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 SENATOR MITCH MCCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

DONALD F. MCGAHN II
Counsel of Record
NOEL J. FRANCISCO
ROBERT LUTHER III
ANDREW J.M. BENTZ
J. BENJAMIN AGUIÑAGA
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
dmcgahn@jonesday.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*

Amicus Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky. He is the Republican Leader in the United States Senate and the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is one of the Senate's strongest defenders of the First Amendment's guarantees. For many years, Senator McConnell has participated in litigation defending First Amendment freedoms. For example, he was the lead plaintiff challenging the Bipartisan Campaign Reform Act in *McConnell v. FEC*, 540 U.S. 93 (2003), and he participated as amicus both by brief and oral argument in *Citizens United v. FEC*, 558 U.S. 310 (2010), which overruled *McConnell* in part.[1]

[1] In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and his counsel made any monetary contribution intended to fund this brief.

SUMMARY OF ARGUMENT

From the beginning, the Bipartisan Campaign Reform Act of 2002 (BCRA) was a constitutional train wreck. It was the "most significant abridgment of the freedoms of speech and association since the Civil War." *McConnell*, 540 U.S. at 264 (opinion of Thomas, J.). In fact, even as he signed BCRA into law, President George W. Bush recognized that its provisions "present serious constitutional concerns." The White House, *President Signs Campaign Finance Reform Act: Statement by the President* (Mar. 27, 2002), https://tinyurl.com/zmncwdby.

President Bush was right. And though this Court initially struggled to save BCRA's provisions, the Court has now spent the better part of two decades excising BCRA's patently unconstitutional features. *See McConnell*, 540 U.S. at 114–246 (upholding, in badly fractured opinions, some provisions against facial challenges). Those include the ban on political contributions by minors, *id.* at 232; a restriction on party committees engaging in both coordinated and independent expenditures, *id.* at 217–19; the asymmetrical contribution limits for opponents of self-financed candidates, *Davis v. FEC*, 554 U.S. 724, 743–44 (2008); the ban on corporate and union speech before an election, *Citizens United*, 558 U.S. at 365–66; and aggregate limits on donor contributions, *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014); *see also FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.) (holding the ban on corporate issue ads before an election unconstitutional as applied); *Emily's List v. FEC*, 581 F.3d 1, 4 (D.C. Cir. 2009) (Kavanaugh, J.) (striking

down FEC's cap on non-profits' election-related expenditures).

This case presents the latest First Amendment challenge to yet another of BCRA's unconstitutional features: the prohibition on a campaign using post-election contributions to repay a candidate's personal loans over $250,000. As the court below concluded, that limit "runs afoul of the First Amendment." J.S.App.6a.

The burden imposed by BCRA's loan-repayment limit "is evident and inherent in the choice that confronts" candidates who wish to use personal loans for campaign financing. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011). The limit means a candidate might not recoup amounts in excess of $250,000; thus the limit chills core political speech, especially speech by unknown challengers who need to spend more to be heard. And the loan-repayment limit does not serve any legitimate government interest. As this Court has held, the only interest that can justify a burden on core political speech is "preventing corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 206. The government cannot even pretend that the limit serves that interest. After all, the limit also applies to candidates who *lose* the election. J.S.App.32a.

The unconstitutionality of BCRA's loan-repayment limit is obvious. But "[e]nough is enough." *WRTL*, 551 U.S. at 478. This Court's decisions over the past decade have rendered BCRA the Humpty Dumpty of campaign-finance law, a patchwork of provisions that Congress never would have approved standing alone and that can never be put back

together again. There is no reason to let BCRA limp along, no need for further piecemeal surgery by this Court: the Court should strike the entire statute.

This case presents the ideal opportunity to do so. If this Court holds the loan-repayment limit unconstitutional, the key provision that made BCRA politically viable (the "Millionaire's Amendment") will be completely scuttled. *See Davis*, 554 U.S. at 743–44 (striking the other portion of the amendment). The absence of that amendment would have doomed BCRA at a roll call vote in 2002; it should certainly doom what is left of BCRA twenty years later.

It is time to put BCRA out to pasture.

ARGUMENT

I. THIS COURT HAS SPENT TWO DECADES DISMANTLING BCRA.

Constitutional doubts have plagued BCRA since its inception. In turn, those doubts have required this Court again and again to adjudicate BCRA's provisions. Although in *McConnell* the Court initially upheld much of BCRA on its face (though even then inflicting some flesh wounds to the law), Senator McConnell's original critique has proven prescient. And the Court's subsequent decisions have inflicted fatal blows to BCRA, resulting in a legislative regime that looks nothing like the one Congress passed.

A. *McConnell* began chipping away at BCRA.

BCRA's journey in this Court began shortly after Congress passed the law. Just a year after President Bush signed the law, this Court considered facial challenges to nearly all of BCRA's provisions in *McConnell*. Through splintered opinions, a bare

majority upheld most provisions of BCRA. It was indeed "a sad day for the freedom of speech." *McConnell*, 540 U.S. at 248 (opinion of Scalia, J.). Still, fractures in BCRA's foundation were apparent.

