No. 21-12

IN THE

# Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

*Appellant*,

—v.—

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

*Appellees*.

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

## BRIEF OF BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT


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## STATEMENT OF IDENTITY AND INTEREST[1]

The Brennan Center for Justice at NYU School of Law ("Center") is a non-partisan law and public policy institute that works to strengthen the systems of democracy and justice.[2] The Center seeks to bring the ideal of representative democracy closer to reality by working to eliminate barriers to full participation and to ensure that public policy and institutions reflect the diversity of voices and interests that enable a robust democracy. The Center researches and designs legislation and policy, empirical studies, and scholarship, among other means, to promote reasonable campaign finance reforms and other objectives that are central to its mission.

The Center respectfully submits this brief to provide legal and factual context to assist the Court.

## SUMMARY OF THE ARGUMENT

At issue in this case is Section 304 of the Bipartisan Campaign Reform Act ("BCRA"), which allows a candidate to repay up to $250,000 in loans to their own campaign from contributions received post-election. Amicus concurs with the government that Section 304

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[1] Pursuant to Rule 37.3(a), the parties have provided written consent for the filing of this *amicus curiae* brief. Counsel for the Brennan Center affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] This brief does not purport to convey the position, if any, of the New York University School of Law.

is constitutional. We write separately to underscore two points.

First, because Section 304 does not restrict the contributions a candidate may receive, the amount a candidate may loan or donate to their own campaign, or the amount the candidate or anyone else may spend on electoral advocacy, it imposes a minimal burden on First Amendment rights and should be subject to a correspondingly deferential standard of review. The district court's arguments that heightened review is justified because Section 304 indirectly burdens the ability of some candidates to self-fund, places disparate burdens on challengers, and limits the associational rights of contributors are unfounded.

Second, the government interest in this case is profound—namely, to prevent the use of campaign fundraising for personal financial benefit. Candidates' and officeholders' use of campaign fundraising to benefit themselves not only poses an inherently high risk of classic quid pro quo corruption, but also undermines the basic ideal of public service as a public trust, which is at the heart of our system of government and which Congress has wide latitude to defend. The record amply demonstrates that Section 304 furthers this interest. Moreover, prophylactic rules like Section 304 need not be all-or-nothing propositions: that Section 304 allows some post-election fundraising is demonstrative of the incremental, balanced approach adopted by Congress

and does not undermine the importance of the government interest furthered by Section 304.[3]

## ARGUMENT

### I. This Case Warrants A Deferential Standard of Review Because Section 304 Does Not Meaningfully Burden Protected First Amendment Interests

This Court's campaign finance jurisprudence has long made clear that the standard of review for a given restriction depends on the nature of the burden it places on protected First Amendment interests. *See McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality opinion) (noting that whether the Court should apply strict scrutiny or a less rigorous standard of review depends on "the degree to which [a law] encroaches upon protected First Amendment interests"); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (stating that campaign finance laws that "burden political speech" are subject to strict scrutiny); *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (noting that "the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions" is that "the level of scrutiny is

[3] The position of Amicus is that Section 304 is facially constitutional and constitutional as applied to Senator Cruz and similarly-situated candidates. We take no position on whether a losing candidate who no longer holds public office could potentially mount a successful as-applied challenge, but concur with the government that appellees have not satisfied the over-breadth standard here because "evidence in the record showed that post-election contributions generally flow to winning candidates and that the loan-repayment limit has little effect on losing candidates." Jurisdictional Statement at 23.

based on the importance of the 'political activity at issue' to effective speech or political association").

For instance, expenditure limits receive strict scrutiny because "communicating ideas . . . requires the expenditure of money," and, therefore, laws that restrict "the amount of money [one] can spend on political communication during a campaign" are akin to direct limits on speech. *Buckley v. Valeo*, 424 U.S. 1, 19–23 (1976) (per curiam). Contribution limits, on the other hand, "impose a lesser restraint on political speech because they 'permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *McCutcheon,* 572 U.S. at 197 (quoting *Buckley*, 424 U.S. at 21). Therefore, contribution limits receive a less "rigorous standard of review," under which they "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id*. (quoting *Buckley*, 424 U.S. at 25).

