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 THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF TED CRUZ FOR SENATE

J. Justin Riemer
Matthew Raymer
Republican National Committee
310 1st Street SE
Washington, DC 20003
(202) 863-8626

Michael E. Toner
Counsel of Record
Brandis L. Zehr
Stephen J. Obermeier
Andrew G. Woodson
Jeremy J. Broggi
Christopher White
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
MToner@wiley.law

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Counsel for Amicus Curiae

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INTRODUCTION[1]

The American electoral system lives up to its full promise only when all candidates are treated equally under the law. But in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress chose to deviate from this democratic cornerstone and openly deter individuals from self-financing challenges against incumbent officials.

In *Davis v. FEC*, 554 U.S. 724 (2008), this Court held unconstitutional two inter-related BCRA provisions that targeted individuals specifically for exercising their right to fund their own campaigns. A third BCRA provision, which prohibits self-funding candidates from repaying personal loans after an election beyond $250,000, is at issue here. The three-judge district court below correctly recognized that this type of arbitrary, onerous restriction cannot withstand First Amendment scrutiny, particularly without record evidence that candidate loan repayments lead to actual or apparent *quid pro quo* corruption. This Court should affirm that judgment and once again hold that Congress may not directly or indirectly impede the fundamental First Amendment right of candidates to spend personal funds on campaign speech.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the RNC or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Republican National Committee ("RNC") is a national political party committee and the national political organization of the Republican Party of the United States. The RNC represents the interests of Republican voters and candidates at all levels throughout the nation, and it engages in a wide range of party-building activities, including voter registration, persuasion, and turnout programs. As part of its mission, the RNC recruits and supports candidates at the local, state, and national levels. The RNC also raises and spends funds to support Republican candidates across the United States at all levels of government.

The RNC has both an acute interest in and first-hand knowledge of the impact of the candidate loan repayment limit and the politically expressive nature of campaign contributions made to candidates after their election. As a national political party committee, the RNC allocates its limited resources across races and states based on considerations that include the perceived candidate need for the investment and the expected impact of the investment. Where individual campaigns can effectively fund a program or effort on their own, the RNC is free to redirect resources from that race to other races around the country. When a candidate or campaign is unable or unwilling to adequately fund voter persuasion and turnout efforts – as in the case of a candidate who is reluctant to incur personal loans beyond the repayment maximum – the RNC is forced to increase its own investment in that race, resulting in fewer resources available to other races.

Nor are the RNC's interests limited to any one federal election cycle. As an ongoing political entity, the RNC's next election cycle begins the moment the previous one has been completed. Accordingly, the RNC does not ever cease its political fundraising operations. The days and weeks following each election offer voters a chance to donate to candidates, the RNC, or joint fundraising committees consisting of both the candidate committee and the RNC, to express their continued support for candidates who have recently won election to office or lost narrowly. These post-election contributions play a key role in seeding the efforts of both the RNC and candidates in future elections and demonstrating the amount of continued support a candidate may or may not have moving forward.

SUMMARY OF ARGUMENT

For nearly five decades, legislators have tried – either through direct spending limits or by erecting other thinly-veiled impediments – to inhibit self-financing candidates from running for public office. In *Davis*, this Court held unconstitutional certain BCRA provisions that authorized asymmetrical contribution limits on self-funding candidates, plus certain inter-related reporting requirements.

A third, contemporaneously-enacted BCRA provision makes it unlawful for a candidate to repay more than $250,000 in personal loans after an election. This broad restriction applies after both the primary and general elections, regardless of whether the candidate wins or loses, and only to indebtedness

arising out of a loan made by the candidate and not to debts to any other entity.[2]

Such a restriction obviously penalizes and burdens the self-financing candidates who, because they are prohibited from returning to the financial *status quo* after the election, either refrain from maximally funding their campaigns or forgo a run for public office altogether. But the law also hurts such candidates' contributors who, for a variety of legitimate reasons, might want to contribute toward the candidate's post-election debts up to the current limits of $2,900 for individuals or $5,000 for PACs. And the restriction impacts the First Amendment activities of the RNC and other groups too, as they must retool their political activities to account for candidates who refrain from spending additional dollars or running altogether.

In view of the restriction's detrimental impact on campaign speech, the Government bears a heavy burden to justify the law. The evidentiary record here, however, is functionally barren, and the

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[2] The full text of the provision reads as follows:

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

BCRA § 304 (codified at 52 U.S.C. § 30116(j)).

legislative history – replete with references to impermissible governmental interests such as leveling the playing field – serves as a millstone rather than an aid. And as to fit, the restriction is so underinclusive, overinclusive, and untethered to its purported interests that the Government's brief ends up clinging to BCRA's severability clause in a half-hearted attempt to save what it can.

In short, as the district court recognized, the loan repayment prohibition "runs afoul of the First Amendment" at every step of the constitutional analysis. This Court should affirm that conclusion.

