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.

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Few rights in our democracy are more fundamental than the right of citizens to run for office and speak on issues of political importance. And campaign funding is critical to individuals' ability to exercise that right. Campaigns are expensive, often racking up costs in the millions of dollars. For an unknown candidate of modest means and limited connections, often the only way to launch a campaign is for the candidate to extend his own campaign a personal loan. That loan is often necessary to provide the running start needed to get the attention of voters and donors.

But Section 304 of the Bipartisan Campaign Reform Act imposes a $250,000 limit on the repayment of such loans using funds contributed after the election. By doing so, the law burdens candidates' ability to engage in political speech necessary for a successful campaign. That restriction is particularly damaging to challengers, who depend on campaign expenditures early in the election cycle to get attention. The loan-repayment limit is nothing more than political protectionism, passed by well-heeled and well-connected politicians with massive war chests that insulate them from the threat of a challenger. Section 304 imposes

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[1] *Amicus* gave the parties timely notice of its intent to file this brief, and all parties have consented to its filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amicus*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. *Amicus* is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.

an unconstitutional burden on free speech, and this Court should hold that it is unconstitutional.

These issues are of special interest to *amicus* Protect the First Foundation ("PT1"), a non-profit, non-partisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people across the ideological spectrum, including people who may not even agree with the organization's views.

STATEMENT

A candidate may loan any amount of money to his own campaign. But Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") places a $250,000 limit on the repayment of personal loans with funds secured after election day. 52 U.S.C. §30116(j). The FEC's implementing regulations provide that a campaign committee may repay the entire amount of the personal loans using pre-election contributions within 20 days of the election. 11 CFR § 116.11(b)(1), (c)(1). A committee may also repay up to $250,000 of personal loans with post-election contributions. *Id.* at § 116.11(c)(2). Following the lapse of the twenty-day period after the election, however, the remaining balance of the personal loan exceeding the limit must be treated as a contribution from the candidate. *Id.*

On November 5, 2018, the day prior to the general election, Senator Cruz loaned $260,000 from his personal bank accounts and margin loans to his committee to finance his reelection campaign for United States Senate ("the Committee"). J.A. 70. After the

election, the Committee used the funds available to pay vendors and other bills instead of repaying Senator Cruz's loans. *Ibid*. The Committee later repaid the $250,000 with post-election contributions. *Ibid*. But because of the BCRA's loan repayment limit, the Committee could not repay the final $10,000 in excess of the $250,000 statutory cap. *Ibid*.

Appellees challenged the constitutionality of the $250,000 limit imposed by the BCRA and the FEC's implementing regulations under the First Amendment. J.A. 14-27 A three-judge district court unanimously granted Appellees summary judgment because the loan-repayment limit burdens core political speech and did not meet even the standard of "closely drawn" scrutiny. Jurisdictional Statement App. 20a-21a. The FEC appealed. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

As this Court has previously held, "There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon* v. *FEC*, 572 U.S. 185, 191 (2014). This case is about both the first and the last of those options.

In theory, BCRA allows a candidate to spend as much on his own campaign as he chooses. But in practice, BCRA's $250,000 loan-repayment limit functions as a cap on campaign spending, at least until a

candidate can raise sufficient funds to repay himself. That limit violates the First Amendment for two reasons.

First, the loan-repayment limit explicitly targets core political speech. Early in a campaign, the candidate himself and his personal contacts are likely the campaign's only source of funding. Candidates who don't have the resources or networks to fund a campaign without promise of repayment are thus particularly burdened by any type of restriction on loan repayment. A candidate who is deterred from funding his campaign based on that limit is hindered in spreading his message and engaging in the political process. Such a burden on core political speech must be struck down unless it meets the demands of heightened scrutiny. The loan-repayment limit cannot do that.

Second, despite the unusual test-case posture of this challenge, the legislative history makes clear that the loan-repayment limit was passed by incumbents to give themselves an advantage over challengers. And the restriction is effective at serving that purpose: With only rare exceptions, early campaign spending is critical to a successful challenger campaign. The loan-repayment limit effectively deters candidates of limited means from spending more than $250,000 before they have raised the funds to repay any personal loan and thereby impedes them from gaining the traction they need to be successful.

This Court should affirm the district court in holding that Section 304 of the BCRA violates the First Amendment.

