UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Although the Constitution entitles federal candidates to spend their own money to support their campaigns without limit, *Buckley v. Valeo*, 424 U.S. 1 (1976), there is simply no constitutional right for candidates to be *reimbursed* for funds they provide to their campaigns, despite plaintiffs' claims. And to promote the important government interest in deterring corruption, Congress passed 52 U.S.C. § 30116(j) (the "Loan Repayment Limit"), a carefully targeted prophylactic rule that prohibits campaign committees from using contributions received after an election to repay more than $250,000 of a candidate's personal loans to that committee. Because candidates' spending remains unlimited and campaigns are unrestricted in how they may use funds for political activity, the statute does not burden First Amendment speech rights.

The Court should therefore reject this constitutional challenge by Senator Rafael Edward ("Ted") Cruz and his campaign committee, Ted Cruz for Senate (the "Committee"), including their as-applied challenge, for which they have failed to demonstrate any harm caused by the Limit. More generally, the post-election repayment of candidate loans is not the same as self-financed campaigning from a constitutional standpoint — even if some loans are considered expenditures under the statutory definition, as plaintiffs note — because candidates who expect to be repaid have a need for outside contributions. Indeed, campaign data, scholarly research, public opinion polling, and notable examples over recent decades show that post-election fundraising to repay large candidate loans presents particular concerns of at least the appearance that contributions will be made in exchange for policy favors. Because the Limit does not burden speech, it need only be rationally related to a legitimate government interest and not be overbroad, a threshold it clears easily. But even under a higher level of review, the statute would still be constitutional because it is sufficiently tailored to serve vital government interests of diminishing corruption and its appearance, and promoting timely disclosure of candidate support.

ARGUMENT

I. THE LOAN REPAYMENT LIMIT DOES NOT BURDEN CORE SPEECH AND IS THUS SUBJECT TO ONLY RATIONAL BASIS SCRUTINY

As the Commission showed in its opening brief, the Loan Repayment Limit does not prohibit any candidate, nor any other person or entity, from spending as much of his or her money on political speech as desired. Nor does the Limit burden such a self-funding candidate by benefitting the candidate's opponent, as the unconstitutional Millionaire's Amendment did. Rather than limiting fundraising or spending on campaign activities, where it has any effect the Limit operates to increase the funds available for campaign spending and decrease the amount of committee funds that are diverted back to the personal use of a candidate. Therefore, rational basis scrutiny applies. (FEC's Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n. to Pls'. Mot. for Summ. J. ("FEC Br.") at 19-29 (Docket. No. 66).) In response, plaintiffs make a number of arguments in an effort to support heightened scrutiny. As the FEC explains below, these claims all miss the mark.

A. Candidate Loans Differ from Other Contributions and Expenditures

The Supreme Court in *Buckley* established that candidates have a constitutional right to spend as much of their own money as they choose to support their candidacies. *See Buckley,* 424 U.S. at 53. But plaintiffs stretch that holding into uncharted territory by asserting that in effect it also established a constitutional right for candidates to be repaid by contributors for that campaign spending. (*See, e.g*., Pls.' Combined Reply in Supp. of Their Mot. for Summ. J. and Opp'n to Defs.' Cross-Mot. for Summ. J. ("Pls.' Reply") at 6 (arguing that loan repayment is a constitutional right because "it is obvious that the entirety of the loan transaction is a form of spending on political speech").) That purported right is not articulated in *Buckley*, nor is it consistent with the reasoning in the opinion. In fact, a candidate loan that is reimbursed plainly

differs from a contribution the candidate makes for campaign activity, and the differences between the two transactions show why the Loan Repayment Limit does not infringe on any constitutional rights.

1. *The Statutory Definition of "Expenditure" Does Not Determine the Scope of* Buckley*'s Holding on Self-Funding*

Constitutional rights are determined by the Constitution, as interpreted by the courts, not by statute. The constitutional right of a candidate to self-fund is rooted in the First Amendment, as explained in the *Buckley* opinion. As discussed *infra* pp. 4-5, though, the opinion in *Buckley* does not mention loans, nor does the reasoning in that opinion apply to the repayment of loans. Thus, the *Buckley* opinion simply did not directly address the question of whether the repayment of loans is encompassed by the constitutional right to self-fund. Yet plaintiffs now insist that loans and their repayment are similarly protected in part because *Buckley* established a constitutional right for candidates to make unlimited expenditures, and "loans" are included in both the statutory and regulatory definitions of "expenditure." (Pls.' Reply at 5-6 (quoting 52 U.S.C. § 30101(9)(A)(i) and 11 C.F.R. § 100.111(a)).)

The contours of constitutional rights are not determined by statutory or regulatory language, and plaintiffs' reliance on such language here is misplaced. It is true that FECA defines an expenditure as any "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . ." 52 U.S.C. § 30101(9)(A)(i). And *Buckley* held that limits on independent expenditures are generally unconstitutional. 424 U.S. at 51. Yet despite this holding, and despite the fact that the statutory definition of expenditures refers to "any person," FECA nonetheless prohibits foreign nationals from making such independent expenditures. *See* 52 U.S.C. § 30121(a)(1)(C). And when that provision was challenged on constitutional grounds in *Bluman v.*

FEC, the law was upheld both by a three-judge panel of this court and by the Supreme Court. 800 F. Supp. 2d 281, 292 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). If plaintiffs were correct that courts could determine the scope of *Buckley*'s constitutional holding by merely examining statutory definitions, the courts that decided *Bluman* would have reached the opposite conclusion and struck down the ban on independent expenditures by foreign nationals. And while "loans" were part of the definition of expenditures when *Buckley* was decided, so was the term's extension to activity by "any person," but that fact did not change the outcome of the *Bluman* case. In any event, as shown below, it is clear that the *Buckley* Court was not contemplating loans when it struck down FECA's limits on candidate expenditures.[1]

2. Buckley *Was Not Considering Loans When It Struck Down Limits on Candidate Expenditures*

In the four-paragraph section of the *Buckley* opinion that explains the constitutional right of candidates to self-fund, the Supreme Court considered a provision of FECA that limited the amount of personal expenditures a candidate could make. The Court struck that provision down because it was not supported by the government's interest in "the prevention of actual and apparent corruption of the political process." *Buckley*, 424 U.S. at 53. The Court reasoned that corruption tends to be the result of the candidate being influenced by other people, which is less of a concern when the candidate simply spends the candidate's own money. The Court first approvingly quoted the Court of Appeals opinion, which had adopted the same reasoning, and stated that "the core problem of avoiding undisclosed and undue influence on candidates from

[1] Plaintiffs also claim that the fact that candidate loans are a form of self-financing establishes that they are a candidate expenditure that cannot be restricted. (Pls.' Reply at 5-6.) But this argument has the same flaw as the arguments based on statutory definitions. Constitutional rights are not determined solely by semantics or how relevant conduct may be described. Even if particular conduct might be deemed an expenditure in one context, it does not follow that such conduct falls within the constitutional right to self-fund established in *Buckley*.

outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." *Id.* (quoting *Buckley v. Valeo*, 519 F.2d 817, 855 (D.C. Cir. 1975)). The Supreme Court then noted that in fact, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." *Id.*

But the Court's discussion of this expenditure limit includes no reference to loans or their repayment and is incompatible with the possibility that the Court considered candidate loans. When a candidate makes a loan to his campaign and expects to be repaid, his dependence on outside contributions is not reduced, but is *increased*, because now the candidate needs outside contributions to repay his own personal debt, not just to run his campaign. (*See* Def. FEC's Statement of Material Facts Not in Genuine Dispute ("FEC SOF") (Docket No. 65) ¶ 68 (quoting study's conclusion that self-financed officeholders are pressured to raise contributions and reduce reliance on their personal funds).) This is a particular concern for the very candidates that plaintiffs claim are most burdened by the Limit – those who are wealthy enough to make loans of more than $250,000 to their campaigns, but not wealthy enough to simply give such funds to their campaign. (Pls.' Reply at 9 ("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*.").) Such candidates cannot be described as having reduced dependence on outside contributions; quite the contrary. As a result, the potential for corruption is not eased, but intensified.

B. Post-Election Repayment of a Candidate Loan Does Not Constitute Speech

As the Commission argued in its earlier brief, the Loan Repayment Limit only applies to the repayment of loans, while permitting unlimited political spending, and therefore it simply

does not restrict speech. (*See* FEC Br. at 19-29.) Plaintiffs argue that this straightforward perspective is too narrow because loan transactions must be "viewed *as a whole*" and therefore "it is obvious that the entirety of the loan transaction is a form of spending by the candidate on political speech." (Pls.' Reply at 6.) But plaintiffs' desire to characterize all parts of a candidate loan transaction as "speech" ignores both the reality of how candidate loans operate and the manner in which courts have always determined what constitutes speech.

1. *Post-Election Repayment of Candidate Loans Are Not Like Other Loan Repayments*

Limiting the repayment of loans after an election is not a restriction on speech because any political message has already been conveyed, and the repayment or non-repayment of the loan does not impact either the content or amount of that speech—except to the extent repayment actually *limits* future speech by directing campaign funds back to the candidate for personal use. (*See* FEC Br. at 19-20.) Plaintiffs resist these fundamental truths, arguing that the Commission's position is a "blinkered focus on only the back end of the loan transaction—the repayment—[that] defies economic reality." (Pls.' Reply at 7). But it is plaintiffs whose position ignores the economic reality of how candidate loans actually operate.