ARGUMENT

I. The Loan Repayment Prohibition Places a Significant Burden on First Amendment Rights.

There is "no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion). Because that right necessarily includes running for office and contributing to a candidate's campaign, *see id.*, this Court has recognized that "[s]pending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001). And in solidarity with these principles, the First Amendment solemnly protects each citizen's "fundamental . . . right to spend personal funds for campaign speech." *Davis*, 554 U.S. at 738.

The loan repayment prohibition defies these core constitutional values. Not only does the prohibition inhibit the First Amendment activities of the candidates themselves – whose burdens are so self-evident that no "empirical evidence . . . of a burden whatsoever" is actually required, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 746 (2011) – but it also impedes the constitutional rights of political organizations like the RNC and the individual contributors who support the candidates of their choice. And as discussed *infra* at 13-14, 28-29, because the provision imposes these heavy burdens, courts must review any limitation under a high level of constitutional scrutiny.

A. The loan repayment prohibition intrudes into the candidate's decision-making and inhibits speech.

The "political speech of candidates is at the heart of the First Amendment." *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). "[N]o less than any other person," the candidate "has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (*per curiam*). Courts must, therefore, guard against laws that inhibit candidates' "unfettered opportunity to make their views known [to] the electorate." *Id.* at 52-53.

Instead of advancing these constitutional ideals, the loan repayment prohibition tramples upon them. In the initial phases of a campaign, traditional

candidates "need to build a base of support, and that includes fundraising." Niv Sultan, *Self-Funded Candidates Lose Big (Except When They Don't)*, OpenSecrets.org, Mar. 15, 2017, https://www.opensecrets.org/news/2017/03/self-funded-candidates/. But self-funding candidates can jump right to connecting with voters and skip "the difficult work of building that base of both popular and financial support. [They] can plow straight ahead and hire staff, pay for ads and open campaign offices." *Id.*; *see also Anderson v. Spear*, 356 F.3d 651, 673 (6th Cir. 2004) (recognizing that a candidate may need to "spend more early to raise name recognition, or to address an issue of public concern prior to contributions arriving").

Candidates who self-fund, however, "[u]sually . . . make loans . . . because they hope to get at least some of the money back through contributions if the campaign builds momentum." Monica Venditouli, *Deep in Hock: 10 Most Indebted Campaign Committees*, OpenSecrets.org, July 24, 2013, https://www.opensecrets.org/news/2013/07/deep-in-hock-10-most-indebted-campaign-committees/. This makes sense, as many self-funding candidates have business backgrounds and are less likely to get into a political race – or to inject additional funds as the campaign wears on – if a law materially precludes them from returning to the financial *status quo* after the election. Indeed, candidates can and have diverted resources from last-minute voter outreach to ensure that they are – at least partially – made whole before the election bell rings. *See, e.g.*, David Wildstein, *Schmid Paid Back $100,000 Personal Loan Before Election Day*, New Jersey Globe, Dec. 3, 2020,

https://newjerseyglobe.com/congress/schmid-paid-back-100000-personal-loan-before-election-day/.

In these ways, even though the provision does not directly "cap . . . a candidate's expenditure of personal funds, it [still] imposes an unprecedented penalty on any candidate who robustly exercises" their First Amendment rights, *Davis*, 554 U.S. at 738-39, and prevents them "from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21. That, in turn, "leads to advantages for opponents in the competitive context of electoral politics." *Bennett*, 564 U.S. at 736; *see also* Fed. Elec. Comm'n Adv. Op. Request 2008-09 (July 25, 2008), https://www.fec.gov/files/legal/aos/2008-09/995740.pdf (underscoring, in a letter on behalf of former New Jersey Senator Frank Lautenberg, that the loan repayment prohibition "imposes significant burdens" on self-financing candidates vis-à-vis other candidates); *Bennett*, 564 U.S. at 741-42 (explaining the Court's history of rejecting a penalty for one speaker to help others). While some candidates may ultimately accede to this state of affairs to run for electoral office, they still shoulder a "substantial" – and ultimately, unconstitutional – burden "on the exercise of [their] First Amendment right[s]" when doing so. *Id.* at 736.

B. The loan repayment prohibition frustrates the RNC's First Amendment activities, as well as those of other non-candidates.

The loan repayment prohibition also burdens the First Amendment rights of a self-funding candidate's

supporters. Political parties, in particular, have a "strong working relationship with candidates." *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 453. Indeed, at the time of BCRA's enactment, Congress understood that both major political parties were looking "around the country to try to find wealthy candidates who can self-finance their own campaigns." S2537 (statement of Sen. DeWine); *see also id.* S2540 (statement of Sen. McCain) (noting that "both parties . . . recruit people who have sizable fortunes of their own in order to run for the Senate"); Chris Cillizza, *Corzine Looks for Millionaires*, Roll Call, May 2, 2003.