ARGUMENT

Amicus writes to highlight two points in addition to those emphasized by Appellees: (1) why the FEC's loan-repayment limit is constitutionally suspect on its face; and (2) how that limit protects incumbents at the expense of challengers, particularly challengers of limited means.

I. The Loan-Repayment Limit Is Constitutionally Suspect Because It Targets Funds That Are Used Exclusively for Political Speech or Speech-Facilitating Activities.

As this Court has recognized, "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010) (citation and internal quotation marks omitted). The loan-repayment limit raises the specter of a First Amendment violation on its face. By limiting the amount of money a campaign can repay the candidate after the election, Section 304 explicitly targets core political speech. It cannot do so without surviving heightened scrutiny, whether this Court applies strict scrutiny or "closely drawn" scrutiny.

As Appellees show, strict scrutiny applies here because the government has burdened core political speech. Appellees' Br. 41 (citing *Davis* v. *FEC*, 554 U.S. 724, 738–740 (2008); *Arizona Free Enter. Club's*

Freedom Club PAC v. *Bennett*, 564 U.S. 721, 737, 740, 742 (2011)). But even if this Court applies the lower "closely drawn" scrutiny standard, see *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam), the loan-repayment limit cannot survive. See Appellees' Br. 39-55.

1. As this Court has long recognized, political speech is "integral to the operation of the system of government established by our Constitution." *McCutcheon*, 572 U.S. at 203 (quoting *Buckley*, 424 U.S. at 14). And the government may not burden such political speech or inject itself "into the debate over who should govern" by imposing campaign finance restrictions that pursue objectives other than preventing *quid pro quo* corruption. *Id.* at 192. "[T]hose who govern should be the *last* people to help decide who *should* govern." *Id.* (emphasis in original).

But that is precisely what the government has done here. By limiting the amount of personal loans that can be repaid by post-election contributions, the government has impermissibly deterred candidates from expending funds to speak on behalf of their political ideals, stances, and qualifications for office. In particular, the government has hindered the political speech of candidates who are not wealthy enough to bankroll their own campaigns through contributions or connected enough to access donor networks that can do so. See *infra* Section II.

That limit prevents candidates, especially candidates of limited means, from engaging in a host of political speech and speech-facilitating activities.

Campaign funds are necessary to run ads, make calls, print and mail flyers, post yard signs, design websites, host rallies, and more. But if a candidate is deterred from loaning money to his own campaign in advance of raising the funds necessary to repay that loan, he cannot afford to engage in these activities. A lack of funding is crippling to a campaign, and often causes candidates to withdraw from the race.[2] The loan-repayment limit is thus an unmistakable burden on core political speech which lies at the heart of the First Amendment

2. It makes no difference whether the loan-repayment limit is directly designed to suppress speech—although the legislative history suggests it may have been designed to do exactly that. See 147 Cong. Rec. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle) (noting that the loan-repayment limit "protects incumbents"). As the district court noted, "In a political campaign, expenditures and contributions are part of a connected cycle of speech and association protected by the First Amendment." Jurisdictional Statement App. 13a. Because of the core speech and association rights at stake, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340.

The loan-repayment limit is in a sense even more offensive to the First Amendment than the

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[2] Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 Election L.J.: Rules, Pol. & Pol'y 153, 163–64 (2017).

contribution limits this Court has previously struck down, see *e.g. McCutcheon*, 572 U.S. at 204, because it hinders a candidate's ability to speak on his own behalf. This can serve no legitimate anti-corruption purpose, for a candidate cannot corrupt himself through the giving of a loan to his campaign. And, as Appellees correctly argue, a candidate is not later corrupted when his loan is repaid through post-election campaign contributions. If one lends his friend a thousand dollars, he does not feel he has received a gift when the thousand dollars is repaid, and it is unlikely he would feel indebted to his friend for the repayment. So too when a candidate is repaid what he loaned to his campaign. He receives no more than he had prior to issuing the loan, and is made none the richer thereby. Appellees' Br. 48-50. And all subsequent contributions from which repayment would be made must still meet pre-existing contribution limits, and thus raise no meaningful specter of undue influence or corruption.

That conclusion is fatal to Section 304's constitutionality. As this Court has long held, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210 (citation omitted). The district court correctly held that the FEC has not carried that burden.