Candidate loans are unlike every other sort of loan, because they are not generally made for ordinary financial purposes. Even before the passage of the Loan Repayment Limit, it was common for candidates to loan money to their campaigns in circumstances in which a commercial lender would not, because of a high risk of default on the loan. As a result, it has been common for candidate loans not to be repaid in full, or not at all, and that has been true both before and after the Loan Repayment Limit was enacted. Furthermore, different candidate loans can differ substantially in key ways, for example in the expectations of repayment. One candidate made loans to his campaign in amounts greater than any campaign had ever raised

from contributors. *See* FEC SOF ¶ 32 (showing over $56 million in candidate loans for a 2000 New Jersey Senate race). Plaintiffs insist that loans must be viewed as a single inseparable transaction with a front end (receipt of the loan) and a back end (repayment of the loan). (Pls.' Reply at 6-7.) But for many campaign loans, there is no back end or even an expectation of a back end. And the Limit regulates only the potential for a post-election back end.

The critical distinctions between candidate loans and commercial loans have been codified into the Commission's regulations. To avoid being considered contributions, commercial loans to campaigns must: 1) charge interest comparable to the lender's ordinary practice; 2) be "made on a basis that assures repayment"; 3) be "evidenced by a written instrument"; and 4) be "subject to a due date or amortization schedule." 11 C.F.R. § 100.82. Candidate loans have no such requirements. They do not need to be made on a basis that assures repayment.[2] Virtually every candidate loan would be considered an unlawful contribution if it were made by a bank rather than by the candidate.

The differences between candidate loans and commercial loans explain the flaw in plaintiffs' analogy to the home mortgage industry. (Pls.' Reply at 6-7.) Plaintiffs argue that under the FEC's analysis about what constitutes spending, a mortgagee making a mortgage payment would not constitute "spending on housing." (Pls.' Reply at 6.) But this comparison actually helps to illustrate why candidate loans are different from other loans and why the

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[2] Plaintiffs argue that "a loan that cannot be repaid is not a loan at all." (Pls.' Reply at 9 n.3.) But the Loan Repayment Limit does not make repayment impossible by any means. To the contrary, the fact that the Loan Repayment Limit sets some terms on the timing of repayment makes a candidate loan *more* similar to a commercial loan, which would be "subject to a due date or amortization schedule." 11 C.F.R. § 100.82. A candidate that prioritizes repayment of his loan can lawfully include similar terms if he chooses. After all, a commercial loan is still a loan, even if it requires repayment within a specified time period.

transactions are properly viewed differently. Because mortgages are arms-length financial transactions in which the lender wants to be assured of repayment, a mortgagor takes a financial interest in the home, so that it can foreclose and recoup the shortfall if the home buyer fails to pay the mortgage in a timely manner. As a result, the homeowner is compelled to make regular payments, and every time he does so, he is effectively buying a piece of the home back from the lender. Thus each mortgage payment can easily be viewed as spending on housing. By contrast, a campaign that has received a loan from a candidate is generally not compelled in any real sense to make payments. If the campaign is using the loan proceeds for funds spent on advertising and other campaign communications, the candidate obviously has nothing to take possession of if the campaign fails to make timely payment, nor is there generally any recourse against the campaign for a failure to pay. Despite these clear distinctions between candidate loans and other loans, plaintiffs simply assume that loan repayment is part and parcel of every campaign loan. That is not the case, and so candidate loans are properly analyzed in accord with their specific features.

2. *The Supreme Court Has Made Clear That What Constitutes Protected Speech Is Determined by Specific Transactions, Not by the Uses of Related Funds at Other Times*

As the Commission has noted, when a candidate loan is repaid, that money is not being used for speech, but actually goes back into the candidate's bank account for personal uses. (FEC Br. at 20.) Plaintiffs argue that this fact is irrelevant and that "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." (Pls.' Reply at 8.) But this backward-looking approach is inconsistent with the way in which the Supreme Court has analyzed what constitutes protected speech in this context.

The Supreme Court has made clear that it is specific transactions that constitute speech, not the earlier or later uses of specific dollars, and the person speaking is generally not the original source of the money. *See Buckley*, 424 U.S. at 21 ("While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."). For example, when a contributor gives money to a campaign, that act constitutes an expressive act of association by the contributor and amount limitations are "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21 ("A contribution serves as a general expression of support for the candidate and his views."). But when the campaign then uses the contributor's money to run an advertisement, that expenditure constitutes speech by the campaign that increases "the number of issues discussed, the depth of their exploration, and the size of the audience reached"; as such, "expenditure ceilings impose significantly more severe restrictions on protected freedom of political expression and association." *Id.* at 19, 23; *see also Holmes v. FEC*, 875 F.3d 1153, 1167 (D.C. Cir. 2017) (explaining that each spending decision is "an independent one on the part of the campaign.")

Viewing candidate loans through this transaction-level lens clarifies why the repayment of a loan does not constitute speech or even associational expression. When a candidate gives her campaign money, either as a contribution or loan, that is a roughly expressive act of association just like any other contribution. *Buckley*, 424 U.S. at 21. And if the campaign later uses the candidate's loan proceeds to fund a campaign communication, that transaction would constitute political speech by the campaign, because it increases "the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. But when the campaign uses contributors' money to repay the candidate, it is neither making a general

expression of support nor increasing the public discussion of issues. Even though the money used to repay the loan may have originated with contributions that were themselves expressive acts, those funds are only transformed into political expression by the campaign if they are used "to present views to the voters." *Id.* at 21. "[A] bank account balance becomes speech only when spent for expressive purposes." *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 548 (D.C. Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 569 (2019). A transaction-level analysis demonstrates that the FECA provision at issue in this case is distinguishable from the Kentucky statute struck down in *Anderson v. Spear*, 356 F.3d 651, 672-73 (6th Cir. 2004). (*See* FEC Br. at 28.) That state law prohibited candidate loans exceeding $50,000. 356 F.3d at 672. The Kentucky law therefore interfered with the front end of a candidate loan that does constitute an act of expression, rather than the back end which does not.[3]

The Court's transaction-level approach provides a reasonable way to determine the extent to which expressive acts are taking place and who may be engaging in them. Plaintiffs criticize this approach as "pretend[ing] that the back end of the transaction—the repayment—is all that has taken place." (Pls.' Reply at 8.) On the contrary, this approach simply makes clear that each transfer of money represents a different transaction that needs to be analyzed to determine

[3] The FEC has argued that limiting the post-election repayment of candidate loans does not restrict speech. Plaintiffs argue that if the Commission is correct, then "it would necessarily follow that the Government could *entirely ban* candidates or committees from taking out loans of any kind . . . without *even implicating* the First Amendment or triggering anything other than *rational-basis review*." (Pls.' Reply at 8.) But plaintiffs of course ignore that the Limit affects only post-election repayments, a context which means that any political messages would already have been communicated and any additional post-election contributions could not result in any additional speech. This was central to the Commission's argument. (*See* FEC Br. at 20.) By contrast, a law entirely barring the taking of campaign loans would reduce the funding available to committees for speech and thus would impose burdens which a court would need to analyze to determine the appropriate level of review, including whether such a limit prevented campaigns from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21.

whether it is expressive and how it relates to any person's "ability to engage in free communication." *Buckley*, 424 U.S. at 20. And as described *supra* pp. 6-8, because candidate loans need not be made in a manner that assures repayment, the repayment of a candidate loan does not proceed inexorably from the original loan. A campaign committee has discretion with respect to when or whether to pay back a candidate loan, as demonstrated by the involvement of Committee staff in deciding the timing and extent of repayment of Senator Cruz as this case was manufactured. Of course the candidate would in most cases also be heavily involved in determining the terms of repayment, but it is a distinct, later, discretionary act, and the First Amendment analysis accordingly reflects that reality.

C. The Supreme Court Has Not Found That Self-Financing Candidates Have a Constitutional Right to Reimbursement by Other Contributors

Pursuant to the Loan Repayment Limit, any portion of a campaign loan that exceeds $250,000 that is not repaid with pre-election funds is converted into a campaign contribution. 52 U.S.C. § 30116(j). Plaintiffs argue that the law therefore constitutes a "special and potentially significant burden" that should therefore be subjected to strict scrutiny and struck down. (Pls.' Reply at 10 (quoting *Davis v. FEC*, 554 U.S. 724, 739-40 (2008)).)

In *Davis*, the Supreme Court struck down the Millionaire's Amendment because it forced candidates to "abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id.* at 740. The Court held that this was unconstitutional because it allowed no way for a candidate to exercise his "unfettered right to make unlimited personal expenditures . . . without abridgment." *Id.* at 739-40; *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (striking down law that provided additional public financing to the opponents of candidates that spent over certain threshold amounts). But as we have shown (FEC Br. at 22-

24), the Limit is not asymmetrical, does not force candidates into a problematic choice between exercising rights and helping opponents, and does not amplify the speech of the self-funder's opponent. The Limit does allow a candidate the "unfettered right to make unlimited personal expenditures . . . without abridgment," *Davis*, 554 U.S. at 739-40. (*See* FEC Br. at 26-29.) Candidates have no constitutional right to have their campaign spending reimbursed by contributors without limitation, and the absence of burdens imposed by the Limit distinguishes this case from the strict scrutiny applied in *Davis*.[4]

D. The Evidence Shows That the Loan Repayment Limit Does Not Substantially Deter Candidate Loans

The Loan Repayment Limit permits campaigns to raise up to $250,000 in post-election contributions for the purpose of repaying a candidate loan. 52 U.S.C. § 30116(j). Thus, the only candidates that might be deterred from making loans in their desired amounts are those who: 1) want to and can loan their campaigns more than $250,000; 2) believe that they are likely to have insufficient pre-election contributions to repay the loan down to $250,000 or less; 3) believe they are likely to be able to raise over $250,000 in post-election contributions; and 4) would prefer to not make at least some of the loan at all rather than to take the risk of a portion being converted into a campaign contribution. As it turns out, the evidence shows that this subset of candidates

[4] As the Commission has explained, *McConnell* 's analysis of the ban on receipt of "soft money" states that limiting the opportunity for a campaign to *receive* money does not infringe on the campaign's right to *spend* money. (FEC Br. at 26. (citing *McConnell v. FEC*, 540 U.S. 93, 138-39 (2003).) Plaintiffs argue that, unlike the situation in *McConnell*, the very purpose of the Loan Repayment Limit is to "curb a candidate's right to *spend his own money*." (Pls.' Reply at 10-11.) But as discussed *infra* pp. 22-36, the primary purpose of the Loan Repayment Limit is to diminish corruption, which is also the purpose of the soft money ban discussed in *McConnell*. And to any extent that the Limit may alter behavior, it operates to increase how much candidates spend of their own money, not decrease it.

represents no more than a very small fraction of candidates overall. Even if the Loan Repayment Limit could be viewed as burdening speech in this way, that burden is clearly very modest.