Meanwhile, courts have held that rules governing the proper use of campaign funds, like restrictions on their personal use, "do[] not restrict the content of [a candidate's] message" or "limit the amount of speech or political activity in which [a candidate] can engage," and so are subject to no heightened standard of review. *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 739–40 (D. Del. 2016); *see also* Mem. Op., *Ted Cruz for Senate v. FEC*, No. 19-cv-908 (NJR) (APM) (TJK) (D.D.C. June 3, 2021), ECF No. 71 at 13 n.6 ("D.D.C. Mem. Op.") (acknowledging that the prohibition on spending for a candidate's personal use "arguably do[es] not" burden political expression).

As the district court acknowledged, "the loan-repayment limit does not cap the amount of candidate financing or *prohibit* a candidate from loaning his campaign more than $250,000, and the candidate remains free to repay the full amount of the loan with pre-election contributions." D.D.C. Mem. Op. at 11. In finding that Section 304 nevertheless warranted heightened scrutiny, the district court focused on the supposed indirect burden it places on candidate speech and the competitive burden it allegedly places on electoral challengers over incumbents. Section 304, however, imposes minimal burdens on the First Amendment interests of candidates and contributors. Accordingly, it merits a deferential standard of review.

### A. Section 304 does not meaningfully restrict the political speech of candidates

Section 304's limit on the use of post-election contributions to recoup money a candidate has lent to their own campaign does not significantly restrict election-related speech (which by definition has already occurred) or other interests protected under the First Amendment. The district court's suggestion that Section 304 indirectly burdens political speech because limiting a candidate's ability to recoup personal loans after the election could potentially deter them from loaning money in the first place is unfounded. Any incidental burden would only violate candidates' First Amendment rights to the extent it prevented them "from amassing the resources necessary for effective advocacy." *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion). Appellees have not come close to making this showing.

For First Amendment purposes, "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). Section 304 does not limit the amount that a candidate may donate or loan to their own campaign, or how much they may raise from other contributors to spend on advocacy. Rather, it prescribes how and when a candidate may use post-election contributions to recoup candidate loans that the campaign has already spent. Recouping debt owed to the candidate post-election is not an "expressive purpose;" as the government noted, by that point, "any political message has already been communicated." FEC Mot. to Dismiss at 29, 33. Instead, the "money that repays a candidate's personal loan after an election effectively goes into the candidate's pocket, and not to fund speech or speech-related activities." *Id.* at 28.

The district court's focus on the potential for an indirect burden on candidate speech was misplaced. All fundraising restrictions have some potential to impact candidates' electoral spending. For decades, this Court has consistently held that such incidental burdens violate candidates' First Amendment rights only to the extent they prevent candidates "from amassing the resources necessary for effective advocacy." *Randall*, 548 U.S. at 247 (quoting *Buckley*, 424 U.S. at 21); *Nixon v. Shrink Miss. Gov't PAC*, 528 U.S. 377, 396 (2000) (internal quotations and citations omitted); *see also Thompson v. Hebdon*, 140 S. Ct. 348, 350–51 (2019) (reaffirming holding in *Randall*).

Here there is no evidence for such a conclusion. On the contrary, fundraising data available on the FEC's

website shows that most Congressional candidates (72% of 26,320 Senate and House candidates from 2003 to 2020) have not used personal loans to fund their campaigns. *See* Appendix A. And of the minority of Congressional candidates who did loan their campaigns money since Section 304 was enacted, roughly 87% did so at amounts below the $250,000 threshold, while approximately 12% exceeded the threshold. *Id.* The "clustering" of candidate self-loans at exactly the $250,000 level emphasized by the district court represents barely 1% percent of candidates who loaned their campaigns money, and only 0.30% of the tens of thousands who have run in Senate and House elections since the passage of Section 304. *Id.*; *see also* D.D.C. Mem. Op. at 10 (citing Alexei V. Ovtchinnikov & Philip Valta, *Debt in Political Campaigns* 24 (May 2020)).[4] Apart from Senator Cruz's representations, there is scant evidence in the record shedding light on what role

[4] Even among the candidates analyzed by Ovtchinnikov and Valta, of those who loaned their campaigns between $100,000 and $1 million, loans of exactly $250,000 were only 7%, compared to the 41% that exceeded $250,000. *See* Ovtchinnikov & Valta, *Debt in Political Campaigns* 24.

