**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| TED CRUZ FOR SENATE, *et al.*, | ) | |
| *Plaintiffs*, | ) | |
| v. | ) | Civil Action No. 19-908-NJR-APM-TJK |
| FEDERAL ELECTION COMMISSION, *et al.*, | ) | |
| *Defendants*. | ) | |

# PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

The FEC acknowledges that Senator Cruz and his Campaign Committee are free today to accept contributions, unrestricted by any $250,000 cap, so long as those contributions are "designated . . . for the *upcoming* election," FEC's Br. 18, and so long as they comply with the $2,800 contribution limit. The FEC's defense of BCRA Section 304's Loan-Repayment Limit thus necessarily depends on the notion that a contribution made at the *same time*, in the *same amount*, from the *same contributor*, to the *same candidate*, suddenly poses a "heightened risk of quid pro quo corruption," *id.* at 32, when instead of being designated for the *next* election, it is designated to pay off the two-hundred, fifty-thousand-and-first dollar of a candidate loan from the *prior* election. To state that proposition is to refute it. The whole answer to the FEC's whole theory of *quid pro quo* corruption is that "Congress's selection" of the $2,800 contribution limit "indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014). Further, Congress has judged that this $2,800 limit is adequate to guard against any "cognizable risk of corruption," *id.*, stemming from post-election contributions in general, as well as from contributions to an incumbent officeholder who is running for reelection. Further still, Congress has judged that this $2,800 limit is even adequate to guard against any "cognizable risk of corruption," *id.*, stemming from contributions to an incumbent that are used to *pay off candidate loans* made to advance the incumbent's *current* reelection campaign. The FEC's suggestion that the very same contribution is transformed into "a highly valuable quid," FEC's Br. 30, if it is instead designated to pay off a candidate loan left over from the *previous* election is an utterly implausible conjecture—and the courts "have never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210. And implausible becomes absurd in light of the fact that, again, it is only after the campaign pays back the first

$250,000 of the candidate loan with non-corrupting post-election contributions that the corrupting influence of post-election funds suddenly, magically kicks in.

The FEC fields a variety of arguments aimed at shoring up this conjecture with something more tangible, but in the end it is left with nothing but the conjecture. It points to an online poll it crafted for purposes of this litigation, which it claims shows that the public "overwhelmingly views" post-election loan-repayment contributions as corrupting. FEC's Br. 10. But even if this kind of evidence could satisfy strict scrutiny, the FEC's poll is worthless because, among other flaws, it *never tested* the critical question in this case—whether loan-repayment contributions pose heightened corruption risks even though they are *subject to the same $2,800 limit as pre-election contributions*. The FEC asked instead whether such payments would be corrupting in a nonexistent hypothetical reality where they are subject to "*no* limit." *Id.* at 11 (emphasis added). The FEC also cites two social-science studies, but they actually damage rather than improve its position. The first study fails to distinguish between *post-election* and *pre-election* contributions—or between candidate loans and other forms of campaign debt—and in any event, it ultimately *supports* Congress's view that a $2,800 limit adequately guards against *quid pro quo* corruption. And the second study in fact *confirms* that officeholders with outstanding personal loans *are not especially beholden* to special-interest contributors. Finally, the FEC cites anecdotes about three officeholders who made large candidate loans and then accepted contributions to repay them. But even taken at face value, there is *no evidence* of any *quid pro quo* in any of these anecdotes—as opposed to "mere influence or access," which "the Government may not seek to limit." *McCutcheon*, 572 U.S. at 208.

At the end of the day, the FEC is not able to bring forward *any evidence* that the conduct restricted by Section 304 has *ever involved* actual *quid pro quo* corruption—even though that conduct was fully lawful and unrestricted prior to 2003 at the federal level, and *remains* fully lawful and unrestricted in forty States and the District of Columbia. The Loan-Repayment Limit simply cannot survive heightened scrutiny on this record.

Perhaps recognizing that it cannot satisfy heightened scrutiny, the FEC' spends most of its brief trying to avoid it. It labors to show that Section 304 is subject to mere "rational basis" review because it does "not burden any fundamental right." FEC's Br. 19. That contention is refuted by three simple propositions that the FEC *itself essentially acknowledges*. Proposition one: the First Amendment protects the fundamental right of candidates to spend their own money, without limit, to advance their own election campaigns. *See id.* at 26. Proposition two: candidate loans are simply one way in which candidates can spend their own money on their own campaigns—both because a loan is a "thing of value" and because the statutory and regulatory definitions of "expenditure" *expressly include loans*. *See id.* at 32 n.8. Proposition three: the Loan-Repayment Limit on its face burdens this fundamental right by deliberately decreasing "the likelihood [that a candidate loan] might be repaid." *See id.* at 24; *see also infra*, pp. 5 n.1 (discussing FEC's unsuccessful attempt to waive this concession away). The Loan-Repayment Limit also burdens the rights of committees and contributors, but these three propositions alone establish that it burdens the rights of candidates, and that is sufficient to require strict scrutiny. Finally, the burden that the Loan-Repayment Limit, on its face, imposes on candidates—and its failure, on its face, to advance any compelling interest—means that the Court must strike that Limit down, on its face, *whether or not* it is specifically unconstitutional as applied to Senator Cruz and his Committee (which it is).

Because the fundamental right to free speech is "vulnerable to gravely damaging yet barely visible encroachments," the First Amendment requires that it "must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). One such bulwark is the settled rule that where a candidate's right to spend his own money advancing his own election is subjected to "a special and potentially significant burden"—even one that falls short of "a cap on a candidate's expenditure of personal funds"—the burden "cannot stand unless it is justified by a compelling state interest." *Davis v. FEC*, 554 U.S. 724, 738–40 (2008). No such interest justifies the burden inflicted by Section 304's Loan-Repayment Limit, so that Limit cannot stand.

**ARGUMENT**

The FEC's combined opposition and cross-motion makes essentially three arguments: (I) that Plaintiffs' facial challenge is subject to rational-basis review because the Loan-Repayment Limit does not burden any First Amendment expression; (II) that Plaintiffs' as-applied challenge to the Loan-Repayment limit fails because their subjective motivation in taking out, and waiting to repay, the $260,000 of candidate loans at issue was to establish the factual predicate for this lawsuit; and (III) that the Loan-Repayment Limit survives both rational-basis review and "heightened scrutiny." The FEC is wrong on all three scores.

## I. The Loan-Repayment Limit Burdens Core Political Speech.

The FEC admits that candidate loans are a form of "self-financing" and are expressly included within the its own definition of a political "expenditure." FEC's Mem. in Supp. of its Mot. For Summ. J. & in Opp. to Pls.' Mot. for Summ. J. at 32 n.8 (July 14, 2020), Doc. 65 ("FEC's Br."); *see* 52 U.S.C. § 30101(9)(A)(i). And it does not meaningfully dispute that the Loan-Repayment Limit "imposes a 'burden' " on the ability to make candidate loans. *Id.* at 27. Indeed, it effectively conceded the point in prior briefing, explaining that because of the 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." Def. FEC's Opp'n to Pls.' Appl.

for a Three-Judge Ct. & Mot. to Dismiss at 44 (June 7, 2019), Doc. 26 ("FEC's MTD Br.").[1] Those two simple, undisputed points are alone fully sufficient to defeat the FEC's contention that "the Loan-Repayment Limit does not burden First Amendment speech rights," FEC's Br. 1, and we are tempted to leave it at that. Because the FEC devotes nearly a quarter of its brief to attempting to establish that proposition, however, we will explain in detail how the challenged Limit burdens the First Amendment rights of candidates, committees, and contributors.

**A. Candidates.**

1. The FEC acknowledges that under binding Supreme Court precedent any law that limits "expenditures by a candidate from his personal funds" violates the candidate's "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." FEC's Br. 4 (quoting *Buckley v. Valeo*, 424 U.S. 1, 51, 52 (1976)). And the FEC also acknowledges that a loan from a candidate to his campaign is simply one type of "expenditure by a candidate" on his campaign. After all: (1) such candidate loans are "[ ]thing[s] of value" (that is why lenders charge interest) and are *expressly included* within the statutory definition of "expenditure," *see* 52 U.S.C. § 30101(9)(A)(i); *see also* FEC's Br. 32 n.8 (admitting this); (2) they are also expressly included within *the FEC's own* definition of "expenditure" in its implementing regulations, *see* 11 C.F.R. § 100.111(a);[2] and (3) such candidate loans are in fact, as

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[1] The FEC now awkwardly attempts to claw that concession back, claiming that this quotation of its explanation "is misleading" because the quoted passage was merely intended to show that if the Loan-Repayment Limit "applied only to winning candidates," it would burden them in an "asymmetrical" way. FEC's Br. 24. To be sure, that "hypothetical," "asymmetrical" law is "not present here," *id.*; but the only difference is that the Loan-Repayment Limit as it exists in the *real* world burdens *all* candidates in the way FEC described, not just those that prevail. What the FEC pointedly *does not* say, in its most-recent brief, is that the Loan-Repayment Limit *does not have an effect* on "the likelihood [that a candidate who has made loans subject to the limit] might be repaid." *Id.*

[2] The FEC asserts that our citation of its regulatory limits and definitions "is not appropriate" because the "Court held plaintiffs' regulatory claims in abeyance." FEC's Br. 22 n.6.

the FEC again admits, merely one (extremely common) form of "self-financing" by a candidate, *see* FEC's Br. 7 (noting that "[a]lmost half of all federal campaign committees use some sort of debt to finance their campaigns"); *id.* at 8 (noting that "[m]ost self-financing takes the form of personal loans" (quoting FEC's Statement of Undisputed Material Facts ¶ 32 (July 14, 2020), Doc. 65 ("FEC's SOF"))).