The Loan Repayment Limit has a minimal impact on the amount of candidate loans overall.[5] Plaintiffs' argument that the size of a constitutional burden is "irrelevant" to the Court's inquiry is incorrect. (Pls.' Reply at 11-12.) The Supreme Court in *Bennett* was merely making the point that even modest burdens can be sufficient to strike down a law if there is no substantial government interest. (*See* Pls.' Reply at 12 (quoting *Bennett*, 564 U.S. at 745-46); *Bennett*, 564 U.S. at 753 (holding that the government lacked "a sufficient justification for the burden.")) That is not the case here.

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[5] The fact that contributions merely serve as a "general expression of support for the candidate and his views," irrespective of the size of the contribution, is one of the reasons the Supreme Court has generally found that strict scrutiny is not warranted and upheld limits on the amount of contributions as constitutional. *See Buckley*, 424 U.S. at 21. It is also why, with respect to the Loan Repayment Limit, the rights of post-election contributors are not infringed if those contributions are designated for the next election rather than the previous election. There is no support for plaintiffs' argument that the inability of a campaign to use funds from post-election contributors to repay a candidate loan beyond the $250,000 limit for an already-completed election is an infringement of a contributor's constitutional rights. (Pls.' Reply at 15.) Contributors have no constitutional right to have their contributions used for any particular campaign purpose. *See Holmes v. FEC*, 875 F.3d 1153, 1167 (D.C. Cir. 2017) (en banc) (holding that contributors do not control a committee's spending decisions, which are "independent . . . on the part of the campaign"). Plaintiffs contend that there is a constitutional right to make contributions across election cycles but "[t]he logic of plaintiffs' challenge . . . extends to any contribution ceiling" and "[s]uch a theory cannot be reconciled with *Buckley*'s general approval of contribution limits as adequately suited to combatting the appearance and actuality of corruption." *Id.* at 1165. But in making that argument, plaintiffs illustrate a significant justification for the law, namely to limit circumvention of the per-election contribution limits. Plaintiffs describe how campaigns could circumvent contribution limits when they note that, in the absence of the Loan Repayment Limit, a contributor could without limitation simultaneously contribute "$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." (Pls.' Reply at 15; *see also* FEC Br. at 34 (describing the practice of stacking loans to circumvent per-election contribution limits).) Although the Loan Repayment Limit still allows some of this "stacking" up to the $250,000 limit, it diminishes the extent to which this strategy can be used for large scale circumvention of FECA's limits.

As the Commission explained, an academic study that looked at federal candidate loans between $100,000 and $1,000,000 indicates that from 1983 until the effective date of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), 3.6% of such loans were between $240,000 and $250,000, while from the time BCRA became effective until 2014, 7% of such loans were at that that threshold. (FEC Br. at 10 (citing statistics from Alexei Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* ("Ovtchinnikov & Valta") at 24-25 (May 2020) (Docket No. 65-1).) This change of 3.4% percent may represent the percentage of loans between $100,000 and $1,000,000 that might have been larger if not for the Loan Repayment Limit. Plaintiffs quote from the study that even this small number represents a "binding constraint for many politicians," but it is important to examine closely what "many" means in this context. (*See* Pls.' Reply at 13 (quoting Ovtchinnikov & Valta at 25).) Fewer than half of campaigns rely on debt at all, and of those that do, eight percent do so through commercial loans rather than candidate loans. Ovtchinnikov & Valta at 2-3. Furthermore, of those that actually do rely on candidate loans, only a minority of those loans fall within that $100,000 to $1,000,000 range — in the 2018 election cycle, for example, 206 of all House and Senate candidate loans fell within that range, which is only 20.8% of all loans. In other words, at least in 2018, the "many politicians" who may have found the Loan Repayment Limit to be a binding constraint only made approximately seven candidate loans, which is 3.4% of the 206 loans falling within the study's parameters. These seven candidate loans represent only a tiny subset of the total of 990 candidate loans and over 2000 candidates overall.

The Commission also showed the apparently modest effect of the Loan Repayment Limit on the size of candidate loans by comparing the numbers of loans over $250,000 both before and after BCRA and showing that the percentages of such loans are similar. (FEC Br. at 10.)

Plaintiffs argue that these numbers actually show a significant constraint because the average campaign's total spending increased significantly from the time before BCRA to now. (Pls.' Reply at 13.) But plaintiffs offer no reason that the size of candidate loans should necessarily correspond with the total amount of spending by campaigns. In fact, the increasing number of individual donors during that period would understandably both *increase* the total amount of campaign spending and *decrease* the apparent need for campaigns to rely on candidate loans. *See Zachary Albert*, Report for the Campaign Finance Task Force, *Trends in Campaign Financing 1980-2016* (Oct. 12, 2017) at 4, https://bipartisanpolicy.org/wp-content/uploads/2019/05/Trends-in-Campaign-Financing-1980-2016.-Zachary-Albert..pdf.

In sum, because the Loan Repayment Limit reduces the diversion of funds away from campaign spending and presents no burden on expression, mere rational basis scrutiny applies, just as in comparable contexts in which campaign finance restrictions simply impose no limit on contributions or spending. FEC Br. at 21-22; *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 739 (2016) (upholding under rational basis review FECA's provision banning campaigns from spending campaign funds on a candidate's personal use).

II. PLAINTIFFS SUFFERED NO COGNIZABLE BURDEN FROM THE LOAN REPAYMENT LIMIT AND IT IS CONSTITUTIONAL AS APPLIED TO THEM

Because plaintiffs have suffered no unconstitutional burden as a result of the Loan Repayment Limit, their as-applied challenge must fail. (FEC Br. at 14-19.) Plaintiffs have already stipulated that this lawsuit was the only reason Senator Cruz made the loans in the first place, and the only reason that the Committee chose not to pay him back in full. The law had no impact on plaintiffs in 2018 and they undertook extensive efforts to manipulate their behavior just to come barely within the ambit of the statute. As plaintiffs themselves acknowledge elsewhere in their brief, because candidates that do not use loans are unburdened by the law,

"[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." (Pls.' Reply at 45 (quoting *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418 (2015)).) The Court should therefore reject plaintiffs' as-applied challenge. Moreover, plaintiffs' lack of constitutional burden undermines their facial challenge.

A. There Is No Evidence That Plaintiffs Actually Used Senator Cruz's Loans to Fund Campaign Operations

Plaintiffs cannot prevail in their as-applied challenge because they were not burdened by the Loan Repayment Limit. Nonetheless, plaintiffs now argue that in fact they were burdened, building a house of cards upon a purported concession that the Commission has never made. According to plaintiffs, after Senator Cruz loaned $260,000 to the Committee, the "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." (Pls.' Reply at 16; *see also id.* (stating that the FEC "do[es] not dispute that as a factual matter the loans *were used* to fund campaign operations.") Plaintiffs conclude that the loans "constitute expenditures on core First Amendment expression" and that therefore plaintiffs were "indisputably burdened" because "the Limit barred the Cruz Committee from repaying $10,000 of Senator Cruz's $260,000 loans with any post-election contributions." (Pls.' Reply at 16, 17.) Nothing about this story bears any connection to reality.

The evidence makes clear that the Committee did not use Senator Cruz's loan for anything except this lawsuit. Senator Cruz loaned the Committee $260,000 on the day before the general election, and he was repaid $250,000 of that loan less than two months later. (Pls.' Resp. to Defs.' Statement of Undisputed Material Facts ("Pls.' Factual Response") ¶¶ 54, 63 (Docket No. 67-1.) None of the $250,000 in payments were made from contributions raised after the election. (*Id.* ¶ 64.) In other words, $250,000 of the loan was merely passed back and forth

between the plaintiffs. The remaining $10,000 remains in the Committee's bank account, ready to be disbursed to Senator Cruz if this lawsuit is successful. Because the loans were not actually used for any political operations, there is no merit to plaintiffs' argument that the loans constitute expenditures for core First Amendment expression. And because plaintiffs used $250,000 in pre-election contributions to repay Senator Cruz, there is also no merit to plaintiffs' argument that they were burdened because they could not repay $10,000 of loans using post-election contributions. After all, plaintiffs voluntarily used $250,000 of pre-election funds to repay Senator Cruz despite only being required to use $10,000 of such funds if they wished to repay Senator Cruz in full.

