No. 21-12

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

TED CRUZ FOR SENATE AND
SENATOR RAFAEL EDWARD "TED" CRUZ,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

November 22, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes and Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in laws designed to further the Constitution's anti-corruption principles and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In one of the most famous passages from *The Federalist Papers*, James Madison declared that "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961). Madison's statement reflected the Framers' deep-seated and nearly universal fear of corruption in government, born out of experiences in England, that motivated the architects of our Constitution. The people's interest in establishing political systems designed to combat corruption and improve integrity in government thus lies at the foundation of our constitutional democracy.

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Exercising the powers granted in the Constitution to limit opportunities for corruption, Congress enacted Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 97 (codified at 52 U.S.C. § 30116(j)), which bars federal candidates from using more than $250,000 in post-election campaign contributions to repay their personal campaign loans. By limiting the amount of funds given *after* an election that can go directly into a candidate's pocket, the law takes aim at those contributions that most pose a risk of actual *quid pro quo* corruption, as well as the appearance thereof.

Concerns about the corrupting potential of personal gifts to people in positions of power date back to the Founding. When the Framers gathered in Philadelphia in the summer of 1787 to draft our Constitution, anti-corruption measures were considered essential to creating an enduring system of government. As George Mason warned his fellow delegates at the Constitutional Convention, "if we do not provide against corruption, our government will soon be at an end." 1 *The Records of the Federal Convention of 1787*, 392 (Max Farrand ed., 1966) [hereinafter *Farrand's Records*]. Because the Framers understood that corruption is insidious and could be "expected to make [its] approach[] from more than one quarter," *The Federalist No. 68*, *supra*, at 412 (Alexander Hamilton), they designed the Constitution to include as many protections against corruption as possible, including by giving Congress the power to enact into law limits designed to ensure integrity in federal elections. *See* U.S. Const. art. I, § 4, cl. 1 (granting Congress authority to regulate "[t]he Times, Places and Manner of holding Elections").

The Framers established governmental structures and political systems, such as "checks and balances"

and election procedures, that were designed to help the government withstand corruption and ensure that it would be independent of potentially corrupting influences and thus dependent only on the people. But the Framers also included in the Constitution a number of specific and strongly worded gift, salary, and appointment restrictions targeted at minimizing discrete opportunities for corruption. These specific restrictions, like the Emoluments Clauses, reach more broadly than simply outlawing bribery. Much like the BCRA provision at issue in this case, they serve as prophylactic measures that also target both actual *quid pro quo* corruption and the appearance thereof.

Consistent with this constitutional text and history, this Court has long recognized Congress's "legitimate and compelling" interest in "preventing corruption and the appearance of corruption." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496 (1985). Over a century ago, the Court observed that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections . . . by corruption is a constant source of danger." *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884). Thus, avoiding even the appearance of corruption is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (internal quotation marks omitted).

The BCRA provision limiting the use of post-election contributions to repay candidates' personal campaign loans is a narrowly tailored means of serving these compelling interests in preventing *quid pro quo* corruption and the appearance of such corruption. Indeed, the loan-repayment limitation at issue here is

similar in many ways to the various emoluments restrictions that have been part of the Constitution since it was written, and it reflects the same anti-corruption principles that inspired the architects of those constitutional provisions.

By concluding that the BCRA provision "imposes a 'drag' on the candidate's First Amendment activity by discouraging the personal financing of campaign speech," J.S. App. 15a (citing *Davis v. FEC*, 554 U.S. 724, 739 (2008)), the court below ignored both what the law actually does, as well as the extent to which it vindicates the anti-corruption principles reflected in our Constitution's text and history. Significantly, the BCRA loan-repayment limitation does not limit campaign spending or prevent candidates from raising money to spread the candidate's message during the election. It does not limit the amount that a candidate can personally loan to his campaign or the extent to which he can be reimbursed for such loans. It does not even limit campaign contributions to help a candidate repay a personal loan so long as they are made *during* the campaign. As described below, the provision simply puts a limit on the dollar amount of monetary gifts made *after* a campaign that can go directly into a candidate's pocket and be used in his personal capacity. In other words, the law dictates *when* funds must be raised by a campaign for the purpose of a candidate's personal loan repayment. It does not restrict a candidate's ability to personally finance his campaign or engage in political speech.