The FEC *never addresses* the critical and self-evident proposition that candidate *loans* are by definition a form of candidate *expenditures*, but this proposition is fatal to its assertion that the challenged Loan-Repayment Limit does "not involve any restraint on a candidate's spending to further her candidacy." FEC's Br. 19. Instead of attempting to dispute that candidate loans are a form of protected candidate spending, the FEC advances a variety of arguments that *ignore* the nature of the loan as a whole and instead pretend as though the only part of the loan transaction that occurs is the loan's *repayment*. The FEC asserts, for instance, that when a campaign repays candidate loans it is "making funds *unavailable for political expression*," rather than spending money on political expression. *Id.* That is nonsense. Viewed at *the end* of the transaction—after the loan has been made *and used to purchase speech*—it is of course tautologically true that the funds used by the committee to *repay* the loan can no longer be used by the committee to purchase *additional* speech. But viewed *as a whole*, it is obvious that the entirety of the loan transaction is a form of spending by the candidate on political speech—and that curbing or eliminating such loans would necessarily restrict spending on speech. The FEC's back-ended view of transactions would mean that home mortgages are not a form of spending on housing because when the

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But the fact that our *legal challenge* to the FEC's regulations implementing BCRA Section 304 is not currently before the Court plainly does not blind the Court from looking at the FEC's regulatory regime *in assessing the constitutional challenge that is before it*. *See Bluman v. FEC*, 766 F. Supp. 2d 1, 4 n.3 (D.D.C. 2011); *see also McConnell v. FEC*, 540 U.S. 93, 169 n.63 (2003).

homeowner *repays* the home loan, the funds used for the repayments are no longer available for the homeowner to use in purchasing *a second house*. No, home loans are a form of spending on housing *because they are used to finance the purchase of the house that is the subject of the loan*. And banning or restricting home loans would have a direct effect on home-buying. So too with candidate loans.

These obvious propositions also dispose of the FEC's argument that limiting the repayment of candidate loans does not restrict speech because "any political message has already been communicated" at the time of repayment. *Id.* at 20. As just discussed, however, the FEC's blinkered focus on only the back end of the loan transaction—the repayment—defies economic reality, the undisputed facts, and all sense. Again, that is why federal law, and the FEC's own regulations, *define political expenditures to include loans*. *See* 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a). Indeed, it is undisputed that nearly half of all federal campaigns use debt to finance their political speech. *See* FEC's SOF ¶ 31. And as we explained in our opening brief, nothing in *Buckley* or any other precedent suggests that the First Amendment rule against limiting political expenditures turns on when the money changes hands. *See* Pls.' Mem. of Points and Authorities in Supp. of their Mot. for Summ. J. 18–19 (June 9, 2020), Doc. 61-1 ("Pls.' Br."). The FEC offers no response, because there is none.

Indeed, in the only case to have addressed the issue, the Sixth Circuit squarely held that "loans are candidate expenditures, unless and until they are repaid," and that "[a]s a matter of campaign finance law, therefore, limitations on candidate loans are limitations on campaign expenditures." *Anderson v. Spear*, 356 F.3d 651, 672–73 (6th Cir. 2004). The FEC grasps for a way to repudiate the Sixth Circuit's persuasive reasoning, characterizing this statement as "dicta," and disparaging the case as "wholly inapposite" because it involved "a monetary cap" on loans.

FEC's Br. 28. Wrong on both scores. Far from dicta, *Anderson*'s conclusion that "limitations on candidate loans are limitations on campaign expenditures" *is the fundamental basis for the court's holding striking down the restriction at issue*. 356 F.3d at 673. And yes, *Anderson* involved a different *type* of restriction on candidate loans than the one here, but that irrelevant distinction does not somehow render "inapposite" the court's conclusion—directly on point and directly contrary to the FEC's reasoning in this case—that "[a]s a matter of campaign finance law, . . . limitations on candidate loans are limitations on campaign expenditures." *Id.*

The FEC's theory that limiting the repayment of campaign-finance loans does not "restrict[ ] political speech," FEC's Br. at 20, goes too far, for it would necessarily follow that the Government could *entirely ban* candidates or committees from taking out loans of any kind—a source of funding available to every other lawful enterprise and used by nearly half of all federal campaigns—without *even implicating* the First Amendment or triggering anything other than *rational-basis* review. That obviously cannot be correct, and so neither can the FEC's theory.

Finally, the FEC argues that money used to repay candidate loans goes to the candidate's "personal use" because it "effectively goes into the candidate's pocket." FEC's Br. 20, 21. There is nothing to this. Again, the relevant question is not how the money used to *repay* a candidate loan is then spent by the candidate, but whether *the loan proceeds* were used to finance speech. And where the proceeds of a candidate loan were spent by the committee to pay for political speech, the FEC never explains why the Court should pretend that the back end of the transaction—the repayment—is all that has taken place. Accordingly, the decision by the U.S. District Court for the District of Delaware concerning the personal use of campaign funds in *FEC v. O'Donnell*, 209 F. Supp. 3d 727 (D. Del. 2016), is completely irrelevant. While it tiptoes up to the assertion, the FEC never actually claims that when a committee repays a candidate's loan it has unlawfully converted campaign funds to personal use in violation of 52 U.S.C. Section 30114(b)(1). It does not claim this because it cannot. *See* 52 U.S.C. § 30116(j) (allowing such payments, subject to the challenged limit).

2. The burden that Section 304 inflicts on candidate loans—that is, on protected speech—is indisputable. The FEC itself explains that candidates "often host 'debt retirement' fundraising events . . . to help pay down [the] candidate's debt," FEC's Br. 9, and by barring the use of these debt-retirement funds to repay any candidate loan in excess of $250,000, the challenged Loan-Repayment Limit reduces the sources of funding that are available to repay a candidate's loans. And again, in prior briefing the FEC acknowledged the (obvious) point that this necessarily affects "the likelihood he or she might be repaid." FEC's MTD Br. 44. In effect, the design and inevitable result of the Limit is to substantially increase the likelihood that any amount over $250,000 loaned by the candidate is a "loan" in name only, and will in reality end up being a flat contribution. *See* 11 C.F.R. § 116.11(c); *see also* FEC's Br. 7 (explaining that unpaid candidate loans in excess of the $250,000 limit must be treated as a contribution). The Loan-Repayment Limit thus forces a candidate who can afford to *loan*—but not to *give*—money to his campaign to think twice before making such a loan, perversely *harming* the very non-wealthy candidates Congress designed it to *benefit*.

It cannot seriously be denied that Section 304 operates in this way, and the FEC does not seriously try.[3] Instead, FEC once again attempts to becloud the issue rather than dispute it. It

[3] The FEC does briefly argue that we are "conflat[ing] the political speech paid for by candidate loans . . . with the terms for repayment of candidate loans." FEC's Br. 22. That is an utter non-sequitur. As just discussed, a limit on the "repayment of candidate loans" quite obviously restricts the right to *make* the loan—and therefore "the political speech paid for by [it]," *id.*—since a loan that cannot be repaid is not a loan at all.

repeatedly points out, for example, that the Loan-Repayment Limit is not a *flat ban* on candidate loans. FEC's Br. 22, 27. But it is far too late in the day to suggest that the Government gets a First-Amendment pass so long as it stops short of *flatly banning* protected speech. *See United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). No, even when the law "does not impose a cap on a candidate's expenditure of personal funds," strict scrutiny is required it if forces the candidate to "shoulder a special and potentially significant burden if they make that choice." *Davis*, 554 U.S. at 739–40. That is why the Supreme Court in *Davis* struck down the other portion of BCRA's "Millionaire's Amendment"—its asymmetrical contribution limits—even though those limits were not as intrusive as the "specific limits on the amount[s] that candidates could spend" invalidated in *Buckley*. FEC's Br. 22. And that is why *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* likewise struck down Arizona's discriminatory public-financing scheme, 564 U.S. 721, 755 (2011), even though it "impose[d] no ceiling on speech," *id.* at 763 (Kagan, J., dissenting).

The FEC attempts to distinguish *Davis* and *Bennet* on their facts, insisting that the laws in both cases were unconstitutional only because they imposed "*asymmetrical* limits," and "the Loan Repayment Limit is not asymmetrical." FEC's Br. 23, 24 (emphasis added). But the Supreme Court in *Bennett* explicitly repudiated *this exact argument*:

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

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

The FEC next seeks support from the Supreme Court's decision in *McConnell*, pointing out that *McConnell* upheld certain restrictions on raising and spending "soft money" by treating them as contribution limits, even though they "restrict[ed] not only contributions but also the spending . . . of funds raised outside of FECA's contribution limits." 540 U.S. at 138. The Court concluded that those spending limits merely "regulate[d] contributions on the demand rather than the supply side" and did not "burden[ ] speech in a way that a direct restriction on the contribution itself would not." 540 U.S. at 138–39. That line of reasoning is utterly irrelevant here. Section 304 does not restrict the right of committees to spend funds that are *contributed* from certain sources or in certain amounts in an effort to curb those contributions, as in *McConnell*; rather, it restricts the repayment of candidate loans in an effort to curb a candidate's right to *spend his own money*, in the form of loans, on his election effort.

Finally, the FEC claims that the Loan-Repayment Limit does not impinge upon First Amendment rights because "plaintiffs have not offered evidence to support their allegation that the Limit significantly deters candidates from making loans to their campaigns in amounts greater than $250,000" and "publicly available FEC data indicates that in the wake of the Loan Repayment Limit's enactment in BCRA in 2002, federal candidates have continued to loan their campaigns amounts over $250,000 at similar rates." FEC's Br. 27, 28. Even if that assertion painted an accurate picture of Section 304's empirical effect (and it does not, as we show next), it would be irrelevant. The burden imposed on candidate spending by the Loan-Repayment Limit is plain on its face as a matter of law, and the Court need not pause to consider *how many people it successfully deters* from freely exercising their First Amendment rights. A court faced with a flat fine on political pamphlets would not need to carefully compare the rate of pamphleteering before and after the fine's enactment to determine whether the fine burdens speech. And in *Bennett*, the Supreme Court squarely held that the same is true of less categorical burdens—and once again squarely rejected the approach advocated by FEC:

> While there is evidence to support the contention of the candidates and independent expenditure groups that the matching funds provision burdens their speech, it is never easy to prove a negative—here, that candidates and groups did not speak or limited their speech because of the Arizona law. In any event, the burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups. . . . As in *Davis,* we do not need empirical evidence to determine that the law at issue is burdensome. See 554 U.S., at 738–40 (requiring no evidence of a burden whatsoever).