The lack of any evidence that Senator Cruz's loans were actually used for campaign funding establishes that the Committee did not suffer any injury from the law. According to plaintiffs, the Committee was injured because it had to decide within twenty days after the election whether "(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)." (Pls. Reply at 17). But this purported decision is also a fiction. Plaintiffs have conceded that the sole reason they waited to pay Senator Cruz was to attempt to build the factual basis to bring this lawsuit, not because it would have resulted in a vendor not being paid. (Pls.' Factual Response ¶ 59 ("the sole and 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]." (emphasis added)).) Furthermore, two days after the 20-day deadline elapsed, Senator Cruz emailed to ask the Committee to begin repaying him "[s]ince more than 20 days have passed" and the Committee began repaying him less than a week later. (*Id.* ¶¶ 62, 63.)

B. Plaintiffs Chose Not to Avail Themselves of Other Legally Available Options That Would Have Allowed Full Repayment of Senator Cruz's Loan

Plaintiffs cannot prevail on a First Amendment claim by foregoing legally available options for their desired spending in lieu of more burdensome unlawful spending options. *See Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10 (D.C. Cir. 2014); FEC Br. at 16-17. Plaintiffs claim that it would have constituted a burden on them if they "*complied* with the very Loan-Repayment Limit they believe is *unconstitutional* by simply repaying the loan with pre-election money." (Pls.' Reply at 17.)[6] But there are at least two substantial flaws to this argument. First, as described *supra* p. 17, plaintiffs voluntarily used $250,000 of pre-election money to repay Senator Cruz, so paying Senator Cruz $10,000 using pre-election money could not possibly be an unconstitutional burden.

But more importantly, plaintiffs' argument has already been rejected by the D.C. Circuit in *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*. 761 F.3d at 14. The plaintiff in *Stop This Insanity* believed that the solicitation law at issue there was unconstitutional, and rather than organizing itself in compliance with the law, plaintiff organized itself in such a way that it could not legally make solicitations, then "claim[ed] there is a constitutional right to do things the hard way." *Id.* Similarly, plaintiffs in this case believe the Loan Repayment Limit is unconstitutional, so rather than repaying Senator Cruz in a manner that is both legal and would have allowed them to make a full repayment, they deliberately let the 20-day period elapse and now claim they have a constitutional right to do things the hard way. Plaintiffs try to distinguish

[6] To be sure, a First Amendment claim regarding an unconstitutional law remains available even if the plaintiff complied with the law. (Pls.' Reply at 18 (citing *Minneapolis Star & Tribune Co. v. Minn. Com'r of Revenue*, 460 U.S. 575, 578-79, 593 (1983)).) Plaintiffs' as-applied challenge does not fail because they complied with the law, it fails because they suffered no constitutional burden.

Stop the Insanity by claiming that the plaintiffs in that case "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 constitutional injury." (Pls.' Reply at 18). But that is simply wrong, as noted above. *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").[7] (*See also* Mem. Op. & Order at 10 (Docket No. 45) (holding that "in light of Plaintiffs' own assertions about the nature of the alleged burdens imposed on them, we cannot conclude that the information sought by Defendants would have no bearing on any merits-based defense they may raise to Plaintiffs' as-applied challenges."); *Brown v. FEC*, 386 F. Supp. 3d 16, 30 (D.D.C. 2019) (reviewing arguments of plaintiffs about a "quandary that purportedly censors their speech" and concluding that their theories do not "withstand[] scrutiny").)

The question of whether plaintiffs' constitutional rights have actually been burdened is an essential part of the Court's inquiry for the as-applied claim, rather than just an issue of "subjective motivations," as plaintiffs characterize it. (Pls.' Reply at 19.) Plaintiffs principally rely on *Pierson v. Ray*, 386 U.S. 547 (1967), for their argument that subjective motivation and lack of burden are intertwined, but that case stands for no such proposition. (Pls.' Reply at 19.) The plaintiffs in *Pierson* were an integrated group of clergymen traveling in 1961 from New Orleans to Detroit. *Pierson*, 386 U.S. at 552. When the group entered a segregated facility at a

[7] *Stop This Insanity* does differ from this case in one important respect. Unlike in this case, the plaintiff in *Stop This Insanity* did not engage in conduct merely as a test, but stated that it actually wanted to "open a separate unrestricted account devoted to making independent expenditures that could solicit the general public." *Stop This Insanity*, 761 F.3d at 12. Thus, the opinion in that case analyzed whether separate segregated funds generally were burdened by the law, whereas this Court need not engage in that analysis to reject the discrete, as-applied challenge brought here. (*Contra* Pls.' Reply at 18 (noting that the *Stop the Insanity* court engaged in constitutional analysis before dismissing that as-applied challenge).)

bus stop in Jackson, Mississippi, they were arrested, convicted, and sentenced to four months in jail and a $200 fine, although after one member of the group successfully appealed and obtained a directed verdict on remand, the charges against all of them were dropped. *Id.* at 553, 549-50. One question in the case was whether the clergymen could recover damages under section 1983 in light of the "substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested." *Id.* at 558. The Court held that despite plaintiffs' knowledge that they were likely to be arrested for exercising their constitutional rights, "their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983." *Id.* But there was no question in that case that the plaintiffs' constitutional rights had been burdened — they were arrested, convicted and sentenced all for merely exercising their constitutional rights. Plaintiffs in this case can point to no such burden.

Finally, plaintiffs argue that the Commission's position on the lack of the harm needed to support their as-applied claim is "in serious tension" with standing cases such as *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Evers v. Dwyer,* 358 U.S. 202, 204 (1958) because it would "cause a sea change in constitutional-rights litigation and call into question the results of landmark civil rights cases." (Pls.' Reply at 20.) But this Court has already indicated that standing and the merits are distinct analyses in this context. (*See also* Mem. Op. & Order at 10 (Docket No. 45) (holding that, despite earlier ruling that plaintiffs have standing, information about constitutional burdens may nonetheless have "bearing on any merits-based defense [the FEC] may raise to Plaintiffs' as-applied challenges.")

In any event, these cases do not support plaintiffs' position. *Havens* was a case brought under the Fair Housing Act, not one alleging a constitutional violation, so its relevance to a discussion of as-applied constitutional challenges seems limited at best. *Havens*, 455 U.S. at

366. But if any meaning can be drawn from that standing analysis in the merits context here, the case is inconsistent with plaintiffs' position. The Court held that a black plaintiff had standing as a "tester" because she had actually been lied to by defendants, while the white plaintiff lacked standing because he had no such injury. *Id.* at 374. *Evers* was a constitutional case, but, like *Pierson* above, the plaintiff had suffered a clear burden to his constitutional rights – when he sat in the front of a segregated bus he was told he had had to "go to the back of the bus, get off, or be arrested," 358 U.S. at 204. Plaintiffs here suffered no such burden to the exercise of their rights.

III. THE LOAN REPAYMENT LIMIT SERVES COMPELLING GOVERNMENT INTERESTS AND WOULD THUS SURVIVE EVEN HEIGHTENED SCRUTINY IF THAT APPLIED

The Commission demonstrated that the Limit serves important interests in deterring corruption as well as promoting electoral transparency, and so it would satisfy closely drawn or even strict scrutiny if those applied. (FEC Br. at 30-43.) This Court must weigh any speech burdens against the government's interest in the statute Congress has passed. Because combatting corruption and the appearance of corruption are substantial government interests, the Loan Repayment Limit should nonetheless be upheld even if the Court were to determine that the law creates some speech burden. *See, e.g, Buckley*, 424 U.S. at 26 (finding that base contribution limits in FECA promote the government's interest to "limit the actuality and appearance of corruption"); *id* at 21 (upholding those contribution limits because they "entail[] only a marginal restriction upon the contributor's ability to engage in free communication.")

A. The Loan Repayment Limit Furthers Vital Anti-Corruption Interests

1. *Legislative History Establishes That the Loan Repayment Limit Was Enacted to Diminish Corruption*

The legislative history of the Loan Repayment Limit makes clear that corruption concerns related to post-election fundraising were the primary motivation behind the passage of

that provision.[8] Plaintiffs acknowledge that two statements in the legislative history of the Loan Repayment Limit indicate that corruption concerns motivated the law, but state that "[t]here 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.'" (Pls.' Reply at 22 (quoting 147 Cong. Rec. S2460 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici)).) But plaintiffs' arguments ignore other Member statements that also refer to the anti-corruption motivation and clearly do not refer to "leveling the playing field." And those statements, although limited in number, make up almost the entirety of the floor statements specifically about the Loan Repayment Limit. (FEC Br. at 6-7.)

The FEC identified several additional floor statements from the legislative history that indicate that the Loan Repayment Limit was intended to address the problem of indebted politicians selling official acts in exchange for contributions. (FEC Br. at 6-7.) Plaintiffs argue that these statements do not refer directly to corruption, so they should be ignored. (Pls.' Reply at 23 n.5.) But the most reasonable way to interpret those statements, in context, is that they refer to corruption concerns relating to the repayment of candidate loans.