Political parties often recruit self-funding candidates as part of their overall electoral strategy because such individuals enable "resources [to be] freed to go into states where there were equally skilled candidates without personal money." Cillizza, *Corzine Looks for Millionaires*. Political parties are certainly "efficient in generating large sums to spend and in pinpointing effective ways to spend them," *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 453, including through conducting independent expenditure campaigns. But these tools are no substitute for a candidate who can invest his or her own dollars into a race.

If federal law deters a candidate from self-funding, either in whole or in part, the RNC, other political party committees, super PACs, and other entities must devote more of their own resources to engage in that particular race. That comes at extra cost. *See, e.g.*, *id.* at 470 (Thomas, J., dissenting) (collecting authority that, *inter alia*, "independent expenditures

would increase fundraising demands on party organizations because independent expenditures are less effective means of communication" and "do not qualify for the lowest unit rates on the purchase of broadcasting time"). And that extra cost burdens the speech and associational rights of the RNC and other non-candidates by effectively reducing the number of candidates these organizations can support (absent additional fundraising to compensate).

As in the past, this Court should affirm that a restriction which "prompts parties to structure their spending in a way that they would not otherwise choose . . . imposes some burden on parties' associational efficiency" that requires full First Amendment scrutiny. *Id.* at 450 n.11.

C. The First Amendment value of contributions does not diminish after an election.

The First Amendment also safeguards the "right to participate in the public debate through political expression and political association." *McCutcheon*, 572 U.S. at 203. "When an individual contributes money to a candidate, he exercises both of those rights: The contribution serves as a general expression of support for the candidate and his views and serves to affiliate a person with a candidate." *Id.* at 203 (internal quotation marks omitted). These rights remain just as strong after an election as before it.

The Government downplays (at 28, 36) the burden on the right to contribute after an election, claiming such contributions do not advance any "legitimate"

justifications for speech. But that analysis is precisely backward. It is not *the speaker* that must justify his speech, but *the Government* that must justify its restriction. "The First Amendment is a limitation on government, not a grant of power." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

In any event, post-election contributions advance the very interests that the Government concedes are "legitimate." In fact, post-election fundraising is a very common practice in American politics. Many Members of Congress begin fundraising "[l]ess than 24 hours after the polls close[]," motivated by an eagerness "to retire campaign debt and prepare for the next election cycle." Janie Lorber, *Members Confront Debt from Capitol Hill to Capital Grille*, Roll Call, Nov. 9, 2012; *see also* Jonathan Phelps, *Tierney Looks to Rebuild Coffers*, The Salem News, Jan. 2, 2013 (observing that "[p]eople win and then a day or two later, before they are even sworn in, they start raising money"). And it should come as no surprise that some of a candidate's supporters are eager to affiliate or re-affiliate with that candidate, help them prepare for the next election cycle, and ward off potential challengers. In this era of the perpetual campaigns, post-election contributions undoubtedly "facilitate political speech," "express[ ] support for a candidate," and "increase the likelihood that the favored candidate will prevail." FEC Br. at 36.

Furthermore, post-election contributions serve First Amendment interests that are unrelated to reelection efforts. Winning candidates (and candidates seen as likely to win) often experience a

surge in small-dollar contributions from persons eager to associate themselves with the victor in the final days of an election or its immediate aftermath. *See, e.g.*, Peter Overby, *Obama Finished Campaign with Money to Spare*, NPR, Dec. 5, 2008, https://www.npr.org/templates/story/story.php?storyId=97877948 ("From Oct. 16 through Nov. 24 . . . lots of small donors . . . gave small amounts"). Similarly, even losing candidates receive some post-election contributions, as supporters often want to show solidarity with the candidate and the values they represented. *See, e.g.*, Alex Isenstadt, *Trump Relaunches His Fundraising Machine after Months of Quiet*, Politico, Apr. 7, 2021, https://www.politico.com/news/2021/04/07/trump-fundraising-relaunch-479724 ("the store . . . is promoting new items like 'Don't Blame Me I Voted for Trump' emblazoned bumper stickers, doormats and yard signs"). These interests are protected by the First Amendment.

But these First Amendment interests are artificially suppressed by the loan repayment restriction. Federal law permits post-election contributions only "to the extent that the contribution does not exceed net debts outstanding from such election." 11 C.F.R. § 110.1(b)(3). Ordinarily, but for the loan repayment restriction, self-funding candidates with personal campaign debt could accept $2,900 checks (from individuals) and $5,000 checks (from multi-candidate PACs) to retire all debt – whether personal or to a vendor. *See* Fed. Elec. Comm'n, *Contribution Limits*, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-

limits/. But because personal loan debts greater than $250,000 are excluded from this calculation, supporters could find themselves willing to write a check but with no one to cash it. In this way, the prohibition burdens the rights of contributors just like candidates.

