No. 21-12

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, APPELLANT

v.

TED CRUZ FOR SENATE, ET AL.

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

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

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I. APPELLEES LACK ARTICLE III STANDING

Our opening brief identifies (at 10-26) two separate reasons that appellees lack standing to challenge the loan-repayment limit. Appellees have overcome neither problem.

A. Appellees Cannot Satisfy The Traceability And Redressability Requirements For Article III Standing

Our opening brief explains (at 11-20) that appellees' asserted injury is not traceable to, and would not be redressed by an order restraining the enforcement of, the statutory provision they challenge. Appellees offer both factual (Br. 24-29) and legal (Br. 11-24) responses, but each lacks merit.

1. The statutory provision that appellees challenge prohibits a campaign from using "contributions made * * * after the date of [an] election" to repay more than

$250,000 in candidate loans for that election. 52 U.S.C. 30116(j). Our opening brief explains (at 13-14) that appellees have produced no record evidence that they have exhausted the $250,000 cap on the use of post-election funds. Our opening brief also argues (at 14-16) that the record affirmatively shows that they have not exhausted that cap.

With respect to the first of those points, appellees do not even assert—let alone cite record evidence showing—that they used post-election funds to repay Senator Cruz $250,000. To the contrary, appellees state (Br. 29) that the committee "did not undertake the meaningless task of attempting to trace which fungible dollars were used to repay Cruz's loans." But it is the plaintiff's burden to prove, not the defendant's burden to disprove, the factual predicates of standing. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Appellees effectively concede that they cannot meet that burden.

Appellees instead respond only to the government's second point, but their responses to that argument lack merit. Our opening brief emphasizes (at 15) appellees' express admission in the district court, in response to paragraph 64 of the statement of undisputed facts filed by the Federal Election Commission (Commission or FEC), that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." J.A. 329. Appellees argue (Br. 28-29) that the "deposition testimony" cited in paragraph 64 "clearly shows that the contributions received after election day * * * *were* used to repay debt outstanding from the 2018 campaign." But that carefully worded sentence elides the distinction between repaying debt in general and repaying Senator Cruz's loan in particular. Deposition testimony showing that the committee used post-election

contributions "to repay debt outstanding from the 2018 campaign," Appellees Br. 28-29, would not cast doubt on appellees' admission that the committee did not use such contributions to repay "the $250,000" loaned by Senator Cruz, J.A. 329.

In any event, there is no ambiguity in the factual proposition to which appellees stipulated below. The parenthetical citation to relevant deposition testimony in paragraph 64 of the FEC's statement of undisputed facts (see J.A. 329) was required by a local rule of court, which states that "[e]ach motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, *which shall include references to the parts of the record relied on to support the statement*." D.D.C. Local Civil Rule 7(h)(1) (emphasis added). If appellees believed that paragraph 64 reflected a misreading of the cited deposition testimony, they should have objected at that time. See *ibid*. They instead admitted to the facts as set forth in the Commission's statement, including the fact that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." J.A. 329. Appellees therefore may not now "suggest, on appeal, that the facts were other than as stipulated." *Christian Legal Society* v. *Martinez*, 561 U.S. 661, 677 (2010) (citation omitted).

Our opening brief also explains (at 15), based on the committee's financial disclosures, that it was mathematically impossible for the committee to have repaid Senator Cruz $250,000 using contributions made after the date of the election. Appellees argue (Br. 25-27) that this calculation overlooks a "second set of contributions": contributions that were "redesignated" toward the 2024 election after election day 2018, but that re-

mained available to repay outstanding 2018 debt. But the contributions on which appellees now rely involve funds that were transferred to the committee *before* the election and that remained under the committee's control until the contributions were redesignated. The loan-repayment limit applies to contributions that are "*made* * * * after the date of [the] election." 52 U.S.C. 30116(j) (emphasis added). And a contribution is "considered to be made when the contributor relinquishes control over the contribution." 11 C.F.R. 110.1(b)(6). Contrary to appellees' suggestion (Br. 27), the committee's post-election "redesignations" did not transform those funds into new post-election contributions subject to the loan-repayment limit.

This Court need not wade into those debates in order to resolve this case. Even on appellees' view, the record would show at most that the committee *could* have repaid Senator Cruz's loan by using post-election funds—or, as appellees put it (Br. 26), that the committee had raised post-election funds "in amounts sufficient to repay $250,000 of Cruz's loans" by the time the $250,000 repayment was made. It would not show that the committee actually used those funds for that purpose.

