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May 31, 2022

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

<u>Submitted Electronically via CM/ECF</u>

Re: No. 22-10168: State of West Virginia, et al. v. U.S. Department of the Treasury, et al.

Dear Clerk:

Under Federal Rule of Appellate Procedure 28(j) and Eleventh Circuit IOP 6, we write to advise the Court of additional authority related to our brief dated March 25, 2022.

We explained why the States have standing to challenge the Tax Mandate: it offends state sovereignty, subjects States to reporting requirements, and threatens States with recoupment proceedings. *See* Br. 14-23. Recently, the Ninth Circuit agreed that Arizona had standing to challenge the Tax Mandate "both because there is a realistic danger of ARPA's enforcement, and because there is a justiciable challenge to the sovereignty of the State." Ex. 1, *Arizona v. Yellen*, No. 21-16227, 2022 WL 1574217 (9th Cir. May 19, 2022).

As to enforcement, Arizona's suit met the test for standing in pre-enforcement challenges. *Id.* at 5 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159

(2014)). *First*, in implementing the Tax Mandate, the federal government intends to engage in an act "affected with a constitutional interest." *Id.* at 6. *Second*, Arizona had "accepted ARPA funds, certified that it will meet ARPA's conditions, and passed a $1.9 billion tax cut," which established that ARPA prescribed Arizona's future conduct. *Id.* *Third*, a threat of enforcement exists given (1) the federal government's refusal to disavow the Tax Mandate, (2) the Secretary of the Treasury's letter saying she intended to enforce it, and (3) Treasury's promulgation of procedures for recoupment actions. *Id.* at 7.

As to the injury to state sovereignty, the Ninth Circuit agreed that ARPA could "give[] rise to a cognizable injury in fact" if it "extends a federal grant with ambiguous or coercive terms to the States." *Id.* at 9. Although the district court disagreed that the statute is ambiguous or coercive, it erred in "confus[ing] perceived weakness on the merits with absence of Article III standing." *Id.*; *see also* Ex. 2, *FEC v. Cruz*, No. 21-12, 2022 WL 1528348, at *5 (U.S. May 16, 2022) ("For standing purposes, [courts] accept as valid the merits of [plaintiffs'] legal claims.").

Sincerely,

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EXHIBIT 1

2022 WL 1574217
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

State of ARIZONA, Plaintiff-Appellant,
v.
Janet YELLEN, in her official capacity as Secretary of the Treasury; Richard K. Delmar, in his official capacity as acting inspector general of the Department of Treasury; United States Department of the Treasury, Defendants-Appellees.

No. 21-16227
|
Argued and Submitted January 13, 2022 San Francisco, California
|
Filed May 19, 2022

Synopsis
Background: State of Arizona filed suit against Secretary of United States Treasury, seeking declaratory judgment that offset provision of American Rescue Plan Act (ARPA), prohibiting states from using federal funds intended to address economic harms caused by COVID-19 pandemic to offset reduction in net tax revenue, violated Spending Clause and Tenth Amendment. The United States District Court for the District of Arizona, Diane J. Humetewa, J., 550 F.Supp.3d 791, dismissed for lack of subject matter jurisdiction. Arizona appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

[1] state lacked standing based on compliance cost theory of injury in fact;

[2] state had standing to bring pre-enforcement challenge to provision due to future injury from enforcement; and

[3] state had standing based on cognizable sovereign injuries.

Reversed and remanded.

R. Nelson, Circuit Judge, filed concurring opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (23)

[1] **United States** State and local governments and agencies

Congress has the power pursuant to the Spending Clause to pass legislation authorizing federal grants to the states that come with strings attached. U.S. Const. art. 1, § 8, cl. 1.

[2] **Constitutional Law** Advisory Opinions
Declaratory Judgment Advisory opinions
Federal Courts Nature of dispute; concreteness

Because Article III empowers the Court of Appeals only to adjudicate live cases or controversies, the court will not wade into disputes that would require it to issue advisory opinions or declare rights in hypothetical cases. U.S. Const. art. 3, § 2, cl. 1.

[3] **Federal Civil Procedure** In general; injury or interest

An injury in fact, as required for Article III standing, is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** In general; injury or interest

A concrete injury, as required for Article III standing, is one that actually exists, meaning that it is real, and not abstract. U.S. Const. art. 3, § 2, cl. 1.

[5] **Federal Courts** Standing

Court of Appeals gives de novo review to issues of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[6] **Declaratory Judgment** State or state officers

United States Persons entitled to seek review or assert arguments; parties; standing

State of Arizona lacked injury in fact based on regulatory burden imposed by reporting requirements of Treasury Department's interim final rule (IFR), explaining implementation of American Rescue Plan Act (ARPA) and its conditions for obtaining federal funds, as would be required for Arizona to establish Article III standing to seek declaratory judgment that ARPA's offset provision violated Spending Clause and Tenth Amendment by prohibiting states from using funds intended to address economic harms from COVID-19 pandemic to offset reduction in net tax revenue, since there was no required regulatory compliance scheme at time Arizona filed its complaint, as Treasury's IFR was promulgated after Arizona filed complaint. U.S. Const. art. 1, § 8, cl. 1; U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 10; 42 U.S.C.A. § 802(c)(2)(A); 31 C.F.R. § 35.10.

[7] **Federal Civil Procedure** In general; injury or interest

Article III standing is measured at the time of the complaint. U.S. Const. art. 3, § 2, cl. 1.

[8] **Federal Civil Procedure** In general; injury or interest

Three factors must exist for a plaintiff to have Article III standing to bring a pre-enforcement challenge to a law: (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) but proscribed by a statute, and (3) there must be a credible threat of prosecution under the statute. U.S. Const. art. 3, § 2, cl. 1.

[9] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Pleading

Determining whether plaintiff has Article III standing in no way depends on the merits of plaintiff's claim, and all of plaintiff's material allegations in the complaint must be taken as true and construed in favor of plaintiff. U.S. Const. art. 3, § 2, cl. 1.

[10] **United States** Persons entitled to seek review or assert arguments; parties; standing

Arizona suffered injury in fact sufficient for Article III standing to bring pre-enforcement challenge to American Rescue Plan Act's (ARPA) offset provision that allegedly violated Spending Clause and Tenth Amendment by prohibiting states from using funds intended to address economic harms from COVID-19 pandemic to offset reduction in net tax revenue; Arizona alleged intention to engage in course of conduct arguably affected with constitutional interest due to allegedly unconstitutionally ambiguous and coercive provision, Arizona's intended future conduct was proscribed by ARPA as Arizona had taken all steps to violate offset provision, and Arizona alleged credible threat of prosecution under provision that would force state to repay federal funds used to offset its $1.9 billion tax cut. U.S. Const. art. 1, § 8, cl. 1; U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 10; 42 U.S.C.A. § 802(c)(2)(A); 31 C.F.R. § 35.10.

[11] **Federal Civil Procedure** In general; injury or interest

Plaintiff need not admit to violating a law in order to have Article III standing to challenge it. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

In evaluating whether a claimed threat of enforcement of a challenged law is genuine enough to confer Article III standing, Court of Appeals considers: (1) whether plaintiffs have articulated a concrete plan to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** In general; injury or interest

In evaluating whether a claimed threat of enforcement of a challenged statute is sufficiently genuine to confer Article III standing, where the challenged statute is new, the history of past enforcement carries little, if any, weight. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** In general; injury or interest

In evaluating whether a claimed threat of enforcement of a challenged law is sufficiently genuine to confer Article III standing, a concrete plan to violate the law need not be cast in stone but must be more than a hypothetical intent. U.S. Const. art. 3, § 2, cl. 1.

[15] **States** Status under Constitution of United States, and relations to United States in general

In the dual sovereign system, the State of Arizona enjoys special solicitude in the Article III standing analysis. U.S. Const. art. 3, § 2, cl. 1.

[16] **United States** State and local governments and agencies

Congress's legislation enacted pursuant to the Spending Clause is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. U.S. Const. art. 1, § 8, cl. 1.

[17] **United States** State and local governments and agencies

The legitimacy of Congress' power to legislate under the Spending Clause rests on whether a state voluntarily and knowingly accepts the terms of the contract; there can be no knowing acceptance if a state is unaware of the conditions of receiving federal funds or is unable to ascertain what is expected of the state. U.S. Const. art. 1, § 8, cl. 1.

[18] **United States** State and local governments and agencies

Congress's authority under the Spending Clause to attach conditions upon grants of federal funding is limited by the following requirements: (1) spending must be in pursuit of the general welfare, a broad and deferential term, (2) if Congress desires to condition the states' receipt of federal funds, it must do so unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation, (3) any conditions should relate to the federal interest implicated by the spending, and (4) the conditions must not violate other constitutional provisions. U.S. Const. art. 1, § 8, cl. 1.

[19] **United States** State and local governments and agencies

In some circumstances the financial inducement offered to the states by Congress, under the Spending Clause, might be so coercive as to pass the point at which pressure turns into compulsion. U.S. Const. art. 1, § 8, cl. 1.

[20] **United States** Persons entitled to seek review or assert arguments; parties; standing

State of Arizona suffered injury in fact from sufficiently concrete and particularized harm to its ability to exercise its sovereign rights, due to allegedly unconstitutionally ambiguous and coercive offset provision of American Rescue Plan Act (ARPA), prohibiting states from using federal funds intended to address economic harms from COVID-19 pandemic to offset reduction in net tax revenue, as required for Arizona's standing, under Article III, to pursue claims that offset provision violated Spending Clause and Tenth Amendment; Arizona would face serious consequences from ambiguous and coercive offset provision by losing control over its taxing policies and being held to funding offer that it allegedly did not understand. U.S. Const. art. 1, § 8, cl. 1; U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 10; 42 U.S.C.A. § 802(c)(2)(A); 31 C.F.R. § 35.10.

[21] Constitutional Law Political Questions

Federal courts are without jurisdiction to adjudicate abstract questions of political power, of sovereignty.

[22] Federal Civil Procedure In general; injury or interest

In evaluating whether an injury is sufficiently concrete and particularized to satisfy Article III standing, intangible harms can be concrete. U.S. Const. art. 3, § 2, cl. 1.

[23] Federal Civil Procedure In general; injury or interest

A district court should be cautious not to confuse perceived weakness on the merits with absence of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

Appeal from the United States District Court for the District of Arizona, Diane J. Humetewa, District Judge, Presiding, D.C. No. 2:21-cv-00514-DJH

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Before: Ronald M. Gould, Mark J. Bennett, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Gould;

Concurrence by Judge R. Nelson

OPINION

GOULD, Circuit Judge:

[1] It is well established that Congress has the power pursuant to the Spending Clause to pass legislation authorizing federal grants to the States that come with strings attached. For the most part, cases challenging Spending Clause legislation come to us arising from a specific dispute between the federal government and the recipient of federal funds. Usually, the federal government will claim that the recipient violated a condition that Congress placed on the federal grant and demand repayment. The recipient, in turn, will claim that the condition on the funds violates the limits of the Spending Clause, as enumerated in *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

This appeal, however, requires us to decide whether a State has standing to challenge the constitutionality of Spending Clause legislation before a specific and concrete dispute arises between grantor and grantee. We hold that Arizona has standing to challenge the American Rescue Plan Act, 42 U.S.C. § 802(c)(2)(A), ("ARPA" or "the Act"), both because there is a realistic danger of ARPA's enforcement, and because there is a justiciable challenge to the sovereignty of the State, which alleges infringement on its authority to set tax policy and its interest in being free from coercion impacting its tax policy.

BACKGROUND

Congress passed the American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4, in March 2021 to help state, local, and tribal governments mitigate the ongoing effects of the COVID-19 pandemic. ARPA provides nearly $200 billion in new federal grants to States. 42 U.S.C. § 802(b)(3)(A). Arizona accepted ARPA funds and expects to receive $4.7 billion in total aid from the Act, equivalent to about a third of Arizona's total budget for the 2022 fiscal year.

***3** Like most federal funding, ARPA funds come with conditions attached. The Act delineates permissible uses for its funds:

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers ... or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency ...; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1). In addition to specifying permissible uses for the funds, ARPA also stipulates impermissible uses. First, no State or territory may use ARPA funds "for deposit into any pension fund." *Id.* § 802(c)(2)(B). Second, the statute contains a provision—challenged in this appeal—prohibiting a State from using ARPA funds to subsidize a tax cut or otherwise offset a reduction in state net tax revenue. More specifically, this condition (hereinafter the "Offset Provision") provides:

> A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by

> providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

Id. § 802(c)(2)(A). If a State wants to accept federal money under ARPA, it must certify to the Treasury Department that it will use the funds "in compliance with" these conditions. *Id.* § 802(d)(1). ARPA provides that if a State violates the Offset Provision, it must repay the Treasury the lesser value of the amount of funds used in violation of the condition or the total amount of funds received under the Act. *Id.* § 802(e). ARPA also authorizes the Secretary of the Treasury to "issue such regulations as may be necessary or appropriate to carry out this section." *Id.* § 802(f). It is this Offset Provision which is the subject of the State's challenge.

The Treasury Department issued an Interim Final Rule ("IFR") in May 2021 explaining how it would implement ARPA and its conditions, including the Offset Provision. *See* *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) (codified at 31 C.F.R. § 35.1 et seq.). Specifically, the IFR provides that a State will

> be considered to have used [ARPA funds] to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the [ARPA funds] to offset the reduction in net tax revenue.

***4** 86 Fed. Reg. at 26,807. Recognizing that "money is fungible," the IFR states that even if ARPA funds "are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for" state funds that would "otherwise have been needed to cover" the reduction. *Id.* at 26,807.