In analyzing the impact of Section 304 on candidate funding, the authors found that (1) there was a clear bunching of self-loans in the post-BCRA period at round amounts ($200,000, $300,000, and $500,000), including 6.34% at $250,000; (2) "BCRA did not eliminate self-loans," including 41% of candidates who exceeded the $250,000, "which suggests that many politicians are unaffected by BCRA;" and (3) "BCRA did not reduce the total demand for self-funds; rather the law affected the allocation of self-funds between self-loans and self-contributions." Alexei Ovtchinnikov & Philip Valta, *Self-funding of Political Campaigns* 29 n.18 (June 2021). None of these findings support the conclusion that Section 304 resulted in less speech.

Section 304 played in these few candidates' decision to loan themselves exactly $250,000. Clustering of the sort noted by the district court occurs at various other "round number" amounts; in fact, more candidates have clustered at the $50,000 and $100,000 levels than at $250,000, Appendix A, indicating that clustering alone is not evidence of *why* certain candidates selected a particular amount to loan their campaigns.[5]

Even if Section 304 has affected the decision-making of a small number of candidates, there is no evidence that it has led to any reduction in candidates' actual ability or willingness to self-fund. *See* note 4, *supra*. More broadly, there can be no credible argument that this provision has deprived candidates of the ability to amass resources necessary to mount effective campaigns. Along with raising up to $250,000 post-election to recoup self-loans, Senator Cruz and other candidates remain free to (1) contribute an unlimited amount to their own campaigns; (2) loan their campaigns unlimited amounts to be recouped with pre-election contributions; (3) receive an unlimited number of contributions within the legal limits prior to the election to fund speech directly and pay other campaign expenses; (4) receive an unlimited number of contributions within the legal limits post-election to retire other debts; and (5) fundraise pre- and post-election for other political action committees ("PACs")

[5] The district court noted that "clustering" at $250,000 increased following passage of BCRA, but the same is true for higher round numbers. For instance, the number of candidates loaning themselves $1 million more than doubled in the post-BCRA period. *See* Ovtchinnikov & Valta, *Debt in Political Campaigns* 38.

expressly dedicated to advancing the candidate's political fortunes, such as leadership PACs and even candidate-specific super PACs,[6] *see* Section I(C), *infra.*

Senator Cruz raised over $34 million in the 2018 election cycle to fund his successful campaign,[7] and appellees have pointed to no example of another candidate whose race was inhibited due to Section 304.[8] Appellees have not demonstrated that Section 304 has been a meaningful restraint on his or any other candidate's speech.

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[6] BRENT FERGUSON, BRENNAN CTR. FOR JUST., CANDIDATES & SUPER PACS: THE NEW MODEL IN 2016 (2015), https://www.brennancenter.org/our-work/research-reports/candidates-super-pacs-new-model-2016.

[7] *See* U.S. Federal Election Commission*, 2018 Financial Summary for Rafael Edward Ted Cruz,* https://www.fec.gov/data/candidate/S2TX00312/?cycle=2018&election_full=true (last visited Nov. 20, 2021) ($34,437,689.21 in total contributions for the 2018 Senate election).

[8] As the government notes, Section 304 did not, in fact, impose any burden on Senator Cruz and was only triggered by his choice to delay repayment of his self-loans. *See* FEC Br. at 11; *cf. Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 13–16 (D.C. Cir. 2014) (reasoning that a law that restricted ways in which a separate, segregated fund could solicit contributions did not infringe upon the appellants' First Amendment rights when appellants had the option to create an entity that was permitted to solicit the appellants' desired type of contributions, but appellants chose to pursue the harder option).

### B. Section 304 does not pose a competitive burden for any candidates

Nor does Section 304 impose a competitive burden on particular candidates. It is certainly not analogous to the campaign finance provisions invalidated by this Court for penalizing the political speech of candidates and others by granting a direct competitive advantage to their opponents. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 743–44 (2008) (invalidating BCRA provisions that raised contribution limits for opponents of self-funded candidates); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728–32, 753–55 (2011) (invalidating Arizona law that provided increased public financing to candidates based on how much their privately financed opponents spent). Section 304 imposes no such disparate burden. It applies to all candidates equally (and in any event does not have significant competitive electoral consequences given that it only comes into effect post-election and plainly does not deter the vast majority of candidates from loaning money to their campaigns, *see supra* Section I(A)).