Having alleged in their complaint that they "repaid [Senator Cruz] the statutory maximum of $250,000 from money raised after the election," J.A. 23, and having subsequently admitted the contrary proposition that "[n]one of the $250,000" repayment "was from contributions raised after the election," J.A. 329, appellees now assert (Br. 29) that they did not actually trace the funds used to repay Senator Cruz's loan and that doing so would have been a "meaningless task." It is likely true that, apart from the operation of Section 30116(j), appellees had no practical reason to care which of the

funds in their possession were used for this purpose and which were used to repay other debts. But that simply highlights the fact that the loan-repayment limit did not cause appellees any injury. Appellees' suggestion (*ibid.*) that tracing would have been "meaningless" is particularly incongruous given that (a) the statute they challenge applies only to "contributions made * * * after the date of [an] election," 52 U.S.C. 30116(j), and (b) the loan transactions here were performed solely to facilitate this lawsuit, J.A. 325.

2. Appellees also argue (Br. 12-24) that they have standing to challenge the statutory loan-repayment limit because an FEC regulation implementing that provision bars them from repaying the final $10,000 of Senator Cruz's loan. They contend (Br. 16-17) that this Court's cases allow a party injured by a regulation to challenge the statute that the regulation implements. Appellees misread those decisions.

In each of the cases on which appellees rely (Br. 16-17), a plaintiff who was injured by an executive action was held to have standing to challenge *that action*. As a ground for finding the challenged executive action unlawful, the plaintiff in each case argued that the statute authorizing the action was unconstitutional. In *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), for example, this Court held that parties injured by an amendment to a contract had standing to challenge "that amendment." *Id.* at 1779. The Court then considered the argument that the amendment was unlawful because the statute establishing the agency that had adopted it violated Article II. *Id.* at 1779-1789. Similarly, in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), the Court held that parties injured by the President's cancellation of certain federal expenditures had "standing to challenge the can-

cellation." *Id.* at 434. The Court then considered the challenge on the merits and held that the disputed cancellation was unlawful because it exceeded the President's authority under the Presentment Clause. *Id.* at 436-447. Appellees' remaining cases (Br. 16-17) follow a similar pattern.

Here, by contrast, the district court did not treat the perceived invalidity of the statute as a ground for holding the regulation to be invalid. Rather, consistent with the limited role of three-judge courts in the applicable jurisdictional scheme (see Gov't Br. 19-20), the district court adjudicated a freestanding challenge to the statute itself, and it ultimately dismissed appellees' "regulatory claims" as "moot." J.S. App. 38a. And while appellees' complaint included counts challenging the regulation (see J.A. 25-26), appellees now contend (Br. 22) that their standing to challenge the statute "would have been just as secure if those regulatory claims had never been added." Appellees thus appear to disclaim any argument that the court should have declared the FEC regulation invalid or enjoined its enforcement.

The district court viewed appellees' challenge to the statute as properly before it because it believed that the committee had already exhausted the statutory cap by using post-election funds to repay Senator Cruz $250,000. See J.S. App. 9a, 44a; Gov't Br. 13-14. But as explained above (pp. 2-4, *supra*) and in our opening brief (at 16-17), the regulation is the actual barrier to further repayment of Senator Cruz's loan. In these circumstances, adjudication of appellees' challenge to the statute would violate bedrock principles of Article III standing.

"[S]tanding is not dispensed in gross," and "plaintiffs must demonstrate standing for each claim that they

press and for each form of relief that they seek." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021). Under this Court's precedents, a plaintiff must show that its injury is "fairly traceable to the defendants' conduct in enforcing the specific * * * provision" it attacks. *California* v. *Texas*, 141 S. Ct. 2104, 2120 (2021). Appellees' injury is traceable not to the Commission's enforcement of the loan-repayment limit, but to the Commission's enforcement of the regulation—and, in particular, to a regulatory requirement (the 20-day rule) that goes beyond what the statute itself prohibits. See Gov't Br. 16.