In that sense, the BCRA provision prevents *quid pro quo* corruption and the appearance of *quid pro quo* corruption in just the same manner as a restriction on the acceptance of gifts from foreign dignitaries and other related constitutional limitations. By insisting that the law must fail First Amendment scrutiny due

to the government's inability to point to a specific example of *quid pro quo* corruption occurring in its absence, the court below ignored the self-evident and deeply historical premise that gifts that inure to the personal benefit of a politician that are given at a time (after an election) when it is known that that politician will retain political power plainly give rise to an intolerable risk of actual *quid pro quo* corruption and the *appearance* of *quid pro quo* corruption. Indeed, the appearance of *quid pro quo* corruption alone is sufficient under this Court's precedents to sustain the law. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) ("Our cases have held that Congress may regulate campaign contributions to protect against . . . the appearance of corruption.").

Consistent with these precedents, as well as the constitutional text and history reflecting the Framers' commitment to anti-corruption principles, this Court should uphold the BCRA provision at issue in this case, and the judgment of the court below should be reversed.

ARGUMENT

I. The Constitution's Text and History Reflect the Framers' Strong Interest in Preventing Corruption.

A. In Drafting the Constitution, the Framers Were Keenly Concerned with Preventing Both the Appearance and Reality of Corruption.

Corruption was a chief concern that informed the Framers' design of the Constitution. Alexander Hamilton explained that in drafting the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." *The Federalist No. 68*, *supra*, at 412.

"[T]here was near unanimous agreement [among the delegates at the Convention] that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 181 (1994).

The Framers viewed the American Revolution as a fresh start from the corruption they saw as endemic to politics and government. While many viewed Britain as "the best example of structured self-government that [they] could imagine," Zephyr Teachout, *Corruption in America* 36 (2014), they also viewed it as a tragedy of corruption, racked, in the words of Patrick Henry, by "the bolts and bars of power" with "bribery and corruption defiling the fairest fabric that ever human nature reared." Patrick Henry, *Speech in the Convention of Virginia on the Expediency of Adopting the Federal Constitution*, June 7, 1788, *reprinted in* 1 E.B. Williston, *Eloquence of the United States* 223 (E. & H. Clark eds., 1827); *see also* 1 *Farrand's Records* 380 (George Mason) ("I admire many parts of the British constitution and government, but I detest their corruption.").

Indeed, the very decision to hold the Constitutional Convention itself—separate from the ordinary process established under the Articles of Confederation—was in part a reaction to the perceived "corruption & mutability of the Legislative Councils of the States." 2 *Farrand's Records* 288 (John Francis Mercer). The Framers viewed those self-interested state legislatures as a chief cause of the failure of the Articles of Confederation, as they repeatedly put their own interests ahead of the whole. *See* 3 *Farrand's Records* 542 (James Madison) (describing, for instance, how the

states under the Articles of Confederation "were subject to be taxed by their neighbors," creating "a source of dissatisfaction and discord, until the new Constitution, superseded the old").

This preoccupation with stemming corruption, born of the Founders' experience under British rule and the shortcomings of the Articles of Confederation, pervaded the debates at the Constitutional Convention. James Madison's notes of the Constitutional Convention record that fifteen delegates used the term "corruption" no less than fifty-four times, the vast majority by seven of the most prominent delegates, including Madison, Governeur Morris, George Mason, and James Wilson. Savage, *supra*, at 177. Corruption was an express topic of concern on almost a quarter of the days that the members convened, Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 352 (2009), and concern over corruption quickly became "the common grammar of politics" during the Convention, John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, *in Virtue, Corruption, and Self-Interest: Political Values in the Eighteenth Century* 103, 104 (Richard K. Matthews ed., 1994).