The district court nevertheless suggested that in practice Section 304 "places a particular burden on relatively unknown challengers" by limiting their ability to self-finance more than for incumbents, but the court offered absolutely no evidence for this assertion. D.D.C. Mem. Opp. at 10. If anything, striking the cap is most likely to benefit incumbents. It is well-established that sitting officeholders have far more capacity to leverage their office to fundraise than challengers who do not hold the office sought—and

also that most incumbents who seek reelection win.[9] Striking the $250,000 cap on post-election candidate loan repayments will thus primarily benefit winning candidates, who are best positioned to fundraise in excess of $250,000. Most winning candidates who are likely to benefit will be incumbents who won re-election. *See Incumbent Advantage*, *supra* note 9.

### C. Section 304 does not burden contributors' associational rights

Finally, Section 304 also does not significantly restrict the associational rights of contributors, who remain free to donate to the candidate of their choice up to the legal limit per election.

The district court suggested in passing that Section 304 might burden contributors' right to associate with

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[9] *See Incumbent Advantage*, OPENSECRETS.ORG, https://www.opensecrets.org/elections-overview/incumbent-advantage?cycle=2018 (last visited Nov. 17, 2021) (incumbents raised on average over $13,458,917 more than challengers during the 2018 senatorial elections); *see also* Matthew T. Cole, et al., *Incumbency Advantage in an Electoral Contest*, 49 ECON. & SOC. REV. 419, 420 (2018) ("Incumbents also tend to benefit from greater *fundraising efficiency* since as officeholders they are in a position to deliver political favours to donors."); L. SANDY MAISEL, THE INCUMBENCY ADVANTAGE, IN MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 119 (Margaret Latus Nugent & John R. Johannes eds., 1990) (highlighting how incumbents have electoral advantages that translate into fundraising advantages as well as electoral strength at the polls); *Thompson v. Hebdon*, 7 F.4th 811, 820 (9th Cir. 2021) (noting that "in competitive campaigns in Alaska, candidates who raise more money generally win, incumbents regularly raise more than challengers, and indeed incumbents win almost all elections").

Senator Cruz because the $250,000 limit would prevent their post-election contribution from being used for the 2018 election cycle. *See* D.D.C. Mem. Op. at 13 n.5. This suggestion is at odds with this Court's decades-old understanding that a campaign contribution "serves as a general expression of support" for a candidate. *See Buckley*, 424 U.S. at 21. The reality is that any contributor who wished to associate with Senator Cruz had a variety of ways to do so: they had ample opportunity to donate before the election and were also free to donate after, not only to help him recoup money he lent to his campaign up to $250,000, but also to retire an unlimited amount of debt owed to other creditors. Contributors could also donate for future election cycles, or to other PACs established to advance Senator Cruz's political fortunes, such as "Jobs, Freedom, and Security PAC," his leadership PAC, and "Ted Cruz Victory Committee," a joint fundraising committee that sends contributions to his campaign and leadership PACs. Given these options, there is no significant burden on contributors' associational rights.

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Because Section 304 at most minimally burdens the First Amendment rights of candidates and contributors (and arguably does not burden them at all), this Court need not apply a heightened standard of review. The $250,000 cap on reimbursing candidate loans with post-election funds is most analogous to other restrictions on the use of campaign funds to benefit a candidate personally, such as prohibitions on converting campaign funds to personal use, which warrant no heightened scrutiny. *See O'Donnell*, 209 F.

Supp. 3d at 740. Even if there is some incidental burden on protected First Amendment interests, it is more "marginal" than that imposed by a direct contribution limit, *Beaumont*, 539 U.S. at 161, let alone a limit on expenditures, and so the typical strict and intermediate levels of scrutiny applied in the majority of campaign finance cases are not warranted here.

## II. The Government's Interest In Preventing Corruption And Its Appearance Is Undisputed And Furthered By Section 304

Regardless of the level of scrutiny, Section 304 should be upheld because it plainly furthers the government's interest in deterring corruption. This Court has long held that the government has an interest in the prevention of corruption and its appearance, including deterrence of classic quid pro quo corruption and efforts to prevent public officials and others who have been given a public trust, including candidates and former candidates, from misusing their position for personal gain or otherwise acting—or even appearing to act—in favor of personal financial interests, rather than the public good. *See, e.g.*, *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."); *Buckley*, 424 U.S. at 28–29; *Crandon v. United States*, 494 U.S. 152, 164–65 (1990) (upholding 18 U.S.C. § 209 and recognizing that "[l]egislation designed to prohibit and to avoid potential conflicts of interest in the performance of

governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service"). The government's anti-corruption interest is at its height in cases such as this one, where there is a direct personal financial benefit to an officeholder or candidate.