II. The Loan Repayment Prohibition Fails to Withstand First Amendment Scrutiny.

A. The First Amendment requires the Government to prove actual or apparent *quid pro quo* corruption.

A "candidate's expenditure of his personal funds directly facilitates his own political speech" and is therefore regulated not "as a contribution [but as] an expenditure." *Buckley*, 424 U.S. at 52 n.58. And as such, a law that imposes "a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech . . . cannot stand unless it is justified by a compelling state interest." *Davis*, 554 U.S. at 740; *see also Bennett*, 564 U.S. at 748 (holding same under strict scrutiny); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (Roberts, C.J.) (requiring "compelling interest"); *McCutcheon*, 572 U.S. at 197 (explaining that, "[u]nder exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest"). But even if a less-rigorous standard of review applies – i.e., *Buckley*'s closely drawn scrutiny with its "sufficiently important interest" standard – the Government has failed to identify any valid interest that would justify the prohibition here.

This Court has repeatedly taught that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests" for regulating election-related speech. *Davis*, 554 U.S. at 741 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985)). In this context, "corruption" means "*quid pro quo* corruption" – that is, "a direct exchange of an official act for money." *McCutcheon*, 572 U.S. at 192; *see also Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (explaining that the "hallmark of corruption is the financial *quid pro quo*: dollars for political favors). Thus, when the Government targets the appearance of corruption, it may not regulate attempts to "garner 'influence over or access to' elected officials." *McCutcheon*, 572 U.S. at 208. This latter boundary "must be respected in order to safeguard basic First Amendment rights," *id.* at 209, particularly where the laws might "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign," *Bennett*, 564 U.S. at 750. And when there is the slightest doubt, it is better to "err on the side of protecting political speech rather than suppressing it." *McCutcheon*, 572 U.S. at 209.

Laws that pursue other objectives unrelated to the prevention of *quid pro quo* corruption or its appearance are therefore impermissible. *See id.* at 192. "No matter how desirable it may seem," for example, it is "not an acceptable governmental objective to level the playing field, or to level electoral opportunities, or to equalize the financial resources of candidates." *Id.* at 207 (internal quotation marks and brackets omitted).

Moreover, this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Id.* at 210. "[S]peculation," without "any real-world examples," cannot "justify [a] substantial intrusion on First Amendment rights." *Id.* at 217–18. Instead, "the Government bears the burden of proving the constitutionality of its actions," *id.* at 210, through "record evidence or legislative findings suggesting [a] special corruption problem," *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996). Even at the barest minimum, Congress must show that "experience under the present law confirms a serious threat of abuse." *McCutcheon*, 572 U.S. at 219.

Congress has failed to satisfy each of these basic requirements here.

1. Congress passed the loan repayment prohibition to "level the playing field" rather than to prevent corruption.

Rather than target corruption or its appearance, the loan repayment requirement seeks to protect incumbents. Indeed, Congress has improperly fixated on the alleged "problem" of self-financing challengers for decades. In the 1970s, legislators implemented strict limits on the amount candidates could themselves expend on their own campaigns. *See* 18 U.S.C. § 608(a)(1) (1976). The *Buckley* Court rejected this unlawful regulation of speech. *See* 424 U.S. at 51-54.

Undeterred, Congress spent years stewing on this issue. Senate leaders quarreled with *Buckley*'s rationale, mocked its reasoning as beneath "the words of the drafters of the Constitution," and openly plotted "changing the Supreme Court's decision" since Senators had "as much background and basis to do that as the justices who were there." Transcript of Senate Gov't Affairs Comm. Hearing, 105th Cong., Sept. 24, 1997 (statement of Sen. Specter). But ultimately, with no obvious path to overruling *Buckley*, Senators became adamant instead that "campaign committees should not pay back loan[s] that candidates make to their own campaigns." 139 Cong. Rec. S6433 (daily ed. May 25, 1993) (statement of Sen. Cohen).

Many Members of Congress reasoned that such a restriction would serve their interests as incumbents. According to one Senator, "[w]hen *Buckley* came down, it had a personal impact on me because I was in the middle of a campaign against [a wealthy opposing candidate]." Transcript of Senate Gov't Affairs Comm. Hearing, 105th Cong., Sept. 24, 1997 (statement of Sen. Specter). As "long as somebody can come into the campaign and spend $10, $15, $20 million, there's going to be considerable pressure on us incumbents," *id.*, particularly when the self-funder could claim independence from donors during the campaign but leave open the possibility of raising loan repayment funds later, S. Rep. 102-37 (Apr. 11, 1993). To another Senator, this latter scenario fueled a particularly "wasteful and potentially destructive" environment where legislators were needlessly "forced to spend a large amount of funds on their election campaign because other candidates in the

same election spend a large amount of funds." 143 Cong. Rec. S10439-40 (daily ed. Oct. 6, 1997) (Amndt. of Sen. Moseley-Braun proposing legislative findings for limiting loan repayments). One prominent congressional witness agreed that self-funding was, in short, a "terrible problem" in need of some real "impediments." Transcript of Senate Gov't Affairs Comm. Hearing, 105th Cong., Sept. 24, 1997 (testimony of Dr. Ornstein).