For one, several Justices recognized BCRA for what it was: "an incumbency protection plan." *Id.* at 306 (opinion of Kennedy, J.). And four Justices would have held many of BCRA's key provisions unconstitutional. *See id.* at 286–341; *see also id.* at 264–86 (opinion of Thomas, J.). For example, Justice Kennedy, writing for three Justices, explained, "Even a cursory review of the speech and association burdens" of Title I of BCRA makes its "First Amendment infirmities obvious." *Id.* at 289 (opinion of Kennedy, J.). Title I contains draconian limits on the receipt and use of soft money. It "bars individuals with shared beliefs from pooling their money above limits set by Congress to form a new third party." *Id.* It also "bars national party officials from soliciting or directing soft money to state parties for use on a state ballot initiative" even if "no federal office appears on the same ballot." *Id.* Because "Congress has no valid interest in regulating soft-money contributions that do not pose *quid pro quo* corruption potential," according to many Justices, the key features of BCRA Title I could not be constitutionally justified. *Id.* at 321; *see also id.* at 268–69 (opinion of Thomas, J.).

Likewise with Section 203. That provision (which would finally fall in *Citizens United*) prohibited corporations and labor unions from using money from their general treasury to fund electioneering communications. Section 203 "silence[d] political speech central to the civic discourse that sustains and informs our democratic processes." *Id.* at 323 (opinion

of Kennedy, J.). Four Justices therefore also would have held this provision unconstitutional. *Id.*; *see also id.* at 274–75 (opinion of Thomas, J.).

Moreover, while a bare majority of the Court upheld much of BCRA, the *McConnell* Court unanimously agreed that at least some provisions were unconstitutional. For example, the Court invalidated Section 213 of BCRA, which required a political party—"during the postnomination, preelection period"—to forfeit "the right to make independent expenditures for express advocacy" if it "wish[ed] to spend more than $5,000 in coordination with its nominee." *Id.* at 213, 216–17 (majority opinion) (emphasis omitted); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (striking down pre-BCRA provision).

Section 318 of BCRA met a similar fate. That provision prohibited individuals under the age of 18 "from making contributions to candidates and contributions or donations to political parties." *McConnell*, 540 U.S. at 231. The Court emphasized, "Minors enjoy the protection of the First Amendment." *Id.* And "[l]imitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association." *Id.* The Court held that the government failed to "advance[] an important interest" that could justify overriding these basic principles. *Id.* at 232.

Finally, the majority made clear that its ruling was not the last word on BCRA. For instance, although five Justices rejected a facial challenge to Section 203, they left the door open for as-applied challenges. *See*

Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006) ("In upholding § 203 against a facial challenge [in *McConnell*], we did not purport to resolve future as-applied challenges.").[2] Those challenges would eventually succeed. *WRTL*, 551 U.S. at 482. Similarly, although *McConnell* rejected challenges to a provision in BCRA's so-called Millionaire's Amendment, the Court did so because no plaintiff had standing to challenge the provision. 540 U.S. at 229–30. That provision, too, would fall in due course. *Davis*, 554 U.S. at 743–44.

McConnell started this Court down an inevitable path to dismantle BCRA, brick by brick. And though *McConnell* was the Court's first foray into BCRA's constitutional bramble, it would not be the last.

B. Subsequent decisions dealt significant blows to BCRA.

McConnell proved to be the high watermark for BCRA, as a steady stream of follow-on decisions undermined BCRA.

1. BCRA's downward spiral accelerated in 2007 with *WRTL*, where the Court held that Section 203 of BCRA was unconstitutional as applied. Section 203 made it "a federal crime for any corporation to broadcast, shortly before an election, any communication that names a federal candidate for

---

[2] Remarkably, the FEC argued that as-applied challenges were precluded by *McConnell*, even though the first line in its *McConnell* brief acknowledged that the challenges "arise out of pre-enforcement facial constitutional challenges." Br. for Appellees at 2, *McConnell*, 540 U.S. 93 (No. 02-1674); *see also* Br. for Appellee at 18–25, *Wis. Right to Life*, 546 U.S. 410 (No. 04-1581).

elected office and is targeted to the electorate." 551 U.S. at 455–56.

McConnell upheld Section 203 against a facial challenge even though the provision encompassed not only campaign speech but also speech about public issues that also mentions a candidate. 540 U.S. at 204–05. *McConnell* saw no overbreadth concern to the extent the speech covered was the "functional equivalent" of express advocacy. *Id.* at 206–07.

WRTL took that purported distinction head on. There, a nonprofit corporation sought to broadcast shortly before a primary a series of radio advertisements that identified two senators. 551 U.S. at 464. The advertisements were not "express advocacy" or the functional equivalent; that is, the advertisements were not advocating the election or defeat of the senators, but rather urging voters to tell the senators to oppose a filibuster of judicial nominees. Nonetheless, because the advertisements named a candidate for federal office, they were still prohibited by Section 203.