### A. The government has a profound interest in the prevention of corruption and its appearance that includes prevention of quid pro quo corruption and broader efforts to protect the integrity of government

This Court has continually recognized limits on campaign fundraising as appropriate prophylactic anti-corruption measures. *See Citizens United*, 558 U.S. at 361 ("We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these [improper] influences."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (finding that the Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared").

Because campaign finance laws may burden important First Amendment interests, they must be tethered to the prevention of outright quid pro quo corruption, not "[i]ngratiation and access." *Citizens United*, 558 U.S. at 360. But campaign finance laws are also part of a broader set of anti-corruption laws designed to combat not only bribery but other attacks on the integrity of government. *E.g., United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (describing the difference between the anti-

gratuity statute and anti-bribery: ". . . for bribery there must be a quid pro quo . . . . An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.").

Congress and this Court have long recognized that "public office is a public trust," and thus federal law has long prohibited the acceptance of "favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties." *Code of Ethics for Government Service*, H. Con. Res. 175, ¶¶ 5, 8, 10 (1958); *Trist v. Child*, 88 U.S. (21 Wall.) 441, 450, 22 L.Ed. 623 (1874) ("all public stations are trusts," and "those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good"); *Crandon*, 494 U.S. at 165 n.20 (conflict of interest legislation is directed at "an evil" that threatens "the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption") (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961) (noting the rationale behind 18 U.S.C. § 434, which prohibited executive branch officers from officially participating in proceedings in which they had financial interests, and its applicability to a government consultant)). Today, a variety of laws and rules restrict public officials and candidates for public

office from using their official position for personal gain falling short of outright bribery.[10]

Indeed, concern about personal benefits potentially corrupting public officials and the execution of their public duties is embedded in various ways in the text of the Constitution, which not only included bribery as one of the few enumerated clauses for impeachment of high public officials, *see* U.S. CONST. art. II, § 4, but also contains three separate Emoluments Clauses, U.S. CONST. art. 1, § 9, cl.8; art. I § 6, cl.2; and art. II, § 1, cl.7.

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[10] *See, e.g.*, 18 U.S.C. § 203 (prohibiting compensation for representational services in any matter in which the United States is a party or has a direct or substantial interest); 18 U.S.C. § 205 (prohibiting, inter alia, federal employees from receiving a gratuity or share of an interest in a claim against the United States, upheld because a federal employee's involvement "could potentially distort the government's process for making a decision," *Van Ee v. EPA*, 202 F.3d 296, 310 (D.C. Cir. 2000)); 18 U.S.C. § 208 (prohibiting personal and substantial participation in matters in which an official has a financial interest); 52 U.S.C. § 30114(b) (prohibiting any person, including candidates, campaign staff, and former candidates, from converting campaign funds to personal use); Stop Trading on Congressional Knowledge (STOCK) Act, Pub. L. No. 112-105, 126 Stat. 291 (2012) (prohibiting Members of Congress from using nonpublic information to influence their personal investment decisions); 5 U.S.C. § 7353 (regulating gifts to federal employees); Senate Code of Official Conduct, Rule 37 (prohibiting members from knowingly using their positions for personal benefit and requiring disclosure of potential conflicts of interest); House of Representatives Code of Official Conduct, Rule 23 (prohibiting members from receiving compensation by improperly using their official positions).

The solicitation of campaign contributions plainly implicates this broader set of anti-corruption concerns.

First, there is the obvious risk that campaign spending will distort government decision-making. While that is not ordinarily a sufficient basis to restrict campaign fundraising, there are notable exceptions. For example, in *Wagner v. Federal Election Commission*, the en banc District of Columbia Circuit upheld the prohibition on federal government contractors making contributions, either directly or indirectly, to any political party, committee, or candidate for public office. 793 F.3d 1, 26 (D.C. Cir. 2015). The court held that the statute supported a sufficiently important interest not only because it protects against quid pro quo corruption and its appearance, but also because it prevents interference with merit-based public administration in the issuance of contracts and the spending of taxpayer funds. *Id.* at 21.

Second, as noted above, officeholders and candidates may misuse their positions for personal benefit, which is why federal law and Congressional rules restrict their ability to convert campaign funds to personal use. *See* 52 U.S.C. § 30114(b); *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 850 (D.C. Cir. 2016); *O'Donnell*, 209 F. Supp. 3d at 740–41.