Similar concerns animated BCRA. When Congress debated the need for stricter campaign finance laws in 2001, one of the most pressing "concern[s] that literally every nonmillionaire Member [had was] that they wake up some morning and pick up the paper and find out that some [self-funder] is going to run for their seat, and that person intends to invest . . . million[s] of their own money in order to win." 147 Cong. Rec. S2540 (daily ed. Mar. 20, 2001) (statement of Sen. McCain).[3] The "one thing we ought to seriously worry about," pleaded another Senator, is "a man or woman who chooses to run for the Senate and says: I want to use my constitutional

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[3] As Appellee noted in the court below, the various provisions of the Millionaire's Amendment were taken up and discussed together, with most of the statements made during the legislative debate applying equally to all of the Amendment's sub-sections. *See* Pl.'s Memo. of Points and Authorities in Support of Their Mot. for Summary Judgment at 7 (D.D.C., June 9, 2020) (noting that the debate over the Millionaire's Amendment "*simply did not distinguish* between wealthy candidates *spending* money and *loaning* it," because, as its sponsors noted, "a lot of people who are very wealthy do not give money to their campaign; they loan it and say they will be repaid later").

rights to spend [significant sums of] my own money – his or her own money – to get elected." 147 Cong. Rec. S2450 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici). He continued: "Is it fair, even though it is constitutionally authorized, for a wealthy American to put up whatever amount they want?" *Id.*

Congress answered this question with a resounding "no." Legislators worked overnight to begin changing the rules so that incumbents "could stay in the ball game." *Id.* at S2465 (statement of Sen. Sessions). Congress agreed upon a collection of legislative amendments targeting self-funders, which were contained in BCRA section 304 and more commonly referred to as the "Millionaires' Amendment."

The Senators who supported the combined proposals made no secret that it was designed as "an equalizer amendment" – a "let's be considerate of the candidate who isn't rich amendment," 147 Cong. Rec. S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici) – that "makes [races] more competitive," 147 Cong. Rec. S2547 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine), and "begin[s] to level the playing field," 147 Cong. Rec. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine); *see also* 147 Cong. Rec. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison) ("I think we need to have a level playing field[, and that] is what my part of this amendment does"). Short on specifics or empirical evidence, Congress asserted the law would:

- Have "an impact on the public trust and those kinds of generic things," 147 Cong.

Rec. S2454 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici);

- Rebut "the perception that someone can buy a seat in the Senate with their own money," 147 Cong. Rec. S2547 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine);

- Remedy a "practice that has come into play that . . . is [not] fair. That is, you use your own money or you lend yourself money. Then after you are elected, you go have a lot of fundraisers as an elected Senator, and you pay yourself back," 147 Cong. Rec. S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici); and

- Promote their own, self-interested view of the law, as in "I would like to be able to have a level playing field [for my next campaign]," 147 Cong. S2465 (daily ed. Mar. 19, 2001) (statement of Sen. Sessions).

Moreover, as to why the loan repayment limit was set at $250,000, Senator Domenici brushed aside the issue in perfunctory fashion:

> I don't think the details are very important to this amount. I think if Senators see what I see, they are going to want to adopt this amendment. This whole debate is about what people perceive as too much money being put into campaigns at one level or another.

147 Cong. Rec. S2451 (daily ed. Mar. 19, 2001).

Although many Senators supported the provision, some raised concerns. Senator Daschle, for example, objected that the law unequivocally "protects incumbents," 147 Cong. Rec. S2544 (daily ed. Mar. 20, 2001), even though they already 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); *see also* 147 Cong. Rec. S3250 (daily ed. Apr. 2, 2001) (colloquy of Sens. Levin and McCain) (confirming that the repayment restriction would not apply to an incumbent's current loans). Others warned that the $250,000 threshold could wind up impoverishing some average citizens who "mortgage their homes" – however inadvisable – to mount a congressional run. 147 Cong. Rec. S2542 (daily ed. Mar. 20, 2021) (statement of Sen. Dodd). And at least one Senator astutely recognized that the provision could "be looked upon as [unconstitutionally] disadvantaging that wealthy candidate if we gave some rights to the other candidate that we did not give him." *Id.* S2453 (statement of Sen. Thompson).