To identify direct or indirect offsets, the IFR provides state governments with a four-step framework. First, using the State's "existing approach for measuring the effects of fiscal policies," a State must "identify and value" any actions that it predicts will reduce tax revenue in a given reporting year. *Id.* at 26,809. Second, the State must "calculate the total value of all covered changes" to determine if there was a reduction in net tax revenue. *Id.* If the reduction is below a *de minimis* level—1 percent of the reporting year's baseline—the Offset Provision is not implicated. *Id.* Third, if a State's annual tax revenue exceeds the amount received for fiscal year ending in 2019 adjusted for inflation, it is in a "safe harbor" and does not violate the Offset Provision. *Id.* If, however, there has been more than a *de minimis* reduction in net tax revenue from a change in state law, the fourth step is for the State to "identify any sources of funds" that have been used to offset the reduction. *Id.* at 26,809. Macroeconomic growth, increases in revenue, and spending cuts in areas where the State has not spent ARPA funds can all be used to offset reductions in net tax revenue without violating the Offset Provision. *See id.* at 26,809. A State would be required only to repay any amount of federal funds from ARPA that was used to offset a reduction. *Id.* The IFR also outlines a detailed "Recoupment Process" that allows states to submit a request for reconsideration if the Treasury Department determines they violated the Offset Provision. *Id.* at 26,811–12.

PROCEDURAL HISTORY

Arizona sued the federal defendants in March 2021, soon after President Biden signed the Act into law, alleging that ARPA violates the Spending Clause and the Tenth Amendment. Specifically, Arizona alleges that ARPA's Offset Provision is unconstitutionally ambiguous under the Spending Clause because the statute does not specify what it means to "indirectly offset a reduction in the [State's] net tax revenue." Arizona contends that the Offset Provision could be broadly interpreted as a "blanket prohibition forbidding States from cutting taxes in any manner whatsoever." Second, the State contends that ARPA violates the Spending Clause by being unduly coercive and unconstitutionally commandeering its sovereign power to set its own tax policy in violation of the Tenth Amendment. In essence, Arizona contends that it was coerced into accepting the Offset Provision because of the size of the funds offered under ARPA and the fraught financial situation brought on by the pandemic.

Arizona sought a preliminary injunction enjoining the federal defendants from recouping funds or otherwise enforcing the Offset Provision, as well as declaratory relief that the Offset Provision violates the Constitution. The district court dismissed the case for lack of subject matter jurisdiction, finding that Arizona did not demonstrate a cognizable injury in fact to establish standing.

***5** The district court rejected all five of Arizona's arguments for standing. First, Arizona argued that it was injured by the Offset Provision's ambiguity, which prevented it from understanding the limits placed on the federal funds. Reasoning that Congress met its duty under the Spending Clause by making the condition "explicitly obvious," the district court rejected this theory. Second, Arizona argued that the Offset Provision's ambiguity put Arizona policymakers in an unsettling position of uncertainty because they do not know how to avoid violating ARPA's conditions. The district court found this argument unpersuasive because Arizona policymakers passed a $1.9 billion tax cut, and Arizona did not offer evidence that their decision was at all affected by ARPA's conditions. Third, Arizona claimed it was injured by the compliance costs imposed by the Treasury Department's IFR. The district court rejected this theory because in ARPA, Congress vested the Secretary with the authority to order States to produce information, and the district court found these compliance costs to be "part and parcel" of ARPA. Fourth, Arizona relied upon caselaw that recognizes standing for pre-enforcement challenges where there is a realistic danger of enforcement, arguing that here there is a realistic threat that the Offset Provision will be enforced. The district court disagreed, concluding that Arizona did not demonstrate a substantial likelihood that the condition would actually be enforced against it in the way Arizona fears. Finally, Arizona argued that it suffered an injury by being coerced into accepting the allegedly unconstitutional condition because of ARPA's size and the pandemic-driven need for the ARPA funds. The district court rejected this final theory for standing, reasoning that Arizona would not lose any existing federal funding if it violated the Offset Provision and that Arizona did not allege facts showing it has undergone financial strain.

Arizona's suit is one of six nearly identical challenges to ARPA brought by various states, and in those cases the district courts have reached different conclusions on standing. *Compare* *Ohio v. Yellen*, 539 F. Supp. 3d 802, 813–17 (S.D. Ohio 2021), *West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863, at *6–7 (N.D. Ala. July 14, 2021), *Kentucky v. Yellen*, ––– F.Supp.3d ––––, ––––, 2021 WL 4394249, at *3 (E.D. Ky. Sept. 24, 2021), *with* *Arizona v. Yellen*, 550 F.Supp.3d 791, 794–99 (D. Ariz. 2021), *Missouri v. Yellen*, 538 F. Supp. 3d 906, 912–13 (E.D. Mo. 2021).

[2] **[3]** **[4]** Because Article III empowers this Court only to adjudicate "live cases or controversies," we will not wade into disputes that would require us to "issue advisory opinions" or "declare rights in hypothetical cases." *Clark v. City of Seattle*, 899 F.3d 802, 808 (9th Cir. 2018) (quotation marks omitted). Only the injury-in-fact requirement for standing is contested in this case. An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks omitted). A "concrete" injury is one that "actually exist[s]," meaning that it is "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (quotation marks omitted).

[5] Arizona's arguments for standing fall under three primary theories. First, Arizona contends that it has standing because of the compliance costs imposed by the Treasury Department's IFR. Second, Arizona relies upon caselaw permitting pre-enforcement challenges to statutes to support its argument that the future injury Arizona will suffer, if the Offset Provision is enforced against it, is sufficient to confer standing. Third, Arizona contends that the Offset Provision inflicts cognizable sovereign injuries upon the States by being unconstitutionally ambiguous and coercive. We consider each theory in turn, giving *de novo* review to issues of standing. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 652 (9th Cir. 2021).

DISCUSSION

[6] **[7]** We first address Arizona's compliance cost theory, which contends that the reporting requirements in the Treasury's IFR establish an injury in fact by imposing a regulatory burden on the States. This theory fails for the simple reason that standing is measured at the time of the complaint. *Lujan*, 504 U.S. at 569 n.4, 112 S.Ct. 2130. When the complaint was filed, there was not a required compliance scheme. The compliance costs Arizona complains of come from the IFR, which was promulgated after Arizona filed its complaint. We agree with the district court that Arizona's compliance cost theory should be rejected.

I.

We next consider whether there is a "realistic danger of enforcement" giving rise to a cognizable injury for standing. Because Arizona accepted ARPA funds and then passed a tax cut, Arizona believes that there is a realistic danger that it will be required to return some of the ARPA funds it has accepted, which would amount to a concrete injury in fact. The district court rejected this theory, concluding that Arizona did not demonstrate a substantial likelihood that the condition would actually be enforced against it. Important to the district court's analysis was that Arizona had not claimed to have "directly or indirectly" used ARPA funds to offset its tax cut, nor had Arizona claimed the tax cut it passed would result in a net tax revenue reduction triggering the Offset Provision. We have previously held a "likely 'loss of funds promised under federal law' " satisfied Article III standing. *City and Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (quoting *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015)). We must here decide whether the potential future recoupment of federal funds under ARPA is similarly sufficient in this case to confer standing.

***6** **[8]** Three factors must exist for a plaintiff to have standing to bring a pre-enforcement challenge to a law, as explained by the Supreme Court in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). The plaintiff must allege (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) "but proscribed by a statute," and (3) there must be "a credible threat of prosecution" under the statute. *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

[9] **[10]** The first *Driehaus* factor requires an intent to do an act "arguably affected" by a constitutional interest. Determining whether Arizona meets this factor to a degree resembles an invitation to reach the merits of Arizona's constitutional claims. But the Supreme Court has cautioned that standing "in no way depends on the merits" and has instructed us to take as true all material allegations in the complaint and construe the complaint in favor of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Viewing the Offset Provision through Arizona's eyes, we must accept—for standing purposes—its allegations that the condition is unconstitutionally ambiguous and coercive. We conclude that the first *Driehaus* factor is met.

In evaluating the second *Driehaus* factor, we must determine whether Arizona's intended future conduct is proscribed by ARPA. To do so, we first examine what conduct is proscribed by the Offset Provision to evaluate whether Arizona's desired course of conduct falls under the provision's sweep. The Offset Provision is triggered by specific events. A State must first accept funds under ARPA and certify that it will meet ARPA's conditions. Then, it must make a change to state law that results in a "reduction in net tax revenue." 42 U.S.C 802(c)(2)(A). Finally, to violate the Offset Provision, the State must then use federal ARPA funds to "directly or indirectly" offset the reduction in net tax revenue. *Id.* All these steps must be taken to trigger and violate the Offset Provision.

[11] Here, Arizona has accepted ARPA funds, certified that it will meet ARPA's conditions, and passed a $1.9 billion tax cut. The district court rejected Arizona's theory of standing under *Driehaus* because Arizona had not claimed that its tax cut will result in a reduction in its "net tax revenue," nor claimed to have "directly or indirectly" used ARPA funds to offset the tax cut. On this point we diverge with the district court because its reasoning approximates requiring Arizona to admit to violating a law in order to have standing to challenge it, a prerequisite the Supreme Court has repeatedly rejected. *See* *Driehaus*, 573 U.S. at 163, 134 S.Ct. 2334 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); *Free Enter. Fund. v. Pub.Co. Acct. Oversight Bd.*, 561 U.S. 477, 490, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). Presumably, a $1.9 billion tax cut will lead to a reduction in Arizona's net tax revenue; it is hard for us to imagine how a tax cut of this magnitude would not. This means that Arizona has taken all requisite steps to violate the Offset Provision short of using ARPA funds "directly or indirectly" to offset a net revenue reduction from its tax cut. Unlike the district court, we do not require Arizona to explicitly confess to intended future conduct that is violative of the law it seeks to challenge.

***7** The concurrence suggests that Arizona "has alleged only an intention to pass a tax cut." But Arizona has done more than announce an intention to pass a tax cut; it has passed one. The only thing Arizona has not yet done is allege an intention to use ARPA funds "directly or indirectly" to offset the resulting net revenue reduction from its tax cut. Because doing so amounts to a confession that Arizona will, in fact, violate the law, and the Supreme Court has instructed that plaintiffs need not do that, we disagree with the concurrence on this point.

[12] **[13]** The third *Driehaus* factor, concerning whether there is a credible threat of enforcement, has dispositive weight in this case. We have developed a framework to evaluate whether a claimed threat of enforcement is genuine enough to confer standing. We consider (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (citing *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir. 1996)). Where the challenged statute is new, as here, the history of past enforcement carries little, if any weight. *Cal. Trucking*, 996 F.3d at 652.

[14] A concrete plan need not be "cast in stone" but must be "more than a hypothetical intent to violate the law." *Thomas*, 220 F.3d at 1139. The $1.9 billion tax cut Arizona passed is a sufficiently concrete plan in our view. As described above, we do not require Arizona to admit to violating the law or having a desire to do so.

That the federal government has not disavowed enforcement of the Offset Provision is evidence of an intent to enforce it. *Cal. Trucking*, 996 F.3d at 653. And in this case, there is affirmative conduct by the Treasury Department evincing an intent to enforce the Offset Provision. In response to an inquiry from a group of Attorneys General, the Secretary of the Treasury wrote a letter confirming that the Offset Provision will be enforced (although, the Secretary said, not in the way feared by the States). In *California Trucking*, we recognized a sufficient intent to enforce a law where a state had "sent letters to businesses notifying them" of its interpretation of a new requirement under state law. 996 F.3d at 653. Like the letters in *California Trucking*, we view the Secretary's letter as showing an intent to enforce the Offset Provision, albeit in a cooperative fashion inviting "ongoing dialogue" between the Treasury and the States. In addition to the Secretary's letter, the Treasury's IFR outlines the detailed and specific process that will be used to recoup funds from States that violate the Offset Provision, giving more evidence of the government's intent to enforce the challenged provision. 31 C.F.R. § 35.10. The concurrence suggests that this factor is not met because the Treasury has disavowed enforcing the law in the way Arizona fears. But the Secretary's letter still affirms the Treasury's intent to enforce the Offset Provision against the States, even if it clarifies that nothing in ARPA "prevents States from enacting a broad variety of tax cuts." The Secretary's letter and the recoupment process outlined in the IFR show the federal government's intent to enforce the Offset Provision.

Arizona has done everything short of confessing a desire to use ARPA funds "directly or indirectly" to offset the tax cut it passed. We disagree with the district court's rejection of this theory of standing and hold that Arizona has alleged a sufficiently credible threat of enforcement to bring a pre-enforcement challenge to ARPA's Offset Provision. There is a realistic danger that Arizona, after accepting federal funds under ARPA and passing a billion dollar tax cut, will be forced to repay federal funds for directly or indirectly using those funds to offset its tax cut, in violation of the Offset Provision. This feared future injury is sufficiently realistic and credible to confer standing under *Driehaus* and our caselaw describing its three-factor test.

II.

***8** **[15]** We examine Arizona's sovereign injury theory of standing in the alternative. In our dual sovereign system, Arizona enjoys "special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). This special standing has relevance here, where Arizona alleges that ARPA infringes upon its sovereign rights. Specifically, Arizona argues that the Offset Provision's ambiguity prevents Arizona from being able to exercise its choice voluntarily to accept ARPA funds and understand the consequences of agreeing to ARPA's conditions. Arizona also contends that by coercing the States into accepting the Offset Provision, ARPA threatens Arizona's sovereign prerogative to "tax its residents as it sees fit."

If we were reviewing these issues on a record replete with evidence submitted and a summary judgment ruling, and looking only for an issue of fact requiring trial, we might be somewhat skeptical of the degree to which Arizona is being coerced in derogation of its sovereign rights. But we do not review this today on appeal of a summary judgment ruling. We are reviewing only an order on a motion to dismiss which dismissed the complaint for lack of subject matter jurisdiction. As we have noted above, in this context we must take all allegations of the complaint as true. *See supra* Part I (citing *Warth*, 422 U.S. at 500, 95 S.Ct. 2197). We see no reason under normal juristic standards for us to dispute, deny, or discredit Arizona's contention at this stage that ARPA and its Offset Provision specifically have a coercive impact on the State.