The early American idea of corruption boiled down to a fear of "excessive private interests influencing the exercise of public power." Teachout, *Corruption in America*, *supra*, at 38. This concept stemmed from two main sources: the theories of the French philosopher Charles de Montesquieu, and the Christian tradition of virtue, which was intertwined with John Locke's theories of natural law. *See id.* at 39. In both traditions, "the core metaphor of corruption was organic and derived from disease and internal collapse. Corruption was a rotting of positive ideals of civic virtue

and public integrity." *Id.* As Montesquieu explained, civic "virtue" at the core of a functioning democracy was "the love of the laws and of our country," and "[s]uch love requires a constant preference of public to private interest." 4 Charles de Montesquieu, *The Spirit of Laws* (Melvin Richter trans., Cambridge University Press 1991) (1748). Thomas Jefferson copied this passage into his notebook, and he and other Founders referred to these principles repeatedly throughout the late eighteenth century. Teachout, *Corruption in America*, *supra*, at 42.

While the Framers were well versed in political theory, they were not detached from the rough-and-tumble world of politics, and they approached the problems of corruption with a real-world understanding of political systems and their potential to either foster or restrain corruption. "When the delegates spoke of corruption at the [C]onvention, they did so in a manner that reflected classical republican concerns about dependency, cabals, patronage, unwarranted influence, and bribery." Savage, *supra*, at 181. They were also concerned that even the appearance of corruption posed a risk to civic virtue and the integrity of the fledgling American government. As one scholar has explained, "[t]he Framers appear to have conceptualized corruption as a derogation of the public trust." Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 129 (2010).

In keeping with these practical concerns, the Framers frequently referenced several notorious instances of European corruption that they sought to protect against in the new constitutional order. Several of these incidents involved outright bribery: for instance, when Louis XIV paid Charles II and later James II for foreign affairs alliances. *See, e.g.*, 2 *Farrand's Records* 68-69 (Gouveneur Morris) (noting that

even a king, who "[o]ne would think . . . well secured agst. Bribery . . . was bribed by Louis XIV"); 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 264 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*] (Charles Coteworth Pinckney) (noting the bribe of "Charles II., who sold Dunkirk to Louis XIV").

But the Framers' concerns about corruption extended beyond outright bribery. In Europe at the time, and especially in France, "[e]xpensive gifts—sometimes called *presents du roi* or *presents du congé*—functioned as tokens of esteem, prestige items, and perhaps petty bribes, and were embedded in the culture of international relations." Teachout, *Corruption in America*, *supra*, at 19 (quotation marks and end note omitted). During the Virginia ratification debates, Governor Edmund Randolph explained:

> A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.

3 *Farrand's Records* 327.

As this statement illustrates, the appearance of *quid pro quo* corruption did not just pose of a risk of domestic distrust in government, but also a risk of the souring of diplomatic relationships. Thus, based on their real-world experiences with corruption, the

Founders were determined to craft a governing charter that rooted out not just outright bribery but also *opportunities* for corruption and situations that could give rise to the *appearance* of corruption.

In one famous example, the King of Spain gave John Jay a gift of a horse, even though he remained engaged in high-level negotiations with a Spanish representative at the time. *See Applicability of Emoluments Clause to Emp. of Gov't Emps. by Foreign Pub. Univ.*, 18 Op. O.L.C. 13, 16 n.4 (1994). And in 1780, the United States Ambassador to France, Arthur Lee, received from Louis XVI of France a portrait of the King set atop a gold box commonly called a "snuff box." *Id.* Lee turned the gift over to Congress, which resolved that he could keep it. *Id.*

And perhaps the most well-known snuff box was Benjamin Franklin's. When Franklin left Paris in 1785, Louis XVI gave him a spectacular parting gift: a portrait of King Louis, surrounded by 408 diamonds set in two rows around the painting and held in a solid gold snuff box. Teachout, *Corruption in America*, *supra*, at 1-2, 25-26. While no one suspected that the gift was a bribe, it posed a special concern of the appearance of corruption due to its ostentatious nature, Franklin's "outsized role in the American political landscape," and the fact that Franklin was "notoriously adored" by the French government. *Id.* at 25-26. In other words, not unlike post-election campaign contributions used to retire candidates' personal loans, the gift to Franklin posed a risk of the *appearance* of *quid pro quo* corruption because it inured to him personally and directly while he maintained power and influence in American government.

