UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TED CRUZ FOR SENATE, *et al.*,	)	
Plaintiffs,	)	Civ. No. 19-908 (APM)
v.	)	
FEDERAL ELECTION COMMISSION, *et al.*,	)	REPLY
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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The law that prohibits federal campaigns from using more than $250,000 in post-election contributions to repay candidate loans, 52 U.S.C. § 30116(j) (the "Loan Repayment Limit"), serves an important anti-corruption purpose without infringing any constitutional rights. Plaintiffs U.S. Senator Rafael Edward ("Ted") Cruz and his campaign committee, Ted Cruz for Senate ("Committee") have brought this challenge to strike the law down, arguing that it does in fact infringe their First Amendment rights and the rights of others. They have also requested the convening of a three-judge court. But this Court should instead dismiss the case for lack of jurisdiction because plaintiffs have no Article III standing, their claims are insubstantial, and the relevant three-judge court law does not apply to plaintiffs' challenges to regulations promulgated by defendant Federal Election Commission ("FEC" or "Commission").[1]

Plaintiffs make a dizzying array of arguments in an attempt to keep their case alive and get before a three-judge court, but none have merit. Plaintiffs argue that this single-judge Court lacks the authority to determine standing, but that position contradicts both clear statutory language and binding precedent. Plaintiffs lack standing since they fail to establish that Senator Cruz's campaign committee faced any obstacles to repaying Senator Cruz the $10,000 that the law now prohibits from being repaid if they had simply done so within 20 days of the November 2018 election. Plaintiffs also argue that they have standing because they have been injured by alleged burdens to their constitutional rights, but fail to identify an actual right of their own that is being infringed in connection with their effort to use fewer funds on campaign spending.

Finally, plaintiffs have failed to demonstrate that their claims are substantial enough to warrant being heard by three judges with direct, mandatory review by the Supreme Court. Their

[1] References to "defendant," "FEC," and "Commission" herein should be understood to include the agency's four current commissioners as defendants in their official capacities.

argument that their claims are substantial relies upon the wrong standard of scrutiny, fails to identify a legitimate constitutional right being infringed, and ignores the compelling anti-corruption interests underlying the Loan Repayment Limit.

I. A SINGLE-JUDGE COURT HAS THE AUTHORITY TO DISMISS THIS CASE FOR LACK OF SUBJECT-MATTER JURISDICTION

As discussed in the Commission's earlier brief, a single-judge court plays a critical screening role in determining whether a case should be handled by a three-judge court under section 403 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA") or be dismissed. (Def. FEC's Opp'n to Pls.' Appl. For a Three Judge Ct. and Mot. to Dismiss for Lack of Subject-Matter Jurisdiction ("FEC Br.") at 11-12 (Docket No. 26).) Just two months ago, plaintiffs were in agreement with the FEC, stating that they were "aware of the precedent from this Court and the D.C. Circuit holding that a purely legal challenge to standing may be decided by a single judge before a three-judge court is convened." (*See* Jt. Scheduling Report and Disc. Plan at 4 (Docket No. 21) (citing *Reuss v. Balles*, 584 F.2d 461, 464 n.8 (D.C. Cir. 1978) and *Republican Party of La. v. FEC*, 146 F. Supp. 3d 1, 8 (D.D.C. 2015)).) Further, plaintiffs "concede[d] that until those precedents are reversed, the Court has authority under them to dismiss a case before convening a three-judge court if it concludes that the plaintiff lacks standing as a matter of law." (*Id.*)

Those precedents have not been reversed in the last two months, yet plaintiffs now assert the opposite view that this Court lacks authority to dismiss this case for lack of standing, and only a three-judge court can do so. (Pls.' Reply in Supp. of Their Appl. For a Three-Judge Ct. and Resp. to Defs.' Mot. to Dismiss ("Pls.' Br.") at 8-14 (Docket No. 29).) Plaintiffs lack any support for this position other than a selective reading of statutory text that ignores language

contrary to their position and is internally inconsistent. By contrast, every court to have considered this question has disagreed with plaintiffs' position, including the Supreme Court.

A. Governing Statutes and Binding Precedent Establish the Power of a Single Judge To Rule on Jurisdiction

BCRA's judicial-review provision requires that qualifying challenges "shall be heard by a 3-judge court *convened pursuant to section 2284 of Title 28*." BCRA § 403(a)(1) (emphasis added). Section 2284 in turn prescribes the procedures to be followed "[u]pon the filing of a request for three judges," and allows a single district judge to decline an application if "he determines that three judges are not required." 28 U.S.C. § 2284(b)(1).

Recognizing that BCRA § 403 incorporates section 2284, plaintiffs filed their application for three judges not only under BCRA § 403 but also "[p]ursuant to 28 U.S.C. § 2284." (Appl. for a Three-Judge Ct. at 1 (Docket No. 2).) Yet despite their own reliance on section 2284, plaintiffs now attempt to "dispose[] of the FEC's reliance on 28 U.S.C. § 2284," by incorrectly asserting that this Court's "inquiry is at an end" after reading the text of BCRA § 403, except for that text's direction to follow "section 2284 of [T]itle 28," BCRA § 403(a)(1). (Pls.' Br. at 12.)

Consistent with the entire plain text of those provisions, *binding* D.C. Circuit precedent applying both BCRA § 403 and 28 U.S.C. § 2284 has held that a single judge may dismiss a case for lack of jurisdiction, despite plaintiffs' claim to the contrary (*see* Pls.' Br. 12). Plaintiffs admit, as they must, that just three years ago the D.C. Circuit in *Independence Institute v. FEC* stated that "'a three-judge court is not required where the district court itself lacks jurisdiction.'" (Pls.' Br. at 13-14 (quoting 816 F.3d 113, 116 (D.C. Cir. 2016)).) In then-Judge Kavanaugh's opinion, the Court of Appeals examined whether the plaintiff's constitutional claim against a provision of BCRA qualified for a three-judge court under both BCRA § 403 *and* 28 U.S.C. § 2284, which the court observed "is not absolute." *Indep. Inst.*, 816 F.3d at 115. Even though

BCRA § 403 applied, the D.C. Circuit analyzed whether the plaintiff's claim cleared the "barrier" to a three-judge court of meeting the "general jurisdictional requirement" of raising a substantial federal question. *Id.* at 116. The single-judge district court had held that jurisdiction was lacking; the Court of Appeals disagreed, but never questioned the district judge's authority to make a jurisdictional determination. *See id.* at 116-18. The D.C. Circuit's statement that the single-judge court had the power to determine jurisdiction was essential to its holding and the opinion would have been completely different had the court simply reversed on the basis that single-judge district courts lack the power to determine jurisdiction. That statement was therefore not dicta as plaintiffs' claim (*see* Pls.' Br. at 13-14) and is binding on this Court.