All told, this congressional record is a case study in how to ignore the constitutional boundaries of campaign finance law established by this Court. Nothing the provision's defenders said during the legislative debate touches upon actual evidence of *quid pro quo* corruption or its appearance. Instead, the debates centered on perceived fairness, levelling the electoral playing field, and helping incumbents stay competitive when running against self-financing challengers. Those are all "dangerous" rationales that this "Court has repeatedly rejected." *Bennett*, 564 U.S. at 724, 750 (condemning the government's

ability to set campaign finance laws around "whatever the State may view as fair"). And the additional, *post hoc* interest the Government conjures up (at 36) – i.e., protecting *contributors* from post-election pressure by *candidates* – is so upside down that it is likely not even a legitimate governmental interest, much less a sufficiently important or compelling one.

Moreover, even if there were a subtle nod to *quid pro quo* corruption or its appearance somewhere in the legislative record, "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself." *Buckley*, 424 U.S. 53. In actuality, "the use of personal funds *reduces* the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse of money in politics." *Bennett*, 564 U.S. at 751 (emphasis added, internal quotation marks omitted). In other words, Congress's proposed "solution" in fact made the problem of *quid pro quo* corruption – the only constitutional government interest potentially at stake – worse, not better.

2. *Post hoc* polls and academic studies are not a valid substitute for record evidence of *quid pro quo* corruption.

Since the Government cannot identify any direct evidence of actual or apparent *quid pro quo* corruption in the record before Congress, it attempts to rely on more recent social science scholarship and polling

data to demonstrate that the loan repayment prohibition is necessary. But this Court and the courts of appeals have long expressed hostility to the use of public opinion data on perceived corruption to support restrictions on political speech. *See, e.g.*, *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 499-500 (1985) (concluding that "newspaper articles and polls purportedly showing a public perception of corruption" fall "far short" of the evidentiary showing required to justify limitation on independent expenditures by PACs); *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1230 n.6 (10th Cir. 2000) ("We should not allow generic public dissatisfaction to support the restriction of political speech."), *rev'd on other grounds*, 533 U.S. 431 (2001).

The Government's use of polling data to defend the loan repayment restriction betrays its misunderstanding of the nature of the "interest in stemming the reality or appearance of corruption" identified in *Buckley*. 424 U.S. at 47-48. Even if the public opinion survey relied upon by the Government were flawless – and it certainly is not – the most it could demonstrate is a widespread subjective perception of corruption. But an inquiry into the appearance of corruption "does not turn on whether some persons assert that an appearance of corruption exists. Rather, the inquiry turns on whether the Legislature has established that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem the appearance of real corruption." *McConnell v. FEC*, 540 U.S. 93, 297–98 (2003) (Kennedy, J., concurring and dissenting).

Moreover, if the inquiry turns solely on the scope of the public perception that the regulated conduct is in some way "corrupt," the Court need never look past the fact that the elected representatives of the people had passed the regulation. *Cf. id.* at 298 ("In striking down expenditure limits the Court in *Buckley* did not ask whether people thought large election expenditures corrupt, because clearly at that time many persons, including a majority of Congress and the President, did."). Rather, the inquiry is whether the Government "ha[s] prove[n] that the regulated conduct . . . posed inherent quid pro quo corruption potential." *Id.* Polling or survey data regarding public perception is irrelevant to that inquiry.

Public opinion data regarding perceived "corruption" is particularly ill-suited to support an assertion that regulated conduct "pose[s] inherent quid pro quo corruption potential," as studies have demonstrated that the general public's assessment of whether conduct is "corrupt" often reflects not only an assessment of the presence of or potential for *quid pro quo* corruption, but a broader set of concerns, preferences, and attitudes. These studies have found that the improper factors influencing subjective perceptions of "corruption" include:

- Preexisting attitudes towards the source of payments, Shaun Bowler and Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, American Politics Research (July 2016) (finding that the public is more likely to perceive independent expenditures by corporations

and unions as corrupt than expenditures by individuals);

- The respondent's demographic background, Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law* (2004) (noting that "those with lower socioeconomic status are more likely to perceive corruption" in government generally than those with higher socioeconomic status);

- Satisfaction or dissatisfaction with the state of the economy, *id.* (finding that perceptions of corruption rose during periods of recession and fell during periods of economic growth); and

- Satisfaction or dissatisfaction with the performance of incumbent officeholders generally, *id.* (finding that dissatisfaction with government generally correlated strongly with perceived corruption).

Studies have also shown that data regarding public perception of conduct as corrupt can be shaped by the way in which the survey or poll frames the conduct being evaluated. Respondents are less likely to view "campaign money" as corrupt when informed that a candidate or campaign has a "legitimate" need for it or when provided with information regarding the true cost of campaign advertising. Bowler and Donovan, *Campaign Money, Congress, and Perceptions of Corruption*. Conversely, respondents

are more likely to perceive "campaign money" as corrupt when the opinion survey prompt suggests that the money will be spent on "negative" advertisements. *Id.* One recent study summarized these problems aptly when it described the definite "disjuncture between public opinion and the jurisprudence on campaign finance." Persily and Lammie at 138. At its heart, the public conception of "corruption" expands far beyond the *quid pro quo* corruption identified by the Court in *Buckley* and *McCutcheon* and includes a range of entirely legal political behavior that poses no threat of *quid pro quo* corruption, but is seen as somehow unfair or undesirable.