Viewing the case through the lens of redressability brings the problem into even sharper focus. A party has standing only if its injury is "likely to be redressed by the requested relief." *California*, 141 S. Ct. at 2113 (citation omitted). The relief sought here—an order prohibiting the Commission from enforcing the statutory loan-repayment limit—would do nothing to redress appellees' injury, since the statutory limit does not itself prevent the committee from repaying the final $10,000 of Senator Cruz's loan. The only judicial relief that would redress the injury is an order prohibiting the Commission from enforcing the regulation, but that is not the relief appellees obtained below and defend here.

To be sure, a ruling that a statute is unconstitutional might logically imply that a regulation implementing that statute is unlawful (unless the agency can identify some other legal basis for retaining that regulation). But that logical implication does not suffice to establish redressability. "Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power. It

is the Court's *judgment*, in other words, its injunction to the [defendant], that must provide [the plaintiff] relief—not its accompanying excursus on the meaning of the Constitution." *Franklin* v. *Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment). For the reasons discussed above, an order preventing enforcement of the statute would not itself redress appellees' injury. Appellees therefore lack standing to seek that relief.

B. The Self-Inflicted Character Of Appellees' Injury Is A Separate Barrier To Standing

When appellees failed to repay any portion of Senator Cruz's loan within 20 days after the election, an FEC regulation required them to recharacterize $10,000 of the loan as a contribution by the candidate. The resulting bar to subsequent repayment of that amount constitutes injury-in-fact. Appellees delayed repayment of the loan, however, not to achieve any campaign-related purpose or to avoid some other harm, but solely to facilitate this lawsuit. The self-inflicted character of their current injury is a separate reason they lack standing.

Appellees describe this argument as an "extension of standing doctrine," Br. 31 (citation omitted), but that is not so. This Court has explained that "self-inflicted injuries" do not confer standing, *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 418 (2013), and that a plaintiff cannot "be heard to complain about damage inflicted by its own hand," *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). And as far as we are aware, every court of appeals to consider the issue has agreed that self-inflicted injuries do not give rise to Article III standing. See, *e.g.*, *Backer ex rel. Freedman* v. *Shah*, 788 F.3d 341, 344 (2d Cir. 2015); *Finkelman* v. *National Football League*, 810 F.3d 187, 198 (3d Cir.

2016); *Cameron County Housing Authority* v. *City of Port Isabel*, 997 F.3d 619, 623 (5th Cir. 2021); *Garland* v. *Orlans, PC*, 999 F.3d 432, 440-441 (6th Cir. 2021); *Parvati Corp.* v. *City of Oak Forest*, 630 F.3d 512, 518 (7th Cir. 2010); *ABF Freight System, Inc.* v. *Teamsters*, 645 F.3d 954, 961 (8th Cir. 2011); *Skyline Wesleyan Church* v. *California Department of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020); *State of Colorado* v. *U.S. EPA*, 989 F.3d 874, 888 (10th Cir. 2021); *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (R.B. Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).

The decisions that appellees invoke (Br. 30-33) do not prove otherwise. In each of those cases, the plaintiff faced a dilemma, each horn of which entailed a different injury. For example, in *Evers* v. *Dwyer*, 358 U.S. 202, 203-204 (1958) (per curiam), the plaintiff could have avoided segregation on public buses only by forgoing use of the public transit system. And in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982), the plaintiff could have avoided the denial of truthful information about the availability of apartments only by forgoing his investigation into possible discriminatory practices in the housing market.

This case involves no such dilemma. The committee had more than $2 million in pre-election funds still on hand after the 2018 election. It could have used that money to repay Senator Cruz in full after the election. It also could have repaid Senator Cruz $10,000 within 20 days after the election, and then raised post-election funds to repay the remaining $250,000. Gov't Br. 22.

Those alternatives would have protected Senator Cruz's claimed constitutional interest in being "assured of repayment after election day" (Appellees Br. 41),

while fulfilling his desire (reflected in his emails to his campaign) to be repaid as early as possible (Gov't Br. 22-23). Yet appellees elected not to repay any portion of the loan until the 20-day regulatory window had elapsed, with "the sole and exclusive motivation" of "establish[ing] the factual basis for this challenge." J.A. 325 (citation omitted). If any injury can be considered self-inflicted, it is appellees' current inability to repay the remaining $10,000 of Senator Cruz's loan, which resulted from appellees' pursuit of a course of action that was designed solely to trigger the regulatory bar to full repayment and that had no offsetting advantages.