[16] **[17]** We examine Arizona's sovereign injury theory for standing through the lens of Spending Clause legislation being "in the nature of a contract." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). In *Pennhurst*, a class of residents at a Pennsylvania institution for people with disabilities challenged the conditions of their confinement, seeking closure of the institution. *Id.* at 5–6, 101 S.Ct. 1531. The plaintiffs relied upon a provision in a federal grant program calling for the "least restrictive" treatment setting to argue that this provision created a binding condition upon the States in how they used federal funds to treat people with disabilities. *Id.* at 7, 101 S.Ct. 1531. Rejecting that this provision created a retroactive funding condition upon the States, the Court likened federal grants to contracts:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Id. at 17, 101 S.Ct. 1531 (internal citations omitted).

[18] **[19]** A few years later in *South Dakota v. Dole*, the Court articulated the outer bounds of Congress's authority under the Spending Clause to attach conditions upon grants of federal funding. 483 U.S. 203, 207–08, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). One limit is that spending must be in pursuit of the "general welfare," a broad and deferential term. *Id.* at 207, 107 S.Ct. 2793. A second limit is that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' " *Id.* (alterations in original) (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531). Third, any conditions should relate to the federal interest implicated by the spending. *Id.* Fourth, conditions must not violate other constitutional provisions. *Id.* at 208, 107 S.Ct. 2793. The Court further noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.* at 211, 107 S.Ct. 2793 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)).

***9** **[20]** **[21]** **[22]** Arizona seizes upon several of these limitations to bring a facial challenge—or so we interpret—to ARPA's Offset Provision. [1] To Arizona, the inherent limitations on Congress's power to "lay and collect Taxes" and "provide for the ... general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, create constitutionally-imposed and enforceable criteria that "contractual" funding offers from the federal government must meet. When Congress does not meet one of these criteria, and say, extends a federal grant with ambiguous or coercive terms to the States, Arizona contends that this offer offends state sovereignty and gives rise to a cognizable injury in fact. We agree. We are mindful of the longstanding principle that federal courts "are without jurisdiction" to adjudicate "abstract questions of political power, of sovereignty." *Massachusetts v. Mellon*, 262 U.S. 447, 484–85, 43 S.Ct. 597, 67 L.Ed. 1078

(1923). But intangible harms can be concrete, *Spokeo*, 578 U.S. at 340, 136 S.Ct. 1540, and here, Arizona has alleged sufficiently concrete and particularized harms to its ability to exercise its sovereign prerogatives, intangible as those prerogatives may be. Just as a contract can be challenged under state law for containing ambiguous terms or being a product of duress, so too do we think that the quasi-contractual funding offer at issue here can be challenged by Arizona at the outset for offering conditions that are unconstitutionally ambiguous or coercive. States have standing when an allegedly unconstitutional funding offer is made to them, and they do not need to first violate a condition of an allegedly unconstitutional contract to have standing to challenge it.

[23] In rejecting Arizona's theory of injury based upon having a right to an unambiguous funding offer from the federal government, the district court concluded that the Spending Clause requires Congress to be unambiguous about the *existence* of a condition, not what the condition *requires*. Whether or not the district court is correct that Congress "fulfilled its duty" in making the existence of the Offset Provision known, this analysis examines whether the condition is ambiguous, and not whether being offered ambiguous terms is a cognizable injury. Similarly, in rejecting Arizona's theory of injury based upon being coerced into accepting the Offset Provision, the district court pointed to Arizona's delay in accepting funds and the lack of evidence of any financial strain to conclude there was not standing. This analysis, however, evaluates the merits of whether ARPA is coercive instead of evaluating whether being coerced is a cognizable injury. A district court should be cautious not to confuse perceived "weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)).

At this early juncture, we must take Arizona's allegations to be true. *See* *Warth*, 422 U.S. at 499–502, 95 S.Ct. 2197. The federal government and the district court discredit Arizona's interpretation of the Offset Provision, but differences in what the Offset Provision means and how it may be enforced go to the merits of Arizona's claims, and not to whether a court has jurisdiction to hear these claims. *See* *Cath. League for Religious & C.R. v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc); *City and Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018). In *City and County of San Francisco v. Trump*, the parties "disputed the scope of the challenged measure," but we held it was enough for standing purposes that if the plaintiff's interpretation of the statute was correct, it would "suffer serious consequences." 897 F.3d at 1236. Here, Arizona has demonstrated that if the Offset Provision is as ambiguous and coercive as it alleges, it will face serious consequences in losing control over its taxing policies and being held to a funding offer that it does not understand. Whether there is merit to these feared consequences is a separate matter, but for today, we hold that the district court erred in dismissing Arizona's claim for lack of subject matter jurisdiction.

III.

Concluding that Arizona has standing to bring its challenge to ARPA, both on its theory of realistic danger of enforcement, and alternatively, on its theory of injury to sovereign rights, we decline to turn to the merits of Arizona's constitutional claims. We think it is a better procedure to have the district court make a ruling on the merits in the first instance, as the district court's views can only help our court to resolve the difficult issues presented. [2] We reverse the district court's ruling on standing and conclude that the district court has subject matter jurisdiction to hear this case. We remand for the district court to consider the merits of Arizona's Spending Clause and Tenth Amendment claims.

CONCLUSION

***10** Because standing "in no way depends on the merits," *Warth*, 422 U.S. at 500, 95 S.Ct. 2197, our decision today should not be construed as commenting in any way on the merits of Arizona's case. We limit our decision to the narrow issue of standing and hold that the district court has subject matter jurisdiction to hear this challenge to ARPA.

REVERSED AND REMANDED.

R. NELSON, Circuit Judge, concurring:

I agree that Arizona has standing to challenge the Offset Provision on its theory of sovereign injury and concur in Section II of the majority's opinion.

I disagree, however, with the majority's conclusion that Arizona has alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *See* *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Arizona never alleged that it has taken (or would take, if not for fear of enforcement) action proscribed by the Offset Provision. The lack of such an allegation dooms Arizona's argument for standing on this basis.

Article III of the Constitution limits our jurisdiction to "Cases" and "Controversies." U.S. Const., art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.' " *Driehaus*, 573 U.S. at 157, 134 S.Ct. 2334 (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' " *Id.* at 157–58, 134 S.Ct. 2334 (alteration in original) (quoting *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130). Generally, the injury-in-fact requirement is satisfied by an injury that has already occurred. But we also recognize that threatened enforcement of a law can create an injury in fact. *Id.* at 158, 134 S.Ct. 2334. In those circumstances, we may consider pre-enforcement challenges "under circumstances that render the threatened enforcement sufficiently imminent." *Id.* at 159, 134 S.Ct. 2334. A mere possibility of future enforcement will not do; the likelihood of future enforcement must be "substantial." *California v. Texas*, ––– U.S. ––––, 141 S. Ct. 2104, 2114, 210 L.Ed.2d 230 (2021) (quoting *Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334); *see also* *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("The party who invokes the power [of Article III courts] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement ....").

Likelihood of enforcement is substantial when a plaintiff alleges (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) "but proscribed by a statute," and (3) "there exists a credible threat of prosecution thereunder." *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334 (quoting *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301). In *Driehaus*, for example, two advocacy organizations challenged an Ohio statute prohibiting "false statements" in political campaigns. *Id.* at 151, 134 S.Ct. 2334. The law allowed any person with knowledge of a purported violation to file a complaint with the State. *Id.* at 164, 134 S.Ct. 2334. One organization had already been subject to enforcement proceedings, initiated after a candidate filed a complaint about the organization's attempts to display a billboard stating that the candidate "voted FOR taxpayer-funded abortion." *Id.* at 154, 134 S.Ct. 2334. After losing the election, the candidate moved to withdraw his complaint. The plaintiff organizations challenged the state law, alleging that they "intend[ed] to engage in substantially similar activity in the future" and "face[d] the prospect of [their] speech and associational rights again being chilled" by future complaints. *Id.* at 155, 134 S.Ct. 2334 (second alteration in original).

***11** The Supreme Court held that the organizations had standing to bring a pre-enforcement action. The organizations alleged "specific statements they intend[ed] to make in future election cycles" that would be prohibited. *Id.* at 161, 134 S.Ct. 2334. The text of the statute covered the plaintiffs' intended speech ("concerning the voting record of a candidate," *id.* at 152, 134 S.Ct. 2334), and the statute had been enforced against one of the plaintiffs, *id.* at 162, 134 S.Ct. 2334. The Court did not require plaintiffs "to confess that [they] will in fact violate th[e] law" and held that the organizations had established that their intended future conduct would be proscribed by the statute because it would subject them to future enforcement proceedings. *Id.* at 163, 134 S.Ct. 2334.

The Court held that the final requirement—a substantial threat of future enforcement—was satisfied for three reasons. First, there was a history of past enforcement because one organization had been the subject of prior enforcement proceedings. *Id.* at 164, 134 S.Ct. 2334. Second, the credibility of the threat was bolstered by the fact that any person could file a complaint. *Id.* Because "the universe of potential complainants [was] not restricted to state officials who [were] constrained by explicit guidelines or ethical obligations," there was a substantial risk of complaints from a multitude of parties, including political opponents. *Id.* Finally, the Court noted that enforcement proceedings were frequent and the commission "ha[d] not disavowed enforcement if petitioners make similar statements in the future." *Id.* at 165, 134 S.Ct. 2334.

We have followed a similar approach in this Circuit. In *Real v. City of Long Beach*, we held that a plaintiff had standing to challenge a city's zoning ordinance when he alleged an intent to open a tattoo shop without the required permit. 852 F.3d 929, 934–35 (9th Cir. 2017). Like the advocacy organizations in *Driehaus*, the plaintiff in *Real* had alleged a specific intent to engage in conduct proscribed by the challenged ordinance. *Id.* And, as in *Driehaus*, enforcement proceedings had happened in the past (albeit against non-plaintiffs). *Id.* The City vigorously enforced its zoning ordinances and told the plaintiff that he would be subject to enforcement proceedings. *Id.* The plaintiff had standing to challenge the ordinance because it appeared "likely that the City would take action against [him] if he opened a tattoo shop." *Id.* at 935.

More recently, we held that a trucking trade association had standing to challenge a new California law that codified a test for classifying workers as either employees or independent contractors. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 649 (9th Cir. 2021). The trade association established a "concrete plan" to violate the law by alleging that its members actively maintained policies that were "in conflict with" California law. *Id.* at 653. The association also established a substantial likelihood of enforcement proceedings because the state had refused "to disavow enforcement" against association members and declared its "intention to enforce" the new law. *Id.* Because the law was relatively new, we noted that the history of enforcement carried "little weight." *Id.* Even so, the State had done more than declare its intentions; it had sent letters to businesses notifying them that they were subject to the law and had commenced several prosecutions against businesses for violating the law. *Id.*

On the other hand, we found standing lacking in cases like *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397 (9th Cir. 2019). In *Safer Chemicals*, we held that plaintiffs challenging agency rules do not have standing when "it is not even clear what [agency] procedures will be, let alone whether [the agency] will employ them in a way that injures" the plaintiffs. *Id.* at 415. Ambiguity in the challenged provisions hindered our ability to "predict whether [plaintiffs] will be harmed in the way they claim, or whether the [government] will in fact apply the[ ] rules as [plaintiffs] wish." *Id.* We explained that plaintiffs might have standing in the future, if the agency enforced the rule in the way feared by plaintiffs. *Id.* But we declined to make assumptions about how the government would enforce an ambiguous provision to create standing based on the plaintiffs' allegations. *Id.*

***12** There are striking differences between the allegations in this case and the allegations in cases finding pre-enforcement standing. The Offset Provision prohibits states from using American Rescue Plan Act (ARPA) funds "to either directly or indirectly offset a reduction in the net tax revenue." 42 U.S.C. § 802(c)(2)(A). Arizona alleged only an intention to pass a tax cut (which it has now passed). It did not allege a reduction in net tax revenue, nor did it make any allegation about how a potential post-tax-cut budget would be structured. Unlike the large number of potential complainants in *Driehaus*, the universe of potential complainants in this case is limited to "officials ... constrained by explicit guidelines or ethical obligations." *See* 573 U.S. at 164, 134 S.Ct. 2334. And unlike the frequent past proceedings in *Driehaus* and *Real*, Treasury officials have never initiated enforcement proceedings under the Offset Provision. Indeed, Treasury has explicitly disavowed any prohibition against states enacting tax cuts. *See Real*, 852 F.3d at 934–35; *cf. Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) ("[C]laims of future harm lack credibility when ... the enforcing authority has disavowed the applicability of the challenged law to the plaintiffs.").

Arizona's pleadings leave us to make a series of factual and legal leaps to establish (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) but proscribed by the Offset Provision, and (3) a credible threat of prosecution thereunder. *See Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334. Nowhere in its complaint does Arizona allege that it has (or plans to) directly or indirectly offset a reduction in net tax revenue. For Arizona to have standing under *Driehaus*, we must infer that the contemplated tax cut will not be offset by macroeconomic growth or cuts in spending not affected by ARPA. Then we must infer that Treasury will enforce the Offset Provision in a way that it has explicitly disavowed and never threatened. Inventing standing with such assumptions is inconsistent with precedent.

A tax cut, on its own, does not fall within the Offset Provision's ambit. Without more, we cannot infer both (1) a reduction in net tax revenue and (2) conduct that might count as an "offset." Had Arizona alleged an intent to offset a reduction in net tax revenue in some specific way, it may have separately established standing under its pre-enforcement theory. But as things stand, the specter of enforcement is too hypothetical to present a "Case" or "Controversy" for our review.