II. The Loan-Repayment Limit Provides an Advantage to Incumbents at the Expense of Challengers, Particularly Challengers of Limited Means.

The loan-repayment limit's targeting of core political speech is not the only reason this Court should affirm the district court. Section 304 is also constitutionally problematic because, by design, it provides an advantage to incumbent candidates at the expense of challengers. By deterring a candidate from loaning money to his own campaign early in the election cycle, the government has effectively capped how much a campaign can front-load its expenditures on speech. That cap works to the advantage of incumbents, who have higher name recognition, larger war chests, more connections, and less comparative advantage from early campaign spending. By the same token, the cap cripples challengers, who must spend early in a campaign to establish a name for themselves, spread their message, and generate subsequent donations.

A. The Practical Effect of the Loan-Repayment Limit Is To Deter Candidates of Limited Means From Spending Money in Advance of Raising Funds.

By placing a $250,000 cap on the repayment of loans using funds contributed after the election, the FEC has effectively limited the frontloading of campaign spending—at least for candidates who cannot afford to bankroll their own campaigns without a reasonable expectation that their loans will be repaid. As Appellees explain, "[b]y significantly limiting the

sources of funding that committees can use to repay candidate loans, the $250,000 cap necessarily increases the risk that these loans will not be repaid in full, or perhaps at all." Appellees' Br. 41. Were it not for the loan-repayment limit, campaigns would be able to fundraise to repay personal loans both before and after the election, increasing the odds of repayment.

To be able to fundraise at all, a candidate must get his name and message in front of the public. And that costs money—usually to the tune of hundreds of thousands or even millions of dollars.[3] Early in campaigns, candidates may have no sense of how much they will be able to fundraise prior to an election. Perhaps that is no barrier for wealthy candidates. But it imposes severe limitations on candidates of limited means. If a candidate can only afford to temporarily loan money to his campaign, rather than contribute it outright, he will understandably be hesitant to loan any money that might not be repaid.

Given the uncertainty of electoral politics and the relatively short timeframe of a campaign, the safest bet for a candidate of limited means is to donate less than the $250,000 cap, at least until funds above that amount are raised. So long as the candidate keeps his personal loans below that amount, he can raise funds to repay it both before and after the election.

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[3] FEC, *Top 50 Senate Campaigns by Receipts January 1 – June 30, 2021* (Sept. 3, 2021), https://tinyurl.com/FECstatistics (showing that the top 50 senate campaigns each spent between $876,639 and $34,709,611).

As Appellees note, "For a candidate who wishes to spend more than $250,000 on behalf of his own election but can afford to do so only if he is reasonably assured of repayment after election day, the loan-repayment limit, by design and inevitable effect, will deter the candidate from making the expenditure at all." Appellees' Br. 41. The data show this to be true: There is a "clear clustering of loans right at the $250,0000 threshold." Appellees' Br. 44 (quoting Jurisdictional Statement App. 14a-15a). This has remained true even as spending on congressional campaigns has more than doubled. Appellees' Br. 44. The loan-repayment limit thus deters candidates from front-loading their campaign spending—which is often necessary to electoral success.

B. Incumbent Candidates Have a Greater Ability To Raise Money Early in Campaigns.

The loan-repayment limit's burden on campaign spending also works to the benefit of incumbent candidates and the detriment of challengers. Indeed, as Appellees note, the legislative record itself shows that Congress was aware that the loan-repayment limit would provide such an advantage. Appellees' Br. 7. One senator recognized that Section 304 of the BCRA "protects incumbents." 147 Cong. Rec. S2544 (daily ed. Mar. 20, 2001) (statement of Sen. Daschle). Another recognized that incumbents "have a lot of advantages that do not come out of our personal checkbooks," 147 Cong. Rec. S2465 (daily ed. Mar. 19, 2001) (statement of Sen. Dodd).

This Court should not permit such self-interested protectionism by those already in office to infringe on the free speech rights of those who challenge them. If the First Amendment means anything, it must mean that the people's representatives cannot "restrict the political participation of some in order to enhance the relative influence" of themselves. *McCutcheon*, 572 at 191.