564 U.S. at 745–46 (citation and quotation marks omitted).

Even if the type of empirical inquiry advocated by the FEC had any relevance (which it does not) the evidence in the record overwhelmingly establishes the Loan-Repayment Limit's significant deterrent effect. According to a comprehensive study of all candidate loans from 1983 to 2014—a study the FEC itself relies upon—the deterrent effect of Section 304 is undeniable:

> [T]he implementation of BCRA had a material impact on the propensity of many politicians to make large loans. While the distribution of loans in the $100,000–$1 million range shows no discernible anomalies prior to the passage of BCRA, there is a clear clustering of loans right at the $250,000 threshold in the post-BCRA period. These loans account or seven percent of all loans in the $100,000–$1 million range post-BCRA exceeding the frequency of any other loan during the same period. The loans right at the $250,000 threshold are also much more common during the post-BCRA period compared to the pre-BCRA period where they account for only 3.6 percent of all loans. *The results show that BCRA created a binding constraint for many politicians in the supply of large loans.*

Pls.' Statement of Facts Resp. ¶ 32 (Aug. 11, 2020) ("Pls.' SOF Response") (quoting Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* at 24–25 (May 2020) (emphasis added).

The FEC attempts to downplay these findings, suggesting that since 3.6% of loans were in the amount of $250,000 before BCRA and 7% were in that amount after BCRA, the Loan-Repayment Limit has "impacted the conduct of . . . only about 3% of . . . loan candidates." FEC's Br. 10. But the massive cluster of loans precisely at the $250,000 level, *see* Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns* at 38 fig.3, is important not as a precise measure of the number of candidates affected, but rather as a stark indication that Section 304's limit is plainly influencing candidates' behavior and serving as "a binding constraint for many politicians," *id.* at 25. To be sure, many "candidates have continued to loan their campaigns amounts over $250,000," FEC's Br. 28, but that rejoinder is nothing more than a reiteration of FEC's suggestion (this time expressed in the argot of the social scientist) that the Loan-Repayment Limit should escape constitutional scrutiny because it stops short of an absolute ban.

Moreover, the FEC's own informal study of (1) the five election cycles prior to the enactment of BCRA, and (2) the five most-recent cycles, in fact *conclusively confirms* the existence of Section 304's burden. FEC notes that in the pre-BCRA period, 24% of all Senate candidate loans—and 7.3% of House candidate loans—were for amounts greater than $250,000; by comparison, in the post-BCRA period, 20.7% of Senate candidate loans—and 10.7% of House loans—were in excess of the $250,000 limit. FEC's SOF ¶¶ 38–41. While these percentages at first blush appear to indicate that the rate of larger-than-$250,000 candidate loans remained roughly the same, the FEC neglects to mention the critical fact that overall spending *skyrocketed* between the two periods in question. For the five pre-BCRA cycles analyzed by the FEC, for example, aggregate total spending by Senate and House candidates equaled $1,794,767,010 and $2,495,308,009, respectively. Pls.' SOF Response ¶ 32. By contrast, during the five most-recent *post*-BCRA cycles, the equivalent Senate and House numbers were $3,955,579,053 and $5,773,972,539—in both cases, *over twice as high*. *Id.* The fact that the rate of candidate loans higher than $250,000 has remained essentially the same between these two periods—when overall spending *more than doubled*—is in fact overwhelming evidence of the disincentives created by Section 304's tangible burden.

**B. Committees.**

The Loan-Repayment Limit is also subject to strict scrutiny because it infringes upon the First Amendment rights of committees. As explained in our opening brief, it does so by forcing a committee to choose, in the critical first 20 days following an election, between using the limited pre-election contributions it has on hand to (1) repay any candidate loans that exceed $250,000, or (2) repay its other creditors, including the vendors it contracted with to engage in core First Amendment speech. If it chooses the first horn of this dilemma, it must forego, or at least delay, paying creditors who engaged in speech on its behalf. The FEC trots out its argument that "the campaign has already communicated any political message" it would be paying its vendor for, FEC's Br. 27 n.7, but as explained above, the constitutionality of restrictions on campaign expenditures simply cannot turn on when the money changes hands, *see supra*, pp. 6–8.

If the Committee chooses the second horn of the dilemma, and repays its other creditors instead of the candidate, the necessary result is that the candidate loans will be converted to contributions—foreclosing their repayment forever—which will burden and deter any future candidate loans for all of the reasons discussed above. Either of the options presented by Section 304 thus involve the Government-imposed sacrifice of First Amendment freedoms. The FEC's only response is to contend that the Loan-Repayment Limit "does not 'force' the committee to curb its speech," *id.*—presumably because Section 304 leaves the choice between these two unpalatable options to the Committee. But as the Supreme Court explained in *Davis*, a "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice"—particularly where the statute in question "does not provide any way" that First Amendment rights can be exercised "without abridgment." 554 U.S. at 739–40.

**C. Contributors.**

Finally, the Loan-Repayment Limit must at a bare minimum be subjected to *Buckley*'s "closely-drawn" scrutiny, because it impinges upon the First Amendment rights of contributors. The FEC acknowledges that "contributors may designate their contributions for a particular election," including a previous election, and that generally "[a] contribution designated for a *previous* election may be accepted by a campaign committee only to the extent that the contribution does not exceed the committee's 'net debts outstanding' from that election." FEC's Br. 4, 5. The calculation of a committee's "net debts outstanding" thus effectively serves as a limit on the committee's ability to accept post-election contributions—and, correspondingly, on a contributor's ability to make them. By excluding any candidate loans in excess of $250,000 from the net-debts formula, the Loan-Repayment Limit thus bars some contributions with respect to an election (within the $2,800 base limit) that would otherwise be lawful.

The FEC maintains that this argument "misses the mark," noting that the constitutional value of a contribution from the perspective of a contributor "does not rely on the manner in which a campaign uses the contribution." FEC's Br. 25. True but irrelevant. Section 304 does not restrict "the manner in which a campaign uses" contributions, *id.*, it prevents committees from *accepting certain contributions at all*. FEC resists this point, arguing that Section 304 only requires that a "contribution has to be used for the next election and not the previous election." FEC's Br. 19. Wrong again. Because the base contribution limits apply separately *to each election* (as the FEC acknowledges—*see* FEC's Br. 34), when the Loan-Repayment Limit kicks in *it limits the amount* that may be contributed, not just how those contributions may be used: while a contributor barred by Section 304 from making a post-election loan-repayment contribution is free to contribute up to $2,800 designated for the next upcoming election, a contributor free of the Limit could contribute more ($2,800 for the next election and an *additional* $2,800 for each prior election with respect to which (1) the committee continues to owe money on a candidate loan, and (2) the contributor has not yet contributed any money).

## II. FEC's Challenge to Plaintiffs' As-Applied Claims Is Unpersuasive and Irrelevant.

Because the Loan-Repayment Limit *on its face* burdens the First Amendment rights of federal candidates, their campaign committees, and their contributors, it must be subjected to strict scrutiny—or at a minimum "closely drawn" scrutiny. It therefore matters not at all whether the Loan-Repayment Limit also violates the First Amendment rights of Senator Cruz and the Cruz Committee *as applied*. The many pages the FEC spends assailing our as-applied claims, then, are all so much wasted ink.[4] And the FEC's arguments are meritless as well as irrelevant.

**A. The Loan-Repayment Limit Violates Plaintiffs' First Amendment Rights As-Applied.**

Senator Cruz's constitutional rights have been violated by Section 304 in the same way as any other candidate who has made candidate loans subject to the Limit. It is undisputed that Senator Cruz made candidate loans in the amount of $260,000 prior to the 2018 election. *See* FEC's Statement of Genuine Issues ¶ 32 (July 14, 2020), Doc. 65 ("FEC's SOF Response"). The Cruz Committee spent that $260,000, just like all of the other funds available to it, to finance its First Amendment protected political operations and expression. *See* FEC's SOF Response ¶¶ 37 & 40 (admitting that the Cruz Committee ended the 2018 election with over $2.3 million in "debts for expenses incurred in connection with the election" and that it used its cash on hand following election day to pay some of these creditors). While the FEC makes much of the fact that Plaintiffs' decisions in making and repaying the loans were motivated by their desire to establish the factual predicate for this lawsuit—a matter we turn to shortly—they do not dispute that as a factual matter the loans *were used* to fund campaign operations. Like any other candidate loans, then, Senator Cruz's loans constitute expenditures on core First Amendment expression. And just like any other candidate, Senator Cruz's right to fund his own campaign in this way was indisputably burdened by the challenged Loan-Repayment Limit: the Limit barred the Cruz Committee from repaying

[4] The FEC also argues that Plaintiffs have no as-applied challenge on behalf of their contributors. FEC's Br. 18–19. But we have never advanced such an as-applied challenge; rather, our claim related to contributors is an overbreadth claim. *See infra* Parts II.B, III.C.

$10,000 of Senator Cruz's $260,000 loans with any post-election contributions, and that $10,000 must now be treated as a "contribution from Senator Cruz to his Committee." FEC's Br. 13.

The Cruz Committee's First Amendment rights are likewise infringed by the Loan-Repayment Limit in just the way described above. *See supra*, Part I.B. It is undisputed that the Committee ended the election with insufficient cash to both repay Senator Cruz's loans and meet all of its outstanding obligations to its other creditors. *See* FEC's SOF Response ¶ 35. It thus faced the choice described earlier: it could either use its limited resources (1) to repay the candidate loans; or (2) to pay its other creditors but renege on Senator Cruz's loans (burdening its right to receive contributions from the candidate).