In particular, the FEC quoted critical, distinct statements from Senators that clearly link the Loan Repayment Limit to concerns about potential corruption related to *post-election*

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[8] Plaintiffs claim that "[i]n *Davis*, the FEC made a strategic miscalculation" by arguing that the purpose of the Millionaire's Amendment was to level the electoral playing field for less wealthy candidates. (Pls.' Reply at 22.) But being honest with the court is not a "strategic miscalculation." The legislative history of the Millionaire's Amendment is replete with statements that the purpose of that law was to level the playing field, statements that plaintiffs in this case have cited repeatedly even though they do not apply to the Loan Repayment Limit. The Commission argued in *Davis* that the Millionaire's Amendment was motivated by leveling the playing field, because that is the fairest reading of the legislative history and the interest that supports how the law operated. The Commission argues in this case that the Loan Repayment Limit was motivated primarily by anti-corruption objectives because that is also the fairest reading of the legislative history and the interest suited to how the statute operates.

fundraising, and not to any concern about electoral competition. Plaintiffs concede (Pls.' Reply at 22) that Senator Domenici was referring to corruption when stating that the Limit 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. S2462 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).) But plaintiffs argue that the same Senator was not referring to corruption when he said, "If you incur debt from a personal loan and then you get elected as Senator, and then you go around and say, now I am the Senator, I want you to get me money so I can pay back what I used of my own money to run for election. It is clear in this amendment that you cannot do that in the future." 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici)). However, in both statements Senator Domenici is plainly talking about the same corruption problem. The import of "going around" to potential contributors and saying, "now I am the Senator, I want you to get me money" would not have been lost on members of Congress. This is clearly a description of a newly-elected Senator stressing the power of his office to solicit contributions that will be used to repay his loan. It is abundantly clear Senator Domenici was not referring to "leveling the playing field" here, and plaintiffs make no attempt to show that he was. And at another point Senator Domenici again explained how the Limit addresses these anti-corruption concerns, in a statement about the potential influence of "special interests" that also implicates the public's interest in pre-election disclosure of who is supporting candidates:

> You cannot have it both ways. You are going to put up your own money and say to the electorate: Don't worry about special interests on this candidate's part; I'm not bothering anybody for any money; it's my own. So you spend $5 million or borrow $5 million.
>
> Isn't it interesting, for the most part, you are not in office 1 month and you are interested in the special interests. Why? Because you want to pay the loan off. So

> now you are out raising money. You advocated: Nobody will touch me; it is my own money; I am entitled to spend it; I am entitled to borrow it.

147 Cong. Rec. S2461-62 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici)).

The remaining two statements that the FEC cited in its earlier brief also clearly reflect concerns about post-election fundraising. (FEC Br. at 6.) In the first, Senator Domenici stated that "[t]his [amendment] limits candidates who incur personal loans in connection with their campaign in excess of $250,000. They can do $250,000 and then reimburse themselves with fundraisers. But anything more than that, they cannot repay it by going out and having fundraisers once they are elected with their own money." (*See id.* at S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).) And at another point, Senator Durbin stated that "[the] language [of the Loan Repayment Limit] makes it clear there will not be any effort after the election to raise money to repay those loans."

All of these statements specifically express concern with fundraising after the election, not with any perceived competitive disadvantage. And as the statements make clear, the concern with post-election fundraising to repay candidate loans is that it creates a special risk of corruption, as newly-elected federal office holders seek funds that will go back into their personal accounts, and enables a misleading presentation of campaign financing to voters. If these Senators had been speaking in support of the Loan Repayment Limit because they believed it would level the playing field, then they would have said so, as both Senator Domenici and Senator Durbin clearly did when they were discussing the Millionaire's Amendment. (*See* 147 Cong. Rec. S2460 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici) ("The [Millionaire's] amendment may be negotiable in terms of how we better balance the playing field, but there is no question that [Senator Feinstein] has hit the nail right on the head [in discussing how self-funding candidates have tremendous financial advantages]."); 147 Cong. Rec. S2540 (daily ed.

Mar. 20, 2001) (statement of Sen. Durbin) ("What we are trying to address with [the Millionaire's Amendment] is to level the playing field.")

As the FEC has acknowledged, Senator Hutchison did reference leveling the playing field as a motivation for the Loan Repayment Limit, but she appears to be the only Senator to make such a statement about the Limit; plaintiffs have failed to identify any others. And as the FEC explained, Senator Hutchison herself also clearly indicated that she believed the Limit furthered an anti-corruption interest, in stating that it would work to prevent newly elected office holders from trying to "resell" the office. (FEC Br. at 6-7.) At most, her statements indicate that one supporter of the Limit believed it supported multiple interests.[9]

In any case, when a law has been passed based on multiple governmental interests, it should be upheld even if some of those interests are later found to be invalid by the court, so long as there remains at least some valid interest. For example, the Supreme Court upheld FECA's individual contribution limits because of their anti-corruption purpose, even though it was aware that they were also passed to "mute the voices of affluent persons and groups" and to "act as a brake on the skyrocketing cost of political campaigns," each of which the Court deemed not to be sufficient interests to support them. *See Buckley*, 424 U.S. at 26–27.

[9] As the Commission stated in its prior filing, Senator Hutchison had previously sponsored the Loan Repayment Limit as a stand-alone bill before it was later included during the BCRA amendment process as part of the Millionaire's Amendment. (FEC Statement of Undisputed Material Facts ¶ 20 (Docket No. 66). Plaintiffs denied that this was true because they understood the Commission to mean that the Millionaire's Amendment had first been introduced in the legislative process and then later modified to include the Loan Repayment Limit. (Pls.' Response to Defendants' Statement of Undisputed Material Facts ¶ 20 (Docket 67-1).) However, the Commission was not suggesting that the Millionaire's Amendment had ever been introduced without the Limit, but merely referring to the separate bill that Senator Hutchison had introduced in the previous Congress. *See* S.2565 - Campaign Finance Reform and Disclosure Act of 2000, https://www.congress.gov/bill/106th-congress/senate-bill/2565/text?r=33&s=1.

Lastly, as the FEC noted in its opening brief, the Millionaire's Amendment applied to both contributions and loans, because if loans had been excluded from that law, a candidate could simply characterize a large personal contribution as a loan to prevent his or her opponent from obtaining the benefits of running against a self-funding candidate. (FEC Br. at 32 n.8.) Plaintiffs argue that this proves Congress intended to level the playing field by limiting the repayment of loans. But the fact that several legislators referenced both loans and contributions when speaking about the Millionaire's Amendment is unremarkable because that part of the statute applied to both loans and contributions. It has nothing to do with the distinct and compelling anti-corruption interests supporting the Loan Repayment Limit.[10]

2. McCutcheon v. FEC *Did Not Cast Doubt on the Constitutionality of the Loan Repayment Limit*

In its opening brief, the FEC showed that the situation the Loan Repayment Limit addresses involves the risk of actual quid pro quo corruption and its appearance. (FEC Br. at 33.) Plaintiffs argue that the government's anti-corruption interest "fail[s] to justify the provision as a matter of law" (Pls.' Reply at 25) because the Limit adds a restriction to FECA's base contribution limits, based on the Supreme Court's decision in *McCutcheon v. FEC*, 572 U.S. 185 (2014), but this claim is unavailing. The *McCutcheon* Court's description of base contribution limits does not invalidate every campaign finance restriction beyond those limits. In *McCutcheon*, the Court found invalid aggregate contribution limits in part because it found the base limits sufficient to deter corruption in that context, but the decision did not affect the

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[10] Plaintiffs also claim that the FEC "tender[ed] no response" to plaintiff's argument that the Millionaire's Amendment was motivated by an incumbent-protection purpose. (Pls.' Reply at 25.) But there was no reason for the FEC to address the motivation for a statute that is not at issue here and that has already been struck down. In any case, to the extent it is helpful, the Commission notes that all of plaintiff's evidence about the alleged incumbent-protection motivation for the Millionaire's Amendment comes from critics of the amendment rather than those legislators that actually pushed for its passage.

validity of other, still-applicable restrictions beyond base contribution limits. Courts both before and after *McCutcheon* have recognized that Congress can legitimately set further restrictions and prohibitions on contributions, and these restrictions are constitutional regardless of the application of base contribution limits. *See Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015) (en banc) (upholding prohibition on contributions by individual federal contractors), *cert. denied*, *Miller v. FEC*, 136 S. Ct. 895 (2016); *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding corporate contribution ban); *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (affirming constitutionality of prohibition on foreign national contributions). The *Wagner* decision upholding the contractor contribution ban — where the Supreme Court denied certiorari two years after *McCutcheon* was decided — is particularly instructive, because it upheld a FECA provision that, like the Limit at issue here, imposes a temporally-limited additional restriction to address a special corruption risk.

Moreover, *McCutcheon* did not change courts' historical deference to the line-drawing in which Congress must engage when regulating. Plaintiffs suggest that the Limit's allowance for the use of some post-election contributions disproves that post-election contributions pose any particular risk of corruption or its appearance (Pls.' Reply at 27-28), but that claim fails to recognize that "Congress had to draw the line somewhere" and that ultimately "the legislature must be allowed leeway to approach a perceived problem incrementally." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993). A similar argument could be made about the line-drawing of numerous provisions of FECA that have long been held valid. *See, e.g. Holmes*, 875 F.3d at 1162–63 ("Congress need not justify its exact choice as to the ceiling's time period (or dollar amount) with some added anti-corruption explanation."); *In re Cao*, 619 F.3d 410, 419 (5th Cir. 2010) ("Plaintiffs argue that the multiple limits . . . mean that the Congress

acknowledges that the higher limits are sufficient to accommodate any interest in preventing corruption, and thus the lower limits are automatically unnecessary to advance that anti-corruption interest. . . . The Supreme Court rejected this argument in *Buckley* . . . ."). That Congress allowed for the use of some post-election contributions to repay candidate loans does not undermine the argument that contributions received after an election pose a particular risk of corruption that pre-election contributions do not. "On questions of degree, of drawing the line, sound doctrine gives Congress latitude for reasonable judgments . . . ." *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976), *and modified*, 532 F.2d 187 (D.C. Cir. 1976) (citing cases).