Indeed, incumbents generally fundraise at significantly higher levels than challengers do at all stages of the election cycle.[4] Incumbents have this financial advantage for several reasons. For example, they have a built-in advantage in fundraising due to name recognition, access to special interest groups, and assistance from political action committees.[5] As a result, incumbents raise more money and generally raise it much earlier than challengers.[6] And, because unspent campaign funds can roll over into future campaign war chests, incumbents often have a head start on fundraising before a challenger even decides to enter the race.[7] The advantage results in a 20–25%

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[4] Lynn Vavreck, *A Campaign Dollar's Power is More Valuable to a Challenger*, N.Y. Times (Oct. 7, 2014), https://tinyurl.com/CampaignDollars.

[5] Alexander Fouirnaies & Andrew B. Hall, *The Financial Incumbency Advantage: Causes and Consequences*, 76 J. Pol. 711, 712 (2014).

[6] David Fienberg & Olivia Snavely, *Incumbent Advantage in the Senate*, Ctr. for Int'l Rels. & Pol. J., Fall 2020, at 42.

[7] *Ibid.*

lead in their share of total contributions in an election.[8]

This early advantage is important because challengers must effectively fundraise money early in order to succeed, not just to spend on typical campaign services, but also to signal to special interest groups and wealthy donors that the challenger is a legitimate threat, which leads to even more fundraising power.[9] Money raised early by challengers allows them to compete with the benefits that incumbents already enjoy. Thus, limitations or burdens on fundraising are more damaging to challengers than incumbents.

C. Candidates Who Are Limited in Their Ability To Spend Funds Early in a Campaign Are Less Likely To Succeed.

Because incumbents can raise money earlier in campaigns than challengers can, the loan-repayment limit serves to protect incumbents at the expense of their opponents. Spending early in a campaign is critical for all candidates, but it is particularly important for relatively unknown challengers. The loan-repayment limit thus cripples the campaigns of candidates who cannot afford to contribute money to their campaigns if it is unlikely to be repaid.

1. Across the board, candidates must be able to spend early in a campaign to succeed. Early

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[8] Fouirnaies & Hall, *supra* note 5, at 712.

[9] Robert Biersack, Paul S. Herrnson & Clyde Wilcox, *Seeds for Success: Early Money in Congressional Elections*, 18 Legis. Stud. Q. 535, 537 (1993).

fundraising and spending determine which candidates get their names and platforms publicized first, thereby securing name recognition among voters.

As the Sixth Circuit has held:

> [R]estrictions on loans are particularly onerous because they limit when a party can speak (or how much he can say at a given time). The exigencies of a campaign may require that a candidate spend more early to raise name recognition, or to address an issue of public concern prior to contributions arriving. Indeed, a candidate may need to speak early in order to establish her position and garner contributions. [A] ceiling on loans *** significantly impinge[s] upon a candidate's ability to deliver and to time his or her message.

Anderson v. *Spear*, 356 F.3d 651, 673 (6th Cir. 2004).

Available studies reinforce the Sixth Circuit's conclusion by showing that a candidate's ability to fundraise and spend early in a campaign is indicative of whether he will eventually prevail.[10] Candidates who are unable to fundraise early are more likely to withdraw from the race altogether. Those who find themselves trailing behind, even after just 90 days, are more likely to withdraw from the election.[11] Compared to a candidate who leads in the early stages of fundraising, a candidate trailing in fundraising by 50

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[10] Bonica, *supra* note 2, at 154.

[11] *Id.* at 165.

percent is about twice as likely to withdraw.[12] For a candidate trailing by 75 percent, the chances of withdrawing increase to three times as likely.[13]

Additionally, those who spend money early on are more likely to have greater fundraising success later.[14] Donors are "more likely to give to candidates who can afford to contact them" because of the direct solicitation aspect, so candidates who can afford mail and telephone communications have more success raising a "large number of smaller contributions."[15] Moreover, "success in fundraising early is seen as a crucial test of a campaign's viability by donors outside a candidate's personal network."[16] Candidates must also prove to be good fundraisers early in campaigns to gain critical party support.[17]

This gives more affluent candidates an advantage and makes it difficult for candidates without funds and name recognition to compete. Without a large initial pool of funds, candidates are unlikely to have the money they need to create advertisements for TV, social media, or website campaigns that are necessary to compete with those of opponents who can spend

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[12] *Id.* at 164.

[13] *Ibid*

[14] Biersack, *supra* note 9, at 542.