This Court has concluded that the First Amendment precludes the government from relying on a broader conception of corruption to justify general limits on contributions and expenditures. *See Citizens United*, 558 U.S. at 360. But this case is different, given that the government is seeking to limit the direct personal financial benefit candidates can derive from

campaign fundraising and using means that do not meaningfully restrict electoral speech or association. In light of these facts, it is appropriate to evaluate a sitting officeholder's challenge to Section 304 not only in reference to the government's interest in preventing quid pro quo corruption, but also its broader interest in preserving the integrity of government.

### B. Section 304 plainly furthers the government's anti-corruption interests, which was the primary goal of its passage

Candidates recouping personal loans to their campaigns by soliciting post-election contributions presents exactly the heightened corruption risk courts have found to justify more stringent regulation in other contexts. *Cf. Wagner,* 793 F.3d at 21 ("[T]he empirical record is more than sufficient to satisfy the heightened judicial scrutiny appropriate for review of the legislative judgments . . . the interests supporting the contractor contribution statute are legally sufficient, and the dangers it seeks to combat are real and supported by the historical and factual record."); *Preston v. Leake*, 660 F.3d 726, 737 (4th Cir. 2011) ("[I]n aiming the ban at only lobbyists, who, experience has taught, are especially susceptible to political corruption, North Carolina closely drew its enactment to serve the state interests it identified."); *Blount v. FEC*, 61 F.3d 938, 943 (D.C. Cir. 1995) (discussing safeguarding the commercial marketplace from corruption, explaining that "[i]n every case where a quid in the electoral process is being exchanged for a quo in a particular market where the government

deals, the corruption in the market is simply the flipside of the electoral corruption.").

A candidate using post-election contributions to recoup personal funds effectively inverts one of the core supposed benefits of self-funding, which is to reduce the risk and perception of corruption due to the candidate having less reliance on third party funding. *See Davis*, 554 U.S. at 740–41 ("The *Buckley* Court reasoned that reliance on personal funds reduces the threat of corruption"). Instead of being a less corruption-prone method, funding one's campaign through self-loans to be repaid with post-election contributions that will go directly to the candidate's personal bank account increases the candidate's incentive to perform official acts in exchange for donations. And even in the absence of an actual or perceived quid pro quo, a public official's acceptance of a personal benefit dressed up as a campaign contribution could easily undermine the broader integrity of government.

The legislative history, particularly statements from Section 304's two Senate sponsors, demonstrates that the prevention of corruption was a primary goal of Section 304.

As one sponsor, Senator Hutchison, explained, while self-funded candidates have a constitutional right to spend or loan as much of their own money as they like, they "do not have a constitutional right to resell [their office]." 147 CONG. REC. S3970 (daily ed. Mar. 19, 2001) (statement of Sen. Hutchison). The other sponsor, Senator Domenici, added that candidates should know "right up front" that they will not be able to seek and receive repayments from

contributors after an election by asking, "How would you like me to vote now that I am a Senator?" 147 CONG. REC. S3882 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici). As he later put it:

> I think you should know what we are doing, respectfully, which is to say that anybody who puts in their own money, however they got their own money, when they get elected, they cannot use their Senate seat to raise money to pay off what they put in an election.

147 Cong. Rec. S2543 (daily ed. Mar. 20, 2001) (statement of Sen. Domenici).

In referring to campaign fundraising generally, Senator Byrd explained:

> Both parties are enslaved to those who give. The special interests of the country are the people who are represented—the special interests, for the most part. The great body of people out there are not organized, and they are not represented here. We are beholden to the special interests who give us—when we go around the country holding out a tip cup saying, "Give me, give me, give me," they are the people who respond and they are the people for whom the doors are opened. They are the people for whom the telephone lines are opened when the calls come in.

147 CONG. REC. S2541 (daily ed. Mar. 20, 2001) (statement of Senator Byrd).

Contrary to appellees' assertion, shielding incumbents from competition was not a primary motivator for the implementation of Section 304. Appellees cite to generic comments on self-financing that are not specific to Section 304 and to comments that were specifically about another provision, known as the Millionaires' Amendment. Appellees' Mot. to Affirm or Dismiss ("Appellees' Br.") at 30–31.[11] Whatever Congress's primary motivations were for passing other provisions of BCRA, a desire to prevent corruption plainly was the primary motivating force behind passage of Section 304.