Consistent with *Independence Institute*, other courts considering BCRA challenges seeking three judges have uniformly held that a single judge has the power to determine jurisdiction. *See Republican Party of La.*, 146 F. Supp. 3d at 8; *Rufer v. FEC*, 64 F. Supp. 3d 195, 202 (D.D.C. 2014); *Schonberg v. FEC*, 792 F. Supp. 2d 14, 17 (D.D.C. 2011).[2]

Supreme Court and D.C. Circuit precedent applying the three-judge court procedures of 28 U.S.C. § 2284 in other contexts have also held that "a three-judge court is not required where the district court itself lacks jurisdiction." *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (internal quotation marks omitted) (applying § 2284 in a reapportionment case). In several of those cases, three-judge court review was potentially available under statutes that, like BCRA § 403, explicitly incorporate the procedures of 28 U.S.C. § 2284. *See, e.g.*, *Gonzalez v. Automatic*

[2] Indeed, in the *Schonberg* series of cases, after a three-judge court dissolved itself due to lack of jurisdication and left "final disposition of the complaint to a single judge," 792 F. Supp. 2d at 17 (citation and internal quotation marks omitted), the Court of Appeals did not question its jurisdiction over the subsequent appeal and found that the single-judge dismissal was so clear that it could be affirmed summarily. *Schonberg v. FEC*, 792 F. Supp. 2d 20, 23-25 (D.D.C. 2011), *aff'd* No. 11-5199, Document #1347776 (D.C. Cir. Dec. 15, 2011).

Employees Credit Union, 419 U.S. 90, 94, 100 (1974)) (holding that "[a] three-judge court is not required where the district court itself lacks jurisdiction" in a case brought under the three-judge statute at 28 U.S.C. § 2281, which incorporated § 2284); *Wertheimer v. FEC*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) (affirming dismissal for lack of standing by single judge in case brought under three-judge statute at 26 U.S.C. § 9011(b)(2), which incorporates § 2284); *Reuss*, 584 F.2d at 464 n.8 (holding that "a single judge may first determine whether the court has jurisdiction" in a case brought under the three-judge statute of 28 U.S.C. § 2282, which incorporated § 2284 (quoting *Gonzalez*, 419 U.S. at 100).)[3] This Court not only has the authority, but also the duty, to dismiss the case if it believes that the plaintiffs lack standing.[4]

Given the common thread of section 2284's applicability in all of these cases, the alleged "crucial textual distinctions" (Pls.' Br. at 14) that plaintiffs strain to conjure between sections 2281, 2282, and BCRA § 403 are all beside the point. Plaintiffs do not dispute that section 2284 — which they have invoked in this case — states that a single judge may "determine[] that three judges are not required." (Pls.' Br. 12). The applicability of section 2284's procedures here

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[3] Before their repeal in August 1976, sections 2281 and 2282 of Title 28 had provided that injunctions against the enforcement of allegedly unconstitutional state or federal laws "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." *See* Act of June 25, 1948 ch. 646, 62 Stat. 869, 968 (codified at 28 U.S.C. §§ 2281-2284). Congress added the words "unless he determines that three judges are not required" to section 2284 in 1976, *see* 28 U.S.C. § 2284(b)(1) (1978), but the predecessor version of that statute similarly stated that a single judge could convene a three-judge court only when "required" by federal law "to be heard and determined by a district court of three judges," 28 U.S.C. § 2284 (1970).

[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. . . . [W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation and internal quotation marks omitted)); *O'Hair v. United States*, 281 F. Supp. 815, 818 (D.D.C 1968) ("The first duty of the sole judge is to pass on the sufficiency of the complaint specifically as to whether or not a justiciable controversy is presented over which he has adjudicatory powers, and if he determines that the Court lacks jurisdiction, he must dismiss the suit.").

fatally undermines plaintiffs' arguments the above precedents are not binding on this Court because they allegedly involve "dicta," statements made "in passing," or statutes that are superficially distinguishable from BCRA § 403. (*See* Pls.' Br. at 12-14.)

B. BCRA § 403's Text Does Not Confine Jurisdictional Decisions to Three-Judge Courts

Even if 28 U.S.C. § 2284 were not applicable in this case, plaintiffs' argument that the text of BCRA § 403 alone precludes this Court from determining jurisdiction would still fail. Because BCRA § 403 states that an "*action* … *shall* be heard by a 3-judge court" (emphases added), plaintiffs assert that a single-judge court is powerless to decide standing because determining standing is part of an "action." (Pls.' Br. at 8, 11.) On that basis, plaintiffs attempt to distinguish the above-cited precedent holding that single-judge courts can determine jurisdiction in cases applying statutes, like 28 U.S.C. §§ 2281, 2282, that allegedly require three-judge courts for something less than an entire "action." (Pls.' Br. at 11-13.)