[15] Corwin Smidt & Dino Christenson, *More Bang for the Buck: Campaign Spending and Fundraising Success*, 40 Am. Pol. Rsch. 949, 951-952 (2012).

[16] Bonica, *supra* note 2, at 160.

[17] *Ibid.*

millions, even in a single week.[18] Candidates without such early resources, therefore, have less ability to speak effectively and thus gain fewer supporters.

2. Raising and spending money early is even more crucial for challengers than for incumbents.[19] Less than 1% of challengers have been elected when spending less than $200,000.[20] And the incremental value of an additional dollar fundraised diminishes for incumbents and increases for challengers.[21] The challenger's relatively higher value of a dollar confirms that the FEC's loan-repayment limit harms challengers to the benefit of incumbents.[22]

That advantage is borne out by the data. When challengers spend more money on their campaigns, they are more likely to be elected. The same does not hold true for incumbents.[23] One study, analyzing the spending in the Senate between challengers and incumbents, concluded that challenger spending was the "most important single factor" influencing the

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[18] Anna Massoglia & Karl Evers-Hillstrom, *2020 Presidential Candidates Top $100M in Digital Ad Spending as Twitter Goes Dark*, Open Secrets (Nov. 14, 2019, 2:08 PM), https://tinyurl.com/2020Spending.

[19] See Bonica, *supra* note 2, at 154.

[20] Vavreck, *supra* note 4.

[21] Alan S. Gerber, *Does Campaign Spending Work?,* 47 Am. Behav. Scientist 541, 558 (2004).

[22] Vavreck, *supra* note 4.

[23] Gary C. Jacobson & Jamie L. Carson, The Politics of Congressional Elections 62–70 (9th ed. 2016).

outcomes of the elections, particularly because challengers have to spend more money quickly to catch up to incumbents.[24] In a study of gubernatorial primaries, challengers were estimated to reduce the number of votes an incumbent got by 21% for every extra dollar per voter they spent.[25] Not surprisingly, challengers who are able to spend and fundraise effectively and early generally perform better in a primary election.[26]

Challengers gain a greater advantage from campaign spending—especially early spending—because spending equalizes the playing field: They improve name recognition, gain more opportunities to set the agenda, and earn the trust of wealthy donors and political action committees—benefits that incumbents already enjoy.[27] A challenger's name recognition can only go up once they start campaigning, while an incumbent's usually stagnates.[28]

Early spending also helps challengers compete against the name recognition of incumbents by showing the challenger's capability to access resources and inducing others, including PACs and party officials, to

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[24] Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 Am. Pol. Sci. Rev. 385, 389, 393 (1988).

[25] Kedron Bardwell, *Not All Money is Equal: The Differential Effect of Spending by Incumbents and Challengers in Gubernatorial Primaries*, 3 State Pol. & Pol'y Q. 294, 302 (2003).

[26] Gerber, *supra* note 21, at 558. See also Bonica, *supra* note 2, at 154.

[27] See Gerber, *supra* note 21, at 558.

[28] *Ibid.*

contribute to their campaigns.[29] Those who are unable to show their ability to compete early on are less likely to receive "party aid" and succeed against those with longstanding ties.[30] Donors want to see early on in the campaign whether a candidate, especially a new and unproven candidate, is likely to be competitive for office. The ability to fundraise is a key indicator for the likelihood of success because early in a campaign there are few other metrics to go by.[31]

In sum, a candidate who cannot spend and raise funds quickly, and especially early in the race, is unlikely to win an election. Challengers especially need to spend early to make an impression on the electorate and acquire enough name recognition to compete with incumbents. The loan-repayment limit thus burdens challengers by deterring them from raising money from one of the few sources that may be available to them early in their campaigns: a personal loan. That limit makes it harder for them to compete with incumbents and other candidates who already have large amounts of funds in reserve.

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[29] Biersack, *supra* note 9, at 536.

[30] *Ibid.*

[31] Bonica, *supra* note 2 at 166.

CONCLUSION

The loan-repayment limit targets core political speech and speech-facilitating activities, and is therefore subject to heightened scrutiny, a standard the government cannot meet here. That limit also impermissibly favors incumbents over challenging candidates. This Court should affirm the district court and hold that those who govern may not restrict the speech of those who seek to challenge them.

Respectfully submitted,

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