[11] Appellees' argument that Senators created Section 304 to "protect incumbents" lacks context and is misplaced. For example, appellees cite to a quote from Senator Daschle regarding incumbency protection, but he was clearly referring to the Millionaires' Amendment. Appellees' Br. at 30; 147 CONG. REC. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle) ("Just because I might have a wealthy opponent, should I be allowed to open up the floodgates here and take whatever money I can raise? How is that limiting the influence of money? No, instead this protects incumbents."). While one Senator did mention impermissible objectives like "leveling the playing field" in reference to Section 304, the weight of evidence in the record is clear that the primary motivation was corruption and that does not undermine the laudable and constitutional motives. *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469–70 (1981) (affording a permissible legislative motive behind a statute "great deference," and accordingly upholding said statute, despite some legislators having voted for the statute with impermissible motives in mind).

### C. It is not necessary that the government provide a record of actual quid pro quo corruption or other forms of corruption for the law to stand

To demonstrate that Section 304 furthers its important interest in *preventing* corruption—quid pro quo or otherwise—it is not necessary that the government provide a record that actual corruption has occurred. Rather, the government need only show that there is a *potential* for corruption risk. *See Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011) ("There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures . . . Appellants essentially propose giving every corruptor at least one chance to corrupt before anything can be done, but this dog is not entitled to a bite.") (internal citation omitted).

In *Wagner*, the D.C. Circuit Court dismissed the claim that the law could only stand if the record contained evidence of quid pro quo corruption, noting that "no data can be marshaled to capture perfectly the counterfactual world in which an existing campaign finance restriction does not exist. Instead, the question is whether experience under the present law confirms a serious threat of abuse." *Wagner*, 793 F.3d at 14 (citing *McCutcheon*, 572 U.S. at 219 (internal quotations omitted)); *see also Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) ("Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law,

and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."); *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (upholding restriction of campaign speech near voting places as warranted, notwithstanding limited record evidence, to protect against offenses that "are successful precisely because they are difficult to detect."); *Blount*, 61 F.3d at 945 ("[N]o smoking gun is needed where . . . the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.").

Here, there is an ample record before the Court that sitting officeholders seek campaign contributions in exchange for taking some action in their official capacity, and that the risk of them doing so is especially great when the contribution goes to pay the officeholders themselves back for money loaned to their campaigns. In fact, successful candidates who hold office and maintain campaign debt from the last election of any sort are more likely to switch their votes based on the interests of their donors: "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 votes." FEC J.A. 247 ¶ 67 (quoting Ovtchinnikov & Valta, *Debt in Political Campaigns* 26). Given that campaign debt generally is a driver of corruption, it was reasonable for Congress (made up of people intimately familiar with this dynamic) to conclude that risk would be especially greater where repayment of a debt would stand to benefit the candidate personally as well as politically.

In fact, there is evidence that parties with interests pending before an officeholder have especially strong incentives to help the officeholder recoup money lent to the officeholder's own campaign. One former attorney general of Ohio, for instance, loaned his campaign $2 million and in the years following his election raised $1.47 million to repay this debt; $194,830 in contributions reportedly came from ten law firms and their lawyers that garnered "$9.6 million in legal fees for 225 assignments from the Attorney General's office." *Id.* at 249 ¶ 73. Two past governors of Kentucky loaned their respective campaigns a total of $3.55 million; they recouped these loans through post-election contributions from "'contributors seeking no-bid contracts.'" *Id.* at 252 ¶ 78 (quoting PENNY MILLER, KENTUCKY POLITICS & GOVERNMENT: DO WE STAND UNITED? 219 (Lincoln: University of Nebraska Press 1994)).

Given that Section 304 poses at most a marginal burden on protected First Amendment interest, *supra* Section I, this and other evidence in the record before the Court is more than sufficient for it to be upheld.

### D. Section 304 is not under-inclusive

Finally, to the extent tailoring is required in this case, the district court erred in holding that Section 304 is "not sufficiently tailored" to achieve its anticorruption purposes, in part because it is "substantially underinclusive." D.D.C. Mem. Op. at 26. The court itself acknowledged that "the First Amendment imposes no freestanding underinclusiveness limitation." *Id.* (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015)). Nevertheless, the lower court found that Section 304's

exclusive application to post-election contributions over $250,000 to retire personal loans may "indicate a poor fit" to the extent that post-election fundraising to recoup self-loans is actually corrupting at any level. *Id.* The court also faulted Section 304 for not limiting other practices, including "post-election contributions made to retire other types of campaign debt." D.D.C. Mem. Op. at 27.