But plaintiffs have overlooked binding precedent holding that a single-judge district court may decide jurisdiction even where the statute at issue states that a three-judge court "shall" hear an "action." First, the D.C. Circuit in *Independence Institute* held that a single-judge may determine jurisdiction under BCRA § 403 itself. 816 F.3d at 116. Second, the Supreme Court in *Shapiro* held that a single-judge may determine jurisdiction under section 2284, *Shapiro*, 136 S. Ct. at 455, which similarly states that it "shall" apply to "any action," 28 U.S.C. § 2284(b). Third, the D.C. Circuit has held that single-judge district courts may determine jurisdiction in cases applying the three-judge statute of the Presidential Campaign Fund Act ("Fund Act"),[5]

[5] The Fund Act — which created a program of public financing of presidential campaigns — specifies that eligible parties may "institute such *actions*, including *actions* for declaratory judgment or injunctive relief" to enforce or interpret the Fund Act, and that "[s]uch proceedings

which like BCRA § 403 states that three-judge courts "shall" hear applicable "actions." *Wertheimer*, 268 F.3d at 1072 ("[A]n individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel"); *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar. 11, 2013) ("Because appellant lacked standing to bring a Fund Act claim, the district court properly declined to convene a three-judge court.").

Furthermore, section 2284 had been interpreted as allowing for single-judge determinations of jurisdiction long before BCRA was even passed into law. When Congress refers to an already-enacted provision in a new statute, it "normally can be presumed to have had knowledge of the interpretation given to [that] law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see, e.g. Feng Wang v. Pompeo*, 354 F. Supp. 3d 13, 21 (D.D.C. 2018) ("Congress did not adopt this virtually identical language in a vacuum."). If Congress had aimed to deviate from the well-established judicial interpretation of 28 U.S.C. § 2284 in enacting BCRA § 403, therefore, it would have done so explicitly. *See Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

C. Plaintiffs Concede That Single Judges Can Dismiss Claims Failing to Present a Substantial Federal Question

Plaintiffs undermine their own faulty position that BCRA § 403's text "demands" that jurisdiction be decided by the three-judge court (Pls.' Br. at 11), when, just a few pages later, plaintiffs concede that "a litigant cannot help himself to a three-judge court by asserting a facially frivolous claim challenging the constitutionality of BCRA" (Pls.' Br. at 14). Just like standing, the determination of substantiality is jurisdictional. *See Indep. Inst.*, 816 F.3d at 116 ("As the Supreme Court explained in *Shapiro* [, 136 S. Ct. at 455]*:* 'Absent a substantial federal

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shall be heard and determined by a court of three judges." 26 U.S.C. § 9011(b)(1), (2) (emphases added).

question, even a single-judge district court lacks jurisdiction, and a three-judge court is not required . . . .'"). Plaintiffs do not explain why a single-judge court can enforce its jurisdiction by weeding out insubstantial claims but not by weeding out plaintiffs without standing. Neither the language of BCRA nor any caselaw makes this arbitrary distinction. Under plaintiffs' textual arguments, the determination of substantiality, like standing, should be part of the "action" that BCRA § 403 states "shall" be decided by a three-judge court, but plaintiffs nonsensically argue that the statutory language prohibits one while conceding that it allows for the other. This inconsistency further undermines plaintiffs' incorrect reading of BCRA § 403.

D. Review of a BCRA § 403 Dismissal Here by a Panel of the D.C. Circuit Would Minimize the Supreme Court's Mandatory Docket

As the FEC explained in its opening brief, "district courts are to narrowly construe statutory provisions providing for three-judge courts," including BCRA § 403, given the Supreme Court's "'overriding policy . . . of minimizing the mandatory docket of [the Supreme] Court in the interests of sound judicial administration.'" *Rufer*, 64 F. Supp. 3d at 202 (quoting *Gonzalez*, 419 U.S. at 98). Plaintiffs nevertheless assert that BCRA requires that *any* appeal in this case — including one from a decision by this Court — would go directly to the Supreme Court, and therefore this Court can convene a three-judge court without concern for the Supreme Court's mandatory docket. (Pls.' Br. at 10.) But there is no merit to this position, and again, plaintiffs fail to cite any applicable case to support it.

To the contrary, the Supreme Court has held that if a single-judge court declines to convene a three-judge court and dismisses for lack of jurisdiction, that decision will be reviewed under the ordinary judicial procedures by a panel of the D.C. Circuit. *See Gonzalez*, 419 U.S. at 100 ("It is now well settled that refusal to request the convention of a three-judge court, dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders

reviewable in the court of appeals, not here."); *In re Slagle*, 504 U.S. 952 (1992) ("[W]e narrowly view our appellate jurisdiction in three-judge court cases . . . [and] have thus declined to review the actions, orders, and rulings of a single judge sitting on a three-judge court.")

Plaintiffs fail to successfully distinguish *Gonzalez* (*see* Pls. Br. at 13), but in any event, they again overlook *Independence Institute*, which is binding precedent on this question. *See, e.g., Indep. Inst.*, 816 F.3d at 116. If this Court concludes that plaintiffs lack standing, dismissal at this stage would reduce the mandatory docket of the Supreme Court while still permitting appeal to a panel of the D.C. Circuit. In contrast, under plaintiffs' misguided view, a person with absolutely no redressable injury that is fairly traceable to BCRA could nevertheless require the Supreme Court to hear his or her case by forcing the convening of a three-judge court simply by bringing a hypothetical non-frivolous BCRA challenge.

II. A THREE-JUDGE COURT LACKS JURISDICTION OVER PLAINTIFFS' CHALLENGES TO FEC REGULATIONS

The FEC demonstrated in its opening brief that under the text of BCRA § 403 and Supreme Court precedent, the three-judge court provision of BCRA applies only to constitutional challenges to the statute, not to challenges to Commission regulations. (FEC Br. at 44-45.)

Contrary to plaintiff's misleading characterization of its ruling, the three-judge court in *McConnell v. FEC* did not entertain a regulatory challenge only to deny it on ripeness grounds. (*See* Pls.' Br. at 32.) The *McConnell* three-judge district court explicitly stated that "its jurisdiction does not extend to the FEC's BCRA regulations, see BCRA 403 . . . and therefore it makes no determination on their validity or proper construction." 251 F. Supp. 2d 176, 239 (D.D.C. 2003). It was not the regulatory challenge, but a vagueness challenge to BCRA § 214(c), that the three-judge court found unripe because the pertinent FEC regulations could "have clarified the [statutory] vagueness Plaintiffs contend would chill their rights" but had only

been promulgated after briefing and oral argument. *Id.* at 239 n.72, 261-64. The Supreme Court affirmed, holding that the statutory challenge was not ripe and that "issues concerning the regulations . . . must be pursued in a separate proceeding." *McConnell v. FEC*, 540 U.S. 93, 223 (2003); *see also Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2001) (following *McConnell*).