Because the public opinion survey cited by the Government has no probative value as to the inherent potential of the personal loan repayments leading to *quid pro quo* corruption, the Government relies on an academic study to try and meet its required showing. The study relied upon by the Government, *Debt in Political Campaigns*, is a working research paper by two professors of finance at European universities. Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* (HEC Paris Research Paper No. FIN-2016-1165, Aug. 10, 2017). The Government points specifically to the study's conclusion that "[i]ndebted politicians" were "significantly more likely" to vote differently on the Barnard Amendment to the 1991 Financial Institutions Safety and Consumer Choice Act (H.R. 6) than they voted on the 1998 Financial Services Act (H.R. 10) if they received donations from the banking or insurance industries. *Id.* at 29. The Government artfully elides these specifics in describing the study as finding that indebted

politicians were "significantly more likely . . . to switch their votes if they receive[d] contributions from *** special interests." (Pet. Brief at 39) (quoting Ovchinnikov & Valta at 29).

Leaving aside the dubious value of the study itself, this finding can have only two possible interpretations relevant to this case. It is either impossibly weak evidence to support an assertion by the Government that *quid pro quo* corruption appears to be occurring but is evading detection and prosecution, or it is at best lukewarm evidence that campaign donors sometimes "garner 'influence over or access to' elected officials" that they then use to persuade those elected officials on certain issues. *McCutcheon*, 572 U.S. at 208 (quoting *Citizens United*, 558 U.S. at 359). As the District Court below noted, the study has no value as even indirect evidence of the occurrence or appearance of *quid pro quo* corruption because it "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." D. Ct. Doc. 71 at 20. And as this Court has repeatedly – and correctly – held, "Government may not seek to limit the appearance of mere influence or access." *McCutcheon*, 572 U.S. at 208.

3. The Government's claim that funds going "into the candidate's pocket" changes the traditional analysis lacks merit.

While Appellees' Brief (at 46-54) ably rebuts the Government's interest-based arguments, there is one

point worthy of further elaboration. The Government (at 33) makes much of the fact that contributions used for loan repayment go "into the candidate's pocket" rather than "to fund routine campaign activities." But in determining what kinds of contributions lead to *quid pro quo* corruption, there must be some room to consider a contribution's "value to the candidate." *McConnell*, 540 U.S. at 152. Corruption is ultimately about "subversion of the political process" through "the process of financial gain," *Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 497, and courts must apply a "functional" analysis to assess "whether the conduct now prohibited inherently poses a real or substantive *quid pro quo* danger, so that its regulation will stem the appearance of *quid pro quo* corruption," *McConnell*, 540 U.S. at 293, 298 (Kennedy, J., concurring and dissenting). If it does not, precedent "requires the Court to strike down [the law]." *Id.* at 294.

Here, any loan repayment contributions do not result in a personal "gain" to the candidate; they merely return the candidate to the *status quo ante* financial position he or she had at the beginning of the campaign. Put differently, there is no functional difference between (1) a candidate loaning his or her campaign $1,000, using those funds to make an expenditure, and then receiving funds from a contributor to repay the loan; and (2) a contributor giving $1,000 to the campaign, which then uses those funds to make an expenditure. In either case, the candidate is right back to where he or she started. A $0.00 financial return is not the sort of personal

enrichment that Congress may use the campaign finance laws to criminalize.[4]

There is also a great irony to the Government's position. The Federal Election Commission's regulations permit candidates to pay themselves a salary from campaign funds during at least one of the windows covered by the loan payment prohibition. *See* 11 C.F.R. § 113.1(g)(1)(i)(I) (permitting salary payments for non-incumbent candidates who won their primary). So, in both cases, the funds will ultimately wind up in the candidate's personal bank account, and the Government offers nothing to distinguish why it endorses the payment in one setting but opposes it in another.

B. The Government has not narrowly tailored the loan repayment prohibition.

In "the First Amendment context, [a narrowly tailored] fit matters." *McCutcheon*, 572 U.S. at 218. This is because laws that "burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction . . . is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340; *see also Bennett*, 564 U.S. at 734. Even under exacting or "closely drawn" scrutiny, while the law "does not require that [the challenged regulations] be the least restrictive means of

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[4] And even if it theoretically were, as discussed further *infra* at 31-32, the Government's decision to permit repayments up to $250,000 after the election – and repayment of any amount of personal loan debt before the election – underscores how weak the loan repayment prohibition is at addressing corruption.

achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) (explaining how the Court has required restrictions to be "narrowly tailored" under exacting scrutiny); *McCutcheon*, 572 U.S. at 218 ("closely drawn" scrutiny requires a "narrowly tailored" means). As the *Bonta* Court recently explained, in order to "satisfy[] the means-end fit that exacting scrutiny requires," the government must "demonstrate its need for [the challenged law] in light of any less intrusive alternatives." 141 S. Ct. at 2386 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). This requires an affirmative evidentiary showing by the government. *Id.* at 2386-87 (citing *Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469 (1989)).