All Citations

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Footnotes

1 Whether Arizona's Spending Challenge is facial or as applied was not briefed by the parties, and we suggest that they brief this issue before the district court.

2 We also note that, after we heard argument in this case, the Treasury Department published a final rule implementing ARPA and the Offset Provision. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4,338 (Jan. 27, 2022). In considering the merits, the district court also will have the benefit of that final rule implementing ARPA.

EXHIBIT 2

142 S.Ct. 1638
Supreme Court of the United States.

FEDERAL ELECTION COMMISSION, Appellant
v.
Ted CRUZ for Senate, et al.

No. 21-12
|
Argued January 19, 2022
|
Decided May 16, 2022

Synopsis
Background: Senator and his campaign committee brought action against Federal Election Commission (FEC), alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, which placed $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment. A three-judge panel of the district court was convened pursuant to the BCRA. The United States District Court for the District of Columbia, Rao, Circuit Judge, 542 F.Supp.3d 1, denied FEC's motion to dismiss for lack of standing, granted summary judgment to plaintiffs as to the statute, and dismissed as moot the challenge to the regulation. On direct appeal, the Supreme Court postponed its consideration of its jurisdiction.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] injuries to Senator and committee were fairly traceable to challenged statute, as required for Article III standing, though Senator and committee purposely incurred their injuries;

[2] loan-repayment limitation burdened political speech, for First Amendment purposes; and

[3] prevention of quid pro quo corruption or its appearance did not justify the burden on political speech arising from loan-repayment limitation.

Affirmed.

Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Jurisdiction; Motion for Summary Judgment.

West Headnotes (25)

[1] **Federal Civil Procedure** In general; injury or interest
Federal Courts Case or Controversy Requirement
Article III limits federal courts to deciding “Cases” and “Controversies,” and among other things, that limitation requires a plaintiff to have standing. U.S. Const. art. 3, § 2, cl. 1.

[2] **Federal Civil Procedure** In general; injury or interest
Federal Civil Procedure Causation; redressability
The requisite elements of Article III standing are that a plaintiff must show: (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. U.S. Const. art. 3, § 2, cl. 1.

[3] **Constitutional Law** Elections
Present inability of Senator's campaign committee to repay final $10,000 of Senator's personal loans to his committee, for Senator's reelection campaign less than four years earlier, constituted an injury in fact to both Senator and committee, as element for Article III standing to bring action against Federal Election Commission (FEC) alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment; Senator suffered $10,000 pocketbook harm, and committee was prevented from discharging its obligation to repay its debt

to Senator, which might inhibit that form of financing in the future. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[4] **Constitutional Law** Elections

Injuries to Senator and his campaign committee were fairly traceable to challenged statute, as required for Article III standing to bring action against Federal Election Commission (FEC) alleging that provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened political speech in violation of First Amendment, though Senator and committee purposely incurred their injuries in order to establish the factual basis for challenging the statute; choice of Senator and committee to subject themselves to loan-repayment limitation, did not change the fact that they were subject to the limitation and would face genuine legal penalties if they did not comply. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[5] **Federal Civil Procedure** Causation; redressability

An injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, as required for Article III standing to challenge the enactment, even if the injury could be described in some sense as willingly incurred. U.S. Const. art. 3, § 2, cl. 1.

[6] **Federal Civil Procedure** In general; injury or interest

When determining whether a plaintiff has Article III standing, courts accept as valid the merits of the plaintiff's legal claims. U.S. Const. art. 3, § 2, cl. 1.

[7] **Constitutional Law** Elections

Even assuming that Senator and his campaign committee had not exhausted the challenged statute's $250,000 cap on use of post-election contributions to repay Senator's personal loans to committee, injuries to Senator and committee, from Federal Election Commission's (FEC) threatened enforcement of its regulation prohibiting use of pre-election and post-election contributions to repay candidate loans above $250,000 that were outstanding 20 days after the election, were fairly traceable to the operation of the statute itself, as required for Article III standing to challenge the statute as burdening political speech in violation of First Amendment. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[8] **Administrative Law and Procedure** Statutory basis and limitation

Administrative Law and Procedure Effect on agency

A federal agency literally has no power to act, including under its regulations, unless and until Congress authorizes it to do so by statute.

[9] **Administrative Law and Procedure** Operation and Effect

An agency's regulation cannot operate independently of the statute that authorized it.

[10] **Constitutional Law** Elections

Senator and his campaign committee satisfied redressability element for Article III standing to challenge, as burdening political speech in violation of First Amendment, provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation that placed $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees; if statute was declared invalid and unenforceable, then the regulation, prohibiting use of pre-election and post-election contributions to repay candidate loans to campaign committees above $250,000 that were outstanding 20 days after the election, would also be unenforceable, and injury from threatened enforcement of regulation could be redressed through remedy sought by Senator and committee, i.e., order enjoining government from taking any action to enforce loan-repayment limitation. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[11] **Federal Civil Procedure** In general; injury or interest

A plaintiff injured by one law does not thereby acquire Article III standing to challenge a different law. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

A litigant cannot, by virtue of his Article III standing to challenge one government action, challenge other governmental actions that did not injure him. U.S. Const. art. 3, § 2, cl. 1.

[13] **Constitutional Law** Political Rights and Discrimination

The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office. U.S. Const. Amend. 1.

[14] **Constitutional Law** Campaign finance in general

The First Amendment safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom to speak without legislative limit on behalf of his own candidacy. U.S. Const. Amend. 1.

[15] **Constitutional Law** Political Rights and Discrimination

First Amendment protection of conduct for campaigns for political office reflects the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. U.S. Const. Amend. 1.

[16] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of expenditures

Provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation, placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, burdened First Amendment rights of candidates and their campaigns to engage in core political speech, and thus, government was required to justify the loan-repayment limitation by showing a permissible interest; candidates often made such loans to jumpstart a fledgling campaign or to finish strong in a tight race, and limit on use of post-election contributions increased the risk that candidate loans over $250,000 would not be repaid in full, inhibiting candidates from making such loans in the first place. U.S. Const. Amend. 1; 52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[17] **Constitutional Law** Political speech, beliefs, or activity in general

Prevention of quid pro quo corruption or its appearance is a permissible ground under the First Amendment for restricting political speech. U.S. Const. Amend. 1.

[18] **Constitutional Law** Political speech, beliefs, or activity in general

First Amendment protection of political speech prohibits legislative attempts to tamper with the right of citizens to choose who shall govern them. U.S. Const. Amend. 1.

[19] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of contributions

Prevention of quid pro quo corruption or its appearance, which was a permissible ground under First Amendment for restricting political speech, did not justify the burden on political speech arising from provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees; such post-election contributions were otherwise regulated, in order to prevent corruption or its appearance, through $2,900 statutory cap on individual contributions to candidates for federal office and statutory requirement of public disclosure of nontrivial contributions, and government did not identify a single case of quid pro quo corruption in context of loan-repayment limitation. U.S. Const. Amend. 1; 52 U.S.C.A. §§ 30104(b)(3)(A), (c)(1), 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[20] **Constitutional Law** Campaign finance, contributions, and expenditures

Prophylaxis-upon-prophylaxis approaches to regulating campaign finance are a significant indicator, when a regulation is challenged under First Amendment as burdening political speech, that the regulation may not be necessary for the interest it seeks to protect. U.S. Const. Amend. 1.

[21] **Constitutional Law** Political speech, beliefs, or activity in general

When the government is defending a restriction on political speech as being necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured, by pointing to record evidence or legislative findings demonstrating the need to address a special problem. U.S. Const. Amend. 1.

[22] **Constitutional Law** Political speech, beliefs, or activity in general

Under First Amendment protection of political speech, the government may not seek to limit the appearance of mere influence on or access to candidates, because influence and access embody a central feature of democracy, i.e., constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. U.S. Const. Amend. 1.

[23] **Constitutional Law** Contributions

The line between quid pro quo corruption and donors' general influence over candidates may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment protection of political speech, and in drawing that line, the First Amendment requires courts to err on the side of protecting political speech rather than suppressing it. U.S. Const. Amend. 1.

[24] **Constitutional Law** Limitations on amounts

Election Law Limitations on amount of expenditures

Deference to Congress would be especially inappropriate, when considering whether anticorruption goals justified burden on political speech arising from provision of Bipartisan Campaign Reform Act (BCRA) and an implementing regulation placing $250,000 limit on use of post-election contributions to repay candidates for federal office for their personal loans to their campaign committees, where the legislative act might have been an effort to insulate legislators from effective electoral challenge. U.S. Const. Amend. 1;

52 U.S.C.A. §§ 30104(b)(3)(A), (c)(1), 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

[25] **Constitutional Law** Political speech, beliefs, or activity in general

It remains the Supreme Court's role to decide whether a particular legislative choice is an unconstitutional burden on political speech. U.S. Const. Amend. 1.

West Codenotes

Held Unconstitutional

52 U.S.C.A. § 30116(j); 11 C.F.R. § § 116.11(c)(1, 2).

***1641** *Syllabus* [*]

****1** During his 2018 Senate reelection campaign and consistent with federal law, see 11 C.F.R. § 110.10; 52 U.S.C. § 30101(9)(A)(i), appellee Ted Cruz loaned $260,000 to his campaign committee, Ted Cruz for Senate (Committee). To repay these and other campaign debts, campaigns may continue to receive contributions after election day. See 11 C.F.R. § 110.1(b)(3)(i). Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA) restricts the use of post-election contributions by limiting the amount that a candidate may be repaid from such funds to $250,000. 52 U.S.C. § 30116(j). Relevant here, the Federal Election Commission (FEC) has promulgated regulations establishing three rules to implement that limitation: First, a campaign may repay up to $250,000 in candidate loans using contributions made “at any time.” 11 C.F.R. § 116.12(a). Second, to the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs “within 20 days of the election.” § 116.11(c)(1). Third, when the 20-day post-election deadline expires, the campaign must treat any portion above $250,000 as a contribution to the campaign, precluding later repayment. § 116.11(c)(2).

The Committee began repaying Cruz's loans after the 20-day post-election window for repaying amounts over $250,000 had closed. It accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid. Cruz and the Committee filed this action in Federal District Court, alleging that Section 304 of BCRA violates the First Amendment and raising challenges to the FEC's implementing regulation, § 116.11. The District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification, and dismissed as moot their challenges to the regulation.

Held:

1. Appellees have standing to challenge the threatened enforcement of Section 304. Pp. 1646 – 1650.

(a) The Government recognizes that the Committee's present inability to repay the final $10,000 of Cruz's loans constitutes an injury in fact both to Cruz and his Committee. It maintains, however, that appellees lack Article III standing because these injuries are not traceable to the threatened enforcement of Section 304, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. First, the Government argues that appellees knowingly triggered the application of the loan-repayment limitation and thus their injuries are traceable to themselves, not the Government. This Court has never recognized an exception to Article III standing's traceability requirement for injuries that a party purposely incurs. Moreover, this Court has made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred. See *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 3 L.Ed.2d 222 (*per curiam*). Cases cited by the Government—*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264, and *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (*per curiam*)—do not alter that conclusion. In contrast to those cases, here the appellees' injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply. Finally, the Government's observation that it should not be blamed for appellees' injuries because the Committee had a legally available alternative —*i.e.,* repaying Cruz's loans in full with pre-election funds, within 20 days of the election—misses the point. Demanding that the Committee do so would require it to forgo the exercise of the First Amendment right the Court must assume it has when assessing standing—the right to repay its campaign debts in full, at any time. Pp. 1646 – 1648.

****2** (b) The Government next argues that although appellees would have standing to challenge the FEC's implementing regulation, § 116.11, they do not have standing to challenge Section 304 itself. The Government contends that the Committee used pre-election funds to repay the first $250,000, and thus Section 304's cap on using post-election funds to repay a candidate's loan does not prohibit repayment of the final $10,000 here. Instead, it is the agency's regulation—with its 20-day limit—that prevents repayment. Appellees insist that they used post-election funds—in the form of overlimit contributions to the 2018 campaign that were "redesignated" as contributions to the 2024 campaign—to repay Cruz's loans. Ordinarily, it would not matter whether a plaintiff was challenging the statute's enforcement or instead the enforcement of a regulation. Here, however, the parties assume that the distinction makes a difference because the subject-matter jurisdiction of the three-judge District Court is limited to actions challenging the enforcement of the statute. See BCRA § 304(a). Even under the Government's account, the present inability of the Committee to repay and Cruz to recover the final $10,000 is traceable to the operation of Section 304 itself. An agency's regulation cannot "operate independently of" the statute that authorized it. *California v. Texas*, 593 U. S. ––––, ––––, 141 S.Ct. 2104, 210 L.Ed.2d 230. Here, the FEC's 20-day rule was expressly promulgated to implement Section 304. Thus, if Section 304 is invalid and unenforceable, the agency's 20-day rule is as well, and the remedy appellees sought in the District Court would redress appellees' harm by preventing enforcement of the agency's 20-day rule. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In challenging the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation, appellees may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced. Cf. *Collins v. Yellen*, 594 U. S. ––––, –––– – ––––, 141 S.Ct. 1761, 210 L.Ed.2d 432. And because they are challenging "the constitutionality of [a] provision of [BCRA]," § 403(a), jurisdiction was proper in the three-judge District Court. Pp. 1647 – 1650.