The Court thus confronted the question left open in *McConnell*: Was Section 203 constitutional to the extent it banned issue advocacy? This Court answered emphatically, no. The Court accepted that, under *McConnell*, Section 203 was constitutional "to the extent it regulates express advocacy or its functional equivalent." *Id.* at 465. It nonetheless held that the radio advertisements were "plainly not the functional equivalent of express advocacy," because they "focus[ed] on a legislative issue," did "not mention an election, candidacy," and did "not take a position on a candidate's character, qualifications, or fitness for

office." *Id.* at 470. Thus, Section 203 could only be constitutionally applied "if it is narrowly tailored to further a compelling interest." *Id.* at 476.

But the government "identif[ied] no interest sufficiently compelling to justify burdening [the corporation's] speech." *Id.* at 481. Thus, the prohibition could not be constitutionally applied to the advertisements. *Id.*

In addition, three Justices would have gone even further and held, directly contrary to *McConnell*, that Section 203 is facially unconstitutional. *Id.* at 499–500 (opinion of Scalia, J.). And Justice Alito acknowledged the possibility that the Court would "be asked in a future case to reconsider the holding in [*McConnell*] that § 203 is facially constitutional." *Id.* at 482–83 (opinion of Alito, J.,). That case would come in just a couple of years.

2. In the meantime, the Court saw little reprieve from reviewing BCRA. In the very next Term, the Court considered a facial challenge to Section 319 of BCRA in *Davis*, 554 U.S. 724. Section 319—"part of the so-called 'Millionaire's Amendment'"—provided that, "when a candidate spends more than $350,000 in personal funds ... , that candidate's opponent may qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures"—even though the self-financing candidate remained subject to the lower, original limits. *Id.* at 729, 736, 738. *McConnell* did not reach the constitutionality of this provision because the Court concluded no plaintiff had standing. 540 U.S. at 229–30. But now that a plaintiff had standing, this Court held that this "new, asymmetrical

regulatory scheme" could not stand. *Davis*, 554 U.S. at 729.

Davis began by observing that "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 738. And Section 319(a) "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right." *Id.* at 739. A candidate who says too much "must shoulder a special and potentially significant burden." *Id.* That burden meant that Section 319(a) could only be sustained if it were "justified by a compelling state interest." *Id.* at 740.

There was no serious contention that the asymmetrical limit was justified by an interest in eliminating corruption or the perception of corruption. *Id.* Instead, the government's principal argument was that the limits were "justified because they 'level electoral opportunities for candidates of different personal wealth.'" *Id.* at 741. But not only did this Court's precedents "provide no support for the proposition that this is a legitimate government objective," the proposition "has ominous implications." *Id.* at 741–42. "[I]t would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office." *Id.* at 742. The Court explained, "Different candidates have different strengths." *Id.* Some are wealthy, some are famous. "Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and it is a dangerous

business for Congress to use the election laws to influence the voters' choices." *Id.* "[T]he unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment." *Id.* at 743–44.

3. The next case was the one Justice Alito presaged in *WRTL*, a case that challenged one of *McConnell*'s key holdings. The case was *Citizens United*.

Through that case, the Court finally corrected one of *McConnell*'s most grievous errors. *Citizens United* put an end to Section 203 of BCRA, which prohibited corporations from funding electioneering communications close to elections. The *Citizens United* Court explained, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." 558 U.S. at 349.

In *Citizens United*, a nonprofit corporation sought to broadcast on cable television a documentary regarding then-Senator Hillary Clinton (and advertisements for the documentary) within 30 days of the 2008 primary elections. *Id.* at 319–21. The Court was asked whether Section 203 barred these communications and, if it did, whether Section 203 was constitutional. At long last, the Court had the opportunity to correct one of *McConnell*'s most serious errors.

The Court's opinion began by putting the communication at issue in context. This communication was not like the radio advertisements in *WRTL*, which mentioned candidates but did not expressly advocate for or against them. Instead, the

documentary and advertisements in *Citizens United* fell squarely within Section 203's prohibition on corporations using their general treasury funds to make independent expenditures for "electioneering communications." *Id.* at 320–29. The Court also concluded that it could not "resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Id.* at 329. The Court had to confront directly *McConnell*'s conclusion that Section 203 was facially constitutional.

The *Citizens United* Court then roundly rejected *McConnell*'s conclusion. *Citizens United* observed, "The purpose and effect of [Section 203] is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public." *Id.* at 355. "Thus, the following acts would all be felonies": "The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech." *Id.* at 337.

No legitimate government interest could justify such an onerous burden on political speech. The Court thus had little trouble rejecting the justifications that the government proffered. For example, the government half-heartedly asserted that Section 203 served an "antidistortion" interest. *Id.* at 349. That is,

the ban ameliorated the distorting effects of aggregations of wealth accumulated in corporations. This was the interest *McConnell* had relied upon to uphold Section 203. *See* 540 U.S. at 203–09. But if that interest were legitimate, *Citizens United* explained, "the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books." 558 U.S. at 349. And "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

The Court likewise rejected the government's claim that Section 203 served an anticorruption interest. Limits on direct contributions, the Court explained, can "ensure against the reality or appearance of corruption." *Id.* at 357. But "[t]he anticorruption interest is not sufficient to displace the speech here in question"—that is, independent expenditures. *Id.* "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* Trying to prohibit the appearance of influence or favoritism is not enough to justify limits on speech because "[i]ngratiation and access … are not corruption." *Id.* at 360.