Appellees also argue that the government "cannot defeat Appellees' standing by pointing out that they could have avoided [their] financial injury if only they had obeyed the very governmental commands they are challenging as unconstitutional." Br. 33 (emphasis omitted); see J.S. App. 54a. But by using pre-election funds to repay $250,000 of Senator Cruz's loan, appellees *did* "obey[]" the "governmental command[]" (*i.e.*, Section 30116(j)'s loan-repayment limit) that appellees "are challenging as unconstitutional," or at least preserved their ability to repay the loan in full without violating that statute. Appellees Br. 33 (emphasis omitted). The current barrier to full repayment is a separate regulatory requirement that goes beyond what the statute mandates, and that appellees insist they are not challenging.

Appellees also suggest (Br. 38) that the Commission's proposed alternative would have "entailed forgoing * * * the payment of specific vendors and other creditors." But appellees admitted below that the "sole and exclusive motivation" for the delay in repaying the loan was "to establish the factual basis for this chal-

lenge." J.A. 325 (citation omitted). That admission forecloses the assertion that appellees delayed repaying Senator Cruz's loan in order to pay vendors and other creditors. In addition, appellees have failed to identify (Br. 38) any "specific vendors or other creditors" whom the committee in fact repaid, but whom it could not have repaid if it had transferred $10,000 of pre-election funds to Senator Cruz during the first 20 days after the election. By failing to set forth "specific facts" supporting their assertions, appellees have failed to establish standing in the manner required at the summary-judgment stage. *Defenders of Wildlife*, 504 U.S. at 561 (citation omitted).

II. THE LOAN-REPAYMENT LIMIT COMPLIES WITH THE FIRST AMENDMENT

Appellees also fail to show that the loan-repayment limit abridges their freedom of speech in violation of the First Amendment.

A. The Loan-Repayment Limit Does Not Trigger Strict Scrutiny

Appellees argue (Br. 39) that the loan-repayment limit triggers strict scrutiny, rather than "closely drawn" scrutiny under *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam). Under this Court's First Amendment cases, "strict scrutiny is appropriate only if the burden is severe." *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005). Appellees suggest (Br. 40) that the loan-repayment limit triggers strict scrutiny because it imposes a "direct and significant burden" on speech. That argument is incorrect.

1. Appellees fail to show that the loan-repayment limit, on its face, imposes a severe burden on speech. They focus (Br. 40) on a candidate's right to finance his

own campaign, but Section 30116(j) does not bar self-financing. Rather, it applies only to one method of self-financing, namely, lending money to the campaign. And even with respect to that one method, the burden it imposes is slight. Section 30116(j) does not limit the amount of money that a candidate may lend or the amount of money that the campaign may repay. It simply provides that any increment above $250,000 of a candidate's loan to his campaign may be repaid only with funds raised before the election.

Appellees argue (Br. 41) that even this narrow restriction "necessarily increases the risk that these loans will not be repaid," thereby "deter[ring] the candidate from making the [loan]" in the first place. But the prospect that a law might deter some speech is not enough to trigger strict scrutiny. For example, although disclosure requirements "will deter some individuals" from speaking, *Buckley*, 424 U.S. at 68, those requirements are not subject to strict scrutiny because they "impose no ceiling" on political speech, *id.* at 64.

Appellees claim in addition that "a clear clustering of loans right at the $250,000 threshold" has occurred since Congress enacted the loan-repayment limit. Appellees Br. 44 (citation omitted). But during the five election cycles preceding 2020, only 12 of the 588 loans made by Senate candidates (2%), and only 26 of the 3444 loans made by House candidates (0.7%), were for exactly $250,000. J.A. 312-313. Those figures hardly suggest the "clear clustering" that appellees posit.

Appellees further claim that the Commission has conceded that, as a result of the loan-repayment limit, "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."

Appellees Br. 41 (quoting J.A. 33) (brackets omitted). That is a distortion. The FEC said that, "*if the Loan Repayment Limit did only apply to winning candidates*," then "a candidate deciding to loan his or her campaign money in advance of the election would not be able to accurately determine the likelihood he or she might be repaid." J.A. 33 (emphasis added). The Commission thus was discussing the hypothetical alternative law suggested by appellees (see Br. 54-55), not the law that Congress actually enacted.