3. *Survey Evidence Shows That the Public Views Post-Election Contributions to Repay Candidate Loans as Posing Corruption Dangers*

The Commission explained that recent survey evidence clearly shows public concern about the potential for quid pro quo corruption stemming from the repayment of candidate loans with post-election contributions. (FEC Br. 32-33.) In particular, the 2020 YouGov survey showed that an overwhelming majority of respondents believed that post-election contributors to recently elected office holders would be more likely to expect political favors, and that such an expectation would be more likely in the absence of a loan repayment limit. This evidence need not show actual quid pro quo corruption, but does show its *appearance*, and avoiding that appearance is by itself a sufficiently compelling interest to support the constitutionality of the Loan Repayment Limit. *McCutcheon*, 572 U.S. 185 at 207 ("Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." (quoting *Buckley*, 424 U.S. at 27).)

Plaintiffs' objections to the FEC's survey evidence are baseless. Plaintiffs first argue that the FEC "did not include any weight or control to ensure representativeness based on political affiliation" (Pls.' Reply at 30), but this ignores the successful steps taken to ensure a representative sample. As the FEC demonstrated, YouGov ensured that the respondents were a nationally representative sample of the U.S. adult population. (FEC Statement of Material Facts ¶ 82; Deposition Transcript of Ashley Christine Grosse, Ph.D. (May 26, 2020) at 164:15-165:15 ("Grosse Dep.") (FEC Mot. for Summ. J. Exh. 23 (Docket No. 65-23)) (describing YouGov methodology to ensure representativeness in respondent sample).) And the respondents were a representative sample, including on political affiliation.[11] Party affiliation was not an "important profile item to include in a survey" (FEC Statement of Material Facts ¶ 86) where other steps were taken to ensure representativeness, and plaintiffs fail to articulate any reason why party affiliation should have been sought for a poll that did not involve preferences on partisan candidate races.

The data about party affiliation that plaintiffs sought confirmed that concerns about the potential for corruption that the Loan Repayment Limit addresses run across the political spectrum. In particular, the survey showed no partisan split in the public's overwhelming perception that it is likely that post-election contributors expect a political favor in return from

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[11] After plaintiffs requested survey responses related to party affiliation and other political variables, the FEC asked YouGov to compile that information and provided it to plaintiffs. (FEC Statement of Material Facts ¶¶ 88-89.) The panel was a representative sample of the country on political party affiliation. 25% of respondents identified as Republicans and 34% identified as Democrats. (*See* Exhibit A to Decl. of Tanya Senanayake (July 14, 2020) at question 16 (FEC Mot. for Summ. J. Exh. 26 (Docket No. 65-26)).] This is nearly identical to the proportions of people who generally identify with each party. *See* Gallup, Party Affiliation (July 30-Aug. 12, 2020), https://news.gallup.com/poll/15370/party-affiliation.aspx. (last visited Sept. 8, 2020) (finding that 26% of people consider themselves members of the Republican Party and 31% identify with the Democratic Party).

candidates who later take office. (FEC Statement of Material Facts ¶ 92.) In fact, 78% of respondents who identified as Democrat, 78% of respondents identifying as Republican, and 84% of respondents identifying as Independent said that it was "likely" 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." (*Id.*) The public's overwhelming perception that it is likely that contributors who donate money to a candidate's campaign after the election expect a political favor in return from candidates who later take office is also similar among respondents with different political ideologies (FEC Statement of Material Facts ¶ 93), and among respondents who reported casting different presidential votes in 2016 (*id.* ¶ 94). And the public's overwhelming perception that, if a candidate loan repayment limit did not exist, donors would be more likely to expect political favors is also similar among respondents identifying with different political parties and ideologies, and among respondents who reported casting different presidential votes in 2016. (*Id.* ¶¶ 97-99.)

Plaintiffs' general objections to the wording of the survey questions (Pls.' Reply at 31) are also baseless. In conducting the survey, YouGov maintained a right to refuse to field any questions provided by the FEC that did not meet YouGov's quality and ethical standards, consistent with its professional practice — and YouGov had in the past refused to field questions that did not meet its standards. (Grosse Dep. 44:8-14, 18-21.) YouGov had no concerns about the quality or ethics of the questions in the survey and ran the questions without substantive modifications. (Grosse Dep. 45:8-10.) YouGov did make methodological implementations of the survey questions to eliminate answer bias (Grosse Dep. 45:21-46:11), to ensure that respondents maintained the requisite level of attention to the survey and were carefully reading the questions (*id.* 46:12-47:12), and to maintain a nationally representative sample (*id.* 164:15-

165:15). Plaintiffs also contend (Pls.' Reply at n.33) the poll was flawed because it did not define or further explain what "political favors" meant. But the Supreme Court has repeatedly used "dollars for political favors" precisely as a short way to explain quid pro quo corruption. *See, e.g., McCutcheon*, 572 U.S. at 192 (quoting *FEC v. Nat'l Conservative Political Action Comm.*; 470 U.S.480, 497 (1985)).

The YouGov public opinion poll provides useful data on perceptions of the appearance of corruption if the Limit were not to exist, even though the poll questions did not incorporate every specific element of the Limit, such as the level at which the repayment is set. YouGov's representative testified that "this whole topic is incredibly complex for the average American and [the survey] did a very nice job of weighing out something that's quite complex." (Grosse Dep. 157:12-15.) Plaintiffs fault the level of detail in the survey questions (Pls.' Reply at 32-33), but the questions met the standards of YouGov, and there is no evidence that respondents failed to comprehend the questions. In fact, layering poll questions with unnecessary details can, as YouGov's representative testified, "muddy the waters" instead. (Grosse Dep. 153:2-7.) Furthermore, survey respondents were made aware of relevant information through background questions that were required to be completed before they answered the questions directly at issue here. *See* Exhibit A to Decl. of Tanya Senanayake (July 14, 2020) at question 3 (FEC Mot. for Summ. J. Exh. 26 (Docket No. 65-26)). (explaining that loans could be repaid under current law); *id.* at question 4 (referencing "donations from people and groups" to repay the hypothetical $100,000 loan, not a single contribution).

Plaintiffs also criticize the survey for not asking additional questions about pre-election contributions, but YouGov's representative attested that the survey was "very strong" even

without a focus on pre-election contributions. (Grosse Dep. 156:12-14.)[12] In any event, plaintiffs were free to measure public opinion themselves, with the questions that they would prefer, but they chose not to compile such evidence. The YouGov study provides compelling data about the public's concerns regarding the appearance of corruption in the context in which the Limit operates.

4. *Academic Studies Support Congress's Determination That the Loan Repayment Limit Promotes the Government's Interest in Diminishing Corruption*

In its opening brief, the Commission cited two academic studies for specific limited purposes in support of its argument that the Loan Repayment Limit works to combat at least the appearance if not the reality of quid pro quo corruption. (FEC Br. at 8-9, 33.) Plaintiffs criticize these studies and the Commission's use of them at length and on a number of grounds. (Pls.' Reply at 33-39.) But the Commission did not rely on the studies to resolve every outstanding issue in this case, and as explained below, its original points remain valid.

a. *The Pattern of Indebted Candidate Votes Identified in One Recent Study Creates an Appearance of Corruption*

The Commission relied on the 2020 study *Debt in Political Campaigns* by Alexei Ovtchinnikov and Philip Valta ("Ovtchinnikov & Valta"). (FEC Br. at 8-9, 33.) Plaintiffs curiously spend four pages of their brief criticizing the study, even though they had cited to it themselves for several points and indeed attached it to their moving papers. (Pls.' Statement of

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[12] Plaintiffs criticize the FEC for submitting its own questions, but of course the extremely expedited schedule that plaintiffs sought prevented alternatives. There were a little under six weeks between the issuance of the scheduling order and the deadline for service of expert reports. (Order of Jan. 29, 2020 at III.A (Docket No. 40).) Researching, interviewing, and procuring a qualified expert who was available during the height of the presidential primary season; researching, interviewing, and procuring a polling firm for the expert to oversee; completion of the polling; and completion of an expert report analyzing the polling during that period was not feasible.

Undisputed Material Facts at ¶ 39 and Exh. 18 (Docket No. 61-2).) The Commission relied on two findings from the report. First, the Commission discussed the study's finding that federal candidate debt creates "legislative distortions" because "indebted politicians, relative to their debt-free counterparts, are significantly more likely to switch their votes if they receive contributions from those special interests between the votes." (Ovtchinnikov & Valta at 29.) This finding suggests that fundraising to retire candidate debt presents special corruption concerns, and helps to explain why Congress was concerned about post-election contributions being used for the repayment of candidate loans.

Plaintiffs argue that the study cannot conclusively establish that campaign debt actually causes *quid pro quo* corruption, rather than just establishing a correlation between voting patterns and indebtedness (Pls.' Reply at 35), but such a conclusion is not required for the study to provide data material to this case. Even if the authors of the study cannot conclude that these "legislative distortions" are caused by candidate indebtedness, the study provides a basis for the Court to find that it would be reasonable for Congress or the public to draw that conclusion. And it is reasonable to conclude that this correlation creates an appearance of corruption, the diminishment of which is itself a substantial government interest, and likewise supports Congress's actions. *McCutcheon*, 572 U.S. 185 at 207; *McConnell v. FEC*, 540 U.S. 93, 120–21 (2003) (stating that the primary purpose of FECA is "to limit the actuality and appearance of corruption resulting from large individual financial contributions" (quoting *Buckley*, 424 U.S. at 26)).