As this Court has noted, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee*, 575 U.S. at 448. Here, the use of post-election contributions to recoup personal loans plainly implicates unique corruption concerns. *See* FEC Br. at 46 (explaining, for example, that "contributions that repay candidate loans differ fundamentally from contributions that repay third-party loans" as the latter does not increase "the candidate's personal wealth); *supra* Section II(B). While anti-corruption interests might be served through broader limits on post-election fundraising, Congress's decision to adopt a narrower approach does not demonstrate insufficient tailoring. *See Williams-Yulee*, 575 U.S. at 449 (upholding Florida's prohibition on personal solicitation of contributions by judicial candidates and noting that "[a] State need not address all aspects of a problem" through a single piece of legislation).

The same is true for Congress's decision to permit candidates to recoup a certain amount of debt through post-election fundraising. This decision, like the decision to focus only on one kind of campaign debt, reflects a balancing of interests by Congress to deter corruption while maximizing candidates' ability to raise funds for their campaigns. *See* FEC Br. at 48

(noting that Section 304, like other campaign finance regulations, "reflects Congress's effort to strike an appropriate balance between potentially competing objectives").

Section 304 was never intended to inhibit candidates from spending or loaning to their own campaigns to the fullest extent of their wishes: "[A] candidate can spend his or her money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back." 147 CONG. REC. S3970 (daily ed. Mar. 19, 2001) (statement of Sen. Hutchison). Given that fact, it was not unreasonable for Congress to draw the line in a less restrictive manner than it may otherwise have done to allow candidates maximum flexibility in deploying their own resources—even if that entailed tolerating an increased risk of corruption. Preventing corruption is a powerful government interest, but it is almost never the only consideration. This balancing of interests is exactly the type of decision that Congress is empowered to make.

Indeed, this is the same sort of calculus that policymakers undertake when they set any campaign fundraising limit; this Court has never struck down a limit on the grounds that it could have permissibly been set lower. The Court has declined to employ a "scalpel to probe" such determinations, which are best left to the legislative branch. *See Buckley*, 424 U.S. at 30; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions") (internal quotations and citations omitted). Section

304, like other campaign finance regulations, reflects a sound effort to mitigate the risk of actual or apparent corruption while leaving candidates with as many fundraising options as possible. FEC Br. at 48. That is the essence of appropriate tailoring, not a fatal flaw.

## CONCLUSION

The judgment of the district court should be summarily reversed, and the case remanded to the district court with instructions to dismiss.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

| U.S. House and Senate Candidates and the Use of Personal Loans Post-BCRA (2003-2020) | | | | | |
|---|---|---|---|---|---|
| | **None** | **$1 – $250,000** | **At $250,000** | **Above $250,000** | **Total** |
| **No. of Candidates** | 18,960 | 6,419 | 79 | 862 | 26,320 |
| **Percentage** | 72.04% | 24.38% | 0.30% | 3.28% | 100% |

| U.S. House and Senate Candidates Who Used Personal Loans Post-BCRA | | | | |
|---|---|---|---|---|
| | **Below $250k** | **At $250k** | **Above $250k** | **Total** |
| **No. of Candidates** | 6,419 | 79 | 862 | 7,360 |
| **Percentage** | 87.21% | 1.07% | 11.71% | 100.00 % |

| Examples of Clustering of U.S. House and Senate Candidates Using Personal Loans Post-BCRA (2003-2020) | | | | |
|---|---|---|---|---|
| | **$50K** | **$100K** | **$150K** | **$200K** |
| **No. of Candidates** | 134 | 129 | 31 | 55 |
| **Percent of Total Candidates** | 0.51% | 0.49% | 0.12% | 0.21% |
| | **$250K** | **$300K** | **$500K** | **$1M** |
| **No. of Candidates** | 79 | 25 | 26 | 21 |
| **Percent of Total Candidates** | 0.30% | 0.09% | 0.10% | 0.08% |

**Note: The loan amounts reflected in this Appendix were obtained from financial information compiled by the Federal Election Commission for congressional races during the 2003 to 2020 period. *See* U.S. Federal Election Commission, *All Candidates – Bulk Data*, https://www.fec.gov/data/browse-data/?tab=bulk-data (last visited Nov. 20, 2021). The FEC database makes publicly available financial information, including personal loan amounts, for each candidate committee registered with the FEC, as that information is reported by the candidate committee.