The Court also rejected the asserted interest in "protecting dissenting shareholders from being compelled to fund corporate political speech." *Id.* at 361. Just like the antidistortion rationale, this

asserted interest would allow the government to suppress all political speech by corporations. "The First Amendment does not allow that power." *Id.* In addition, shareholders can always sell their shares if they are unhappy with a corporation's message.

In sum, the Court found that Section 203's attempt "to command"—on pain of criminal penalties—"where a person may get his or her information or what distrusted source he or she may not hear" was no more than "censorship to control thought." *Id.* at 356. "This is unlawful." *Id.* Thus, the Court invalidated Section 203, reversing one of the key holdings of *McConnell*. *Id.* at 365–66.[3]

4. The steady march of invalidating provisions of BCRA continued in this Court's most recent tango with BCRA. In 2014, the Court invalidated BCRA's aggregate limits on "how much money a donor may contribute in total to all candidates or committees." *McCutcheon*, 572 U.S. at 192. Perhaps most importantly, the *McCutcheon* Court made clear once and for all that the only legitimate justification for regulating speech in the election context is to prevent "what we have called '*quid pro quo*' corruption or its appearance." *Id.* "Campaign finance restrictions that pursue other objectives … impermissibly inject the

[3] Although *Citizens United* is often called the fight to end all fights, it was not. The FEC and numerous state agencies continue to use precisely the same sort of multi-factor, subjective balancing tests rejected in *WRTL* when ascertaining whether citizens need to undertake the voluminous and intrusive filings required of political committees—including BCRA's failed definition of electioneering communications. *See* Caroline C. Hunter et al., *Statement on Advisory Opinion 2012-11 (Free Speech)* 11–13, FEC (May 9, 2012), https://tinyurl.com/2p85j6ym.

Government 'into the debate over who should govern.'" *Id.* "And those who govern should be the *last* people to help decide who *should* govern." *Id.*

McCutcheon recognized that BCRA's aggregate limits did not serve the interest of preventing corruption or the appearance of corruption. "The difficulty" for the government, the Court explained, "is that once the aggregate limits kick in, they ban all contributions of any amount." *Id.* at 210. Once an individual contributed $48,600 to federal candidates, BCRA prohibited him from contributing any more money to any candidate. Thus, "[t]he individual may give up to $5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional $1,800 that may be spent before reaching the $48,600 aggregate limit)." *Id.* at 204. Once the limit is reached, federal law "den[ies] the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preference." *Id.* But "Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption." *Id.* at 210. In other words, "[i]f there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." *Id.*

Accordingly, the Court held that forcing a donor to "limit the number of candidates he supports" and "choose which of several policy concerns he will advance" constitutes "clear First Amendment harm[]." *Id.* at 204. And because "the aggregate limits on

contributions do not further the only governmental interest this Court [has] accepted as legitimate" to justify limits on political speech, the limits were unconstitutional. *Id.* at 227.

* * *

From *McConnell* through *McCutcheon*, the trend is clear: BCRA is doomed. This Court's decisions have left BCRA in tatters. Sections 203, 213, and 319, along with BCRA's aggregate limits, are dead letters. The invalidation of Sections 203 and 213 stuck a dagger through Title II of BCRA, which comprised only eight short sections to begin with (seven, if you don't count the definitional section). Moreover, the invalidation of Section 319 in Title III gutted part of the so-called Millionaire's Amendment that was an important counterbalance to heightened regulation of other contributions in Title I. *See, e.g.*, Richard Wolf Hess, Comment, *No Fair Play for Millionaires? McCain-Feingold's Wealthy Candidate Restrictions and the First Amendment*, 70 U. CHI. L. REV. 1067, 1070 (2003) (stating that the Amendment passed "after last-minute tweaking of its provisions and in exchange for a total ban on unlimited, non-federal contributions, or soft money"). And once this Court invalidates BCRA's loan-repayment limit at issue in this case, *see infra* pp. 17–26, the Millionaire's Amendment, the amendment that made BCRA legislatively palatable, will no longer exist.

Even though the so-called "soft-money" limits of BCRA's Title I still persist, they are not long for this world. Given that four Justices in *McConnell* (one of whom is still on the Court) gave compelling reasons to jettison most of those limits on their face, it is likely

that, in time, this Court will revisit (and correct) *McConnell*'s holding on that score, at least with respect to as-applied challenges. *See McConnell*, 540 U.S. at 286–341 (opinion of Kennedy, J.); *see also id.* at 264–86 (opinion of Thomas, J.) (same).

In any event, the BCRA of today is a lopsided legislative regime that would not have passed Congress in 2002. It lacks the corporate teeth that Title II was supposed to provide. It lacks the wealth provisions in Title III that were supposed to hold up one end of a legislative compromise for the extreme "soft money" measures in Title I—which themselves hold on by a dubious thread.