Second, the Commission relied on the Ovtchinnikov & Valta study for the point that "politicians with large loans to their campaigns become significantly less responsive to contemporaneous labor contributions following the passage of BCRA and behave remarkably

similar to their debt free counterparts." ((FEC Br. at 8-9) quoting Ovtchinnikov & Valta at 26).) This finding at least suggests that the Loan Repayment Limit has in fact reduced some of the "legislative distortions" described above. Plaintiffs are critical of the use of this finding both because: 1) it can only establish correlation rather than causation; and 2) other changes in BCRA might also have plausibly impacted the ways in which legislators vote. (Pls.' Reply at 37.) But again, even if the study cannot support a definitive conclusion that the Loan Repayment Limit actually caused the changes in votes, it would not be unreasonable for Congress or the public to draw such a conclusion, nor for Congress to believe that the legislative conduct that the study confirmed supports the establishment of the Limit to lessen at least the appearance of corruption in this context. This is particularly true because the Loan Repayment Limit was designed for the very purpose of diminishing corruption resulting from candidate loans, while other provisions of BCRA are unrelated to candidate loans or repayment and would therefore be less likely to explain these changes in legislative behavior. In fact, the authors of the study believed BCRA's other changes were so irrelevant to their findings that they were not even discussed, while the Loan Repayment Limit was explained at length as context for the changes that the authors observed in voting patterns. (Ovtchinnikov & Valta at 6-7.)

Plaintiffs' other criticisms of the Commission's use of the Ovtchinnikov & Valta study are misplaced. Plaintffs complain that the study does not address other parts of this case, for example the specific issue whether "post-election contributions used to repay candidate loans in excess of $250,000 pose some heightened risk of corruption." (Pls.' Reply at 34.) But the study does not need to address every aspect of this case to be relevant, nor did the Commission cite to it for that purpose. On the other hand, plaintiffs also argue that the study actually bolsters their own position, noting that the authors estimate that the average price at which a vote can be

bought from an indebted politician is $37,615 per vote, which is far more than an individual contributor can give. Plaintiffs assert that this indicates that the base contribution limits are sufficient to prevent corruption and therefore the Loan Repayment Limit is superfluous. But plaintiffs' argument ignores the fact that special interests are capable of arranging for the direction to office holders of far more than the individual contribution limit, through the collective contribution activity of multiple PACs or like-minded individuals. The study examined that precise behavior. It would not take many contributions at the individual limit (currently $2,800 per election) or PAC limit ($5,000 per year) to reach the "price" points that the study identifies. *See* FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504-06 (Feb. 7, 2019). Plaintiffs also ignore that an average is just an average, and Congress would be justified in believing that some votes might be purchased for significantly less. Moreover, members of Congress do more than just take floor votes, and other legislative actions, such as committee activity and altering the legislative calendar, could potentially be exchanged for lesser amounts. *See, e.g.*, *McConnell*, 540 U.S. at 149-50 (noting that "manipulations of the legislative calendar" to prevent Congress from enacting legislation constitutes changing "legislative outcomes").

b. *A Second Study Concluded That Indebted Candidates Have a Greater Need to Court Campaign Contributions*

The Commission's opening papers also relied on a study by Anne Baker, *Are Self-Financed House Members Free Agents?*, 35:1 Congress & the Presidency: A Journal of Capital Studies, 53 (2008) ("Baker") (Docket No. 65-3), for several purposes that relate to this case. The Commission's brief cited Professor Baker for the uncontroversial point that "most self-financing takes the form of personal loans" (FEC Br. at 8 (quoting Baker at 56)), and later, the brief quoted her conclusion that "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" (FEC Br. at 33 (quoting Baker at 65)). That conclusion helps to explain why Congress had concerns about the repayment of candidate loans and viewed certain repaid loans differently than bona fide self-funding, which "reduces the candidate's dependence on outside contributions." *Buckley*, 424 U.S. at 53. Plaintiffs once again assert that the study as a whole does not support the Loan Repayment Limit, arguing that it shows self-financing generally has no overall effect on office holder conduct. (Pls.' Br. at 39.) But plaintiffs disregard central observations from the study, including in particular how self-financing candidates become susceptible to vote-for-dollars exchanges over time. If plaintiffs prevail, the phenomenon of initial self-financers quickly becoming reliant on contributions would revert to the pre-BCRA conditions that form the majority of the period studied and significantly *increase*.

As an initial matter, the Baker study distinguished to some extent between loans that are unpaid or repaid, treating loans that are repaid within an election cycle as contributor-financed, not self-financed. (FEC Exh. 3, Baker at 60 (Docket No. 65-3) ("If the candidate repays the loan during the election cycle with funds raised then that portion of the loan is no longer considered to be part of the self-financing total, because those costs have been covered by campaign contributors rather than the candidate.").) Loans "which are not repaid during the election cycle in which the funds are used," on the other hand, were treated "as the personal responsibility of the candidate" and "as the equivalent of personal contributions for that election cycle." (*Id.*) The study thus did not include all loans (*contra* Pls.' Reply at 38), and its very parameters thus reflect an attempt to conform — to the extent feasible — to the reality the Loan Repayment Limit reflects that only unpaid loans constitute actual self-financing reducing corruption risks.

Under those parameters, the Baker study observed financing and voting patterns over ten years, basically 1995-2004. Consistent with an earlier study concluding that "most self-financing is a one-time-only phenomenon," during the period Baker studied "only one member . . . self-financed significant amounts of his campaign for more than two consecutive Congresses.". (*Id.* at 65 (citation omitted).) Previous self-financers thus "want to foster their ties to interest group organizations, to prove that they are worthy of future contributions and support from other interest group organizations in related issue domains." (*Id.*)

The Supreme Court's conclusion in *Buckley* that actual candidate self-spending presents a reduced danger of dollar-for-vote exchanges is common ground in this litigation. The Baker study showed that there is a tendency of one-time self-financers to have their "fundraising strategies . . . become more like those of their peers *over time*." (*Id.* (emphasis added).) The fact that the legislative votes of previous self-financers become as susceptible to interest group contributions as other candidates after a few years thus confirms that there is particular cause for concern regarding later fundraising by indebted self-funders. If such officeholders remained as free from vote-buying concerns as plaintiffs contend, Professor Baker would have found them generally to remain "free agents," *i.e.*, "in a uniquely independent situation not only during the election but also in the event that they achieve office." *Id.* at 53. She did not. And plaintiffs offer no alternative to Baker's explanation that significant self-financers have unique needs to develop alternative funding sources for later elections, a phenomenon that would be most acute for candidates who loaned funds rather than making outright contributions due to economic need.

5. *Evidence Regarding the Repayment of Candidate Loans in Federal and State Contexts Presents at Least an Appearance of Corruption*

The Commission described a number of troubling examples of situations in which post-election fundraising activities to repay candidate loans raised significant corruption concerns.

(FEC Br. at 33-35.) In response, plaintiffs argue that the FEC has "resort[ed] to argument by anecdote" and that at most these examples amount to mere "influence or access" that is not sufficient to support campaign finance restrictions. (Pls.' Reply at 39, 41; *see id.* at 39-42.) However, the Supreme Court and other courts have repeatedly upheld FECA restrictions based at least in part on a similar identification of troubling examples. *See*, *e.g.*, *Buckley*, 424 U.S. at 27 & n.28; *McConnell*, 540 U.S. at 146-52; *Cao v. FEC*, 688 F. Supp. 2d 498, 506 (E.D. La. 2010). The examples the Commission provided, which included widely discussed concerns about Senator Cruz's own loans in the 2012 campaign, were merely illustrative. In any event, as the FEC noted (Br. at 34 n.9), the relevant evidentiary standard is lower for the defense of a prophylactic statute like the Loan Repayment Limit, which has been in place for nearly 20 years. Examples of actual quid pro quo exchanges are notoriously "'difficult to isolate,'" and the evidence establishes at a minimum an appearance of corruption. *Libertarian Nat'l Comm.*, 924 F.3d at 543 (quoting *Buckley*, 424 U.S. at 30). The record shows that the public and informed observers perceive that some office holders appear ready to trade political favors for contributions in this context, as the YouGov polling evidence described above indicates. And this appearance of corruption is sufficient to support restrictions like the Limit. *McCutcheon*, 572 U.S. 185 at 207.

B. The Loan Repayment Limit Furthers Important Disclosure Interests

In its initial brief, the Commission explained that the Limit furthers the government's disclosure interest by ensuring that candidate loan amounts above $250,000 are repaid with pre-election contributions, which are disclosed to the electorate prior to the election through reporting to the FEC. (FEC Br. at 37-38.) Plaintiffs do not dispute that the Supreme Court and the D.C. Circuit have repeatedly emphasized the important interests that FECA's disclosure

provisions support. (*Id*. at 37 (citing cases).) Plaintiffs also concede that pre-election contributions implicate a disclosure interest (Pls.' Reply at 42), but they suggest that there is no disclosure interest involved with post-election contributions because the contributions have not yet occurred at the time of the election. (Pls.' Reply at 43.) To the contrary, however, the disclosure interest is very strong, because the timing of such contributions does not allow voters to determine who is in a real sense financially supporting the candidate's campaign — albeit through funds for the payment of debts incurred before the election — until after the election is over. The Limit at least restricts the use of post-election contributions for the repayment of candidate loans and ensures the use of pre-election contributions for loan amounts above $250,000, and in this manner furthers the disclosure interest that courts have long recognized, including in *Buckley*:

> [D]isclosure provides the electorate with information as to where political campaign money comes from . . . in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

424 U.S. at 66-67 (internal quotation marks omitted). None of this voter awareness is possible if candidates receive contributions to repay self-spending months or even years after the election.

Plaintiffs also argue that the Limit does not further a disclosure interest because it allows post-election contributions to be used to repay candidate loans up to a point (Pls.' Reply at 42-43), but the Limit's carefully defined scope does not mean it fails to further the disclosure interest and help voters determine the sources of support for a campaign at all. That the Limit allows for some post-election contributions merely reflects the constitutionally permissible and ultimately necessary line-drawing in which Congress engaged. *See supra* at pp. 27-28.