Plaintiffs cite no BCRA authority to the contrary. Instead, plaintiffs argue that supplemental jurisdiction is appropriate because BCRA § 403 requires a three-judge court to hear an "action" involving a BCRA as a whole. (Pls.' Br. at 29.) Not only does *McConnell* dispose of this argument as a matter of law, but plaintiffs' approach is unworkable and contrary to Supreme Court and Congressional policy for a couple of additional reasons.

First, supplemental jurisdiction under BCRA § 403 would be incompatible with the 52 U.S.C. § 30110 (formerly 2 U.S.C § 437h), another special judicial review provision in the Federal Election Campaign Act ("FECA"), 52 U.S.C. §§ 30101-46. As plaintiffs acknowledge (Pls.' Br. at 11), that provision requires many constitutional challenges to non-BCRA provisions of FECA to be certified directly to the D.C. Circuit sitting *en banc*. 52 U.S.C. § 30110. However, unlike BCRA § 403, which is optional, section 30110 is *mandatory* and so when it applies it "deprive[s] both the district court and panels of the court of appeals of authority to hear the merits of constitutional challenges to the provisions of FECA." *Wagner v. FEC*, 717 F.3d 1007, 1011-12 (D.C. Cir. 2013). Yet under plaintiffs' incorrect reading of BCRA § 403, such FECA claims would also have to be heard by a three-judge district court if asserted in the same action as a qualifying BCRA claim. This cannot be under *Wagner*. Interpreting BCRA § 403 not to allow for supplemental jurisdiction reconciles the two provisions.

Second, even if supplemental jurisdiction were permissible under BCRA § 403, this Court should decline to exercise it here to avoid unnecessarily burdening this District and the

Supreme Court's mandatory docket. *Cf. Turner Broad. Sys. v. FCC*, 810 F. Supp. 1308, 1312 (D.D.C. 1992) (three-judge court) (declining to exercise supplemental jurisdiction pursuant to a three-judge court statute in part because "[h]aving three judges rule on every single procedural or substantive issue that may arise triples the normal cost of a case for the district court"). Plaintiffs' case is top heavy with regulatory challenges. The complaint challenges one provision of BCRA (the Loan Repayment Limit) in Counts I and II (Compl. ¶¶ 34-44), but asserts both constitutional and Administrative Procedure Act claims against three different Commission regulations in Counts III, IV, and V (*id.* ¶¶ 45-51). Those six distinct regulatory claims challenge provisions that do not merely parrot the Loan Repayment Limit. (*See* Compl. ¶ 48 (attacking the 20-Day Repayment Period), ¶¶ 50-51 (challenging the FEC's interpretation of "personal loans"). Even plaintiffs concede that if a BCRA claim were joined with a "sufficient number of sufficiently unrelated claims," that at some point, supplemental jurisdiction would no longer make sense. (Pls.' Br. at 30 n.5.) That point is reached in this case.

III. PLAINTIFFS LACK STANDING

A. Plaintiffs Needlessly Sequenced The Committee's Finances to Place Senator Cruz's $10,000 at Risk and Injure Themselves

As described in the Commission's earlier brief, "self-inflicted harm doesn't satisfy the basic requirements for standing" because it is neither "cognizable under Article III," nor "fairly traceable to the defendant's challenged conduct." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006); FEC Br. at 14-20.[7] The Committee did not pay back $10,000 of Senator Cruz's loan due to deliberate choices made by plaintiffs —

[7] Accordingly, the FEC has not conceded that either plaintiff has alleged an injury that is cognizable under Article III, as plaintiffs claim (Pls.' Br. at 32-33). (*See* FEC Br. at 21 (explaining that even if plaintiffs' alleged injury was not self-inflicted, the Committee itself would still lack an injury in fact).)

both the decision to make an unnecessary loan on the eve of the election that slightly exceeded the $250,000 threshold, and the voluntary decision of the Committee not to repay $10,000 of that loan to Cruz using pre-election funds within 20 days of the election.

Plaintiffs do not dispute the absence of a genuine campaign-related reason why Senator Cruz loaned the Committee $260,000 the day before the election or why the campaign failed to pay him back $10,000 using pre-election contributions. Additionally, they all but explicitly concede that Cruz's decision to make the loan, and the Committee's decision not to pay back $10,000 within the 20-day window were both calculated to bring this lawsuit. (*See* Pls.' Br. at 36 ("[I]t matters not at all why Senator Cruz loaned money to his campaign, even assuming the loans were designed to bring a test case."); *id.* at 37 (asserting, incorrectly, that plaintiffs suffered First Amendment harm "even if, in this particular instance, they could have fully reimbursed the Senator's loans without transgressing [the Loan Repayment Limit]").)