2. Section 304 of BCRA burdens core political speech without proper justification. Pp. 1650 – 1656.

(a) The loan-repayment limitation abridges First Amendment rights by burdening candidates who wish to make expenditures on behalf of their own candidacy through personal loans. Restricting the sources of funds that campaigns may use to repay candidate loans increases the risk that such loans will not be repaid in full, which, in turn, deters candidates from loaning money to their campaigns. This burden is no small matter. Debt is a ubiquitous tool for financing electoral campaigns, especially for new candidates and challengers. By inhibiting a candidate from using this critical source of campaign funding, Section 304 raises a barrier to entry—thus abridging political speech. Pp. 1650 – 1652.

(b) The Government has not demonstrated that the loan-repayment limitation furthers a permissible goal. Any law that burdens First Amendment freedoms, even slightly, must be justified by a permissible interest. Pp. 1651 – 1656.

(i) The only permissible ground for restricting political speech recognized by this Court is the prevention of "*quid pro quo*" corruption or its appearance. See *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 207, 134 S.Ct. 1434, 188 L.Ed.2d 468. Here, the Government argues that the contributions at issue raise a heightened risk of corruption because they are used to repay a candidate's personal loans. But given that these contributions are already capped at $2,900 per election in order to prevent corruption or its appearance, the approach of adding an additional layer of regulation is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *id.* at 221, 134 S.Ct. 1434. Because the Government is defending a restriction on speech, it must do more than "simply posit the existence of the disease sought to be cured"; it must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795. "[M]ere conjecture" is "[in]adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434. Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context, even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Pp. 1651 – 1654.

(ii) In the absence of direct evidence, the Government turns to a scholarly article, a poll, and statements by Members of Congress to show that the contributions used to repay candidate loans carry a heightened risk of at least the appearance of corruption. All of this evidence, however, concerns the sort of "corruption," loosely conceived, that this Court has repeatedly explained is not legitimately regulated under the First Amendment. Nor is it equivalent to "legislative findings" that demonstrate the need to address a special problem. Pp. 1653 – 1655.

****3** (iii) As a fallback argument, the Government analogizes post-election contributions used to repay a candidate's loans to gifts because they enrich the candidate as opposed to the campaign's treasury. But this analogy is meaningful only if the baseline is that the campaign will default. The record suggests, however, that winning candidates are commonly repaid in full. For these candidates, post-election contributions bear little resemblance to a gift; they instead restore the candidate to the status quo ante. As for losing candidates, the Government does not provide any anticorruption rationale to explain why contributions to those candidates should be restricted. Finally, the Government argues for deference to Congress's "legislative judgment" that Section 304 furthers an anticorruption goal. Given scant evidence of corruption, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to "insulate[ ] legislators from effective electoral challenge." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 404, 120 S.Ct. 897, 145 L.Ed.2d 886 (BREYER, J., concurring). In the end, it remains the role of this Court to decide whether a particular legislative choice is constitutional. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93. Pp. 1655 – 1656.

542 F.Supp.3d 1, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

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Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

***1645** In order to jumpstart a fledgling campaign or finish strong in a tight race, candidates for federal office often loan money to their campaign committees. A provision of federal law regulates the repayment of such loans. Among other things, it bars campaigns from using more than $250,000 of funds raised after election day to repay a candidate's personal loans. This limit on the use of post-election funds increases the risk that candidate loans over $250,000 will not be repaid in full, inhibiting candidates from making such loans in the first place. The question is whether this restriction violates the First Amendment rights of candidates and their campaigns to engage in political speech.

I

A

Candidates for federal office may, consistent with federal law, use various sources to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his campaign. See *Buckley v. Valeo*, 424 U.S. 1, 52–54, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). His campaign—a legal entity distinct from the candidate himself—may borrow an unlimited amount from third-party lenders or from the candidate himself. See 11 C.F.R. § 110.10 (2017);

52 U.S.C. § 30101(9)(A)(i); see also Buckley, 424 U.S. at 52–54, 96 S.Ct. 612. And campaigns may, of course, accept contributions directly from other organizations or from individuals, subject to monetary limitations. Individual contributions are capped at $2,900 for the primary and $2,900 for the general election. See §§ 30116(a), (c); 86 Fed. Reg. 7869 (2021). Campaigns may continue to receive contributions after election day, so long as those contributions go toward repaying campaign debts. See 11 C.F.R. § 110.1(b)(3)(i).

Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 98, 52 U.S.C. § 30116(j), further restricts the use of post-election funds. Under that provision, a candidate who loans money to his campaign may not be repaid more than $250,000 of such loans from contributions made to the campaign after the date of the election. *Ibid.* To implement that limit, the Federal Election Commission (FEC) has ***1646** promulgated regulations establishing three rules pertinent here: First, a campaign may repay up to $250,000 in candidate loans using contributions made "at any time before, on, or after the date of the election." 11 C.F.R. § 116.12(a). Second, to the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs "within 20 days of the election." § 116.11(c)(1). And third, if more than $250,000 remains unpaid when the 20-day post-election deadline expires, the campaign must treat the portion above $250,000 as a contribution to the campaign, precluding later repayment. § 116.11(c)(2).

B

****4** Appellee Ted Cruz represents Texas in the United States Senate. This case arises from his 2018 reelection campaign, which was, at the time, the most expensive Senate race in history. Before election day, Cruz loaned $260,000 to the other appellee here, Ted Cruz for Senate (Committee). At the end of election day, however, the Committee was in the red by approximately $340,000. App. 285. It eventually began repaying Cruz's loans, but by that time the 20-day post-election window for repaying amounts over $250,000 had closed. See 11 C.F.R. §§ 116.11(c)(1), (2). The Committee accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid.

Cruz and the Committee filed this action in the United States District Court for the District of Columbia, alleging that Section 304 of BCRA violates the First Amendment. They also raised challenges to the FEC's implementing regulation, 11 C.F.R. § 116.11. A three-judge panel was convened to hear the case. See BCRA § 403(a)(1), 116 Stat. 113; see also 28 U.S.C. § 2284.

The three-judge District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification. 542 F.Supp.3d 1 (2021). The District Court also ordered that appellees' challenges to the regulation, previously held in abeyance, be dismissed as moot. The Government appealed directly to this Court, as authorized by 28 U.S.C. § 1253. We postponed consideration of our jurisdiction. 594 U. S. —— (2021).

II

[1] **[2]** The Constitution limits federal courts to deciding "Cases" and "Controversies." Art. III, § 2. Among other things, that limitation requires a plaintiff to have standing. The requisite elements of Article III standing are well established: A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[3] As the Government recognizes, the Committee's present inability to repay the final $10,000 of Cruz's loans constitutes an injury in fact both to Cruz and to his Committee. See Reply Brief 8. Cruz, of course, suffers a $10,000 pocketbook harm. See *Czyzewski v. Jevic Holding Corp.*, 580 U. S. 451, 464, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017). And the bar on repayment injures the Committee by preventing it from discharging its obligation to repay its debt, which may inhibit that form of financing in the future. The Government maintains, however, that these injuries are not traceable to the threatened enforcement of Section 304, for two reasons: first, because the inability to repay Cruz's loans was "self-inflicted," and second, because it ***1647** is the threatened enforcement of an agency regulation, not the statute itself, that causes the harm. We address each argument in turn.

A

[4] First, the Government argues that appellees lack standing because their injuries were "self-inflicted." Brief for Appellant 20. Because appellees knowingly triggered the application of the loan-repayment limitation, the Government says, any resulting injury is in essence traceable to *them*, not the Government. The predicate for this argument is appellees' stipulation in the District Court that "the sole and exclusive motivation behind Senator Cruz's actions in making the 2018 loan[s] and the [C]ommittee's actions in waiting to repay them was to establish the factual basis for this challenge." App. 325. At bottom, the Government asks us to recognize an exception to traceability for injuries that a party purposely incurs.

[5] We have never recognized a rule of this kind under Article III. To the contrary, we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred. See *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958) (*per curiam*) (that the plaintiff subjected himself to discrimination "for the purpose of instituting th[e] litigation" did not defeat his standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (a "tester" plaintiff posing as a renter for purposes of housing-discrimination litigation still suffered an injury under Article III).

****5** The cases the Government cites do not alter our conclusion. In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013), for example, the plaintiffs attempted to manufacture standing by voluntarily taking costly and burdensome measures that they said were necessary to protect the confidentiality of their communications in light of the Government surveillance policy they sought to challenge. *Id.*, at 402, 133 S.Ct. 1138. Their problem, however, was that they could not show that they had been or were likely to be subjected to that policy in any event. *Id.*, at 416, 133 S.Ct. 1138. Likewise, in *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976) (*per curiam*), we held that the unilateral decisions by a group of States to reimburse their residents for taxes levied by other States was not a basis to attack the legality of those taxes. Nothing in the challenged taxes required the plaintiff States to offer reimbursements; accordingly, the financial injury those States suffered was due to their own independent response to taxes levied on others. *Id.*, at 664, 96 S.Ct. 2333. Here, by contrast, the appellees' injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply. See 52 U.S.C. § 30109(a)(5); 11 C.F.R. § 111.24.

[6] One final point bears mentioning. The Government maintains that it should not be blamed for appellees' injuries because it provided the Committee with a legally available "alternative" that would have avoided any liability—repaying Cruz's loans in full with pre-election funds, within 20 days of the election. But even if such funds were available, the Government's argument largely misses the point. For standing purposes, we accept as valid the merits of appellees' legal claims, so we must assume that the loan-repayment limitation —including ***1648** the 20-day rule—unconstitutionally burdens speech. See *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("standing in no way depends on the merits of the plaintiff 's contention that particular conduct is illegal"). Demanding that the Committee comply with the Government's "alternative" would therefore require it to forgo the exercise of a First Amendment right we must assume it has—the right to repay its campaign debts in full, at any time. And this would require the Committee to subject itself to the very framework it says unconstitutionally burdens its speech. Such a principle finds no support in our standing jurisprudence. See, *e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

B

The Government next asserts that although appellees would have standing to challenge the FEC's implementing regulation, 11 C.F.R. § 116.11, they do not have standing to challenge Section 304 itself. As a reminder, Section 304 prohibits the use of post-election funds to repay a candidate's personal loans; it does not restrict the use of funds raised before the election. See 52 U.S.C. § 30116(j). That restriction comes instead from Section 304's implementing regulation, 11 C.F.R. § 116.11. This regulation provides that neither pre-election nor post-election funds may be used to repay candidate loans above $250,000 outstanding 20 days after the election. §§ 116.11(c)(1)–(2). Such amounts must instead be treated as contributions to the campaign, barring their repayment.

Bearing that in mind, the Government contends that the record before the District Court reveals that the Committee used funds raised *before* the election to repay the first $250,000 of Cruz's loans. For support, it naturally points to appellees' stipulation that "none of the $250,000 of the loan that was repaid was from contributions raised after the election." App. 329. Thus, the Government says, the Committee has not yet reached the cap in Section 304 on the use of post-election funds, and can still repay the remaining balance without running afoul of that *statutory* restriction. It is instead the agency's *regulation*—with its 20-day limit—that prevents repayment of the final $10,000. This matters, the Government insists, because "[s]tanding is not dispensed in gross," and plaintiffs must establish standing separately for each claim that they press and each form of relief that they seek. Brief for Appellant 17 (quoting *TransUnion LLC v. Ramirez*, 594 U. S. ––––, ––––, 141 S.Ct. 2190, 2208, 210 L.Ed.2d 568 (2021)). A challenge to the regulation, the Government argues, is separate from a challenge to the statute that authorized it.

****6** For their part, appellees insist that the record, properly interpreted, shows that the Committee used post-election funds to repay Cruz. During the period between election day and when the Committee repaid Cruz's loans, the Committee received more than $250,000 in "redesignated" contributions to Cruz's 2024 campaign. Those contributions came from individuals who donated to the 2018 election in amounts exceeding their base limit and who, subsequent to the election, redesignated the overlimit amount to the 2024 campaign. See 11 C.F.R. § 110.1(b)(5). Such funds, appellees say, qualify as "post-election contributions" for purposes of Section 304, and may have been used to repay the first $250,000 of Cruz's loans. See § 116.12(a).

These arguments have an Alice in Wonderland air about them, with the Government arguing that appellees would *not* violate the statute by repaying Cruz, and the appellees arguing that they *would*. But ***1649** this case has unfolded in an unusual way. After all, Cruz and the Committee likely would have had standing to bring a pre-enforcement challenge (as they do now) to Section 304 in a much easier manner—by simply alleging and credibly demonstrating that Cruz wished to loan his campaign an amount larger than $250,000, but would not do so only because the loan-repayment limitation made it unlikely that such amount would be repaid. See *Susan B. Anthony List*, 573 U.S. at 158–159, 134 S.Ct. 2334. In addition, it ordinarily would not matter whether a plaintiff was challenging the statute's enforcement or instead the enforcement of a regulation and, in doing so, raising arguments about the validity of the statute that authorized the regulation. Cf. *Collins v. Yellen*, 594 U. S. ––––, –––– – ––––, 141 S.Ct. 1761, 1779–1780, 210 L.Ed.2d 432 (2021). The parties here, however, assume that the distinction makes a difference because the subject-matter jurisdiction of the three-judge District Court is limited to actions challenging the enforcement of the statute. See BCRA § 403(a) (authorizing a three-judge court to hear any "action ... brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act").

It seems to us that the Government is likely correct that appellees have not shown that they exhausted Section 304's cap on the use of post-election funds. The loan-repayment limitation applies to contributions "made" after the date of the election. 52 U.S.C. § 30116(j). And a contribution is "considered to be made when the contributor relinquishes control" over it, which occurs when the contribution is "delivered" to the Committee or the candidate. 11 C.F.R. § 110.1(b)(6). The redesignated contributions on which appellees now rely, however, involve funds that were delivered to the Committee *before* the 2018 election. And those funds have remained under the Committee's control from that date, even if they were later redesignated to a different campaign.