The FEC nonetheless argues that Plaintiffs have suffered no constitutional violation because they *could* have structured the repayment of the loan in a way that would have fully reimbursed Senator Cruz—for example, by paying Senator Cruz $10,000 within the first 20 days and then paying the remaining $250,000 later or with post-election money. FEC's Br. 16. But while that reduces the amount of money at stake in the dilemma, it does not eliminate the dilemma—for it is undisputed that the Committee's outstanding obligations *exceeded* its cash by over $300,000, *see* FEC's SOF Response ¶ 38, such that even a $10,000 partial re-payment to Senator Cruz would have meant foregoing the repayment of $10,000-worth of other outstanding campaign debts. Put differently, the FEC's proposed "solution" to the constitutional conundrum faced by Plaintiffs is that they could have avoided defaulting on $10,000 of Senator Cruz's loans if only Plaintiffs had *complied* with the very Loan-Repayment Limit they believe *is unconstitutional* by simply repaying the loan with pre-election money. That cannot eliminate the First Amendment problem. For similar reasons, FEC's contention that Senator Cruz "was not deterred by the Loan Repayment Limit," FEC's Br. 15, since he made the $260,000 loans anyway, is entirely beside the point. A party who has been subjected to an unconstitutional burden on his First Amendment rights is not stripped of a First Amendment claim merely because he *shoulders the burden and speaks anyway*. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 578–79, 593 (1983) (striking down discriminatory tax on newspapers under the First Amendment even though the plaintiff newspaper had paid the tax).

The D.C. Circuit's decision in *Stop This Insanity, Inc. Employee Leadership Fund v. FEC* is not to the contrary. 761 F.3d 10 (D.C. Cir. 2014). The plaintiff in that case deliberately formed a type of political action committee that it knew imposed more restrictions on its expenditures and solicitations than other forms of organization, yet it argued that the First Amendment required strict scrutiny of those restrictions. *Id.* at 12–13. But it did not assert a *constitutional right* to choose its more-restrictive form of organization—so it had the option of achieving its interest *without* suffering any constitutional injury. Plaintiffs here never had this option, so they cannot be faulted for "doing things the hard way." *See Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533 (D.C. Cir. 2019) (en banc) ("that the committee chose the lesser of two evils hardly transforms FECA's limitation into a self-imposed restriction"). And even setting that (dispositive) point aside, *Stop This Insanity* still does not support Defendants, since the D.C. Circuit in that case went on to *apply "closely drawn" scrutiny*, *Stop This Insanity*, 761 F.3d at 16 (emphasis added); it did not dismiss the plaintiff's claim for failure to allege a cognizable burden on its First Amendment rights.

The FEC's primary objection to Plaintiffs' as-applied claims is based on the fact—to which we have stipulated—that the exclusive motivation behind Senator Cruz's actions in making the 2018 loans and the Committee's actions in waiting to repay them was to establish the factual basis for this lawsuit. The FEC claims this point about subjective intent is "fatal to plaintiffs' as-applied challenge," FEC's Br. 14, but it offers no authority whatsoever for the startling proposition that a court must weigh the subjective motivations behind a plaintiffs' decision to exercise its constitutional rights in order to determine whether those rights have actually been burdened. *Stop This Insanity*—the only case cited by the Committee in support of its argument—certainly does not so hold; that case conducted no inquiry into the plaintiffs' motive in setting up the type of PAC at issue, nor is there a single word in the opinion indicating that such an inquiry into subjective motivation has any conceivable relevance.

That proposition, moreover, is flatly contrary to the Supreme Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967). The plaintiffs there—"a group of 15 white and Negro Episcopal clergyman"—were arrested when they "attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961." *Id.* at 549. The Court of Appeals concluded that their challenge to Jackson's regime of segregation failed "because of their anticipation that they would be illegally arrested" when they went to the bus terminal, *id.* at 558, but the Supreme Court disagreed. "[E]ven assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations," the Court held, the plaintiff clergymen "had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner *does not disqualify them from seeking damages under [Section] 1983*." *Id.* (emphasis added). *Pierson* thus plainly holds that the plaintiffs' subjective intent was no barrier to their Section 1983 claim *on the merits*. The subjective motivations of Senator Cruz and his Committee are likewise irrelevant to the merits of their as-applied claims.

Defendants' contrary insistence that Plaintiffs' subjective intentions somehow bars their as-applied challenge is also in serious tension with the cases we have previously cited (and this Court's previous decisions) establishing that subjective intent is irrelevant to a plaintiff's standing.

*See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958); Memorandum Opinion and Order 11–12 (Dec. 24, 2019), Doc 34 ("December 24, 2019 Opinion"); Memorandum Opinion and Order 8 (Mar. 30, 2020), Doc. 45. For the inquiry into subjective motivation that Defendants advocate would—at the merits stage no less than the standing stage—cause a sea change in constitutional-rights litigation and call into question the results of landmark civil rights cases.

### B. In Any Event, Plaintiffs' Facial Challenge Renders the Dispute Over Their As-Applied Claims Irrelevant.

Ultimately the dispute over Plaintiffs' as-applied claims is of no moment, however, given the presence of our facial claims. While a plaintiff is ordinarily limited to vindicating his own constitutional rights, it is black-letter law that in the First Amendment context a party may "challenge a statute not because their own rights of free expression are violated," but rather because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 613 (1973). The Supreme Court, accordingly, has squarely held that "where the claim is that a statute is overly broad in violation of the First Amendment, . . . a party [may] assert the rights of another without regard to the ability of the other to assert his own claims," *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984). After all, "[b]ecause of the sensitive nature of constitutionally protected expression," if such "attacks on overly broad statutes" were not permitted, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Indeed, the judicial solicitude for these transcendent First Amendment rights is so strong that a facial attack on an overbroad statute need not meet the ordinary requirements that apply when a plaintiff challenges a law on its face. In other contexts, a plaintiff mounting a facial attack must "establish that 'no set of circumstances exists under which [the challenged law] would be valid.' " *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But "[i]n the First Amendment context" the Supreme Court has "recognize[d] a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quotation marks omitted); *but see* FEC's Br. 39 (incorrectly suggesting that the ordinary facial-challenge standard applies). To be sure, a plaintiff bringing an overbreadth challenge must still "satisf[y] the requirement of 'injury-in-fact,' " *Joseph H. Munson Co.*, 467 U.S. at 958, but this Court has already held that Plaintiffs cleared that hurdle at the pleading stage, December 24, 2019 Opinion at 15, and the facts establishing standing are now undisputed, *see* FEC's SOF Response ¶¶ 32–44.

As demonstrated above, Section 304's Loan-Repayment Limit impinges upon the First-Amendment Rights of candidates, committees, and contributors, and that remains true *regardless* of whether its application to Senator Cruz's 2018 loans impinged upon the First Amendment rights of Plaintiffs themselves. Moreover, as explained next, *see infra* Part III, that infringement of core First Amendment freedoms is not narrowly tailored (or even "closely drawn") to serve any compelling governmental interest. Accordingly, Section 304 is unconstitutional on its face, and the Court may strike it down without reaching Plaintiffs' as-applied claims.

## III. The Loan-Repayment Limit Fails Both Strict and "Closely-Drawn" Scrutiny.

Because it infringes the core First Amendment rights of candidates and committees (including Senator Cruz and the Cruz Committee) as well as their contributors, Section 304 must achieve a compelling (or at least sufficiently important) governmental interest and be narrowly tailored (or at least closely drawn) to achieve that interest. *See McCutcheon*, 572 U.S. at 198–99; *Bennett*, 564 U.S. at 734. The Loan-Repayment Limit fails on every score.

### A. The Loan-Repayment Limit Does Not Further Any Anti-Corruption Interest.

The FEC's primary argument is that the Limit is "justified by the important governmental interests in preventing quid pro quo corruption or its appearance." FEC's Br. 30. But we explained in our opening brief why that admittedly compelling interest cannot justify Section 304 as a matter of law, and all of FEC's arguments to the contrary are unavailing.

1. In *Davis*, the FEC made a strategic miscalculation, arguing that the purpose of the Millionaire's Amendment was to "level electoral opportunities for candidates of different personal wealth." 554 U.S. at 741 (quotation marks omitted). The Supreme Court flatly rejected that justification as "wholly foreign to the First Amendment." *Id.* at 742. The FEC understandably now back peddles away from it—insisting that Congress's levelling interest was carefully isolated to the portion of the Millionaire's Amendment "challenged in *Davis*," FEC's Br. 32, and that the Loan-Repayment Limit was a "discrete" "anti-corruption measure," *id.* at 5–6.

The only evidence the FEC is able to muster for that revisionist interpretation of legislative history is comprised of two floor statements during the Senate debate: a cryptic remark by Senator Hutchison suggesting that the Limit would prevent candidates from "resell[ing]" their office once elected, 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001), and a statement by senator Domenici claiming that it would limit the ability of candidates to hold post-election "fundraising events" asking their contributors "How would you like me to vote now that I am Senator," 147 CONG. REC. S2464 (daily ed. Mar. 19, 2001). There is no indication that any anti-corruption motivation was widely shared, or that it was anything other than second-fiddle to the Millionaire Amendment's virtuoso First Violin: Congress's desire to "better balance the playing field." *Id.* at S2460 (statement of Sen. Domenici). Indeed, as the FEC acknowledges, *see* FEC Br. 7 n.3, Senator Hutchison *repeatedly and explicitly explained*, in the very same remarks relied upon by the FEC, that the Loan-Repayment Limit has "the same purpose" as the rest of the Amendment and that this "purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field," 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison); *see also id.* at 2542 (statement of Sen. Hutchison) ("The point is, everyone would like to see the most level playing field we can find . . . *That is what my part of this amendment does*.").[5]

In addition to Senator Hutchison's remarks, the evidence that this levelling interest was the *real* motivation behind the Millionaire's Amendment is simply overwhelming. *See* 147 CONG. REC. S2463 (daily ed. Mar. 19, 2001) (statement of Sen. DeWine) (Amendment was designed to "level the playing field" between self-funding candidates and their non-self-funding opponents); *id.* at S2459 (statement of Sen. Feinstein) (Amendment "an attempt to level the playing field"); *id.* at S2464 (statement of Sen. Sessions) ("I believe we have an unfair situation. It makes it difficult for candidates to run on a level playing field."); 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Durbin) ("What we are trying to address with this amendment is to level the playing field."). And contrary to the FEC's assertion that these statements only "pertain to the Millionaire's Amendment . . . and not to the Limit in particular," FEC's Br. 32, the evidence is *also* overwhelming—and the FEC in fact admits—that Congress *simply did not distinguish* millionaires and billionaires who *donated* their own money to their campaigns from those who

[5] In addition to the two remarks by Senators Hutchison and Domenici, the FEC cites a laundry-list of floor statements as supposed support for the notion that Section 304 was meant as "an anti-corruption measure." *See* FEC Br. 5–7. Apart from the two statements discussed in the text, however, none of these citations provides the least support for the FEC's revisionist theory of Congress's intent. FEC appears to believe that any reference to contributions occurring "after the election" is shorthand for "corruption," but it offers no evidence of this question-begging theory; and the theory is hard to square with the fact that the same Congress chose to *freely allow* post-election contributions to (1) incumbents, and (2) candidates with other forms of debt (subject in both cases, of course, to the inflation-adjusted $2,800 base limit).