Plaintiffs assert that "the Senator's injection of funds into his campaign helped to ensure that the Committee's creditors would be paid" (Pls.' Br. at 33), but that factually incorrect statement would not rescue plaintiffs' allegations of injury even if true. First, plaintiffs' injury was self-imposed because they *chose* to prioritize paying back other creditors over paying back Senator Cruz, and plaintiffs do not contend otherwise. (*See* Pls. Br. at 41.) Plaintiffs themselves cite authority stating that if a plaintiff has an opportunity to avoid an alleged injury but chooses not to for financial or budgetary reasons, then that injury is imputed to the plaintiff, not the law. (*See* Pls.' Br. at 43 n.9 ("'[E]conomic considerations that cause an individual to reject a certain option because it is less favorable in some ways and more favorable in others does not transform

an otherwise voluntary decision into a coerced one.'" (quoting *Huron v. Berry*, 12 F. Supp. 3d 46, 53 (D.D.C. 2013), *aff'd sub nom. Huron v. Cobert*, 809 F.3d 1274 (D.C. Cir. 2016)).)[8]

Second, plaintiffs' suggestion that Cruz was compelled to loan the Committee money to ensure payment of creditors is inconsistent with the publicly available facts. Those facts demonstrate, and plaintiffs do not dispute, that the Committee (1) donated $200,000 to the Texas Republican Party on the same day as Cruz's loan (FEC Br. at 15), (2) was legally able to raise post-election contributions to repay its creditors other than Cruz up to the total amount of its net debts outstanding from the election (*id.* at 17), and (3) did in fact pay the vast majority of Cruz's loan back to him before repaying all of its vendors (*id.* at 19-20).

Plaintiffs' failure to avoid their alleged injury due to their mere preference not to utilize a legal and non-injurious way to repay Cruz's $10,000 precludes their standing. (*See* FEC Br. at 17-19; *Huron*, 12 F. Supp. 3d at 53 (holding that a family's "cost considerations" did not grant them standing to challenge a health insurance plan for lacking certain coverage because they could have enrolled in another plan with the coverage they needed); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10 (2014) (holding that a corporation's preference to engage in a barred method of electoral spending through a PAC did not create a constitutional injury when the corporation could have legally engaged in the same spending itself).[9]

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[8] Plaintiffs do not dispute that Senator Cruz controls his own campaign committee and is thus responsible for its choices. (*See* Pls.' Br. at 37 n.7.) As required by FECA, Cruz authorized the Cruz Committee to receive contributions and make expenditures on his behalf, *see* 52 U.S.C. § 30101(6), and he is an agent of the Cruz Committee, *id.* § 30102(e)(2). In any event, if the Committee had acted independently when it decided not to pay Senator Cruz $10,000 from pre-election funds, Cruz's alleged injury would have been caused by the Committee, not BCRA.

[9] Plaintiffs claim this case is unlike *Huron* because their own injury "cannot be redressed by pointing to *other* sources of funds that could have been used to reimburse the Senator." (Pls.' Br. at 42.) But *Huron* rejected a similar argument by a plaintiff who claimed that his injury could not be redressed by choosing other health care plans that could have been used to provide the coverage he needed. 12 F. Supp. 3d at 53. Plaintiffs also argue that *Stop This Insanity* is

The fact that Senator Cruz could have avoided any injury by repaying himself in accord with the law distinguishes this case from the various rulings upon which plaintiffs rely. (Pls.' Br. at 34-40.) In those cases, the relevant plaintiffs faced an actual, concrete injury as a result of complying with the law. In *Libertarian National Committee v. FEC*, the court concluded that the plaintiff political party could not have accepted the entire amount of a donor's $235,000 bequest free from restraints on how it could use the money while still complying with FECA. 924 F.3d 533, 538 (D.C. Cir. 2019) (*en banc*). In *Becker v. FEC*, the plaintiff candidate had no legal way to participate in a debate while still running a campaign that did not accept corporate contributions due to the FEC's regulations permitting corporate debate sponsorship. 230 F.3d 381, 388 (1st Cir. 2000). In *Brown v. Board of Education*, the plaintiff African-American schoolchildren could not have obtained a desegregated public education by any then-lawful means. 347 U.S. 483, 495 (1954). In *Evers v. Dwyer*, the African-American plaintiff was "[a] resident of [Memphis] who cannot use transportation facilities therein without being subjected by statute to" racial segregation. 358 U.S. 202, 204 (1958).[10] Similarly, civil rights pioneer Rosa Parks (*see* Pls.' Br. at 2-3) had no legal way to take a desegregated city bus ride on December 1,

"irrelevant" because it is not about standing (Pls.' Br. at 43), but *Stop This Insanity* was a ruling about whether plaintiffs had suffered a constitutional injury, the same question at issue in this motion (*id.* at 37). Furthermore, plaintiffs are simply wrong when they claim that the *Stop This Insanity* plaintiff "did not assert a constitutional right to choose its more-restrictive form of organization" (*id.*). *See Stop This Insanity*, 761 F. 3d. at 14 (stating that the plaintiff "claims there is a constitutional right to do things the hard way").

[10] *Havens* and *City of Jersey City* (*see* Pls.' Br. at 34, 36, 38-39), also offer plaintiffs no help since they feature the distinguishable situation where an Article III injury "exist[s] solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (internal quotation marks omitted) (intention to buy or rent a home not necessary for right to truthful housing information); *City of Jersey City v. Consol. Rail Corp.*, 668 F.3d 741, 745 (D.C. Cir. 2012) (procedural right of first refusal to buy property).

1955 in Montgomery, Alabama without having to stand for white passengers. *See* Peter Irons, *A People's History of the Supreme Court* at 222-23 (2006).

Senator Cruz's self-created inability to repay himself $10,000 after a campaign in which he received $29.2 million in contributions bears no resemblance to the plight of Rosa Parks or any of the plaintiffs described above. The Cruz plaintiffs identify no harm that would befall Cruz or his campaign if the Committee had simply repaid Cruz's $10,000 loan using fungible contributions raised pre- rather than post-election.

B. Plaintiffs' Brief Cannot Change the Alleged Injury-in-Fact Stated in Plaintiffs' Complaint

Faced with the reality that the injury stated in the complaint was self-inflicted, plaintiffs twist their purported injury: Plaintiffs' injury is not a "financial injury," they claim, but instead the "*constitutional* injury of being denied the use of post-election contributions to fully reimburse the Senator's loans." (Pls.' Br. at 37; *see also id.* (claiming a "constitutional right to use *post*-election funds to reimburse Senator Cruz"). Plaintiffs' attempt to evade the self-inflicted nature of their injury fails because this purported focus of their injury is not stated in their complaint.