[7] [8] [9] [10] But we need not go further down this rabbit hole. Even under the Government's account, appellees have standing to challenge the threatened enforcement of Section 304. The present inability of the Committee to repay and Cruz to recover the final $10,000 Cruz loaned his campaign is, even if brought about by the agency's threatened enforcement of its regulation, traceable to the operation of Section 304 itself. An agency, after all, "literally has no power to act"—including under its regulations—unless and until Congress authorizes it to do so by statute. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct.

1890, 90 L.Ed.2d 369 (1986); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). An agency's regulation cannot "operate independently of " the statute that authorized it. *California v. Texas*, 593 U. S. ––––, ––––, 141 S.Ct. 2104, 2119–2120, 210 L.Ed.2d 230 (2021). And here, the FEC's 20-day rule was expressly promulgated to implement Section 304. See 68 Fed. Reg. 3973 (2003). Indeed, the Government admitted at oral argument that it could find no other basis to authorize enforcement of this regulation, Tr. of Oral Arg. 5, and "concede[d]" that "the most likely result, if the statute were declared invalid, is that the regulation would cease to be on the books or would cease to be enforceable," *ibid.* Thus, if Section 304 is invalid and unenforceable—as Cruz and the Committee contend—the agency's 20-day rule is as well. And the remedy appellees sought in the District Court —an order enjoining the Government from taking any action to enforce the loan-repayment limitation, App. 27—would redress appellees' harm by preventing enforcement of the ***1650** agency's 20-day rule. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

****7 [11] [12]** Contrary to the Government's suggestion, the foregoing analysis does not call into question the principle that "a plaintiff injured by one law does not thereby acquire standing to challenge a different law." Brief for Appellant 17. It is true that a litigant cannot, "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, n. 5, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). Here, however, appellees seek to challenge the *one* Government action that causes their harm: the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation. In doing so, they may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced. Cf. *Collins*, 594 U. S., at –––– – ––––, 141 S.Ct., at 1779–1780. Even on the Government's version of the facts, then, we are satisfied that appellees have standing to challenge the threatened enforcement of Section 304. And because they are challenging "the constitutionality of [a] provision of [BCRA]," § 403(a), jurisdiction was proper in the three-judge District Court. We thus proceed to the merits.

III

A

[13] [14] [15] The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). It safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom "to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54, 96 S.Ct. 612. This broad protection, we have explained, "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, at 14, 96 S.Ct. 612 (internal quotation marks omitted).

[16] The Government seems to agree with appellees that the loan-repayment limitation abridges First Amendment rights, at least to some extent, see Brief for Appellant 27–32, and we reach the same conclusion. This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans. See 52 U.S.C. § 30101(9)(A)(i) (defining "expenditure" to include loans); see also *Buckley*, 424 U.S. at 52, 96 S.Ct. 612. By restricting the sources of funds that campaigns may use to repay candidate loans, Section 304 increases the risk that such loans will not be repaid. That in turn inhibits candidates from loaning money to their campaigns in the first place, burdening core speech.

The data bear out the deterrent effect of Section 304. After BCRA was passed, there appeared a "clear clustering of [candidate] loans right at the $250,000 threshold." A. Ovtchinnikov & P. Valta, Debt in Political Campaigns 26 (2020), Record 65–1 (Ovtchinnikov, Debt); see also Brief for United States Senator Roy Blunt et al. as *Amici Curiae* 6–7. There was no such clustering before the loan-repayment limitation went into effect. The Government's evidence in the District Court, moreover, reflects that the percentage of loans by Senate candidates for exactly $250,000 has increased tenfold since BCRA was passed. See App. 312–313. Section 304, then, has altered "the propensity of many politicians to make large loans." Ovtchinnikov, Debt 26; see also Brief for Protect the First Foundation as *Amicus Curiae* 10–11. In

***1651** doing so, it has predictably restricted a candidate's speech on behalf of his own candidacy. See *Buckley*, 424 U.S. at 54, 96 S.Ct. 612.

Quite apart from this record evidence, the burden on First Amendment expression is "evident and inherent" in the choice that candidates and their campaigns must confront. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011); see also *id.*, at 746, 131 S.Ct. 2806 ("we do not need empirical evidence to determine that the law at issue is burdensome"); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 738–740, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (requiring no empirical evidence of a burden). Although Section 304 "does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right." *Id.*, at 738–739, 128 S.Ct. 2759. That penalty, of course, is the significant risk that a candidate will not be repaid if he chooses to loan his campaign more than $250,000. And that risk in turn may deter some candidates from loaning money to their campaigns when they otherwise would, reducing the amount of political speech. This "drag" on a candidate's First Amendment right to use his own money to facilitate political speech is no less burdensome "simply because it attaches as a consequence of a statutorily imposed choice." *Id.*, at 739, 128 S.Ct. 2759.

****8** The "drag," moreover, is no small matter. Debt is a ubiquitous tool for financing electoral campaigns. The raw dollar amount of loans made to campaigns in any one election cycle is in the nine figures, "significantly exceeding" the amount of independent expenditures. Ovtchinnikov, Debt 11. And personal loans from candidates themselves constitute the bulk of this financing. See Brief for Appellant 35 ("more than 90% of campaign debt consists of candidate loans"). In fact, candidates who self-fund usually do so using personal loans. See J. Steen, Self-Financed Candidates in Congressional Elections 21 (2006).

The ability to lend money to a campaign is especially important for new candidates and challengers. As a practical matter, personal loans will sometimes be the only way for an unknown challenger with limited connections to front-load campaign spending. See G. Jacobson, Money in Congressional Elections 97–101 (1980). And early spending—and thus early expression—is critical to a newcomer's success. See Steen, Self-Financed Candidates in Congressional Elections, at 35, 171. A large personal loan also may be a useful tool to signal that the political outsider is confident enough in his campaign to have skin in the game, attracting the attention of donors and voters alike. See R. Biersack, P. Herrnson, C. Wilcox, Seeds for Success: Early Money in Congressional Elections, 18 Leg. Studies Q. 535, 537 (1993); see also Brief for United States Senator Roy Blunt et al. as *Amici Curiae* 13. By inhibiting a candidate from using this critical source of campaign funding, however, Section 304 raises a barrier to entry—thus abridging political speech.

The dissent cannot and does not claim that Section 304 imposes no burden on candidate speech. See *post*, at 1659 (opinion of KAGAN, J.) ("every contribution regulation has some kind of indirect effect on electoral speech"). The dissent instead dismisses that burden as minor and insignificant. *Post*, at 1658 – 1660. As just explained, the extent of the burden may vary depending on the circumstances of a particular candidate and particular election. But there is no doubt that the law does burden First Amendment electoral speech, and any such law must at least be justified ***1652** by a permissible interest. See *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 210, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

B

With those First Amendment costs in mind, we turn to whether the loan-repayment limitation is justified. The parties debate whether strict or "closely drawn" scrutiny should apply in answering that question. *Buckley*, 424 U.S. at 25, 96 S.Ct. 612. We need not resolve this dispute because, under either standard, the Government must prove at the outset that it is in fact pursuing a legitimate objective. See *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434. It has not done so here.

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[17] **[18]** This Court has recognized only one permissible ground for restricting political speech: the prevention of "*quid pro quo*" corruption or its appearance. See *id.*, at

207, 134 S.Ct. 1434; see also *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). We have consistently rejected attempts to restrict campaign speech based on other legislative aims. For example, we have denied attempts to reduce the amount of money in politics, see *McCutcheon*, 572 U.S. at 191, 134 S.Ct. 1434, to level electoral opportunities by equalizing candidate resources, see *Bennett*, 564 U.S. at 749–750, 131 S.Ct. 2806, and to limit the general influence a contributor may have over an elected official, see *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 359–360, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). However well intentioned such proposals may be, the First Amendment—as this Court has repeatedly emphasized—prohibits such attempts to tamper with the "right of citizens to choose who shall govern them." *McCutcheon*, 572 U.S. at 227, 134 S.Ct. 1434; see also *Davis*, 554 U.S. at 742, 128 S.Ct. 2759; *Bennett*, 564 U.S. at 750, 131 S.Ct. 2806.

****9** **[19]** The Government argues that the contributions at issue raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It also maintains that post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good.

[20] We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of "prophylaxis-upon-prophylaxis approach[es]" to regulating campaign finance. *McCutcheon*, 572 U.S. at 221, 134 S.Ct. 1434 (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.)). Individual contributions to candidates for federal office, including those made after the candidate has won the election, are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election, see 86 Fed. Reg. 7869, and nontrivial contributions must be publicly disclosed, see 52 U.S.C. §§ 30104(b)(3)(A), (c)(1). The dissent's dire predictions about the impact of today's decision elide the fact that the contributions at issue remain subject to these requirements. See *post*, at 1657 – 1658, 1664. And the requirements are themselves prophylactic measures, given that "few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876. ***1653** Such a prophylaxis-upon-prophylaxis approach, we have explained, is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *McCutcheon*, 572 U.S. at 221, 134 S.Ct. 1434; see also *Bennett*, 564 U.S. at 752, 131 S.Ct. 2806 ("In the face of [the State's] contribution limits [and] strict disclosure requirements ... it is hard to imagine what marginal corruption deterrence could be generated by [an additional measure].").

[21] There is no cause for a different conclusion here. Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than "simply posit the existence of the disease sought to be cured." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996). It must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Ibid.* We have "never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)).

Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Cf. Brief for Campaign Legal Center et al. as *Amici Curiae* 17–18 (citing the 10 States that do impose such a prohibition). Our previous cases have found the absence of such evidence significant. See *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876 (the Government did not claim that the political process was corrupted in the 26 States that allowed unrestricted independent expenditures by corporations); *McCutcheon*, 572 U.S. at 209, n. 7, 134 S.Ct. 1434 (the Government presented no evidence of corruption in the 30 States that did not impose aggregate limits on individual contributions).

****10** The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports "merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate." 542 F.Supp.3d at 15. That is not the type of *quid pro quo* corruption the Government may target consistent with the First Amendment. See *McCutcheon,* 572 U.S. at 207–208, 134 S.Ct. 1434.

[22] The dissent at points shrugs off this distinction, see *post,* at 1657, 1662 – 1663, n. 3, 1663 – 1664, but our cases make clear that "the Government may not seek to limit the appearance of mere influence or access." *McCutcheon,* 572 U.S. at 208, 134 S.Ct. 1434. As we have explained, influence and access "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.*, at 192, 134 S.Ct. 1434.

[23] To be sure, the "line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Id.*, at 209, 134 S.Ct. 1434. And in drawing that line, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Ibid.* (quoting *Wisconsin Right to Life*, 551 U.S. at 457, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.)).

***1654** 2

In the absence of direct evidence, the Government turns elsewhere. It contends that a scholarly article, a poll, and statements by Members of Congress show that these contributions carry a heightened risk of at least the appearance of corruption. Essentially all the Government's evidence, however, concerns the sort of "corruption," loosely conceived, that we have repeatedly explained is not legitimately regulated under the First Amendment.

The academic article—cited for various propositions by both sides—concludes that "indebted politicians" are "more likely to switch their votes" if they receive contributions from the banking or insurance industries. Ovtchinnikov, Debt 31. But the authors explicitly note that they cannot distinguish between voting pattern changes traceable to legitimate donor influence or access, and voting pattern changes as part of an illicit *quid pro quo*. See A. Ovtchinnikov & P. Valta, Self-Funding of Political Campaigns, Management Science, Articles in Advance 18 (April 7, 2022) (Ovtchinnikov, Self-Funding). As noted, our precedents demand adherence to that distinction. See, *e.g.*, *McCutcheon*, 572 U.S. at 209, 134 S.Ct. 1434. The authors also state that their analysis is merely a "first step" in understanding whether politicians' self-funding decisions impact voting behavior, because they cannot "pin down a causal link" yet. Ovtchinnikov, Self-Funding 21.

The online poll the Government asks us to consider similarly misses the mark. The poll, conducted at the Government's behest for this litigation, reports that most respondents thought it "very likely" or "likely" that a person who "donate[s] money to a candidate's campaign after the election expect[s] a political favor in return." App. 351–352. But it failed to ask whether those same respondents thought it likely that donors who contribute to a campaign *before* the election also are likely to expect political favors in return. Nor did the poll mention that the individual base limits still apply to such contributions. And it failed to define the term "political favor," leaving unclear the critical issue whether the respondents associated such contributions with the direct exchange of money for official acts, which Congress may regulate, or simply increased influence and access, which Congress may not.

****11** Finally, the Government places great weight on statements made by certain Members of Congress during debates that preceded the enactment of BCRA. One Senator, for example, remarked that without the loan-repayment limitation, a winning candidate who loaned money to his campaign could "get it back from [his] constituents [at] fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" 147 Cong. Rec. S2462 (March 19, 2001) (remarks of Sen. Domenici). Another stated that candidates "have a constitutional right to try to buy the office, but they do not have a constitutional right to resell it." 147 Cong. Rec. S2541 (March 20, 2001) (remarks of Sen. Hutchison). Nothing these legislators said, however, constitutes actual evidence that the loan-repayment limitation was necessary to prevent *quid pro quo* corruption or its appearance. And a few stray floor statements are not the same as "legislative findings" that might suggest a special problem to be addressed. *Colorado Republican Federal Campaign Comm.*, 518 U.S. at 618, 116 S.Ct. 2309.

All the above is pretty meager, given that we are considering restrictions on "the most fundamental First Amendment activities"—the right of candidates for political office to make their case to the American people. *Buckley*, 424 U.S. at 14, 96 S.Ct. 612. In any event, the legislative ***1655** record helps appellees just as much as the Government, given that some Senators evidently viewed the limit as designed to protect incumbents like themselves from wealthy challengers. See 147 Cong. Rec. S2465 (March 19, 2001) (remarks of Sen. Sessions) ("[Section 304] prohibits wealthy candidates, who incur personal loans in connection with their campaign that exceed $250,000, from repaying those loans from any contributions made to the candidate.... I am glad I didn't face a person who could write a check for $60 million, $10 million —or $5 million, for that matter. If so, I would like to be able to have a level playing field so I could stay in the ball game."); see also 147 Cong. Rec. S2541 (March 20, 2001) (remarks of Sen. Hutchison) ("Our purpose is to level the playing field.").