Congress is not required to solve every problem at once. *See McConnell*, 540 U.S. at 158 ("[W]e respect Congress' decision to proceed in incremental steps in the area of campaign finance regulation . . . ."). Nor is it required to address only problems plaintiffs identify in ways they would prefer, as they appear to assert in discussing ear-marked contributions. (Pls.' Reply at 42-43.) The Limit serves a disclosure interest by ensuring that candidate loan amounts above $250,000 are repaid using pre-election contributions, thereby enabling voters to determine the sources of campaign funding before they vote.

C. The Loan Repayment Limit Is Neither Underinclusive Nor Overinclusive

As the Commission has explained, the Loan Repayment Limit advances the government's anti-corruption and disclosure interests, and it is sufficiently tailored to serve those interests. (FEC Br. at 38-43.) Everything demonstrating that burdens imposed by the Limit are at best modest and supportive of a reduced level of scrutiny, *see supra* pp. 12-15, is also relevant to questions of proportionality. Even if the Court were to determine that the law creates some burden on expression, any burdens must be considered in light of the government's interests in the statute Congress has passed. *McCutcheon*, 572 U.S. at 199 ("[W]e must assess the fit between the stated governmental objective and the means selected to achieve that objective."). If the burdens on speech a law imposes are modest, it is relatively easier for the statute to "'avoid unnecessary abridgement'" of First Amendment rights. *Id.* (quoting *Buckley*, 424 U.S. at 25). Because the Loan Repayment Limit furthers the substantial government interests in combatting corruption and the appearance of corruption to a degree commensurate with any impositions on affected parties, it should be upheld. *See, e.g, Buckley*, 424 U.S. at 26 (finding that base contribution limits in FECA promote the government's interest to "limit the actuality and

appearance of corruption"); *id* at 21 (upholding those contribution limits because they "entail[] only a marginal restriction upon the contributor's ability to engage in free communication.")

Plaintiffs argue that the Court should strike down the Limit because it is "not narrowly tailored to achieve [that] objective" (Pls.' Reply at 43 (quoting *McCutcheon*, 572 U.S. at 218)), asserting that the law is underinclusive in some respects and overinclusive in others.

The Loan Repayment Limit is not underinclusive. The Limit is tailored to apply in situations when the strength of the government's already important interests are at their peak. First, the limit applies where a campaign has spent hundreds of thousands of dollars received *after* an election, at a time when the winner is already known and thus in a better position than a candidate to provide legislative favors to contributors. Second, the Limit applies to funds given by a campaign to a candidate or officeholder who can then essentially pocket those funds and use them for any purpose. Plaintiffs argue the law is underinclusive because if post-election contributions used to repay candidates pose a danger of corruption, then so do lawful 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." (Pls.' Reply at 44.) But none of these situations involve the convergence of the two factors described above that create a heightened risk of corruption – that the contributions take place after the election and are ultimately directed to the candidate.

Given these two aspects of the Loan Repayment Limit, in the absence of the provision an individual who had not been motivated to contribute before the election but is interested in obtaining legislative favor with a newly elected Senator or Representative could give up to a total of $5,600 ($2,800 for the previous primary and general elections) that would in effect go directly into the pocket of that officeholder, on top of the equal amounts they could give for the

next election cycle. Even when used for campaign-related purposes, large contributions that are "given to secure a political quid pro quo from current and potential office holders" undermine the "integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27. That system is threatened even further when federal candidates use contributions to subsidize their own personal expenses. At the very least, it *appears* corrupt to the public when candidates use contributions for their personal projects. *O'Donnell*, 209 F. Supp. 3d 727, 740 (D. Del. 2016) (personal use prohibition is constitutional in part because it "promotes public confidence in the campaign finance and political system."). And as the Supreme Court has explained, "the avoidance of the appearance" of corruption is "critical" to prevent the public's "confidence in the system of representative Government" from being "eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (internal quotation marks omitted); *McCutcheon*, 572 U.S. 185 at 207 ("Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates." (quoting *Buckley*, 424 U.S. at 27).)[13]

At the same time, the Loan Repayment Limit is not overbroad. (FEC Br. at 41-43.) As previously discussed, the Limit does not infringe on speech, and the overbreadth doctrine would only be applicable if the First Amendment were implicated. *See* FEC Br. at 41; *O'Donnell*, 209

[13] In other contexts, federal legal and ethical rules recognize the particular dangers that exist when elected officials receive funds that they can use for any purpose from constituents. Giving something of value to a public official for the purpose of influencing an official act under other circumstances constitutes bribery. 18 U.S.C. § 201(b)(1). Similarly, the Senate Ethics Rules prohibit Senators from receiving gifts over $50, and limit the total amount of gifts a Senator may receive in an entire year to $100. *See* The Senate Code of Official Conduct, Select Committee on Ethics (March 2015), Rule XXXV(2)(A), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=EFA7BF74-4A50-46A5-BB6F-B8D26B9755BF (last visited Sept. 8, 2020). The Loan Repayment Limit is another means by which such quid pro quo corruption and its appearance are diminished.

F. Supp. 3d at 740 (rejecting overbreadth challenge against the personal-use ban because defendants "fail to identify *even one* fact pattern in which a prohibited expense would interfere with political speech"). The Limit does not restrict *any* avenues for independent political speech by candidates or campaign committees. It does not restrict campaign contributions, as it applies only to one potential use of campaign funds after an election. Nor does the Limit prevent campaigns from repaying candidate personal loans *in full* by using any funds before an election or by using their election-day cash on hand within 20 days after the election. And the Limit applies only to the extent such loans exceed $250,000. Thus, the situation in which the Limit applies is itself a limited one.

But even if the Court finds some burden on speech, "the overbreadth doctrine is not casually employed." *L.A. Police Dep't*, 528 U.S. at 39-40. It is "strong medicine" that should be invoked only "as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In particular, the Court has "repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974). To strike down a statute for being overbroad, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

Any overbreadth of the Loan Repayment Restriction would be insubstantial in relation to its legitimate sweep. First, the statute's "plainly legitimate sweep" includes application to winning candidates and is thus extensive. *Id.* at 615. Though both winning and losing candidates carry debt from personal loans, winning candidates do possess a greater capacity to retire that debt through payment from contributions over time. (FEC Br. at 9.)

Plaintiffs argue that the law is overinclusive because it applies not only to winning candidates that would therefore be in a position to provide a quid pro quo, but also to losing candidates that have no such ability. (Pls.' Reply at 44.) But winning candidates do not mark the full extent of the Limit's legitimate sweep, because incumbent candidates who lose are still officeholders for some time after their loss and donors have always recognized that some candidates who lose an election may be good candidates to be elected to office in the future. *See, e.g.* , Steven V. Roberts, *Debt Retirement Party Becoming an Institution*." N.Y. Times, November 29. 1982) (describing an interest group "which urges its members to contribute to promising losers who favor business interests and might run again for public office" and how "debt retirement politics" affects "key votes" during lame-duck sessions).[14] In any case, courts have repeatedly upheld FECA restrictions that apply to *all* candidates against overbreadth challenges, even if the justification applied more to some candidates than others. *Buckley*, 424 U.S. at 29 (even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," it is nonetheless justified as a "prophylactic" to limit the *risk* and *appearance* of corruption arising inherently from large contributions because it is "difficult to isolate suspect contributions"); *McConnell*, 540 U.S. at 158-59 (restrictions on minor parties closely drawn despite unlikelihood of success because "[i]t is . . . reasonable to require that all parties and candidates follow the same set of rules designed to protect the integrity of the electoral process."); *Libertarian Nat'l Comm.*, 924 F. 3d at 544 ("Because the First Amendment does not require Congress to ignore the fact that candidates, donors, and

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[14] The number of losing candidates who will never hold federal office to whom the Loan Repayment Restriction could apply is lessened even further by the fact that a substantial number of candidates for federal office are either not able to loan their campaign $250,000 or not able to raise $250,000 in campaign contributions. Losing candidates often lack the ability to raise over $250,000 in post-election contributions. (FEC Br. at 9.)

parties test the limits of the current law, prophylactic contribution limits are permissible — even vital — to forestall the worst forms of political corruption." (internal quotation marks and citations omitted)).

Indeed, if the Loan Repayment Limit did only apply to winning candidates, it would risk creating the very type of "asymmetrical" limit that the Supreme Court condemned in *Davis*, the primary case upon which plaintiffs rely. And such a law would be administratively problematic because a candidate would not know in advance of the election whether she would win and thus what rules would govern repayment. *Cf. O'Donnell*, 209 F. Supp. 3d at 740-41 (suggesting that under rational basis review, the personal-use ban's application to expenses "almost always personal in nature" would be constitutional even if justified only by "administrative efficiency").

Plaintiffs' response to the FEC's showing that any overbreadth is insubstantial in relation to the Limit's legitimate sweep is, essentially, that the law has no legitimate sweep at all. (Pls.' Reply at 45 ("for those candidates to whom it *does* apply . . . [the Loan Repayment Limit] does not serve any valid anti-corruption interest *no matter the overall amount of loans at stake*.").) But if the Court finds that the Loan Repayment Limit imposes modest if any burdens and promotes government interests in deterring corruption and its appearance, then for the reasons above any arguably unconstitutional applications of the law are insubstantial in comparison.

In the case of the Loan Repayment Limit, there is no "substantial mismatch between the Government's stated objective and the means selected to achieve it." *McCutcheon*, 572 U.S. at 199. It should be upheld.

CONCLUSION

For the foregoing reasons, the Court should grant the FEC's motion for summary judgment and deny plaintiffs' motion for summary judgment.

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