"loan it and say they will be repaid later." 147 CONG. REC. S2461 (daily ed. Mar. 19, 2001) (statement of Sen. Durbin); *see also id.* at S2462 (statement of Sen. Durbin) ("Think about what this institution will become if that is what one of the rules is to be part of the game: That you have to be loaning or contributing literally millions of dollars in order to be a candidate for public office."); *id.* at S2465 (statement of Sen. Sessions) (amendment "prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate."); *id.* at S2462 (statement of Sen. Domenici) ("it should be a condition to your putting up your own money, knowing right up front you are not going to get it back from your constituents"); FEC's SOF Response ¶ 13.

Once again, the point is strongly confirmed by the very floor statements the FEC relies upon. 147 CONG. REC. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici) (candidate who "incur[s] debt from a personal loan" has used his "own money to run for election"); 147 CONG. REC. S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici) ("candidates who incur personal loans" have been "elected with their own money"); *id.* (statement of Sen. Hutchison) (under the Loan-Repayment Limit "a candidate can spend his or her own money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back").

The FEC's only response to this evidence is that references to candidate loans during the legislative debate should be ignored because "the Millionaire's Amendment on its own terms applies to both self-financing through a contribution of funds or loans." FEC's Br. 32 n.8. But this concession self-defeatingly *clinches* the proposition that Congress's levelling intent extended to *both* candidate spending and candidate lending.

Finally, as explained in our opening brief, the Millionaire's Amendment was *also* motivated in part by the *even more pernicious* purpose of protecting the benefits that accrue to all incumbents—who need not "speak early" or loan their campaigns seed money to "establish [their] position and garner contributions." *Anderson*, 356 F.3d at 673; *see* 147 CONG. REC. S2465 (daily ed. Mar. 19, 2001) (statement of Sen. Dodd); 147 CONG. REC. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle); *id.* at S2548 (statement of Sen. Levin); *id.* at S2540 (statement of Sen. McCain); 147 CONG. REC. S2853 (daily ed. Mar. 26, 2001) (statement of Sen. Reid). The FEC tenders no response to this troubling aspect of the Amendment.

In short, the core purpose of the Loan-Repayment Limit was "the same purpose" as the balance of the Millionaire's Amendment: "to level the playing field" on which wealthy and non-wealthy candidates campaigned. 147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Sen. Hutchison). If the Limit also happened to advance an anti-corruption interest (and it does not), it would be a matter of pure happenstance.

2. Even if Congress had deliberately crafted the Loan-Repayment Limit to prevent corruption, that purpose would still fail to justify the provision as a matter of law. In *McCutcheon*, as explained at greater length in our opening brief, the Supreme Court struck down FECA's "aggregate" per-donor contribution limits based on the conclusion that the inflation-adjusted $2,800 "base limits remain the primary means of regulating campaign contributions," and "Congress's selection of a [$2,800] base limit indicates its belief that contributions of that amount or less *do not create a cognizable risk of corruption*." 572 U.S. at 209, 210 (emphasis added). "If there is no corruption concern" with any given contribution within the $2,800 limit, the Court reasoned, then "it is difficult to understand" how the contributions barred by the *separate aggregate* limit "can be regarded as corruptible." *Id.*

As in *McCutcheon*, so too here. There is no dispute that all post-election contributions—both those freely allowed under current law and those barred by the Loan-Repayment Limit because they would be used to repay more than $250,000 in candidate loans—are limited by the same $2,800 base limit that applies to pre-election contributions. But Congress has concluded that "contributions of that amount or less *do not create a cognizable risk of corruption*," *id.* at 209 (emphasis added)—a judgment the FEC apparently shares, since it has *never* called upon Congress to lower the base limit. *See* FEC's SOF Response ¶ 31. Accordingly, imposing an *additional* limit on the particular contributions governed by Section 304 cannot be justified as an anti-corruption measure as a matter of law.

As in *McCutcheon*, the FEC attempts to avoid this conclusion by justifying the Loan-Repayment Limit as serving "an important anti-circumvention purpose." FEC's Br. 34. As in *McCutcheon*, this maneuver fails. FEC argues that without Section 304, "a candidate could keep outstanding debt from past campaigns such that a single individual contributor could simultaneously make maximum contributions to multiple campaigns for the same candidate." *Id.* But what the FEC describes is *entirely legal*—and will remain so *with or without* Section 304's limit. The ability of donors to make multiple simultaneous maximum contributions is in fact simply a consequence of (1) Congress's creation of a contribution limit that applies separately "with respect to [each] election," 52 U.S.C. § 30116(a)(1)(A), and (2) the Government's decision to allow post-election contributions up to the amount of a candidate's net debt from a past election (subject to the $250,000 limit for candidate loans), 11 C.F.R. § 110.1(b)(3)(i); *accord* FEC's Br. 5 ("[A] campaign may accept post-election contributions . . . to the extent necessary to pay down a net shortfall from that election."). The FEC worries about candidates creating a "deliberate" "cycle" of "debt stacking," *id.* at 34, but given that a candidate can only accept debt-retirement funds to the extent it is *genuinely carrying debt from a prior campaign*, the maneuver the FEC describes is by definition incapable of improving a candidate's net financial position.[6] And in any event, the FEC *never explains* how simultaneous contributions to a candidate's different election campaigns can constitute "circumvention" of the contribution limits when the debt at issue comes from personal loans but not when it comes from other forms of debt.

3. The FEC attempts to evade the force of the Supreme Court's holding in *McCutcheon* with the argument that the extra limit imposed by Section 304 "addresses a limited situation involving special dangers of corruption where Congress can legitimately regulate further." FEC's Br. 35. Just as FECA's ban "on contributions by individual federal contractors" has been upheld because of the "special concerns about corruption" in that context, FEC says, the Loan-Repayment Limit "functions in a specific, temporally-limited context where concerns about both actual quid pro quo corruption and its appearance are heightened." *Id.* at 35–36 (citing *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc). As explained in our opening brief, *see* Pls.' Br. 29–33, this argument is irreconcilable with the actual campaign finance scheme Congress and the FEC have established.

The FEC is ambiguous about what, precisely, gives rise to the purported "special concerns about corruption" in this context, *id.* at 35, but no matter how the story is fleshed out, the concerns turn out to be illusory. At times, the FEC acts as though the conduct limited by the Loan-Repayment Limit is especially corrupting because it involves contributions that occur "after an

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[6] The FEC's circumvention scenario also makes no financial sense. As the FEC describes it, the concern is that a candidate might loan money in one campaign cycle so that in the following cycle one of his donors will be able to double her maximum contribution, with half of the contribution going to pay back the previous campaign's loan. FEC's Br. 34. But the candidate could achieve *precisely the same result* by simply having the donor make the contribution *during the first campaign* and then rolling the contribution over to the next cycle after election day, *see* 11 C.F.R. § 110.3(c)(4)—leaving it entirely unclear why he would resort to the cumbersome (and risky) mechanism of a personal loan to reach the same financial destination. *Cf. McCutcheon*, 572 U.S. at 213 ("[I]t is hard to believe that a rational actor would engage in such machinations.").

election, at a time when it is clear whether the candidate will be in a position to grant political favors to those contributors." *Id.* at 40. That cannot be the key pillar upon which Section 304's weight rests, however, because precisely the same thing can be said about *all post-election contributions*, including those that are freely allowed by Section 304 to repay other debts or to repay the first $250,000-worth of candidate loans. Even more fundamentally, the same thing is true *of all incumbent officeholders running for re-election*—for all of their contributions, too, are made "when it is clear whether the candidate will be in a position to grant political favors." *Id.* If the *post-election* nature of the conduct targeted by Section 304 is the concern, then, far from addressing a "specific, temporally-limited context," *id.* at 36, the challenged Limit is aimed at a feature shared by the *nearly 50% of federal candidates* who finance their elections with some form of debt, *see id.* at 7, as well as *every incumbent seeking reelection*—all of whom Congress has determined may freely receive contributions while holding office, subject to the inflation-adjusted base limit, without "creat[ing] a cognizable risk of corruption," *McCutcheon*, 572 U.S. at 210. The FEC never addresses (or even appears to recognize) this fatal difficulty with its theory that the "post-election" nature of the contributions governed by Section 304 somehow make them an especially "valuable quid for which a candidate or officeholder may exchange an improper quo." FEC's Br. 30.

The FEC also suggests that using contributions to repay candidate loans is particularly problematic for a second reason: because those repayments supposedly "go directly into the pocket" of the candidate and may be used "for their own personal benefit." *Id.* at 32, 41. We have already explained why this contention reflects an utter lack of understanding of elementary economic reality. A candidate who loans his campaign $260,000 and is ultimately repaid that amount does not have *a single additional cent* to spend "for their own personal benefit." *Id.* at 32.

