers, who disproportionately rely on candidate loans. Limited access to outside campaign funds often initially hinders new political candidates and challengers, increasing their reliance on debt. Section 304's loan-repayment limit therefore raises barriers to entry for new political candidates.

Challengers and new candidates are usually not a known quantity to contributors at first—while incumbents' votes, speeches, and prior campaigns have already elucidated their positions. So these fresh political faces often need to jumpstart their own campaigns with debt financing. In fact, new candidates may "use debt strategically to signal their quality" to outsiders ranging from their opponents to voters to interest groups. Ovtchinnikov & Valta, *Debt in Political Campaigns*, at 9-10.

It is thus no surprise that challenger and open-race campaigns "are more dependent on debt financing compared to incumbent campaigns." *Id.* at 4. Incumbents generally are "significantly less dependent" on debt financing than their challenger and open-race candidate counterparts. *Id.* at 13. From 1983 to 2014, incumbents raised a total of "$118 million" in debt financing compared to a total of "$897 million" for challengers and another total "$897 million" for open-race campaigns. *Id.* And as

compared to incumbent campaigns, challenger and open-race campaigns are *five times* more likely to borrow funds from their own candidates. *Id.* New candidates and challengers who rely more on candidate loans are therefore particularly burdened by Section 304's loan-repayment limits.

"The First Amendment burden is especially great" for new candidates and challengers who do not have the same "ready access to alternative avenues" for funding their campaigns as incumbents do. *McCutcheon*, 572 U.S. at 205. Section 304 burdens new candidates and challengers in the early stages of their campaigns, and the law makes it harder for them to exercise their First Amendment rights as candidates.

* * *

In sum, Section 304's loan-repayment limit sets an arbitrary cap on candidate loans that may be repaid with post-election contributions. The limit has had a noticeable impact on campaign financing, as candidate loans cluster at Section 304's $250,000 limit. Section 304 burdens campaign speech, and it is not properly tailored to furthering a sufficient governmental interest. The Court therefore should hold that Section 304's loan-repayment limit violates the First Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 2021