That the limit may have been designed to protect incumbents should come as no surprise. Section 304 was enacted as part of the "Millionaire's Amendment" to BCRA, designed to hobble wealthy candidates mounting self-financed campaigns. See *Davis*, 554 U.S. at 739, 128 S.Ct. 2759. And it was debated together with another provision we have already held unconstitutional, in part because it pursued the same impermissible goal of "level[ing] electoral opportunities for candidates of different personal wealth." *Id.*, at 741, 128 S.Ct. 2759. The connection between these two provisions casts further doubt on the anticorruption interest the Government now asserts in this case.

3

Perhaps to make up for its evidentiary shortcomings, the Government falls back on what it calls a "common sense" analogy: Post-election contributions used to repay a candidate's loans are akin to a "gift" because they "add to the candidate's personal wealth" as opposed to the campaign's treasury. Brief for Appellant 33. The risk of corruption is thus greater, the Government argues, because the donor is lining the pockets of a legislator or legislator-elect.

The dissent at multiple points makes the same argument, contending that contributions that go toward repaying a candidate's loan "enrich the candidate personally," allowing him to "buy a car or make tuition payments or join a country club." *Post,* at 1660, 1664; see also *post*, at 1657, 1657 – 1658, 1660 – 1661, 1663 – 1664. But this forgets that we are talking about repayment of a *loan*, not a gift. If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way.

On top of that, contributions that go toward retiring a candidate's debt could only arguably enrich the candidate if the candidate does not otherwise expect to be repaid. In other words, the Government's gift comparison is meaningful only if the baseline is that the campaign will default. The Government, however, provides no reason to believe that most or even many *winning* candidates—the only candidates with whom its anticorruption interest is concerned—expect not to be repaid by their campaigns. To the contrary, the Government has recognized throughout this litigation that winning candidates are commonly repaid in full. See App. 31–32 (citing the former FEC Commissioner's statement that "only winners have an easy time dealing with debt"); *id.,* at 317 (same); see also Ovtchinnikov, Self-Funding 11 (concluding that, even with BCRA's limitations on loan repayment in place, two out of three winning campaigns were able to repay a candidate's loans in full). For such a candidate, then, post-election contributions bear little resemblance to a gift, because there is less of a chance that his campaign will default. Such contributions instead restore the candidate to the status quo ante, ***1656** a position to which he legitimately expected to return. As for losing candidates, they are of course in no position to grant official favors, and the Government does not provide any anticorruption rationale to explain why post-election contributions to those candidates should be restricted. See Brief for Appellant 45–46.

****12** The analogy also proves too much. By the Government's logic, post-election contributions to retire candidate loans are little different from gifts given directly to the candidate. But that logic is belied by how the Government treats the two categories of purported "gifts." On the one hand, federal law flatly prohibits candidates from using campaign contributions for personal purposes. See 52 U.S.C. § 30114(b)(2). And it forbids Senators from accepting gifts worth $250 or more. See 2 U.S.C. § 4725(a)(1). By contrast, the postulated "gift-by-loan-repayment" limits are simply the individual contribution limits, which are now more than ten times higher than the gift limit: $2,900 per election. And Section 304 allows over 86 such "gifts" before a campaign hits the Act's $250,000 cap. Either the Government is openly tolerating a significant number of "gifts" far more generous than what it would normally think fit to allow, or post-election contributions that go toward retiring campaign debt are in no real sense "gifts" to a candidate. We find the latter answer more persuasive.

[24] As a final argument, the Government claims that if the matter is otherwise in doubt, we should defer to Congress's "legislative judgment" that Section 304 furthers an anticorruption goal. Brief for Appellant 39; see also *post*, at 1661 (KAGAN, J., dissenting) (also arguing that we have no "reason to second-guess Congress's experience-based judgment"). Such deference, the Government contends, is grounded "in part on the understanding that Congress 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.' " Brief for Appellant 40 (quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (some internal quotation marks omitted)). But as explained, the evidence here is scant, and Congress's judgment is hardly based on "vast amounts of data." *Id.*, at 195, 117 S.Ct. 1174. Moreover, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to "insulate[ ] legislators from effective electoral challenge." *Shrink Missouri Government PAC*, 528 U.S. at 404, 120 S.Ct. 897 (BREYER, J., concurring); see also *Randall v. Sorrell*, 548 U.S. 230, 248–249, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion).

[25] In the end, it remains our role to decide whether a particular legislative choice is constitutional. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); see also *Randall*, 548 U.S. at 248–249, 126 S.Ct. 2479 (stressing need for "the exercise of independent judicial judgment" in case raising concern that "contribution limits that are too low [may] harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders"). And here the Government has not shown that Section 304 furthers a permissible anticorruption goal, rather than the impermissible objective of simply limiting the amount of money in politics.

* * *

For the reasons set forth, we conclude that Cruz and the Committee have standing to challenge the threatened enforcement of Section 304 of BCRA. We also conclude that this provision burdens core political speech without proper justification. ***1657** The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected, he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go straight from the campaign to him, as repayment for his loan. He is deeply grateful to those who help, as they know he will be—more grateful than for ordinary campaign contributions (which do not increase his personal wealth). And as they paid him, so he will pay them. In the coming months and years, they receive government benefits—maybe favorable legislation, maybe prized appointments, maybe lucrative contracts. The politician is happy; the donors are happy. The only loser is the public. It inevitably suffers from government corruption.

****13** The campaign finance measure at issue here has for two decades checked the crooked exchanges just described. The provision, Section 304 of the Bipartisan Campaign Reform Act of 2002, prohibited a candidate from using post-election donations to repay loans exceeding $250,000 that he made to his campaign. The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing. At the very least —even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms.

In striking down the law today, the Court greenlights all the sordid bargains Congress thought right to stop. The theory of the decision (unlike of the statute) is hard to fathom. The majority says that Section 304 violates the candidate's First Amendment rights by interfering with his ability to "self-fund" his campaign. *Ante*, at 1651. But the candidate can in fact *self*-fund all he likes. The law impedes only his ability to use *other people's* money to finance his campaign—much as standard (and permissible) contribution limits do. And even that third-party restriction is a modest one, applying only to post- (not pre-) election donations to repay sizable (not small) loans. So the majority overstates the First Amendment burdens Section 304 imposes. At the same time, the majority understates the anti-corruption values Section 304 serves. In the majority's view, there is "scant" danger here of *quid pro quo* corruption; loan repayments produce only the "sort of 'corruption' " in which contributors wield "greater influence" over candidates than they otherwise would. *Ante*, at 1653 – 1654, 1656. Assume away all objections to that distinction, which even the majority concedes is "vague," *ante,* at 1653 – 1654; for better or worse, it underlies this Court's recent campaign finance decisions. Still, the conduct targeted by Section 304 threatens, if anything does, both corruption and the appearance ***1658** of corruption of the *quid pro quo* kind. That is because the regulated transactions—as Members of Congress well knew from experience—personally enrich those already elected to office. In allowing those payments to go forward unrestrained, today's decision can only bring this country's political system into further disrepute.

I

In assessing a law's burden on speech, this Court's decisions all distinguish between restricting expenditures and restricting contributions. See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 19–23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). (The majority glosses over that core distinction, for reasons that will soon become clear.) According to settled precedent, expenditure restrictions—caps on a campaign's or candidate's electoral spending—impose the greatest burdens on expression. The First Amendment, as the majority notes, "has its fullest and most urgent application" when a "legislative limit" prevents a candidate from "us[ing] personal funds to finance campaign speech"—that is, speech "on behalf of his own candidacy." *Ante*, at 1650 (internal quotation marks omitted). By contrast, laws focused on third-party contributions to a campaign (a category the majority mostly prefers to ignore) typically "entail[ ] only a marginal restriction" on First Amendment interests. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. Take, for example, a simple limit on the amount someone can donate to a campaign, like the federal $2,900 ceiling. That kind of restriction, we have reasoned, in no way interferes with the donor's "freedom to discuss candidates and issues" through independent spending. *Id.*, at 1656. And it has only an indirect effect on the campaign itself. To be sure, the cap makes raising money (for speech and other things) harder: It forces candidates "to raise funds from a greater number" of people and generally results in the campaign taking in less money than it otherwise would. *Id.*, at 1656. But the Court has viewed such limits as troublesome only if they are so low as to prevent candidates from raising "the resources necessary for effective advocacy." *Randall v. Sorrell*, 548 U.S. 230, 247, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 21, 96 S.Ct. 612). In the usual case, the incidental effect of a contribution restriction on a campaign's speech does not count as a significant First Amendment burden. See *Randall*, 548 U.S. at 246–247, 126 S.Ct. 2479.

****14** Under that precedent, Section 304 "entails only a marginal restriction" on speech, because it regulates contributions alone. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. The provision leaves a campaign free to spend any amount of money for speech. Likewise, it leaves the candidate himself —here, Senator Ted Cruz—free to do so. The candidate can (in the majority's words) "use personal funds to finance campaign speech" without limit; if he wishes, he can devote his whole fortune to "speech on behalf of his own candidacy." *Ante,* at 1650 – 1651. Section 304 restricts only the use of third-party contributions to support his efforts—which, as just shown, imposes a far more modest First Amendment burden. Recall how Section 304 works: It prevents post-election campaign contributions from going to repay large loans that the candidate has made to his campaign. So the provision limits—much as standard contribution caps do—only the candidate's ability to shift the costs of his electoral speech to others. Or said a bit differently, it addresses not a candidate's "self-fund[ing]," *ante*, at 1651, but only his reliance on third-party financing.

And even that regulation of third-party contributions is a narrow one. Under Section 304, a campaign can always accept ***1659** donations for small loans a candidate makes. And it can use *pre*-election donations to retire even his sizable loans. The statute just insists that donations for that purpose occur when speech is ongoing, and before everyone knows which candidate won (and so is in a position to return the favor by delivering government benefits). Consistent with our caselaw, that minor restriction on a candidate's use of other people's money does not severely burden his (or anyone else's) expression.

The majority's argument to the contrary focuses not on the restriction Section 304 actually imposes, but on the indirect effects the provision might have. The majority does not dispute that Section 304 places no limits on the amount a candidate can spend for expression. See *ante*, at 1650 – 1651. Nor does (or could) the majority even claim that the provision caps what a candidate can lend his campaign. Instead, the majority argues that the law "may deter" a candidate from making large loans because it curtails a potential source of repayment—*i.e.*, post-election donations. *Ante*, at 1651. In that way, the majority insists, the law—though concededly regulating only the use of contributions—functions to "restrict[ ] a candidate's speech." *Ante*, at 1650 – 1651; see *ante,* at 1651 – 1652.

But every contribution regulation has some kind of indirect effect on electoral speech, and we have still understood them to impose only minimal burdens. Consider again a standard contribution ceiling, like the federal $2,900 cap. That limit, as we have acknowledged, makes raising money harder. See *Randall,* 548 U.S. at 247, 126 S.Ct. 2479; *Buckley*, 424 U.S. at 20–21, 96 S.Ct. 612. And so it predictably gives a campaign less money to spend. (In fact, a lot less: Just think of a world in which a candidate could raise an unlimited sum from every supporter.) With the contribution cap in effect, the campaign cannot pay for (nearly) as many advertisements, mailings, signs, and so forth. And likewise, to return to the fact pattern here, the campaign has less money available than it otherwise would to repay a candidate's (or any other) loans. By the majority's logic, that downstream effect would mean the contribution cap imposes a significant First Amendment burden. But as noted above, we have always held to the contrary, save for the rare case in which the limit is so low as to preclude effective advocacy. See *supra*, at 1657 – 1659. There is no reason to treat Section 304 differently. In fact, its restriction on post-election contributions for loan repayment probably has much smaller indirect effects on a campaign's or candidate's speech than the contribution ceilings this Court has approved. (Again, just think of all the multi-million-dollar donations those ceilings prevent.) So the majority's view cannot be right.

And more fundamentally, the majority fails to appreciate what Section 304 has an indirect effect *on*: lending, rather than spending, money. In the majority's view, those two activities count as one and the same. See *ante,* at 1650 – 1651. But they are not, in an obvious way. The *expenditure* of "personal funds" for speech, this Court has observed, "reduces the candidate's dependence" on donors—precisely because he is not trying to speak on their dime. *Buckley*, 424 U.S. at 53, 96 S.Ct. 612. The *loan* of personal funds has the opposite effect, as further shown in this opinion's next part. When a candidate lends substantial funds to his campaign, he wants (maybe desperately needs) them returned; he thus risks—indeed, invites—dependence on donors, who alone can make him financially whole. Section 304 responds to that difference in whether a candidate is speaking independently, or instead relying on others' largesse. The provision at most deters a single mechanism ***1660** for financing electoral activities, because it carries a heightened threat of corruption.

II

****15** Preventing *quid pro quo* corruption or its appearance is a compelling interest by any measure. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). *Quid pro quo* corruption—which extends beyond criminal bribery to "less blatant and specific" arrangements—"subver[ts] the political process" and threatens "the integrity of our system of representative democracy." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388–389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (internal quotation marks omitted). And the appearance of that corruption (though scarcely mentioned in the majority opinion) is "[o]f almost equal concern." *Id.*, at 388, 120 S.Ct. 897. Avoiding that appearance is "critical" if public "confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.*, at 389, 120 S.Ct. 897.