That is why no one (except, it appears, the FEC) thinks the money used to repay those loans (within Section 304's strictures) has been unlawfully converted to the candidate's "personal use," 52 U.S.C. § 30114(b), and that is also why no one is concerned that when a committee repays debts owed to banks or vendors, it is giving those entities some windfall to use "for their own personal benefit," FEC's Br. 32.

In any event, the important point for present purposes is that *even if* this aspect of loan repayment *did* create a risk of corruption or its appearance (which it does not), that would still be incapable of justifying the Loan-Repayment Limit. For that supposed risk, once again, would *not* be confined to the "specific, temporally-limited context" restricted by Section 304. *Id.* at 36. Rather, precisely the same concerns could be raised, once again, about the many loan repayments *that are freely allowed without limit* by federal law: repayments of candidate loans made with *pre-election* contributions (including, it must be noted, repayments made to *incumbent officeholders*—who are therefore subject to *both* of the FEC's purported concerns). Since Congress has concluded there is "no corruption concern" with the use of contributions for *those* loan repayments, it remains "difficult to understand" how the analytically identical loan repayments limited by Section 304 "can be regarded as corruptible." *McCutcheon*, 572 U.S. at 210. The FEC again fails to address *or even mention* this fatal flaw in its theory that contributions targeted by the Loan-Repayment Limit are uniquely corrupting because they "effectively go[ ] into the candidate's pocket." FEC's Br. 20.

The short of it is this: as the FEC acknowledges, any given donor is free under unquestioned campaign-finance rules to contribute up to $2,800 to Senator Cruz *today*, so long as the contribution is designated for Senator Cruz's 2024 campaign. FEC Br. 18. Further, FEC acknowledges that the same contribution, in the same amount, could also be designated for Senator Cruz's *2018 campaign*, to repay debts *other* than candidate loans. *Id.* at 5, 41. And further still, the

FEC acknowledges that the same $2,800 contribution could also be designated for Senator Cruz's 2018 campaign to repay up to $250,000 in loans from the Candidate. *Id.* at 12. But if the Committee's only remaining debt is the last $2,800 of a candidate loan in the amount of $252,800, that very same contribution suddenly raises "a heightened risk of the subversion of the political process," *Id.* at 29 (emphasis added)—even though *nothing* about the identity of the donor, the timing or amount of the contribution, or Senator Cruz's status as an officeholder has changed in the slightest. The FEC says nothing to justify that facially absurd proposition.

4. In an effort to concoct *some* support for the notion that the Loan-Repayment Limit serves an anti-corruption purpose, the FEC earlier this year designed and commissioned an online public-opinion poll. Pls.' SOF Response ¶ 82. The questions for the poll were crafted by the FEC itself, and it paid the public-opinion company YouGov to field the poll between April 16 to 20, 2020. *Id.* YouGov obtained survey responses from 1,202 individuals; it used standard demographic questions to ensure that its sample was representative based on gender, age, race, and education, but it did not include any weight or control to ensure representativeness based on political affiliation, and at FEC's request YouGov did not report political affiliation or ideology as part of the survey results. *Id.* In addition to the demographic and other background questions, FEC's poll asked two questions of relevance to the present litigation:

> How likely is it that those who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office? . . .
>
> Currently, there is a limit on how much money a federal campaign may raise after Election Day to repay a candidate loan. If there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate, would donors be more likely to expect political favors? Less likely to expect political favors? Or would it make no difference?

Decl. of Ashley Grosse, Ex. A at qs.5 & 6 (Apr. 24, 2020), Doc. 65-16 ("FEC Opinion Poll").

With respect to the first question, the FEC reports that 33% of the survey respondents stated that it was "very likely" that those who donate money after an election "expect a political favor in return," and 43% responded that it was "likely." *Id.* And as to the second question, 67% of respondents stated that if "there were no limit on how much money a federal campaign could raise after Election Day to repay a candidate," "[d]onors [would be] more likely to expect favors." *Id.* Based on these results, the FEC concludes that "[t]he public understands that limiting the post-election repayment of federal candidate loans reduces at least the appearance of quid pro quo corruption." FEC's Br. 32.

The FEC's poll shows nothing of the kind. Most critically, the wording of the poll's key question concerning the anticipated effect of the Loan-Repayment Limit is blatantly misleading in a way that utterly vitiates the reliability of the survey's findings (an error which is not surprising, given that the FEC wrote the questions in-house for purposes of this litigation and declined YouGov's assistance in determining how to word them. Pls.' SOF Response ¶ 82). The FEC's poll asked whether the expectation of "political favors" would be more or less likely "[i]f there were *no limit* on how much money a federal campaign could raise after Election Day to repay a candidate," FEC Opinion Poll q.6 (emphasis added), but it neglected to mention that such post-election fundraising would *remain limited by the $2,800 federal contribution limit*—the *very same limit* that applies to *pre*-election fundraising. It cannot be assumed that the FEC's survey respondents were *implicitly aware* that federal contribution limits would still apply, since *over two thirds* of the survey respondents were unaware or unsure that post-election loan-repayment contributions were permissible under current law *at all*. *Id.* at q.4. The poll's key question thus solicited the public's opinion on a scenario that *would not exist even if Section 304 were invalidated*. The survey respondents' views on the likely result if post-election loan-repayment contributions were allowed with "no limit" obviously tells us *nothing* about whether those same respondents share Congress's view that contributions that *are* subject to the inflation-adjusted $2,800 base limit "do not create a cognizable risk of corruption." *McCutcheon*, 572 U.S. at 210. This error alone is fatal to the FEC's attempt to draw support from its public-opinion poll.

Moreover, the poll is also subject to the very same flaws and inconsistencies that undermine the FEC's own attempts to justify Section 304 as an anti-corruption measure (a fact that is again unsurprising, given that the FEC *designed* the poll to provide it with an empirical costume in which it could dress its litigating position). In addition to leaving out the critical detail about base contribution limits, for instance, the FEC's survey *also* failed to inform the survey respondents that federal campaigns could *already* repay candidate loans *before* the election, without any limit other than the base contribution limits. Once again, it is unrealistic to expect the respondents to be aware of that fact—indeed, Dr. Grosse, the YouGov political scientist who supervised the survey, *was herself unaware* of it. Pls.' SOF Response ¶ 95. Nor did the poll ask whether a donor who contributed money to a campaign after the election to repay a candidate loan would be more likely to expect political favors if the candidate loan was less than $250,000 than if the loan was greater than $250,000. Nor did the survey ask about post-election fundraising for the repayment of *other* types of campaign debt. Similarly, while the FEC's poll asked respondents whether they thought post-election donors were likely to "expect a political favor in return" for their donation, FEC Opinion Poll q.5, it did not ask—for purposes of comparison—whether respondents believed it likely that donors who contribute to a campaign *before the election* are likely to expect political favors in return.[7] In short, the FEC's facially biased survey "evidence" provides no support—zero—for its anti-corruption rationale for Section 304.

Had the FEC asked these questions and provided these crucial pieces of background information, we might at least have been able to compare the respondents' opinions regarding the likelihood of corruption stemming from fundraising to repay candidate loans versus other forms of debt, say—or their respective views on pre-election and post-election loan-repayment contributions, or pre-election and post-election contributions in general. It would not be at all surprising to learn that the opinions of respondents to surveys such as these do not perfectly map on to the federal campaign finance regime Congress has enacted; after all, as Dr. Grosse acknowledged, "this whole topic is incredibly complex for the average American." Pls.' SOF Response ¶ 95. That is why the role of this Court is not to simply defer to a litigation-driven, outcome-contrived online opinion survey, but rather to *ensure for itself* that the challenged law *actually serves* the FEC's stated anti-corruption interest, in light of the other campaign finance restrictions currently in place, and is *actually tailored* to that end. *See McCutcheon*, 572 U.S. at 210; *Bennett*, 564 U.S. at 734.

5. In addition to its own online poll, the FEC also seeks support from two academic studies related to campaign finance. But one study at most establishes heightened "influence," not *quid pro quo corruption*, and fails to shed *any* light on the effects of the conduct *actually limited* by Section 304 (as opposed to conduct that remains entirely lawful); and the other study in fact *confirms the absence* of any evidence of a heightened risk of corruption.

[7] Nor did the survey define what it meant by the term "political favor," or explain whether it was limited to *quid pro quo* corruption or also extended to the "influence or access" that the Government may not constitutionally seek to limit. *McCutcheon*, 572 U.S. at 208. The term is naturally read to include access; indeed, Dr. Grosse *herself understood the term that way*. *See* Pls. SOF ¶ 95 ("Political favors. I would think access is a pretty big one.").

a. The FEC's first study is an unpublished paper by Alexei Ovtchinnikov and Philip Valta, *Debt in Political Campaigns*, which has not yet undergone peer-review, much less the crucible of interrogation in a deposition. Ovtchinnikov and Valta analyzed campaign finance data for Members of Congress, including each member's level of debt and receipt of contributions from labor-affiliated Political Action Committees, and compared it with pro-labor voting scores as measured by the AFL-CIO. After employing a variety of complicated statistical techniques, the authors concluded that "the labor voting score is strongly positively correlated with the proportion of funding [i.e., contributions to the candidate] that comes from labor PACs." Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 14. They further concluded, after comparing the results for debt-free politicians with indebted politicians, that "politicians that carry debt from the prior campaign are significantly more likely to vote pro-labor when they receive labor contributions." *Id.* at 16.