From *McConnell* to *McCutcheon*, the theme is clear: BCRA is a constitutional nightmare. A nightmare this Court should end.

II. BCRA'S LOAN-REPAYMENT LIMIT IS THE LATEST UNCONSTITUTIONAL PROVISION TO BE CHALLENGED.

This case involves yet another BCRA provision that is doomed to fall: a key part of the so-called Millionaire's Amendment. Section 304 of BCRA—the loan-repayment limit—prohibits candidates from using post-election contributions to repay personal loans above $250,000. 52 U.S.C. § 30116(j). As the court below concluded, that limit "burdens political speech and thus implicates the protection of the First Amendment." J.S.App.6a. And because the government cannot show that "the loan-repayment limit serves an interest in preventing quid pro quo corruption, or that the limit is sufficiently tailored to serve this purpose, the loan-repayment limit runs afoul of the First Amendment." *Id.* This Court should

affirm that judgment and remove yet another unconstitutional vestige of BCRA from the U.S. Code.

A. BCRA's loan-repayment limit burdens political speech.

"[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). And the First Amendment's protections extend to campaign financing because to be heard, one must spend money. *See Buckley v. Valeo*, 424 U.S. 1, 19–23 (1976) (per curiam).

As this Court explained in *McCutcheon*, in analyzing whether a campaign-finance restriction is unconstitutional, the first question is whether it burdens political speech. 572 U.S. at 203–06. BCRA's loan-repayment limit clearly does.

The limit principally burdens the candidate himself. A candidate for federal office may self-finance his campaign without limit—including by making loans from his personal funds. Candidate loans are the primary source of campaign debt and regularly the only way to quickly infuse money into a startup campaign. *See Anderson v. Spear*, 356 F.3d 651, 673 (6th Cir. 2004) ("[A] candidate may need to speak early in order to establish her position and garner contributions.").

But a candidate who wishes to make such expenditures through personal loans must think twice before he does so—because he might not be repaid. All other campaign debts may be repaid by post-election contributions, but not personal loans over $250,000. J.S.App.14a. The candidate thus faces a dilemma:

forego his right to engage in unfettered spending for his candidacy or risk losing all money he loans his campaign above the $250,000 threshold. That clearly burdens the candidate's speech.

This burden on speech is similar to those imposed by the BCRA provisions at issue in *Davis* and *McCutcheon*. In *Davis*, a self-financing candidate who "pass[ed] the $350,000 mark" triggered an assymetrical regime that lifted limits on the candidate's opponent. 554 U.S. at 729. Speak too much, and you're penalized. In *McCutcheon*, the aggregate cap limited "how many candidates or causes a donor [could] support." 572 U.S. at 204. Speak too much, and you're penalized.

The same is true here: A candidate who wishes to loan his campaign more than $250,000 "has two choices: abide by [that] limit [by not loaning more than $250,000] or endure the burden that is placed on [the] right [to loan more than $250,000] by the activation of a scheme [that bars repayment above $250,000]." *Davis*, 554 U.S. at 740. Both choices "impose[] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." *Id.* Speak too much, and you're penalized. And just as it was "no answer" in *McCutcheon* "to say that the individual can simply contribute less money," 572 U.S. at 204, it is no answer here to say that a self-financing candidate can speak more quietly (by loaning less than $250,000) or forfeit any amount over $250,000 if he insists on speaking as loudly as he can.

Ignoring the writing on the wall, the FEC claims the loan-repayment limit is "at most a modest burden" on free speech. FEC Opening Br. 27. (If this line of

argument sounds familiar, it's because the Court rejected it in *McCutcheon*. *See* 572 U.S. at 204 (stating that an aggregate limit "is not a 'modest restraint' at all").) For support, the FEC highlights the fact that "the great majority of candidate loans are for less than $250,000 and thus do not implicate the loan-repayment limit in the first place." FEC Opening Br. 30. So? That the law has been successful in restricting speech is no reason to uphold the law. Quite the opposite.

The FEC next insists that in the years preceding BCRA's enactment, the majority of loans by candidates were below $250,000. That was twenty years ago. By one estimate, the cost to fund a winning campaign has more than doubled in that time. *See* Campaign Fin. Inst., *The Cost of Winning an Election, 1986–2018* (2018). If any further proof were needed, it isn't the case today that loans are *far* below the limit; instead, "there is a clear clustering of loans" at the $250,000 threshold. J.S.App.14a–15a.

The FEC also concentrates on the fact that the loan-repayment limit does not, "[o]n its face," prevent a candidate from spending his own money or loaning his campaign an unlimited amount of funds. FEC Opening Br. 27. But that hollows out the First Amendment. *See United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). This Court has never limited the First Amendment's protections to direct restrictions on expenditures. *Buckley* itself recognized as problematic laws with a "deterrent effect on" speech that arises "indirectly as an unintended but inevitable result." 424 U.S. at 65. After all, the First Amendment does not say "Congress shall make no law *eliminating* the freedom of speech."