Serious dangers of actual and apparent *quid pro quo* corruption attend the transactions Section 304 regulates—again, the use of post-election contributions to repay a candidate's personal loans. Consider a simple comparison. When a campaign uses a donation to fund routine electoral activities (including speech), the money marginally aids the candidate's electoral odds, but in no way adds to his personal wealth. By contrast, when a campaign uses a donation to repay the candidate's loan, every dollar given goes straight into the candidate's pocket. With each such contribution, his assets increase; he can now buy a car or make tuition payments or join a country club—all with his donors' dollars. So contributions going to loan repayment have exceptional value to the candidate—which his donors of course realize. And when the contributions occur after the election, their corrupting potential further increases. At that time, a campaign can use donations only to repay loans, of which some 97% come from candidates. See 11 C.F.R. 110.1(b)(3)(i) (2017); A. Ovtchinnikov & P. Valta, Self-Funding of Political Campaigns, Management Science, Articles in Advance 5 (Apr. 7, 2022) (Ovtchinnikov, Self-Funding). So post-election donors can be confident their money will enrich a candidate personally. And those donors have of course learned which candidate won. When they give money to repay the victor's loan, they know—not merely hope—he will be in a position to perform official favors. The recipe for *quid pro quo* corruption is thus in place: a donation to enhance the candidate's own wealth (the *quid*), made when he has become able to use the power of public office to the donor's advantage (the *quo*). The heightened threat of corruption—and, even more, of its appearance—is self-evident (except, it seems, to observers allergic to all campaign finance regulation).

In addressing that special danger, Section 304 is anything but a "prophylaxis-upon-prophylaxis," as the majority labels it. *Ante,* at 1652. The idea behind that fancy-sounding epithet is just that the statute is a needless precaution: The $2,900 contribution ceiling, the majority asserts, already provides generous protection against the corrupting potential of donations, so the loan-repayment provision is unnecessary. See *ibid.* But that claim ignores that Section 304 targets only a subset of contributions, which raise (as just described) unique corruption risks. When an added protection addresses an added danger, the existence of a basic protection (however ordinarily ample) fails to show the supplement's pointlessness. Regular seatbelts might suffice to protect drivers on the interstate, but special belts—and ***1661** roll cages to boot—are essential measures on the racetrack. So too, a $2,900 cap might suffice to prevent corruption from normal campaign contributions—but not from post-election contributions to repay a candidate's loan, and thus to enrich him personally. When Congress, as here, responds to a heightened threat with a heightened safeguard, the majority has no call to "greet" it "with a measure of skepticism." *Ibid.*

****16** Nor does the majority have reason to second-guess Congress's experience-based judgment about the specially corrupting effects of post-election donations to repay candidate loans. The majority's first attempt to counter that judgment is that "we are only talking about repayment of a *loan*": "If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way." *Ante,* at 1655. But that altogether misses the point. However much money the candidate had before he makes a loan to his campaign, he has less after it: The amount of the loan is the size of the hole in his bank account. So whatever he could buy with, say, $250,000—surely a car, but that's beside the point—he cannot buy any longer. Until, that is, donors pay him back. Then, the hole is filled, the bank account replenished, and the purchasing power restored. That is a significant financial gain to the officeholder, courtesy of donors. If they had not stepped up, the officeholder would have been $250,000 poorer.

The majority's second theory fares no better. Contributions to repay loans, the majority argues, do not really enrich an officeholder, because he has, from the beginning, "expect[ed] to be repaid." *Ante*, at 1655. But the record provides no support for that self-assured statement. Contra the majority, the Government "has recognized throughout this litigation" not that winning candidates are usually repaid, but only that they are repaid more often than losing ones. *Ibid.*; see App. 31–32, 317.[1] That is no surprise—and the fact is affirmatively unhelpful for the majority's position, because it shows how post-election donations reflect an expectation of payback from the recipient. Nothing else in the record (or outside it) is helpful to the majority either. The best empirical study suggests that a substantial portion of winning campaigns fail to retire candidate loans, even when their amounts are too small to trigger Section 304's restrictions. See Ovtchinnikov, Self-Funding 11; see also Brief for Campaign Legal Center et al. as *Amici Curiae* 12–13 (summarizing research "show[ing] that most campaigns fail to pay off candidates' personal loans in any amount at any time," in confirmation of the "[c]onventional wisdom" that post-election fundraising is "notoriously difficult"). So a candidate with a loan outstanding has plenty of reason to feel anxious—and to see the loan's repayment as a gratitude-inducing personal benefit. The donor takes him off a sharp hook. And even a candidate who expects repayment is far from impervious to corruption. He may have ***1662** that confidence exactly because he knows that a raft of lobbyists will be eager to pay for political benefits. And with his bank account depleted, he has a great temptation to perform his part in such an exchange.[2]

****17** The common sense of Section 304—the obviousness of the theory behind it—lessens the need for the Government to identify past cases of *quid pro quo* corruption involving candidate loan repayments. As this Court has made clear, "[t]he quantum of empirical evidence needed" to sustain a campaign finance law "var[ies] up or down with the novelty and plausibility of the [law's] justification." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 144, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). There is nothing novel or implausible about Section 304's rationale—once again, that payments going to line an elected official's pockets pose an especial risk of corruption. It is in fact what everyone knows to be true—because everyone knows people (including politicians) will often do things for money. The majority suggests that we should discard our understanding of how the world works because the Government has not come forward with adjudicated instances of corruption in the loan-repayment context. See *ante*, at 1652 – 1654. But *quid pro quo* exchanges, in that and every other setting, are nigh-impossible to detect and prove. That is indeed why we have campaign finance laws like Section 304. They prohibit conduct posing a heightened risk of corruption, so that the Government does not have to ferret out illicit exchanges case by case by case. To strike down Section 304 because the Government has not proved to a certainty some number of loan-repayments-for-political-paybacks is to miss the provision's essential point.

In any event, the Government and its *amici* have marshalled significant evidence showing that the loan repayments Section 304 targets have exactly the dangers Congress thought. See Brief for Appellant 37–40; Brief for Campaign Legal Center et al. 27–29. Here is a sampling from the record, involving jurisdictions unprotected by either Section 304 or a state equivalent. In Ohio, various law firms donated almost $200,000 to help the newly elected attorney general recoup his personal loans. Those donors later received more than 200 state contracts worth nearly $10 million in legal fees. See L. Bischoff, Donations Helping DeWine Pay Down Campaign Loan, Springfield News-Sun, Feb. 2, 2012, p. A1. In Alaska, a lobbyist collected almost $100,000 for post-election repayment of the Governor's personal loans. A business in which he held an interest later received a $9 million state contract. See B. Curry, Alaska Gov. Sheffield's Impeachment Inquiry Has Overtones of Watergate Scandal, L. A. Times, July 19, 1985, p. 11. In Kentucky, two Governors loaned their campaigns millions of dollars, "only to be repaid after the election by contributors seeking no-bid contracts." J. Moore, ***1663** Campaign Finance Reform in Kentucky: The Race for Governor, 85 Ky. L. J. 723, 746 (1997). The scandal those transactions created led to a new state campaign-finance law similar to Section 304. In upholding that statute, a court more cognizant than this one about how corruption works explained that "heavily indebted candidates" were "easy bedfellows for *quid pro quo* contributors." *Wilkinson v. Jones*, 876 F.Supp. 916, 930 (W.D. Ky. 1995). That is also true on the local level. In San Diego, to take just one instance, three city council members cast critical votes benefiting lobbyists who had raised funds to retire their campaign debts. See C. Gustafson, Lobbyists See Benefit From Three City Officials, San Diego Union-Tribune, June 13, 2009, p. A1. [3]

An empirical study in the record confirms the dangers of corruption shown in those examples. The study first found, based on data preceding Section 304's enactment, that politicians carrying campaign debt were "significantly more likely" than their "debt-free counterparts" to "switch their votes" after receiving contributions from special interests. A. Ovtchinnikov & P. Valta, Debt in Political Campaigns (2020), in No. 1:19–cv–00908 (D DC, July 14, 2020), ECF Doc. 65–1, p. 31. In other words, officeholders did more in exchange for donations repaying their personal loans than for other donations. The analysis next looked at Section 304's effect. Here, the data showed that politicians with debt exceeding the law's $250,000 threshold became "significantly less responsive" to contributions than before: They began to "behave remarkably similar to their debt free counterparts." *Id.*, at 28; see Ovtchinnikov, Self-Funding 3 (similarly stating that those politicians became more "independent of contributions from special interest[s]"). In other words, Section 304 did just what Congress thought it would. By preventing post-election contributions from personally enriching politicians, the provision diminished donor-responsive voting. The majority tries to undermine those findings by quoting the kind of careful caveats always accompanying good social science. See *ante,* at 1654; Ovtchinnikov, Self-Funding 21 (noting that the study is a "first step in understanding" and that more work is needed to "fully pin down" all aspects of causation). But the authors are confident—and rightly so—in the findings just described: that Section 304 markedly decreased the frequency with which officeholders voted as donors would like. And although the authors could not responsibly claim that all the shifted votes they tallied were part of *quid pro quo* deals—they are, after all, professors, not the FBI—they deduce from the data that politicians carrying campaign debt were "less likely to [be] sell[ing] access" than to be "sell[ing] votes." *Id.,* at 18.

****18** Finally, the record evidence addresses the "almost equal[ly]" important matter of the appearance of corruption. *Shrink Missouri*, 528 U.S. at 390, 120 S.Ct. 897; see *supra*, at 1659 – 1660. A Government-commissioned survey of public opinion found that 81% of respondents believed it "very ***1664** likely" or "likely" that a person who "donate[s] money to a candidate's campaign after the election expect[s] a political favor in return." App. 351–353. That bears repeating: 81%—an overwhelming perception across all demographic categories, as well as across all party affiliations and political ideologies. See *ibid.* As the court reviewing the Kentucky version of Section 304 explained: "[T]here is an impression" when a contribution repays a loan after an election that the contributor is simply "lining the candidate's pocket, as there is no ongoing campaign to which the contribution may be made." *Wilkinson*, 876 F.Supp. at 930; see *supra*, at 1662 – 1663. The majority flyspecks the polling questions: Why didn't the poll define "political favor"? Did the poll mention that the contributions had to comply with the $2,900 cap? And so forth. See *ante*, at 1654 – 1655. But really —is it likely that such tinkering would have made a real difference? The poll results were so lopsided because the post-election contributions Section 304 targets—ones adding to the candidate's personal wealth—have so conspicuous a potential to corrupt. The public knows that to be true. The public's representatives in Congress knew it to be true. Only this Court —somehow—does not.

* * *

"Democracy works only if the people have faith in those who govern." *Shrink Missouri*, 528 U.S. at 390, 120 S.Ct. 897 (internal quotation marks omitted). And the people cannot have faith in representatives who trade official acts for financial gain. Section 304 prevents that kind of corruption, at barely discernable cost to First Amendment freedoms. The provision limits one narrow use of third-party contributions to a campaign, thus "entail[ing] only a marginal restriction" on speech. *Buckley*, 424 U.S. at 20, 96 S.Ct. 612. And the provision targets a practice posing exceptional risks of *quid pro quo* deals. Repaying a candidate's loan after he has won election cannot serve the usual purposes of a contribution: The money comes too late to aid in any of his campaign activities. All the money does is enrich the candidate personally at a time when he can return the favor—by a vote, a contract, an appointment. It takes no political genius to see the heightened risk of corruption—the danger of "I'll make you richer and you'll make me richer" arrangements between donors and officeholders. Section 304 has guarded against that threat for two decades, but no longer. In discarding the statute, the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process. I respectfully dissent.

All Citations

142 S.Ct. 1638, 2022 WL 1528348, 22 Cal. Daily Op. Serv. 4559

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The statement the majority quotes from a former FEC Commissioner does not support any broader understanding of the Government's claim. That statement appears in a parenthetical to a citation for the Government's actual argument: that winning candidates "possess a greater capacity" than losing ones do to get their loans repaid. App. 31. And the statement—that "only winners" have "an easy time dealing with debt"—means not that all or most winners do, but instead that no losers do. *Id.*, at 31–32. The former Commissioner who made the remark had also served as counsel to a losing presidential campaign, and he was merely observing how hard that campaign had found it to repay debt. See P. Overby, How Will Clinton Resolve Campaign Debt? National Public Radio, May 14, 2008.

2 The majority also fails to recognize that post-election contributions can go toward interest payments, enabling a candidate to turn a tidy profit on top of recovering the amount loaned. Consider the case of one member of the U. S. House Transportation and Infrastructure Committee. She loaned her campaign $150,000 at an 18% interest rate (no, that is not a typo), and over time collected more than $200,000 in interest payments. Much of that money came from fundraising events hosted by a lobbying firm representing members of the transportation industry. See A. Zajac, Interest on Campaign Loan Pays, L. A. Times, Feb. 14, 2009, p. B1. The example is extreme, but the FEC typically allows candidates to charge their campaigns—which then tap contributors for—a commercially reasonable rate of interest. See FEC, Campaign Guide for Congressional Candidates and Committees 101 (2021).

3 The majority asserts without explanation that these and other similar examples involve not *quid pro quo* corruption, but only contributors' exercise of their "greater influence" over candidates. *Ante*, at 1653 – 1654. Even accepting that distinction (as our caselaw does), the majority's claim is hard to understand. Here is the *quid* in the examples: a donation paying off a successful candidate's personal loan. And here is the *quo*: a government contract, or a key vote. However "vague" the "line between *quid pro quo* corruption and general influence," *ibid.*, those exchanges cross it. The majority must mean that the Government has not proved beyond a doubt that the trades in fact occurred. But again, that is the wrong standard given (1) the difficulty of such proof and (2) the significant risks of *quid pro quo* corruption inherent in the above fact patterns. See *supra*, at 1661 – 1662.

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