The FEC cites this paper as showing that "officeholders in debt are more likely to be influenced in their legislative voting by PACs and other special interest groups that contribute to their campaigns," FEC's Br. 8, but for multiple reasons the paper falls far short of justifying the Loan-Repayment Limit. Most importantly, Ovtchinnikov and Valta *do not even purport* to analyze the sole question that is relevant in this litigation: whether post-election contributions used to repay candidate loans in excess of $250,000 pose some heightened risk of corruption. *That* is the only conduct limited by Section 304, so as explained above, the FEC can only justify the Loan-Repayment limit if it can explain how that specific conduct poses a risk of corruption that is greater than the conduct Section 304 leaves completely unrestricted: (1) repaying unlimited amounts of *non-candidate* debt with post-election contributions, (2) repaying unlimited amounts of *candidate* loans with *pre*-election contributions, and (3) repaying *up to $250,000* of candidate loans with *post*-election contributions. Ovtchinnikov and Valta's study does not provide any aid whatsoever in making that showing, because (1) the study is *not* limited to *candidate* loans, as opposed to the other kinds of campaign debt, Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 13–14; (2) it is also *not* limited to *post-election* contributions, as opposed to contributions designated for the candidate's *next* election campaign, *see id.* at 14; and (3) it also *does not* distinguish between the non-corrupting influence of the first $250,000 of candidate loan-repayment contributions and the supposed corrupting influence of the two-hundred, fifty-thousand-and-first dollar.[8] These deficiencies alone suffice to refute the FEC's reliance on Ovtchinnikov and Valta, and the Court need read no further to reject it.

If the study is analyzed further, however, the FEC's position does not improve. First, Ovtchinnikov and Valta themselves caution that "[o]f course, these results are just partial correlations, so the tests *do not establish a causal effect of campaign debt on politicians' voting behavior*" since, among other concerns, "some unobserved omitted variables may affect both the debt financing and labor votes." *Id.* at 21 (emphasis added). Accordingly, the study on its own terms is incapable of showing actual *quid pro quo* corruption, as opposed to "the appearance of mere influence or access"—which under the First Amendment the Government "may not seek to limit." *McCutcheon*, 572 U.S. at 208. Accordingly, even if the study *did* establish, as FEC claims, that "officeholders in debt are more likely to be *influenced* in their legislative voting" by special-interest contributions, FEC's Br. 8 (emphasis added), that *would not* provide a constitutionally-sufficient justification for the Loan-Repayment Limit as a matter of settled law.

[8] These same problems also inhere in Ovtchinikov and Valta's much more-limited analysis of the effect of indebtedness on voting behavior related to two pieces of financial-services legislation in 1991 and 1998. *Id.* at 27–29.

Moreover, another of Ovtchinikov and Valta's principal findings, even if taken at face value, in fact *confirms* Congress's judgment that the base contribution limit adequately guards against quid-pro-quo corruption. Based on their analysis of voting scores and special-interest contributions, the authors calculate the implied "price" of buying a pro-labor vote: "a marginal labor vote corresponds to $79,404 . . . in labor contributions for an average debt-free politician." *Id.* at 15. They then calculate that the corresponding price for "a typical indebted politician" is "$37,615" per vote—a "*vote-buying discount*," they say, of "52.6 percent." *Id.* at 16. Once again, this finding does nothing to justify the Loan-Repayment Limit actually at issue in this litigation, since it fails to distinguish (1) candidate loans from other types of campaign debt, (2) pre-election contributions from post-election contributions, or (3) the first $250,000 of loan-repayment contributions from the next dollar. But even setting those dispositive points aside and *accepting* the startling proposition that every Member of Congress is up for sale at the price Ovtchinikov and Valta calculate, the authors neglect to mention anywhere in their paper that even their lower "price" per vote is *over thirteen times higher* than the current maximum permissible contribution of $2,800.[9] If the average "price" of a vote in Congress (in the authors' theoretical construct) is actually $37,615 at the lower bound then in fact Congress is amply justified in concluding that limiting the maximum contribution to *a small fraction* of this amount fully protects against any "cognizable risk of corruption," *McCutcheon*, 52 U.S. at 210.

The FEC also cites Ovtchinikov and Valta's finding that "politicians with large loans to their campaigns become significantly less responsive to contemporaneous labor contributions following the passage of BCRA" as purportedly showing that Section 304 "successfully reduced

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[9] It is also nearly seven times higher than the $5,600 maximum contribution allowed if both the primary and general election campaigns are counted as one.

the level of vote switching as a result of contributions." FEC's Br. 8–9. It shows nothing of the kind, and for many of the same reasons. Ovtchinikov and Valta's analysis *cannot* show that the Loan-Repayment Limit "successfully reduced the level of vote switching," since by the authors' admission it cannot demonstrate "a causal effect" *of any kind*. Ovtchinnikov & Valta, *supra*, *Debt in Political Campaigns*, at 21. Even setting that point aside, the authors' analysis of the effects of BCRA's passage—like their principal analysis discussed above—once again does not distinguish between (1) officeholders with outstanding candidate loans as opposed to other forms of debt, and (2) post-election debt-retirement contributions and pre-election contributions designated for the next election. *Id.* at 25. That vitiates the study's ability to show *even a correlation* between changes in voting behaviors and *the specific conduct actually restricted by Section 304*.

But even setting *that point aside too*, there is still an even more fundamental problem with this portion of Ovtchinikov and Valta's analysis. In comparing Members' voting behavior before and after the passage of the Loan-Repayment Limit, the authors act as though Section 304 was *the only relevant change* that occurred with the passage of BCRA. That is of course palpably false; indeed, they elsewhere acknowledge that "the two major provisions of BCRA focused on the role of soft money in campaign financing and the proliferation of issue advocacy, while the candidate personal loan provision received much less attention and was inserted in the miscellaneous section of the bill." *Id.* at 27. Accordingly, any change in voting behavior that may have occurred when BCRA went into effect could just as likely be attributed to *one of BCRA's numerous other provisions*, rather than Section 304. Ovtchinikov and Valta do not purport to control for this problem, leaving the FEC's suggestion that "Passage of the Loan Repayment Limit successfully reduced the level of vote switching as a result of contributions," FEC's Br. 8, entirely unmoored.

b. The FEC also relies on a 2008 article by Anne Baker, but it is hard to see why it thinks the article supports *its* position. Anne Baker, *Are Self-Financed House Members Free Agents?*, 35 CONG. & THE PRESIDENCY 53 (2008), Doc. 65-3. The Baker study analyzed two measures of the ideological distance between Members of the House of Representatives and their congressional districts, and then used a regression analysis to determine whether the Member's ideological distance, on either measure, was correlated with the degree to which the Member financed his or her own election campaign (through either personal contributions or candidate loans). *Id.* at 59–61. Like the Ovtchinikov and Valta study just discussed, Baker's findings *necessarily cannot* justify the specific limitation actually at issue, because she does not distinguish between pre- and post-election contributions, or between the first $250,000 of contributions and the next dollar. Indeed, Baker does not *look at contributions at all*—her analysis is solely confined to the degree a candidate engaged in self-financing (either through loans or spending).

But even if those deficiencies were set aside and Baker's findings were somehow deemed relevant, they in reality *refute the FEC's argument*. Because the study examined the 107th Congress—which met between 2001 and 2003—none of the loans at issue were subject to BCRA's Loan-Repayment Limit. *See id.* at 54. Nonetheless, Baker's regression analysis determined that the degree of self-financing made *no statistically significant difference* in the distance between a Member's ideology and that of his or her district. "If self-financing interfered in the relationship between a member and constituents by making a member's ideology less reflective of constituent ideology, the [regression result] would be negative and significant. However, *the results imply the opposite*." *Id.* at 63 (emphasis added); *see also id.* at 64 (regression result for the other measure of ideological distance "is minute or nonexistent" which "serves to bolster [the] argument that self-financing does not affect member responsiveness to district ideological preferences.").

That finding seriously undermines the FEC's contention that the Loan-Repayment Limit is necessary to prevent corruption. The measures of ideological distance used by Baker were specifically designed to detect "symptoms of shirking," *id.* at 58—that is, the pursuit of the preferences of special interests rather than the Member's constituents. If the ability to seek unlimited repayment of candidate loans with post-election contributions created such a serious risk of *quid pro quo* corruption, then presumably the degree of "shirking"—and thus ideological distance—should have been greater for Members with significant personal debt, especially given that at the time such debt could be repaid from post-election contributions *without limit*. Yet Baker's regression analysis, again, detected no such difference. *Id.* at 63, 64. The FEC points to the study's correlative conclusion that the degree of ideological distance was also not any *lower* for self-funded Members—and it highlights Baker's hypothesis that this is because "self-financed members feel pressure to court other sources of campaign contributions so they can be less reliant on their own money in the next election." *Id.* at 65. But to justify the Loan-Repayment Limit, it plainly does not suffice to show that Members whose outstanding candidate loans may be repaid with post-election contributions are *equally* as corruptible as other Members who have no such loans; rather, the FEC must show that such Members with outstanding candidate loans labor under *a greater* risk of corruptibility. The Baker study strongly confirms that no such greater risk exists.

6. Finally, the FEC resorts to argument by anecdote. It cites news articles concerning two state officeholders—out of the tens of thousands of individuals who have held state office in recent years across the forty States that do not limit the repayment of candidate loans, *see* Pls.' Br. 28)—and even these examples completely fail to support the notion that the post-election repayment of candidate loans is especially corrupting. The FEC discusses a $2 million loan made by Mike DeWine during his 2010 campaign for Ohio attorney general, which it says "was

reportedly retired by $194,830 in contributions from 10 law firms that received $9.6 million in legal fees for 225 assignments from the Attorney General's office." FEC Br. 35. It neglects to mention (1) that many of the law-firm assignments "were made by previous attorneys general," Laura A. Bischoff, *Donations helping DeWine pay down campaign loan*, SPRINGFIELD NEWS-SUN (Feb. 2, 2012), Doc. 65-12, (2) that DeWine's predecessor in office, Richard Cordray, had a similar pattern of favoring donors for legal contracts (even though he apparently made no loans to his campaign), Pls.' SOF Response ¶ 73, or (3) that the law firms gave far more "to build up a war chest for [DeWine's] 2014 re-election bid" and to support the judicial campaign of DeWine's son, Laura A. Bischoff, *Firms gave heavily to DeWine, GOP*, DAYTON DAILY NEWS (Jan. 26, 2014), Doc. 65-13—contributions that have nothing to do with the repayment of candidate loans.