2. Appellees also fail to show that the loan-repayment limit imposes a severe burden on speech as applied in this case. Appellees argue (Br. 45) that the limit has burdened Senator Cruz's right to speak by preventing the campaign from repaying his loan, but that argument is flawed several times over.

Senator Cruz made the loan the day before the election not to fund political speech, but to lay the foundation for this lawsuit. J.A. 324-325. And the loan-repayment limit did not prevent the committee from repaying Senator Cruz during the period immediately after the election. As discussed above, the committee could easily have repaid Senator Cruz in full. See p. 9, *supra*. It simply chose not to, again with the "sole and exclusive motivation" of facilitating this constitutional challenge. J.A. 325.

Nor, for that matter, does the loan-repayment limit prevent the committee from repaying Senator Cruz today. As discussed above, the committee's current inability to repay the remainder of Senator Cruz's loan results from an FEC regulation, not from the statute. See p. 5, *supra*. The regulatory barrier to full repayment that appellees now face is self-inflicted; but the statute itself does not constrain further repayment at all.

B. The Loan-Repayment Limit Satisfies Heightened Scrutiny

Because the loan-repayment limit imposes at most a modest burden on political speech, it is subject at most to "closely drawn" scrutiny. In any event, the limit satisfies any potentially applicable standard of review, including strict scrutiny, because it serves the compelling interest in preventing actual and apparent *quid pro quo* corruption.

1. As a general matter, a candidate's "use of personal funds" in support of his own campaign "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the [statutory] contribution limitations are directed." *Buckley*, 424 U.S. at 53. But a candidate's *loan* to his campaign can *increase* the candidate's dependence on outside contributors, by making post-election contributions essential to his personal financial well-being. As our opening brief explains (at 33-35), a contribution that repays a personal loan poses a heightened risk of corruption because it is comparable to a gift to the candidate.

Appellees do not dispute that gifts that add to a candidate's personal wealth pose a greater risk of corruption than contributions that may be used only for campaign-related purposes. Nor do they suggest that there is any constitutional infirmity in the many federal laws and congressional rules that restrict public officials' acceptance of gifts. See Gov't Br. 34. Appellees instead contend (Br. 48) that a contribution that repays a loan does not resemble a gift to the candidate. That argument is incorrect.

It is of course true that repayment of a candidate's loan does not make the candidate richer than he was *be-*

fore the loan was made. But the risk of corruption posed by a contribution must be judged at the time of *the contribution*, not at the time of *the loan*. At the time of a contribution regulated by the loan-repayment limit, there is no economic difference between (1) a gift to the candidate and (2) a contribution that enables the campaign to repay a loan made by the candidate.

Imagine that two supporters, Smith and Jones, approach a candidate a day after the election. Smith offers the candidate a gift of $2700, while Jones offers a contribution of $2700, so that the campaign can repay the candidate's loan. Although Smith's payment would go directly to the candidate, while Jones's payment would pass through the hands of the campaign, each would ultimately add $2700 to the candidate's personal wealth. If Smith's gift poses a risk of corruption—and the congressional gift rules rest on the premise that it does—then Jones's contribution poses a similar risk.

At the time of a contribution regulated by the loan-repayment limit (*i.e.*, after the election), the candidate may also face some risk that the committee will be unable to repay his earlier loan. Indeed, appellees' theory of the case rests on the premise (Br. 39) that loans are "inherently subject to a risk of default." A contributor who helps the campaign repay a loan alleviates that risk, thereby conferring a direct financial benefit on the candidate.

2. Our opening brief further explains (at 35-36) that the timing of the contributions regulated by the loan-repayment limit raises an additional risk of corruption. Post-election contributions are especially likely to rest on illegitimate reasons (such as an expectation of favors or a fear of retaliation) and are especially unlikely to rest on legitimate reasons (such as increasing the

chances that the favored candidate will win the election).

Appellees do not deny that the post-election timing of a contribution increases the risk that it rests on a *quid pro quo*. They instead object (Br. 49-50, 55) that the loan-repayment limit is not tailored to address that risk, because it regulates some post-election donations (those that repay candidate loans) but not others. That objection is meritless. A contribution poses a heightened risk of *quid pro quo* corruption if it repays a candidate's loan. Gov't Br. 33-35. A contribution also poses a heightened risk of corruption if it occurs after the election. *Id.* at 35-39. The loan-repayment limit targets contributions that combine both features. That shows not a lack of tailoring, but a narrow focus on the subset of contributions that poses the most serious corruptive potential.