Franklin ultimately asked Congress to approve the gift, which it did in 1786, and there is some evidence that the Constitution's Foreign Emoluments

Clause was inspired in part by Franklin's notorious snuff box. *Id.* at 26-27. That Clause, along with several other distinct constitutional provisions described below, was designed to reduce temptations and opportunities for corruption among public officials and block influences that would tend to compromise the government's intended "dependen[cy] on the people alone." *The Federalist No. 52*, *supra*, at 326 (James Madison).

B. The Text of the Constitution Reflects Both Broad Anti-Corruption Principles and Specific Gift, Salary, and Appointment Restrictions Designed to Prevent Corruption and the Appearance Thereof.

The Framers recognized that whether or not a public official or an institution of government was actually tainted by a corrupting force, members of the public might reasonably question whether their representatives remained loyal to the public. Thus, rather than simply seek to criminalize bribery of public officials, the Framers also wrote into the Constitution specific provisions that would also prevent instances that could give rise to the appearance of corruption. Several of those provisions merit special attention, given their similarity to the loan-repayment law at issue in this case.

The Foreign Emoluments Clause. The Constitution mandates that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The Framers wrote this clause in part in response to those instances between the Revolution and the Convention when American diplomats—like Benjamin Franklin—received valuable gifts from foreign

dignitaries. Teachout, *Corruption in America*, *supra*, at 27. But this Clause also responded to the Founders' deep-seated concern, not tied to any particular incident, that foreign powers could use emoluments and gifts to interfere with America's internal affairs, undermining the nation's republican institutions and making its leaders subservient to foreign interests. Alexander Hamilton wrote that one of the vulnerabilities of republics "is that they afford too easy an inlet to foreign corruption." *The Federalist No. 22*, *supra*, at 149. And during the Constitutional Convention, Elbridge Gerry warned that "[f]oreign powers will intermeddle in our affairs, and spare no expence to influence them." 2 *Farrand's Records* 268. By reaching more broadly than simply outlawing bribery, the Foreign Emoluments Clause served as a prophylactic measure that targeted not just actual corruption, but also the *appearance* of *quid pro quo* corruption.

This restriction on accepting foreign emoluments was one of the few measures to be transferred from the Articles of Confederation to the new Constitution in 1787, reflecting its importance to the Founding generation. Teachout, *Corruption in America*, *supra*, at 26-27. At Philadelphia, the Foreign Emoluments Clause was added to the draft of the new Constitution by unanimous agreement of the state delegations after Charles Pinckney "urged the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence." 2 *Farrand's Records* 389; *see id.* at 384. In adding that clause, the Founders largely borrowed the language of the precursor provision in the Articles of Confederation, but they made one important change: they codified the practice that federal officeholders could accept otherwise prohibited emoluments from foreign states if they first obtained the affirmative consent of Congress, thus reducing the

appearance of corruption. Teachout, *Corruption in America*, *supra*, at 26-27.

Because the Founders wanted to eliminate "foreign influence of every sort," they drafted the Clause with language "both sweeping and unqualified," *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. at 17, "prohibit[ing] those holding offices of profit or trust under the United States from accepting '*any* present, Emolument, Office, or Title, *of any kind whatever*' from '*any* . . . foreign State' unless Congress consents," *id.* (quoting U.S. Const. art. I, § 9, cl. 8 (emphasis added by Office of Legal Counsel)). Consistent with that broad language, the Foreign Emoluments Clause has been understood to be "'directed against every kind of influence by foreign governments upon officers of the United States,' in the absence of consent by Congress." *Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regul. Comm'n*, 10 Op. O.L.C. 96, 98 (1986) (quoting 24 Op. Att'y Gen. 116, 117 (1902)). The Founders' desire to limit the appearance of corruption through gifts that inured directly to the personal benefit of American officeholders resulted in one of the most "strongly worded prohibitions in the Constitution." Teachout, *Corruption in America*, *supra*, at 26.

The Domestic Emoluments Clause. The Constitution also provides that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. This clause, known as the Domestic Emoluments Clause, was written to allay the Founders' concerns that vesting executive power in a

single chief executive could stoke corruption of the kind they had seen in England—where a king engaged in "absolute Tyranny" over the people, The Declaration of Independence para. 2 (U.S. 1776), and where "a well-designed government was eventually internally corrupted and, therefore, self-destructed," Teachout, *The Anti-Corruption Principle*, *supra*, at 350.