It says "Congress shall make no law … *abridging* the freedom of speech." U.S. Const. amend. I (emphasis added). This Court has thus invalidated laws that create a "drag" on political speech, even when the law did not impose a direct cap or ban. *Davis*, 554 U.S. at 739–40; *Bennett*, 564 U.S. at 736. BCRA's loan-repayment limit at the very least creates a drag on speech.

Still, the FEC insists that the limit is simply akin to a "time, place, and manner regulation" because it requires that "contributions used for a given purpose (repaying candidate loans) must be made at a given time (before rather than after election day)." FEC Opening Br. 28. That is incorrect. A candidate's loan is an expenditure that can be (and usually is) used for speech. That speech is burdened "when a candidate is inhibited from making a personal loan, or incurring one, out of concern that she will be left holding the bag on any unpaid campaign debt." J.S.App.19a. BCRA's loan-repayment limit thus acts as a de facto cap on personal loans, and burdens free speech.

B. The FEC fails to show BCRA's loan-repayment limit serves a legitimate interest or is appropriately tailored.

Because the loan-repayment limit burdens political speech, the FEC must show the limit meets heightened scrutiny. *McCutcheon*, 572 U.S. at 199. The FEC has not made, and cannot make, that showing.

This Court has repeatedly said that "[c]urbs on protected speech … must be strictly scrutinized." *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 640 (Thomas, J., concurring in the judgment and

dissenting in part); *see also FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 501 (1985). That should be the standard of review regardless of whether this Court is reviewing a law affecting expenditures or contributions. Indeed, there is no justification to relax that standard when it comes to contributions. "Contributions and expenditures are simply 'two sides of the same First Amendment coin,' and [this Court's] efforts to distinguish the two have produced mere 'word games' rather than any cognizable principle of constitutional law." *McCutcheon*, 572 U.S. at 231–32 (Thomas, J., concurring in the judgment) (quoting *Buckley*, 424 U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part)). This is particularly true here, where a candidate's ability to spend his own money is at issue; merely labeling a restriction a "contribution limit" does not make it so, nor does it change the constitutional harm. The Court should thus use this opportunity to clarify that strict scrutiny applies to laws affecting either type of speech.

In any event, because BCRA's loan-repayment limit cannot survive even so-called "closely drawn scrutiny," it necessarily fails strict scrutiny. *See* J.S.App.20a. Closely drawn scrutiny requires the government to demonstrate that the law serves "a sufficiently important interest and employs means closely drawn to avoid" abridging First Amendment freedoms. *McCutcheon*, 572 U.S. at 197. BCRA's loan-repayment limit does neither.

1. The only government interest sufficient to support a restraint on political speech is "preventing corruption or the appearance of corruption." *Id.* at 206. BCRA's loan-repayment limit doesn't serve that interest. The FEC "has not identified a single case of

actual quid pro quo corruption in this context." J.S.App.23a. Instead, the government relies on supposition and prediction. Even that pontification supports only the unremarkable proposition that candidates will favor constituents who contribute to their campaigns. That is not corruption. As this Court has repeatedly explained, a "generic favoritism or influence theory … is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.)).

The ordinary base limits confirm that the loan-repayment limit serves no anti-corruption interest. A donor in 2018 could only give Senator Cruz $2,700. *See* FEC, *Contribution limits for 2017–2018* (Feb. 16, 2017), https://tinyurl.com/2p8ps4my. If the donor gave $2,700 before the election, he couldn't give any more after the election to retire campaign debt. If he gave nothing before the election, he could give $2,700 after the election to retire campaign debt. And if he gave $1,350 before the election, he could give only $1,350 after the election to retire campaign debt. No matter how he sliced his contributions, he could give no more than $2,700. And even then, the campaign could only accept post-election contributions that did "not exceed net debts outstanding from" the 2018 election. 11 C.F.R. § 110.1(b)(3)(i). These limitations more than adequately address any anti-corruption interest that the government might invoke to justify BCRA's loan-repayment limit.

The true interests of BCRA's loan-repayment limit are far less legitimate. A somewhat forgiving view of the limit is that it serves the interest of leveling the

playing field. As Senator Hutchison said on the floor: "Our purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field." 147 CONG. REC. 3970 (Mar. 20, 2001) (statement of Sen. Hutchison). But this Court has "repeatedly rejected" this interest as a justifification for limits on political speech. *Bennett*, 564 U.S. at 749. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Davis*, 554 U.S. at 741–42.

Moreover, as *Davis* explained, that interest "has ominous implications." *Id.* at 742. Why stop at leveling the financial field? Some candidates are celebrities, some come from well-known families, and still others dress well. "Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Id.* But our system of government leaves those judgments to voters, not Congress. *Id.*

A more realist view of BCRA's loan-repayment limit reveals it is about preserving incumbency. As Senator Levin explained, "In the effort to level the playing field in one area, we are making the playing field less level in another area." 147 CONG. REC. 3977 (Mar. 20, 2001) (statement of Sen. Levin). Senator Dodd elaborated, "It isn't exactly level, in a sense, when we are talking about incumbents who have treasuries of significant amounts and the power of the office which allows us to be in the press every day." *Id.*

at 3971 (statement of Sen. Dodd). Senator Reid summed it up: "[The Millionaire's Amendment] is an incumbent advantage measure in this underlying bill." 147 CONG. REC. S2852 (daily ed. Mar. 26, 2001) (statement of Sen. Reid). Because preserving incumbency is not an interest sufficient enough to justify curtailing political speech, the loan-repayment limit cannot stand.