3. Appellees contend (Br. 46-48) that the existence of the base contribution limits eliminates any justification for Section 30116(j). That is incorrect. This Court has "never held that adopting contribution limits precludes [the government] from pursuing its compelling interests through additional means." *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 455 (2015).

Appellees' reliance (Br. 47-48) on this Court's decision in *McCutcheon* v. *FEC*, 572 U.S. 185 (2014), is misplaced. The statute at issue in *McCutcheon* imposed two types of limits on campaign contributions: base limits, which restricted how much money a donor could contribute to a particular candidate, and aggregate limits, which restricted how much money a donor could contribute in total to all candidates during a given election cycle. *Id.* at 192 (opinion of Roberts, C.J.). A plurality of the Court stated that, to the extent the aggre-

gate limits were intended "to prevent circumvention of the base limits," the Court should be "particularly diligent in scrutinizing the law's fit" because "the *base limits* themselves are a prophylactic measure." *Id.* at 221; see *id.* at 232 (Thomas, J., concurring in the judgment).

Unlike the aggregate limits at issue in *McCutcheon*, Section 30116(j) is not intended to prevent circumvention of the base contribution limits. Rather, it targets a distinct problem—the special risk of corruption posed by contributions that add to candidates' personal wealth and are made after the election—that can arise even when each contribution falls within the base limit. See Gov't Br. 34, 41 (explaining that rules limiting gifts to officials in all three branches of the federal government impose caps far lower than the base contribution limit). Nothing in *McCutcheon* precludes Congress from adopting an additional restriction to address that additional risk. Cf. *Wagner* v. *FEC*, 793 F.3d 1, 21-23 (D.C. Cir. 2015) (en banc) (unanimously upholding federal statutory ban on contributions by federal contractors, and explaining that special risks posed by contractor contributions justified restrictions more stringent than the base contribution limit), cert. denied, 577 U.S. 1102 (2016).

4. Finally, appellees question (Br. 46) the motives of the legislators who voted for the loan-repayment limit. In appellees' view, their votes reflected a desire to "level the playing field," not to combat corruption. *Ibid.* (citation omitted). That argument is unsound.

This Court has long adhered to the "fundamental principle of constitutional adjudication" that a court may not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). "The

diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing* v. *Crowley*, 113 U.S. 703, 711 (1885). And even if a court could somehow ascertain every member's motive, "[m]ust the vitiating cause operate on a majority, or on what number of the members?" *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

The motive alleged in this case, "leveling the playing field," provides no occasion for departing from that rule. This Court's precedents establish that a desire to equalize electoral opportunities is not a permissible justification for restrictions on political speech. See *Buckley*, 424 U.S. at 49. But the Court has never held that a restriction otherwise within Congress's power to enact can be held unconstitutional based on evidence that a desire to level motivated some legislators to support it. Here, Congress had the power to enact the loan-repayment limit because the limit serves the compelling interest in preventing actual and apparent *quid pro quo* corruption. Whether individual legislators believed that the limit would *also* level the playing field is beside the point.

In any event, appellees fail to show that any appreciable number of legislators supported the loan-repayment limit out of a desire to equalize electoral opportunities. Appellees attempt (Br. 6) to tie the loan-repayment limit to a different provision that this Court held unconstitutional in *Davis* v. *FEC*, 554 U.S. 724 (2008), under which a self-financing candidate's expenditures on his own campaign could trigger an increased limit on contributions to his opponent. See 52 U.S.C. 30116(i). Appellees observe (Br. 6) that the two provisions became part of the Bipartisan Campaign Reform Act of 2002

(BCRA), Pub. L. No. 107-155, 116 Stat. 81, as part of the same floor amendment, and that the provision struck down in *Davis* was intended to level the playing field. But that is just guilt by association. The fact that two clauses form part of the same bill or amendment does not mean that they reflect the same congressional motive. Members often "logroll" unrelated provisions into omnibus amendments in order to attract additional support. See *Bengzon* v. *Secretary of Justice*, 299 U.S. 410, 415 (1937).