At no point does the complaint state that pre- and post-election contributions are not fungible and thus plaintiffs are harmed by their inability to fully repay Cruz using contributions raised post-election. Instead, the complaint alleges that FECA and its regulations have harmed them because they "prevent CRUZ COMMITTEE from making *any additional payments* toward the remaining balance due on the debts originating from CRUZ[] . . . *even if* such payments are from contributions specifically raised . . . for the retirement of debts." (Compl. ¶ 32 (emphases added).) Although plaintiffs also allege that absent the Loan Repayment Limit, they would "use post-election contributions to defray the remaining $10,000 loan balance" (*id.* ¶ 33), at this point

in time they have no other choice, since they unnecessarily waited out the 20-Day Repayment Period. The Complaint does not allege that plaintiffs would have been injured or in any way worse off had they used the Committee's cash on hand the day after the election to repay Cruz. Whether plaintiffs have standing must be based on the allegations of their complaint, and not any later, shifting characterizations contained in a brief. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015); *see also, e.g., Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (explaining that a plaintiff's alleged injury "[a]s pled" determines whether standing exists, not a later "shifting characterization" in briefing or argument).

C. Plaintiffs Are Not Injured By Suffering Any Burdens to Their Alleged Constitutional Rights

Even if plaintiffs could recharacterize their injury as stated in the complaint, they would still lack standing. This Court need not accept as true plaintiffs' legal conclusion that their inability to raise more than $250,000 in post-election contributions to repay Cruz imposes a "*constitutional* injury" upon them. (*E.g.*, Compl. ¶ 33.) On a motion to dismiss, courts "do not assume the truth of legal conclusions or accept inferences that are unsupported by the facts alleged in the complaint." *Arpaio*, 797 F.3d at 19.

1. Even if There Were a Constitutional Right to Repay Candidate Loans with Post-Election Contributions It Would Not Grant Plaintiffs Standing

Plaintiffs' attempt to invent a new purported "constitutional right" to repay candidate loans using post-election contributions (*see, e.g.*, Pls.' Br. at 37) fails to grant them standing. Plaintiffs cite no case supporting the existence of such a right, and that is because no such case exists. *See infra* Part IV.A; FEC Br. at 28-29. Even if such a right existed, however, it would fail to support plaintiffs' standing. As previously explained, because money is fungible, courts have found that limits imposed on one method of spending do not injure the plaintiff's

constitutional rights if the plaintiff could have accomplished the same spending in an easier and less burdensome way. (FEC Br. at 18, 18-19 n.13.) For example, in *Stop This Insanity*, a corporation claimed that it had a constitutional right to use a certain type of political committee to solicit funds in a manner that was restricted by law for that type of political committee. 761 F.3d at 11. The D.C. Circuit held that the corporation suffered no constitutional injury because FECA would have allowed the corporation itself to engage in the unrestricted spending it desired without the need for creating a political committee. *Id.* at 14. By contrast, in *Libertarian National Committee, Inc.*, the D.C. Circuit held that the plaintiff political party had alleged an injury in fact because under FECA the party could not accept the entire amount of a bequest and still spend it on its desired purposes. 924 F.3d at 538. This case is a situation like *Stop This Insanity* because the Committee could have accomplished its goals of fully paying back Cruz and all the vendors by paying Cruz $10,000 in pre-election funds within 20 days.

2. Loan Repayments Reduce Candidate Spending on Their Campaigns and Limiting Repayments Does Not Limit Candidate Spending

Although candidates do have a First Amendment right to make unlimited personal expenditures to advocate for their election, the Loan Repayment Limit does not infringe on this right because candidates remain free to spend as much as they wish to promote their campaigns. (FEC Br. 29-32.) The provision merely limits the manner in which such loans may be paid back. (*Id.* at 30.) Nonetheless, plaintiffs assert repeatedly that this constitutional right is burdened by the Loan Repayment Limit. (*See, e.g.*, Pls.' Br. at 3, 33). Yet loan repayments operate to reduce candidate spending on campaigns and the Loan Repayment Limit's regulation of how an authorized committee may *repay* a loan plainly does not prevent a candidate from *spending* as much as he or she wants on a campaign.

There are several logical flaws in plaintiffs' claim that the Loan Repayment Limit nevertheless burdens a candidate's right to spend because it allegedly "diminishes the likelihood that such a loan, and the core political speech it would have funded, will be made in the first place." (Pls.' Br. at 3.) First, plaintiffs' argument proves too much, since if correct, then every limit on contributions to candidates, as well as numerous other campaign finance laws, would also burden a candidate's right to spend unlimited amounts on his or her campaign. It would be far easier for a campaign to raise money, and thereby pay back candidate loans if, for example, there were no limits on the amounts individuals may contribute to campaigns, or if corporations were permitted to make contributions from their general treasury funds. But none of those laws constitutes an infringement upon the right of a candidate to spend his own money. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 35, 54 (1976) (upholding FECA's then-$1,000 limit on individual contributions to candidates while striking down any limits on candidate spending).

Second, a candidate that wishes to fund the maximum amount of political speech can either make a contribution to his committee, rather than a loan, or decline repayment. Campaign funds are increased if repayment does not occur. Speech is not diminished when candidate loans become contributions. A fully repaid candidate's loan does not fund additional political speech, because in the absence of such a loan that speech could simply have been funded by the contributions that were used to repay the candidate — as illustrated by the two "alternative transactions" that plaintiffs' describe (*see* Pls.' Br. at 27) where in both scenarios a campaign has $1,000 to spend on speech regardless of whether a person contributed that money during the campaign or afterward to repay a candidate loan.

The possibility that some candidates might contribute *more* to their campaigns due to the presence of the Loan Repayment Limit results in an increased amount of political speech and does not infringe the candidate's First Amendment Rights to fund the campaign.

3. Even if the Loan Repayment Limit Burdens the Constitutional Rights of Some Persons, Plaintiffs Are Not Among That Group

Plaintiffs' brief incorrectly assumes that if the Loan Repayment Limit infringes on the constitutional rights of *anyone*, then plaintiffs here have standing. But the "irreducible constitutional minimum of standing" requires that "*the plaintiff* must have suffered an 'injury in fact'" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added; internal quotation marks omitted). This is true even for overbreadth claims. *See infra* Part III.E.