The Framers were especially worried that Congress or the states might exploit the President's self-interest as a means of inducing him to favor their personal or provincial concerns. Alexander Hamilton observed that "a power over a man's support is a power over his will," and that if legislatures could alter the President's financial circumstances, they could "tempt him by largesses" and thereby cause him "to surrender at discretion his judgment to their inclinations." *The Federalist No. 73*, *supra*, at 441. History revealed many examples "of the intimidation or seduction of the Executive by the terrors or allurements of . . . pecuniary arrangements." *Id.* Even in the American colonies, experience had shown how conniving legislatures could gain undue influence over the executive through financial rewards, and how the executive in turn could exploit his office to enrich himself.

In some colonies, for instance, governors lacked a fixed salary, instead relying on myriad other sources of profit that accompanied their offices: bonuses, awards of pensions, grants of land, use of land and public labor for personal profit, sharing in taxes and fees, use of idle public funds as personal capital, tax exemptions, and "customary gifts" of merchandise or money from ships at port. Alvin Rabushka, *Taxation in Colonial America* 13, 241-44, 248, 374, 384, 536 n.35, 606 (2008). In colonies that operated as proprietorships, the situation was ever starker: the "public revenue of the colony belonged to the private

proprietor," who often was the governor. Alvin Rabushka, *The Colonial Roots of American Taxation, 1607-1700*, Hoover Institution Pol. Rev. (Aug. 1, 2002), http://www.hoover.org/research/colonial-roots-american-taxation-1607-1700. In both situations, governors "engaged in trade," "accepted bribes," and even "engaged in illicit activities . . . and supported piracy." Rabushka, *Taxation in Colonial America*, *supra*, at 311. Such rampant profiteering enabled legislatures to influence governors' decisions by manipulating their financial rewards. It also enabled governors to hold legislatures hostage to their personal monetary demands.

Aware of this history, the Framers wrote the Domestic Emoluments Clause to avert the flagrant extortion in which some colonial governors had engaged and prevent Congress from bribing the President or punishing him by manipulating his salary. But they ultimately realized that providing a fixed compensation was not enough: Congress and the states might instead give the President other lucrative benefits or rewards besides a compensation increase in order to bend him to their will. To prevent such corruption, John Rutledge and Benjamin Franklin moved to supplement the presidential compensation provision by adding the following: "and he (the President) shall not receive . . . any other emolument from the U.S. or any of them." 2 *Farrand's Records* 626. Franklin and Rutledge's motion was swiftly approved by the Convention, and the Domestic Emoluments Clause became part of the new Constitution. *Id.*

The Ineligibility and Emoluments Clause. The Constitution also provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been

created, or the Emoluments whereof shall have been encreased during such time." U.S. Const. art. I, § 6, cl. 2. This constitutional restriction reflects the Framers' deep anxiety that legislators' temptation to secure future employment might cloud their duty to act in the public interest. "The core corruption the Framers wanted to avoid was Parliament's loss of independence from the Crown because the king had showered members of Parliament with offices and perks that few would have had the strength to resist." Lawrence Lessig, *Republic, Lost* 19 (2011). At the Convention, the delegates explained that this provision would "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 *Farrand's Records* 386 (John Rutledge).

The delegates' decision that an express constitutional "precaution ag[ainst] intrigue was necessary" stemmed from their observations of the British experience, "where men got into Parl[iament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Gov[ernment]." 1 *Farrand's Records* 376 (Pierce Butler). George Mason supported the exclusion "as a corner stone in the fabric" of the Constitution and was "for shutting the door at all events ag[ainst] corruption," particularly in light of the "venality and abuses" that took place in this regard in England. *Id.* During ratification debates over the Constitution, James McHenry explained that the purpose of the provision was "to avoid as much as possible every motive for Corruption." James McHenry, *Speech before the Maryland House of Delegates* (Nov. 29, 1787), *in* 3 Farrand's Records 148; *see McConnell v. FEC*, 540 U.S. 93, 153 (2003) ("The best means of prevention is to identify and to remove the temptation.").