Appellees also invoke (Br. 6-7, 46) floor statements made by Senators, but those statements primarily concern the provision held invalid in *Davis*, not the loan-repayment limit at issue here. Appellees note (Br. 6-7) that Senator DeWine expressed a desire to "level the playing field"; but Senator DeWine was talking about the provision that "raise[d] the dollar amounts a person can give * * * based upon how much money that individual millionaire puts into his or her own campaign." 147 Cong. Rec. 3883 (2001). Appellees also note (Br. 7) Senator Daschle's stated concern that the amendment would "protect[] incumbents"; but Senator Daschle likewise was talking about the provision that "allow[ed] different candidates to raise different levels of money * * * depending upon circumstances." 147 Cong. Rec. 3973 (2001). In any event, because Senator Daschle offered that characterization as a ground for *opposing* the floor amendment, see *ibid.*, his views shed little light on the motives of those Members who supported it.

Appellees ultimately cite only one statement that actually addressed the loan-repayment limit: Senator Hutchison's assertion that the limit would "level the playing field." 147 Cong. Rec. at 3970. But Senator Hutchison expressed concern about corruption as well,

stating that self-financing candidates "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." *Ibid.* Senator Domenici similarly remarked that, without the loan-repayment limit, a winning candidate who loaned money to his campaign could "get it back from [his] constituents [at] fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" *Id.* at 3882. Appellees argue (Br. 46) that "there is no indication" that Senator Domenici's perspective "was widely shared," but they offer no evidence that any meaningful number of legislators supported the loan-repayment limit as a means of leveling the playing field. In truth, the Court has no reliable way to determine what motivated most members of Congress—which is why it should decline to inquire into motive in the first place.

C. Appellees' Reliance On The Overbreadth Doctrine Is Misplaced

In general, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982). The loan-repayment limit did not impair appellees' own freedom of speech, since Senator Cruz's loan could have been repaid in full without subjecting either the committee or the Senator to any practical disadvantage.

Appellees invoke (Br. 45, 54-55) the First Amendment overbreadth doctrine, under which a party may challenge a statute that does not abridge his own freedom of speech, on the ground that the statute "may cause others not before the court to refrain from constitutionally protected speech." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). In particular, appellees argue

(Br. 45) that, even if the loan-repayment limit did not impose a severe burden on their own speech, it could significantly burden other candidates in other circumstances. They also argue (Br. 54-55) that, even if the limit serves an anti-corruption interest as applied to winning candidates, it does not do so as applied to losing candidates.

The overbreadth doctrine is "strong medicine," to be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. No sound basis exists to apply it in this case.

First, the overbreadth doctrine comes into play only if some applications of the statute are actually shown to be invalid. See *Broadrick*, 413 U.S. at 610. But the loan-repayment limit is constitutional even in the circumstances that appellees highlight (Br. 45, 54-55). The limit does not impose a severe burden on any candidate's speech, see Gov't Br. 27-31, and it complies with the First Amendment even with respect to losing candidates, see *id.* at 45.

Second, the overbreadth doctrine does not apply when the allegedly invalid applications of the law are severable from the valid applications. See *Ferber*, 458 U.S. at 769 n.24. BCRA's severability clause states that, "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 52 U.S.C. 30144. If the loan-repayment limit has both valid and invalid applications, BCRA thus mandates that the valid applications be preserved.

Third, the overbreadth doctrine applies only when the invalid applications are "substantial," both "in an

absolute sense" and "relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008) (emphasis omitted). Appellees do not even attempt to show that the loan-repayment limit is invalid as applied to a substantial number of winning candidates. This Court "generally do[es] not apply * * * overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008), and there is no reason for a different approach here.

Appellees do mention the requirement of substantial overbreadth when arguing that the limit violates the free-speech rights of *losing* candidates. They argue (Br. 55) that Section 30116(j) is substantially overbroad "because there are far more losing candidates than winning ones." But "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles* v. *Patel*, 576 U.S. 409, 418 (2015) (citation omitted). As our opening brief explains (at 37), the loan-repayment limit is largely irrelevant to losing candidates, most of whom find it difficult to raise post-election contributions in the first place.

* * * * *

The judgment of the district court should be vacated, and the case should be remanded with instructions to dismiss appellees' challenge to BCRA's loan-repayment limit for lack of standing. Alternatively, the judgment of the district court on the merits should be reversed.

Respectfully submitted.

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