Here, plaintiffs argue that the Loan Repayment Limit burdens the First Amendment because it "diminishes the likelihood that [a candidate's] loan, and the core political speech it would have funded, will be made in the first place." (Pls.' Br. at 3.) But as the FEC previously pointed out, the complaint lacks any allegation that Cruz himself would have loaned his Committee more than the $260,000 he did loan but for a fear of not being repaid due to the Loan Repayment Limit. (FEC Br. at 32.) Indeed, plaintiffs have not and could not allege that in the absence of the law, Cruz would have even made a loan exceeding the $250,000 repayment limit given that the facts of this case illustrate that Cruz lacked any non-litigation motivation for loaning his Committee money. (*Id.* at 14-15.) Thus, even accepting as true plaintiffs' claim that the Loan Repayment Limit diminishes the likelihood that candidates will loan their campaigns money, plaintiffs lack standing because the Loan Repayment Limit did not diminish the likelihood that *Cruz* would loan his campaign money. *See Lujan*, 504 U.S. at 564 (holding that

plaintiffs lacked standing to challenge environmental rule that harms wildlife since they had no concrete plans to visit the area where the wildlife was being endangered).

D. The Cruz Committee Has Not Suffered an Injury

The Committee lacks standing for the additional reason that it did not suffer injury by gaining $10,000 as a result of the Loan Repayment Limit. (FEC Br. at 21.) The Committee's arguments in response are lacking. First, the Committee states new alleged injuries not appearing in the complaint. It claims that it wants to repay Cruz's $10,000 to "incentivize Senator Cruz, no less than others, to extend credit to the Committee in the future" (Pls. Br. at 33 (citing Compl. ¶ 33)), but the complaint says nothing to that effect, nor does it allege that Cruz was disincentivized from loaning money due to the Loan Repayment Limit. Even if the Committee had alleged that, its First Amendment rights would only have been infringed if it had difficulty "amassing the resources necessary for effective [campaign] advocacy," *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (quoting *Buckley*, 424 U.S. at 21), which it did not, *see* FEC Br. at 9 ("[T]he Committee raised more than $35 million."). Second, the Loan Repayment Limit could not "burden the Committee's right to spend money on campaign speech," as plaintiffs' claim. (Pls.' Br. at 33.) Loan repayments are not campaign speech. (*See* FEC Br. at 28-29.) Furthermore, even if the Loan Repayment Limit creates such a disincentive, the Committee does not explain how it can have a constitutional right to spend money a candidate did not loan, or how the Limit would disincentivize the Committee's spending.

There is also no merit to plaintiffs' arguments that the Loan Repayment Limit infringes on the Committee's purported constitutional rights to "make constitutionally protected decisions about how and when to speak during an election," or to "prioritize its spending of pre-election contributions by paying vendors and other creditors rather than reimbursing Senator Cruz."

(Pls.' Br. at 15, 41.) The former is simply not at issue in this case regarding the Committee's post-election efforts to have fewer funds available for election spending. As to their latter asserted interest, plaintiffs had a means by which they could have easily accomplished their goals of paying Cruz back fully and paying off vendors. (*See* FEC Br. at 17.)

E. Plaintiffs' Lack of Standing for Their Own Claims Precludes Their Overbreadth Claims, Which Also Lack Merit

Plaintiffs concede that they are not asserting third-party standing on behalf of potential campaign contributors or on behalf of losing candidates. (Pls.' Br. at 44, 45 n.11.) Rather, their arguments made in connection with those two groups are merely an overbreadth challenge to the Loan Repayment Provision. As an initial matter, plaintiffs must have their own "injury-in-fact" to bring an overbreadth claim to protect the First Amendment rights of others not before this Court. *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). As described above, plaintiffs lack any cognizable injury in fact and therefore they lack standing for their overbreadth claim. Even if plaintiffs did have standing to make these arguments, they have failed to establish that the law is overbroad. *See infra* Part IV.C.

IV. PLAINTIFFS' CLAIMS ARE INSUBSTANTIAL

Even if this Court concluded that plaintiffs have standing, it should nonetheless dismiss the case without convening a three-judge court because plaintiffs' claims are not substantial.

A. Rational Basis Is the Proper Level of Scrutiny for the Loan Repayment Limit Which Does Not Limit Political Speech

As discussed above and in the Commission's previous brief, the Loan Repayment Limit does not infringe on any constitutional rights. Because the Loan Repayment Limit does not burden political speech, a Court deciding this case on the merits must apply rational-basis scrutiny to determine its constitutionality. (FEC Br. at 27.) The level of scrutiny is a critical

factor for the Court to consider in determining whether this case is substantial enough to warrant a three-judge court. Under rational-basis scrutiny, plaintiffs have the burden "to negative every conceivable basis which might support it." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (citation and quotation marks omitted). Plaintiffs do not even attempt to argue that they could meet this burden. Because rational-basis scrutiny is appropriate here, plaintiffs' claims have no chance of success and the entire challenge is insubstantial.

The Commission's prior brief cited *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 740 (D. Del. 2016), for, among other reasons, the proposition that rational basis is the appropriate level of scrutiny for a challenge to a campaign finance law that limits spending other than political speech. (FEC Br. at 36.) Just like the personal-use prohibition, which restricts the use of campaign funds for non-speech expenses such as a candidate's rent, the Loan Repayment Limit restricts the use of campaign funds for the non-speech purpose of paying back candidate loans in excess of $250,000. Plaintiffs' attempt to distinguish *O'Donnell* because loan repayments are not illegal personal-use expenditures under FECA (Pls.' Br. at 19-20) is beside the point.[11]

B. The Government Has an Important Interest in Diminishing Corruption and Its Appearance That Justifies the Loan Repayment Limit

In its opening brief, the FEC demonstrated that the Loan Repayment Limit is rationally related to a legitimate government interest and plaintiffs could not prove otherwise. (*See* FEC Br. at 37-40.) The Loan Repayment Limit applies in a narrow circumstance where the risks of corruption and its appearance are at their apex: when a campaign gives hundreds of thousands of

[11] Because loan repayments do not constitute political speech, the Sixth Circuit's decision in *Anderson v. Spear* (*see* Pls. Br. at 15, 18, 26, 28) has no bearing on this case, since there the court examined state laws banning all post-election contributions and candidate loans in excess of $50,000. 356 F.3d 651, 670-72 (6th Cir. 2004). The Loan Repayment Limit limits neither the amount candidates can loan and give campaigns nor post-election contributions.

dollars received after an election to an officeholder who can legally use the funds for any purpose. In response, plaintiffs make three misleading arguments, each of which lacks merit.