The FEC then moves next-door to Kentucky. It cites a newspaper account of a $200,000-plus contribution to former Governor Wallace Wilkinson's campaign from a business "seeking a state permit," FEC's Br. 35, but what this has to do with candidate-loan repayment is entirely unclear, since the newspaper story plainly states that the donation in question was made *before the election* and was *unrelated* to any loans. Tom Loftus, *Big-Money Politic$*, COURIER-JOURNAL, at 2 (Dec. 29, 1991), Doc. 65-15. The FEC also cites litigation statements made by its Kentucky counterpart, the Registry of Election Finance, in defending the State's limits on the repayment of candidate loans, but the contention that such limits are necessary to prevent corruption is no more persuasive coming out of the mouth of the Kentucky Registry than the FEC itself. (And it bears mention that the limits the Registry was defending are the ones that the Sixth Circuit *struck down as plainly unconstitutional* in *Anderson*, 356 F.3d at 670–71, 672–73). The FEC's Statement of Undisputed Facts identifies a handful of news articles related to two other state officials, *see* FEC's SOF ¶¶ 76, 78, but those examples are even *less* compelling, *see* Pls.' SOF Response ¶¶ 76, 78.

The federal officeholder examples scrounged up by the FEC are no more helpful to its case. The FEC discusses a news report about a debt-retirement fundraising event held on behalf of Representative Grace Napolitano, for example, but the most it is able to conclude about the event is that "contributors want to participate in such events because of the clear benefit provided to the member." FEC's Br. 34. Precisely the same thing could obviously be said about *any fundraising event*; and besides, all it shows is that some contributors donate money (whether pre- or post-election) in the hopes of gaining "influence or access"—not the type of dollars-for-vote corruption that the First Amendment allows the Government to target. *McCutcheon*, 572 U.S. at 208.

The FEC also points to the controversy over the candidate loans made by Senator Cruz in 2012—noting, with much fanfare, that "the loans later came under scrutiny" and that "Senator Cruz circulated many of these media reports to his staff." FEC's Br. 11–12. But as the very "media reports" cited by the FEC demonstrate, the source of the "public concerns" over these loans, *id.* at 11, *emphatically was not* that they were incurred by Senator Cruz personally, or that any post-election payments on the loans would "go directly into [Senator Cruz's] pocket," *id.* at 41. No, the source of the controversy over these 2012 Loans was that they were incurred from Goldman Sachs, where Senator Cruz's wife is employed. *See* Email from Ted Cruz to Catherine Frazier (May 26, 2017, 4:29 PM), Doc. 65-7 (forwarding Salon article noting that "Ted Cruz used Goldman Sachs, where his wife worked, to help fund his 2012 campaign"); *see also* FEC's Br. 11 (noting that "[t]he largest loan . . . came from a margin account with Senator Cruz's wife's employer, Goldman Sachs"); Dep. of Cabell Hobbs at 174:19–175:1 (May 13, 2020), Doc. 65-9 (any public perception concerns . . . with regards to these loans arose solely because of the source of the loans. And in this specific case one of the loans, Goldman Sachs, in that it was the employer of Senator Cruz's spouse."). As shown by the sources the FEC itself cites, the interest rate and terms of the 2012 loan were standard for the market at the time, Pls.' SOF Response ¶ 45, and the loan was fully and publicly disclosed. Like the rest of the FEC's "evidence" of *quid pro quo* corruption, then, Senator Cruz's 2012 campaign loans offer zero support for FEC's justification of Section 304.

In forty States and the District of Columbia, candidate loans may be repaid after election day without restriction other than the ordinary contribution limits; the same was true for federal candidates until 2003. That the FEC has failed to identify *even one* documented example of loan-repayment contributions being used is part of a *quid pro quo* is compelling evidence that Section 304 serves no anti-corruption interest whatsoever.

**B. The Loan-Repayment Limit Does Not Further Any Disclosure Interest.**

As a backup, the FEC briefly argues that the Loan-Repayment Limit is also justified by the Government's interest in disclosure. It notes that pre-election contributions "are reported publicly" before the election, "which allows voters to determine who is financially supporting and associating with the campaign *prior to the election*," while the public is obviously unable to learn about post-election contributions "before heading to the polling booth." FEC's Br. 37–38. But that is only because at the time the election takes place, *there are no* post-election contributions, by definition. The Government can have no rational (let alone compelling) interest in providing disclosure of contributions *that have not yet taken place*. And the only transaction in the FEC's scenario that *has* taken place before the election—the loan—*is* disclosed. *See* 11 C.F.R. § 104.11.

To be sure, the public may have an interest in knowing about any express or implicit *agreement* between a candidate and contributor, before election day, to circumvent disclosure by waiting until after the election to deliver a contribution. *See* FEC's Br. 37–38. But such an agreement, even if tacit, would likely constitute an "earmarked contribution," and would thus have to be disclosed before the election anyway. *See* 52 U.S.C. § 30116(a)(8), 11 C.F.R. § 110.6(b)(1) ("earmarked" contributions include any "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution . . . being made to . . . a clearly identified candidate or a candidate's authorized committee"). And to the extent there is any doubt about that, the FEC is free to amend its definition of earmarking to ensure that it sweeps in such coordinated attempts by candidates and contributors to evade disclosure. What it is *not* free to do is to instead seek to prevent such fanciful circumvention schemes by imposing a blanket limit on *all* post-election repayment of candidate loans in excess of $250,000—for that blunderbuss approach "too readily sacrifice[es] speech for efficiency." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quotation marks omitted).

In any event, the FEC's disclosure justification comes up short even if these points are set aside. As with its anti-corruption justification, the FEC's stated concerns about disclosure of post-election contributions at most provide a reason to limit *all post-election contributions*.[10] They completely fail to justify Section 304's specific restriction on post-election contributions *used to repay candidate loans*—which are no different in this regard from the post-election contributions that remain lawful and unrestricted by any $250,000 cap.

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

Finally, even if Section 304 *did* further the Government's interest in preventing *quid pro quo* corruption (or disclosure), it would still fail constitutional muster—under either strict or "closely drawn" scrutiny—because it is not "narrowly tailored to achieve [that] objective." *McCutcheon*, 572 U.S. at 218. Indeed, the Loan-Repayment Limit is a poor fit on both relevant dimensions. As discussed repeatedly above, it is dramatically *underinclusive*—for even if post-election loan-repayment contributions *did* pose some "heightened risk of quid pro quo corruption,"

[10] Even if the FEC's concern about candidates using loans to circumvent disclosure requirements had any validity, FEC's Br. 37–38, such "circumvention" could just as easily be accomplished through commercial loans.

FEC's Br. 7, they are *indistinguishable* in this regard from many other types of contributions (such as post-election contributions more generally, or pre-election loan-repayment contributions to incumbent officeholders, or post-election loan-repayment contributions up to the $250,000 cap) that federal law leaves unrestricted (subject to general base-contribution limits). *See supra*, pp. 27–30. The FEC attempts to turn these irrational distinctions into a virtue, claiming that they show that the Limit is "tailored to apply in situations when the strength of the government's important anti-corruption interests are at their peak," FEC's Br. 40, but that claim fails for reasons already discussed, *see supra*, pp. 27–30. That under-inclusiveness "raise[s] serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Entertainment Merch. Ass'n*, 564 U.S. 786, 802 (2011). And because "the First Amendment is a kind of Equal Protection Clause for ideas," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting), the Government's decision to burden speech that is *indistinguishable*, from the point of view of the Government's purported interest, from other protected expression that is left unrestricted itself inflicts serious First Amendment harm.

The Loan-Repayment Limit is also impermissibly *over*-inclusive. As we explained in our Opening Brief, Pls.' Br. 33, *even if* the FEC's justifications for the Limit had even a spark of merit with respect to candidates who win their elections (and they do not), they plainly would not apply *at all* to candidates who *lose*. Losing candidates are simply not in a position to grant any *quid pro quo* in exchange for debt-retirement contributions. These losing candidates may have "the hardest task in American politics," FEC's Br. 13, but that is no justification for the Government's decision to heap on the *additional* burden posed by Section 304. The Sixth Circuit's decision in *Anderson* cited this very consideration in striking down Kentucky's similar limit. 356 F.3d at 673. The FEC makes no attempt to defend this obviously overbroad feature of Section 304, instead claiming that we have "waived" the point "by making no effort to advance [it] in summary judgment briefing." FEC's Br. 43 n.10. That is simply false: our Opening Brief included a distinct subpart articulating this point and explaining why it is fatal to Section 304's constitutional validity. *See* Pls.' Br. 33.

Rather than addressing these defects, the FEC seeks solace in the claim that Section 304's overbreadth is "insubstantial in relation to its legitimate sweep," since it validly applies to "all candidates," or at least to those candidates "who seek to repay large personal loans using post-election contributions." FEC's Br. 42. This final gambit also fails. FEC's attempt to include *all* candidates in the "legitimate-sweep" denominator is plainly unsound, since *half* of all candidates do not use campaign loans of *any* kind, FEC's SOF ¶ 31, and "[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, Calif. v. Patel*, 576 U.S. 409, 418 (2015). And for those candidates to whom it *does* apply, given the base-contribution limits that are in place, as discussed above, Section 304 does not serve any valid anti-corruption interest *no matter the overall amount of loans at stake*. *See supra*, pp. 25–30. FEC's failure to identify *even a single instance* of *quid pro quo* corruption related to candidate loans cements the point. *See supra*, pp. 39–42. Put simply, and for all the reasons discussed above, *the Loan-Repayment Limit serves no cognizable anti-corruption interest*—not for candidates with small loans, and not for candidates with large ones. It therefore cannot be justified by invoking the "strong medicine" of the facial overbreadth standard, or by characterizing the Limit "as a prophylactic measure." FEC's Br. 41, 42.

## CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment, deny Defendants' Cross-Motion for Summary Judgment, and strike down BCRA's Section 304 as unconstitutional, both as applied to Plaintiffs and on its face.

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Respectfully submitted,

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