Thus, much like the Foreign and Domestic Emoluments Clauses, the Ineligibility and Emoluments Clause uses sweeping language, yet it is sharply directed at circumstances under which an officeholder might receive—or *appear* to receive—a direct personal benefit (appointment to a more prestigious office along with future job security) in exchange for political favors. So too for the BCRA provision at issue in this case.

The Elections Clause. Finally, aware that the specific safeguards written into the Constitution might not be sufficient on their own to guard against corruption in elections in particular, the Framers drafted the Elections Clause to give Congress the tools to supplement those safeguards and address new abuses that might arise in the future. The Elections Clause provides that Congress may regulate the "Times, Places, and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. "The Clause's substantive scope is broad. 'Times, Places, and Manner[]' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Framers granted Congress the power to establish uniform ground rules for federal elections "to prevent corruption or undue influence," 2 *Elliot's Debates* 535 (Thomas M'Kean), and to ensure that Congress would be dependent on the people alone, not factions in the states that might seek to "mould their regulations as to favor the candidates they wished to succeed." 2 *Farrand's Records* 241 (James Madison); *see* 3 *Elliot's Debates* 11 (George Nicholas) (observing that "the power of Congress to make the times of elections uniform in all the states, will destroy of the continuance of any cabal"). The Elections Clause gave

Congress the power to guarantee the integrity of federal elections and prevent new forms of corruption from undermining the Constitution's anti-corruption principles. Indeed, the BCRA provision at issue in this case was enacted pursuant to Congress's Elections Clause power to regulate the "manner" of elections and to guard against actual *quid pro quo* corruption, as well as the appearance of such corruption.

II. The BCRA Provision at Issue Here Does Not Burden Campaign Speech and Fits Comfortably Within the Constitutional Tradition of Avoiding Corruption in Government, Including *Quid Pro Quo* Corruption.

As the constitutional provisions detailed above illustrate, the Framers were both broadly concerned about corruption in government and specifically concerned about the risk of *quid pro quo* corruption posed by gifts or appointments that inure to the personal benefit of government officials. For this reason, they included multiple clauses in the Constitution targeted at restricting such emoluments, and they gave Congress the power to enact further restrictions to avoid corruption in elections. The BCRA provision at issue here serves the same interests as these constitutional provisions.

Significantly, the BCRA provision does not affect campaign expression at all; it targets only those post-election contributions that inure directly to a candidate's personal benefit. When a candidate receives funds to retire a personal loan from a campaign committee, those funds go directly into the candidate's pocket. Their use is not restricted to activities related to the campaign or political activity. Indeed, their use is not restricted at all: the money becomes personal cash for buying a car, paying off credit card debt, or

saving for a child's college education. As the government has explained, "common sense" illustrates that "the risk of corruption is greater when an officeholder receives $2900 that he can use to pay down his mortgage than when he receives $2900 that his campaign can use to pay for more placards." J.S. 19-20. In a sense, then, funds used to repay a candidate's personal loans to a campaign are no different than Franklin's diamond and gold snuff box: they have no value to the campaign or the government itself—only to the recipient who enjoys the personal benefit of admiring those 408 diamonds and to the gift-giver who puts himself in a position to receive political favors in exchange.

Given this, the loan-repayment limitation is properly analyzed as a gift restriction—like the constitutional provisions detailed above—rather than a restriction on campaign spending or contributions. It is thus difficult to make sense of the district court's statement that the BCRA provision "discourag[es] the personal financing of campaign speech," J.S. App. 15a, when there is absolutely nothing in the law purporting to restrict the amount that a candidate can personally *contribute* to a campaign or even the amount of a candidate's loan that a campaign can *repay*.