First, Congress enacted the Loan Repayment Limit to limit the risks of corruption and its appearance (FEC Br. at 5-6, 39), despite plaintiffs' misleading quotations of legislative history relating to BCRA's Millionaire's Amendment, struck down in *Davis v. FEC*, 554 U.S. 724 (2008) (*see* Pls.' Br. at 4-5, 24-25). The Millionaire's Amendment was struck down in part because it functioned to level the playing field between rich and poor candidates. *Davis*, 554 U.S. at 741-42. Although the Loan Repayment Limit was also enacted as part of BCRA, it is not constitutionally faulty by association (FEC Br. at 8-9), as plaintiffs claim. None of the legislative history recited by plaintiffs related at all to the Loan Repayment Limit, which has a distinct purpose. As quoted in the FEC's prior brief, the legislative history that actually discussed the Loan Repayment Limit makes clear that the provision was at least in part intended to combat *quid pro quo* corruption and its appearance. (FEC Br. at 5-6 (quoting 147 Cong. Rec. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici) (explaining that a candidate who incurred personal loans for his campaign should not be able "to get it back from [his or her] constituents under fundraising events that [he or she] would hold and then ask them: How would you like me to vote now that I am a Senator?")).)

Second, plaintiffs incorrectly argue that the Loan Repayment Limit does not prevent corruption because "the right of a candidate to spend his own money, in the form of a personal loan, to advance his candidacy — actually *reduces* the possibility of corruption." (Pls.' Br. at 25.) But this argument relies on cases such as *Buckley* and *Davis*, which had nothing to do with candidate loans. In *Davis*, the Supreme Court explained that a candidate's expenditure of personal funds on a campaign "reduces the candidate's dependence on outside contributions."

554 U.S at 738. But here, loan repayment reduces candidate campaign spending and Cruz's *loaning* of $260,000 to his campaign *increased* his dependence on outside contributions. (*See* Compl. ¶¶ 30-31 (explaining how the Committee received $250,000 from contributors after the election to repay Cruz).) Indeed, the precise result sought by plaintiffs' lawsuit is a further increase in their dependence on outside contributions. (*See* Compl. ¶ 33.)

Finally, the application of the base limits on individual contributions to candidates are insufficient on their own to account for the unique risks of corruption and its appearance that result from post-election contributions that are given directly to a candidate for his or her own use. Because the government's anti-corruption interests are at their peak in this situation, Congress was justified in using the Loan Repayment Limit to limit the number of post-election contributors from whom an officeholder could receive personal funds. A comparison of plaintiffs' two hypothetical transactions (Pls.' Br. at 27) illustrates the point. The transactions are not "completely identical," as plaintiffs claim (*id.*), when it comes to corruption risk, since when a candidate makes a loan, the candidate has taken a risk that he or she might not be repaid, and a post-election contribution that repays that debt would provide direct, personal benefits to the candidate. From that post-election contributor's perspective, he or she is not making a contribution in the hopes that it will help the candidate win, but is instead putting money directly into the winner's pocket. By contrast, in the second transaction involving pre-election funds from a contributor without any candidate loan, the candidate takes no personal financial risk and he or she cannot spend the $1,000 contribution on personal expenses.

C. The Loan Repayment Limit is Not Overbroad

Even if plaintiffs had standing to claim that the Loan Repayment Limit violates the rights of potential contributors and losing candidates, that claim would fail too. With respect to

potential contributors, plaintiffs argue that the Loan Repayment Limit is unconstitutional because it prevents contributions from those who "wish to contribute, after an election, to a candidate whose only 'net debts outstanding' are comprised of personal loans in excess of the $250,000 limit." (Pls.' Br. at 45.) But this is no more of an infringement on these contributors' rights than the "net debts outstanding" regulation itself, which plaintiffs do not challenge, and which enforces the per-election limits by barring post-election contributions to a campaign in excess of its net debts from the relevant election. 11 C.F.R. § 110.1(b)(3)(i); FEC Br. at 4-5. Courts have repeatedly upheld the per-election limits, *see, e.g.*, *Holmes v. FEC*, 875 F.3d 1175 (D.C. Cir. 2018), and the circumstances of contributions to retire candidate debt pose a heightened danger of corruption, providing no substantial basis for distinguishing those cases.

Similarly, plaintiffs' arguments regarding losing candidates fail to establish that the Loan Repayment Limit is overbroad. Plaintiffs suggest that the number of losing candidates impacted by the Loan Repayment Limit is vast because, for example, "there are currently 737 declared candidates for President in the 2020 election." (Pls.' Br. at 28-29.) But it is not every candidate that is impacted by the Loan Repayment Limit, only those that are willing and able to loan their campaign over $250,000, and whose campaigns are capable of raising over $250,000 in post-election contributions. As plaintiffs acknowledge "a candidate's ability to raise money to repay debts *after* an election is far from assured." (Pls.' Br. at 15.) Winning candidates have a far easier time retiring debt, and the number of affected losing candidates is small in relation to the legitimate sweep of the law. (*See* FEC Br. at 42-43.)

CONCLUSION

For the foregoing reasons and those stated in the Commission's earlier brief, the Court should dismiss the case.

Respectfully submitted,

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