2. BCRA's loan-repayment limit is also not "closely drawn" to protect First Amendment freedoms. In an "area permeated by First Amendment interests," any restriction on speech requires "precision." *Buckley*, 424 U.S. at 41. To survive, the law must employ a "means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218. But BCRA's loan-repayment limit is both over- and under-inclusive.

It is overinclusive because it penalizes losers. There is no risk that a candidate who lost an election will engage in quid pro quo corruption—he has no quo to give. That dispenses with the FEC's lamentation that "Congress had no less restrictive alternative." FEC Opening Br. 40.

The limit is also underinclusive because it only targets post-election funds. But, at least for incumbents, pre-election contributions would pose the same supposed problems as post-election contributions (all of which are subject to the same base per election limit). Yet Congress did not restrict using those contributions to repay personal loans. This ill-fit further confirms that the loan-repayment limit is unconstitutional.

Finally, the loan-repayment limit gets the First Amendment exactly backwards. The limit does not

apply to retiring other campaign debt, such as paying pollsters or pizza parlors, none of which are constitutionally protected as such. Instead, it singles out a particular kind of debt—debt created by self-financing—for censure. Because "the First Amendment simply cannot tolerate" a "legislative limit" on a candidate's "expenditure of his own personal funds," *Buckley*, 424 U.S. at 53–54, however, the retirement of debt from self-financing is entitled to *better*, not *worse*, treatment than the retirement of other debt. This further confirms the loan-repayment limit is not "closely drawn."

* * *

Past is prelude. This Court is once again tasked with striking down an unconstitutional provision of BCRA. The loan-repayment limit burdens political speech with no attendant benefits, certainly no benefits that outweigh the limit's chill. The Court should thus do what it has done time and again, and invalidate an unconstitutional provision of BCRA.

III. THE COURT SHOULD STRIKE DOWN WHAT REMAINS OF BCRA.

The Court should not stop there. BCRA is a shell of its former self. In its present, mangled form, it no longer functions as Congress intended. Moreover, after this Court invalidates the loan-repayment limit, there will be nothing left of the key amendment that saved BCRA from legislative death. The Court should use this case to finish the project it began years ago, and invalidate BCRA in its entirety.

1. The speciously named Millionaire's Amendment was key to BCRA's passage.[4] It had two operative provisions: the asymmetrical contribution limits for opponents of self-financed candidates and the limit on loan repayments. Pub. L. No. 107-155, §§ 304, 319, 116 Stat. 81 (2002). This Court invalidated the asymmetrical contributions limits in *Davis*, 554 U.S. at 743–44. So all that remains of the Millionaire's Amendment is the limit on loan repayments at issue in this case. And because BCRA's passage depended on that Amendment (and given that BCRA already has been substantially overhauled by this Court), there is no justification for keeping the remaining scattershot provisions of BCRA on the books.

In general, an unconstitutional provision should be severed, but not if "the statute created in its absence is legislation that Congress would not have enacted." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020). This Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). The question then is: Would Congress have enacted

[4] It is specious because millionaire status has nothing to do with the provisions. Especially when it comes to the loan-repayment limit, non-millionaires easily can be affected. And presumably, calling it the "Two-hundred-and-fifty-thousand-dollar Gang's Amendment" did not pack the same political punch as the "Millionaire's Amendment."

BCRA if the challenged provision were not included? The answer is obviously "no."[5]

BCRA passed the Senate 60-40. 148 CONG. REC. S2160–61 (daily ed. Mar. 20, 2002); *see also* William M. Welch & Jim Drinkard, *Passage Ends Long Struggle for McCain, Feingold*, USA Today (Mar. 20, 2002). Every vote mattered. BCRA passed the House by a wider margin, but still, the Millionaire's Amendment was key to the bill's passage. *See* Kelly Field, *Shays-Meehan Campaign Finance Reform Clears the House*, Newswire (Feb. 13, 2002) (noting the amendment was one of the eleventh-hour amendments to the Shays-Meehan bill, which ultimately became BCRA). Indeed, campaign finance reform had failed repeatedly without the amendment. *See Campaign Finance Bill Likely Dead for the Year*, CNN (Feb. 26, 1998); Ted Barrett & Dana Bash, *Campaign Finance Battle Moves to Senate*, CNN (Feb. 15, 2002) (noting previous bill failed by one vote in the Senate).

But the Millionaire's Amendment enticed Senators and Representatives to vote for BCRA because it ensured that their incumbent advantage would be protected. *See* Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1279 (1994) (campaign finance "legislation carries significant potential to achieve incumbent protection instead of

---

[5] As appellees explain in their brief, they have standing to challenge the loan-repayment limit; there is thus no need to revisit the "standing-through-inseverability" argument. *See California v. Texas*, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring).

enhancing political competition. It arouses the uncomfortable suspicion that the corruption-prevention banner is an all-too-convenient subterfuge for the deliberate pursuit of less savory or less legitimate goals."). Indeed, the Millionaire's Amendment "carried the redolent whiff of self-dealing by politicians." Samuel Issacharoff, Comment, *On Political Corruption*, 124 HARV. L. REV. 118, 135 (2010).