For example, the loan-repayment limitation does not prevent a campaign committee from repaying one hundred percent of a candidate's personal loan of, say, $500,000. *See* 52 U.S.C. § 30116(j) (imposing no limit on the total loan repayment amount). Indeed, the campaign has multiple options for repaying such a loan. For instance, it can split the repayment 50/50 between pre- and post-election contributions or, provided that it acts within 20 days after the election, *see* 11 C.F.R. § 116.11(c)(1), it can pay back the entire $500,000 personal loan using pre-election funds, *id.* § 116.11(b)(1) (a campaign "[m]ay repay the entire amount of the

personal loans using contributions to the candidate or the candidate's authorized committee provided that those contributions were made on the day of the election or before"). In fact, that is almost precisely what happened here: Senator Cruz's campaign committee repaid $250,000 of Cruz's $260,000 personal loan using pre-election funds (although the campaign actually intended to use post-election funds for purposes of concocting this challenge). *See* Appellant's Br. 7. Thus, the BCRA provision challenged here in no way prevented the Cruz campaign committee from raising $10,000 in post-election contributions and using those funds to repay the remainder of Senator Cruz's personal loan.

Moreover, post-election contributions pose a special danger of corruption because they are made with the knowledge of whether a candidate has won or lost an election. Thus, even if a donor expects nothing in return after giving to a campaign following an election, there is, at a minimum, a risk of the appearance that the donor expected political favors based on the donor's knowledge that the candidate would be in a position to grant such favors. Indeed, the record illustrates that post-election contributions generally flow to winning candidates, exacerbating the risk of the appearance of *quid pro quo* corruption. *See* J.A. 317; Appellant's Br. 37-38. This dynamic is why "Franklin's outsized role in the American political landscape" made his snuff box particularly concerning, at least in terms of the appearance of corruption. Teachout, *Corruption in America*, *supra*, at 26. The "gift portended more than warmth and friendship. It was a show of power." *Id.*

The manner in which this law operates—imposing essentially *no* burden on political speech and operating narrowly to curtail situations in which the risk of *quid pro* corruption or its appearance is heightened—makes

it significantly less restrictive of speech than laws that limit campaign contributions, which this Court has repeatedly upheld as valid measures to limit corruption in government despite the fact that they make it more difficult for candidates to raise money to fund their campaigns. For instance, in *Buckley v. Valeo*, this Court held that individual campaign and candidate contribution limits did not violate the First Amendment, as they imposed "little direct restraint" on a "contributor's freedom to discuss candidates and issues" and still "permit[ed] the symbolic expression of support evidenced by a contribution." 424 U.S. at 21. Similarly, in *Nixon v. Shrink Missouri Government PAC*, this Court upheld a Missouri law that imposed limits on contributions to state candidates, even though, adjusting for inflation, the limit might have been effectively lower than the one upheld in *Buckley*. 528 U.S. 377, 396-97 (2000); *see id.* at 388 ("the dollar amount of the limit need not be 'fine tun[ed]'" (quoting *Buckley*, 424 U.S. at 30)).

Unlike these laws upheld by this Court, the law here does not burden the ability of candidates to raise money to fund their campaigns *at all*. The law does not prevent candidates from soliciting the maximum amount of campaign contributions permitted under other campaign finance laws both pre- and post-election. And it does not restrict the amount that a candidate can personally loan to his campaign or the amount that he can be repaid for that loan. Rather, the BCRA provision at issue here simply restricts the amount of post-election funds (after $250,000) that can go directly into a federal candidate's pocket to retire a personal loan.

This case is also distinct from other recent cases in which this Court has held that discriminatory contribution limits dissuaded self-financing of campaigns in

an impermissible manner. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Davis v. FEC*, 554 U.S. 724 (2008). Here, nothing in the BCRA provision dissuades self-financing by candidates because the law does not infringe on the ability of candidates who loan money to their campaigns to be paid back in full. It is hard to imagine why a candidate would care whether campaign funds used to repay his personal loan came in before or after the campaign unless he specifically intended to use the offer of political favors after winning an election for more effective fundraising—the precise situation that this law guards against.

III. By Faulting the Government for Failing to Provide Specific Examples of *Quid Pro Quo* Corruption Averted by the BCRA Provision, the Court Below Defied Constitutional Text and History and this Court's Precedents Permitting Measures to Avoid the *Appearance* of *Quid Pro Quo* Corruption.