Here, as in *McCutcheon*, "there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights." 572 U.S. at 221. The existing public disclosure of post-election contributions, for example, is one mechanism to ferret out potential corruption. Indeed, a "public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return" and "may discourage those who would use money for improper purposes either before or after the election." *Buckley*, 424 U.S. at 67.

Pay-to-play laws also are, and have been, a far more narrowly tailored means of addressing corruption concerns in the context of political contributions and government contracts. Indeed, lower courts have extensively documented the role pay-to-play laws and government contractor contribution prohibitions have had in preventing *quid pro quo* corruption and its appearance. *See, e.g.*, *New York Republican State Comm. v. SEC*, 927 F.3d 499, 512 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 908 (2020); *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015).

Unmoved, the Government and its allied *amici* point to irrelevant news reporting on speculated "corruption" involving the award of government contracts inspired by repayment of large personal campaign loans by then-Ohio Attorney General Mike DeWine in 2012, Oklahoma Governor Kevin Stitt in 2018, and Kentucky Governor Wallace Wilkinson in 1987. *See* JA at 249-53. As a preliminary matter, these newspaper reports suffer from the same imprecise language and nebulous public understanding of "corruption" that plagues opinion survey data on public perceptions of corruption. But even on substance, these episodes demonstrate that *quid pro quo* corruption and its appearance are indeed adequately deterred by other, less restrictive anti-corruption laws such as pay-to-play laws and criminal anti-bribery statutes. While the Government points to news articles that quote embittered former government contractors who have lost out on contracts, it is unable to point to a single confirmed instance of *quid pro quo* corruption arising from the use of a post-election contribution to repay a loan even in states that – like Ohio, Oklahoma, and Kentucky –

lack a loan repayment limit. Ohio and Kentucky both have pay-to-play laws that adequately address the concerns voiced in the articles cited by the Government by restricting the award of government contracts to individuals or companies that have made significant contributions to the campaign of the responsible official. *See* Ohio Rev. Code § 3517.13(J); Ky. Rev. Stat. § 121.056(2). And *quid pro quo* bribery remains illegal in all three states. *See* Ohio Rev. Code § 2921.02 Okla. Stat. 21, § 382; Ky. Rev. Stat. Ann. § 522.050.

Furthermore, even if the provision had been passed in furtherance of a lawful Government interest, the loan repayment restriction is fatally overbroad because it:

1. Applies to candidates who lost an election, who hold no ability to exchange favors for contributions;

2. Applies to candidates on a per-election basis, covering candidates who win their primaries and advance to the general election but who are not in a position to award favors; and

3. Allows repayment of personal loans of up to $250,000, which in theory presents the same corruption challenges as any contribution over the $250,000 aggregate repayment limit.[5]

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[5] It makes no difference that Appellee won his election and did not personally experience all of these problems. In a First Amendment facial challenge, "a law may be invalidated as

The provision's underinclusiveness also "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011); *see also id.* at 805 (observing that "overbreadth in achieving one goal is not cured by the underbreadth in achieving the other"). Here, the law targets a specific type of debt – personal loans by the candidate – but exempts contributions used to pay down vendor debt and bank loans. These other types of loans can present the same sort of concerns as personal loans, as they often relieve self-financing candidates of the pressure of putting their own personal funds into the campaign. Moreover, and while the RNC strongly disagrees with this position, many of the Government's arguments about the corruption potential of post-election contributions would apply to *all* contributions made during this period – not just those made for debt retirement. But Congress has not enacted a law banning all post-election contributions.

All of these flaws illustrate why the loan repayment prohibition woefully fails to comply with the narrow tailoring requirement.

CONCLUSION

The First Amendment "is designed and intended to remove governmental restraints from the arena of

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overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 141 S. Ct. at 2387.

public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *McCutcheon*, 572 U.S. at 203. That fundamental constitutional principle is immutable and does not ebb and flow depending upon whether the electoral participant is a "lone pamphleteer . . . or someone who spends substantial amounts of money in order to communicate his political ideas." *Id.* (internal quotations and brackets omitted). Rather than unconstitutionally deter citizens from the pursuit of public office, this Court should affirm the decision of the three-judge district court below.

Respectfully submitted,

J. Justin Riemer
Matthew Raymer
Republican National Committee
310 1st Street SE
Washington, DC 20003
(202) 863-8626

Michael E. Toner
Counsel of Record
Brandis L. Zehr
Stephen J. Obermeier
Andrew G. Woodson
Jeremy J. Broggi
Christopher White
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
MToner@wiley.law

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Counsel for Amicus Curiae