In a moment of "candor," Senator McCain (BCRA's loudest proponent and Senate sponsor) explained that the amendment addressed "a concern that literally every nonmillionaire Member of this body has, and that is that they wake up some morning and pick up the paper and find out that some multimillionaire is going to run for their seat, and that person intends to invest 3, 5, 8, 10, now up to $70 million of their own money in order to win." 147 CONG. REC. 3969 (Mar. 20, 2001) (statement of Sen. McCain). Without this blatant incumbency protection, BCRA would have never passed.

2. Moreover, as discussed, this Court has taken a shotgun to BCRA, leaving it riddled with holes. Not only is the entirety of the Millionaire's Amendment gone (or soon will be), so too are the ban on political contributions by minors, the ban on corporate and union funding of political ads before an election, and the aggregate limits on contributions by individuals to multiple candidates or party committee. And the most significant portion of what remains of BCRA, Title I's substantial regulations on the political party committees, would surely not survive this Court's review. *See supra* p. 5. After all, the self-proclaimed level playing field of BCRA now tilts decidedly against

the party committees. Even the most local committee must concern itself with BCRA's spending restrictions, regardless of whether the spending is coordinated with a federal candidate.[6]

Even leaving that aside, however, the lopsided version of BCRA that exists today could not, and would not, have garnered the 60 votes necessary to pass the Senate. *See supra* pp. 26–29. Instead of continuing to

[6] Take for example a state-party direct mailer that expressly advocates for the election of a federal candidate. If the state party coordinates with the candidate, the mailer might or might not be subject to the statutory coordinated party limits. *See* 52 U.S.C. § 30116(a)(7) (treating certain coordinated disbursements and expenditures as contributions). If the mailer is sorted and taken to the post office by a paid party worker, then the limits would apply; but if the same person handling the mailer is a volunteer, that would exempt the mailer from the limits because it would not be a contribution or an expenditure. *See* 11 C.F.R. § 100.87(d); *id.* § 100.147(d); *see also* 52 U.S.C. § 30101(8)(B)(i). Moreover, even if the state party does not coordinate with a federal candidate, if a federal candidate "appears on the ballot," the party can be subject to all sorts of BCRA's so-called "Federal election activity" spending restrictions. 52 U.S.C. § 30101(20)(A)(ii); *see also id.* § 30125(b)(1); *McConnell*, 540 U.S. at 161–73. The constitutionality of imposing such spending limits cannot turn on such inconsequential details.

whittle away at BCRA, this Court should instead toss the whole thing.[7]

3. Finally, BCRA's severability clause (§ 401) is no impediment to striking the law. Foremost, the presence of such a clause creates only a rebuttable presumption that guides, not controls, this Court's severability analysis. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *INS v. Chadha*, 462 U.S. 919, 931–34 (1983) (acknowledging the presence of a severability clause but finding it necessary to examine the act's legislative history before severing its unconstitutional legislative veto provision from the remainder of the act); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause.").

Invoking the severability clause "to salvage parts of a comprehensive, integrated statutory scheme" would "exalt[] a formula at the expense of the broad objectives of Congress." *Buckley*, 424 U.S. at 255 (opinion of Burger, C.J.). Indeed, when *McConnell* was before the three-judge district court, Judge Henderson recognized that Congress would never have enacted such a hollowed-out statute. *McConnell v. FEC*, 251 F. Supp. 2d 176, 270 n.5 (D.D.C. 2003) (Henderson, J.,

---

[7] The same goes for the Court's purported distinction between contribution limits and independent expenditure limits. *See Buckley*, 424 U.S. at 21. That distinction has spawned, in Justice Thomas's words, "word games," where restrictions on independent expenditures are simply labeled "contribution limits." *McCutcheon*, 572 U.S. at 228, 232 (opinion of Thomas, J.) (quoting *Buckley*, 424 U.S. at 244 (opinion of Burger, C.J.)). Given *Buckley*'s shortcomings, the Court ought not continue that sort of mistake here, and thus ought to strike BCRA.

concurring in the judgment in part and dissenting in part). She wrote, "[U]pon examination of the record and despite BCRA's severability provision, I doubt that the Congress, upon elimination of the numerous provisions I believe are invalid, would have been 'satisfied' with the contribution limit increases." *Id.*

The same is true today. There is no need to keep what remains of BCRA on the books. This Court should wipe the slate clean.

CONCLUSION

The Court should affirm the judgment of the District Court for the District of Columbia.

Respectfully submitted,

DONALD F. MCGAHN II
Counsel of Record
NOEL J. FRANCISCO
ROBERT LUTHER III
ANDREW J.M. BENTZ
J. BENJAMIN AGUIÑAGA
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
dmcgahn@jonesday.com

Counsel for Amicus Curiae

DECEMBER 22, 2021