Ignoring the constitutional history discussed above, as well as the way in which the loan-repayment-limitation law actually operates, the court below insisted that the BCRA provision did not survive constitutional scrutiny because "the FEC has not identified a single case of actual quid pro quo corruption in this context." J.S. App. 23a. But by insisting that the government provide actual examples of *quid pro quo* corruption, the court below flouted this Court's rule, with roots in the Founding era, "that Congress may regulate campaign contributions to protect against corruption *or the appearance* of corruption." *McCutcheon*, 572 U.S. at 191 (emphasis added); *see Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (noting that this Court has repeatedly "sustained limits on direct contributions in order to ensure against the reality or

appearance of corruption" (emphasis added)). For the reasons outlined above, post-election campaign contributions used to retire a candidate's personal loan carry a clear and heightened risk of actual and apparent *quid pro quo* corruption. That heightened risk—particularly given its self-evident nature in the case of post-election campaign contributions—gives rise to the appearance of corruption in the scenarios barred by the BCRA.

Indeed, the risk of the appearance of *quid pro quo* corruption was a pivotal reason for this Court's decision in *Buckley v. Valeo* to uphold Congress's individual campaign and candidate contribution limits. The Court acknowledged that "the scope of such pernicious practices can never be reliably ascertained," yet it found the risk "of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to be of "equal concern." *Buckley*, 424 U.S. at 27. *Buckley* cited approvingly this Court's earlier decision in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), a case in which this Court upheld broad restrictions on federal employees' right of partisan political association. *Buckley*, 424 U.S. at 27. "Here, as there," the *Buckley* Court explained, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (quoting *U.S. Civ. Serv. Comm'n*, 413 U.S. at 565).

This Court even recognized the centrality of avoiding the *appearance* of *quid pro quo* corruption in *Citizens United*. Although it determined that "the appearance of influence or access . . . will not cause the

electorate to lose faith in our democracy," 558 U.S. at 360, it did not disturb *Buckley*'s holding that "preventing . . . the appearance of *corruption*" is a compelling government interest, *id.* at 359.

The Court in *Citizens United* also explained that even though "few if any contributions to candidates will involve *quid pro quo* arrangements," regulation of campaign contributions is "preventative," 558 U.S. at 357, ensuring that candidates are not influenced to act "by the prospect of financial gain to themselves or infusions of money into their campaigns," *Nat'l Conservative PAC*, 470 U.S. at 497. The essential point from these cases is that even where "actual corrupt contribution practices ha[ve] not been proved, Congress ha[s] an interest in regulating the appearance of corruption that is 'inherent in a regime of large individual financial contributions.'" *McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in part and dissenting in part) (quoting *Buckley*, 424 U.S. at 27).

Although this Court did not explicitly ground its decisions in these cases in constitutional history, its articulation of the dangers of the *appearance* of corruption echo the concerns of the Framers. For example, fears that the perception of corruption would undermine faith in our government were precisely why Franklin's snuffbox caused such concern for the Founding generation. Franklin was a beloved figure at the time, and there is no evidence in the historical record that anyone believed that he had been bribed by the King of France. *See* Teachout, *Corruption in America*, *supra*, at 25. Yet his contemporaries were concerned that the gift could give rise to appearances of corruption, and they also thought it best to prohibit such gifts in the future, when the public might not have the same trust in their leaders as they did in Franklin. *Id.* at 25-26; *cf. Shrink Missouri*, 528 U.S.

at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

Concerns about the appearance of corruption also informed the Framers' decision to amend the version of the Foreign Emoluments Clause in the Articles of Confederation to add a new provision permitting public officials to keep gifts from foreign dignitaries if Congress first provided its affirmative consent. Of course, Congress's approval could not undo any *quid pro quo* arrangement, but it could subvert the appearance of corruption by sanctioning the gift with the approval of a representative body of government. *See The Federalist No. 39*, *supra*, at 241 (James Madison) (describing the need for a system of government where officials were dependent on "the great body of the people" and "not [on] an inconsiderable proportion or a favored class of it").

At its core, the BCRA provision in this case is a prophylactic measure designed to limit the extent to which post-election gifts, which carry a heightened risk of *quid pro quo* corruption and have at most a tenuous connection to political speech, can be put directly into the pockets of candidates who lend money to their campaigns. Both the Constitution's text and history and this Court's precedents gives Congress a wide berth to prohibit the potentially corrupt repayment scheme that this law guards against.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

November 22, 2021 * Counsel of Record