No. 21-12

IN THE
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Appellant,
v.

TED CRUZ FOR SENATE, *et al.*,
Appellees.

On Appeal from the U.S. District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Amicus curiae addresses only the first of the two Questions Presented:

Whether Appellees have Article III standing to challenge 52 U.S.C. § 30116(j)'s limit on the amount of post-election contributions that an election campaign may use to repay the debt owed to the candidate.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

NCLA is particularly disturbed by the Solicitor General's contention—on behalf of Appellant Federal Election Commission (FEC)—that Appellees lack Article III standing to challenge the constitutionality of Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 52 U.S.C. § 30116(j). FEC asserts that the injuries they incurred are not fairly traceable to Section 304 but rather arose by operation of 11 C.F.R. § 116.11, the regulation FEC adopted to implement Section 304. FEC Br. 16-20. That novel re-interpretation of Article III standing requirements is unsound; any injury traceable to the FEC regulation is also traceable to Section 304, because FEC would have lacked authority to issue the regulation in the absence of Section 304. At least as importantly from NCLA's perspective, FEC's position—if adopted by the Court—would substantially impair the ability of NCLA and like-minded critics of government overreach to challenge unconstitutional federal statutes.

NCLA also disagrees with FEC's alternative grounds for challenging Appellees' standing: that Appellees' injuries do not create Article III standing because they allegedly were self-inflicted. FEC Br. 20-26. NCLA takes no position on the underlying constitutional issue: whether the loan-repayment limit imposed by Section 304 of the BCRA violates the First Amendment.

STATEMENT OF THE CASE

Federal law imposes no limits on the amount of money that candidates for federal office may provide to their own campaigns. Such self-financing often takes the form of loans, which a campaign committee may

repay using contributions received either before or after the election. Section 304 of the BCRA, 52 U.S.C. § 30116(j), however, states that campaigns may repay no more than $250,000 of pre-election loans with post-election contributions. Appellees Ted Cruz for Senate, *et al.*, allege that Section 304's limitation on loan repayments violates their First Amendment rights.

FEC has issued regulations designed to implement Section 304's loan-repayment limitation. The regulations provide that if a campaign wishes to repay a loan of the candidate's personal funds using pre-election contributions, "it must do so within 20 days of the election." 11 C.F.R. § 116.11(c)(1). After that date, such loans may be repaid only with post-election contributions, and any such repayments are subject to Section 304's $250,000 limitation. Any remaining balance of the personal loan that exceeds $250,000 is treated "as a contribution by the candidate." 11 C.F.R. § 116.11(c)(2).

In his 2018 campaign for reelection to the U.S. Senate from Texas, Appellee Ted Cruz loaned his campaign committee (Appellee Ted Cruz for Senate) $260,000, $10,000 more than Section 304 permitted him to be repaid using post-election contributions. Believing that he had a right to be repaid with such funds, Cruz declined to have the committee repay him with available pre-election funds and instead used pre-election funds to pay other creditors. J.S. App. 51a. After the 20-day period specified in 11 C.F.R. § 116.11(c)(1) had elapsed, the campaign committee repaid Cruz the $250,000 statutory maximum using post-election contributions, but Section 304 barred the

committee from repaying the final $10,000 balance. *Id*.

Appellees filed suit against FEC in federal district court, seeking declaratory and injunctive relief against enforcement of Section 304 and its implementing regulations. FEC filed a motion to dismiss, asserting that Appellees lacked Article III standing. FEC contested standing based solely on its "self-inflicted" injury theory: it contended that Senator Cruz's injury was not fairly traceable to Section 304 and its implementing regulations because he brought about the injury deliberately through his own actions.

The district court denied the motion. J.S. App. 50a-57a. It held that an individual does not forfeit his Article III standing "merely because he is a 'test' plaintiff." *Id.* at 52a (quoting *Gavit v. Alexander*, 477 F. Supp. 1035, 1040 (D.D.C. 1979)). It explained, "Because the parties' interests here are plainly adverse, the fact that Senator Cruz may have made the two loans fully expecting that the Loan Repayment Limit would inhibit his ability to be fully repaid has no bearing on his standing to challenge the law." *Id.* at 53a. Rejecting FEC's claim that Appellees should have taken (but failed to take) steps that could have avoided the injury, the court stated that no case law "supports the notion that to avoid causing her own injury a plaintiff must do the very thing she claims she has a right not to do." *Id.* at 55a.

A three-judge federal district court panel later granted summary judgment to Appellees, ruling that Section 304's loan repayment limit violates the First Amendment and enjoined its enforcement. J.S. App. 5a-37a. The panel did not address Appellees' standing,

other than to note that a district judge had previously denied FEC's motion to dismiss for lack of standing. J.S. App. 9a.

SUMMARY OF ARGUMENT

Congress adopted Section 304 of the BCRA in 2002 to restrict the right of congressional candidates to recover funds they loan to their candidate committees. Very soon thereafter, FEC adopted 11 C.F.R. § 116.11(c)(1), a regulation designed to implement that statutory restriction. FEC said at the time that the regulation was "mandated" by the statute. It is uncontested that the restrictions on loan repayment resulted in Appellees suffering a $10,000 loss. FEC argues that the loss is "fairly traceable" only to the FEC regulation, not to the enabling statute, and thus that Appellees lack Article III standing to challenge the statute. But given the extremely close relationship between Section 304 and § 116.11(c)(1), and given that FEC's authority to issue the regulation derives solely from Section 304, Appellees' loss must also be deemed "fairly traceable" to Section 304.

The heightened standing standard proposed by FEC would, if adopted, severely restrict the ability of NCLA and others to challenge unlawful government action. NCLA urges the Court to carefully consider that impact when deciding whether to adopt FEC's novel restrictions on standing.

Nor does the allegedly self-inflicted nature of Appellees' injury defeat their Article III standing claims. Regardless of whether Appellees' injury is "self-inflicted" because they intentionally delayed

repayment following the 2018 election, it is still fairly traceable to FEC's repayment restrictions. According to FEC's own account, Appellees' intentional delay did not displace Section 304 from the causal chain but rather triggered Section 304's loan-repayment restrictions to inflict the injury-in-fact that is the basis for this lawsuit. Under this Court's longstanding precedent, such deliberate provocation of litigation does not defeat standing and instead is a critically important tool in challenging unlawful and unconstitutional government conduct**.**

ARGUMENT

I. APPELLEES' INJURIES ARE FAIRLY TRACEABLE TO SECTION 304 AND ARE LIKELY TO BE REDRESSED BY A FAVORABLE DECISION

Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies," terms intended to confine courts to addressing matters "traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). Standing to sue "is part of the common understanding of what it takes to make a justiciable case." *Ibid.*

The three elements that constitute the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), are well understood. The plaintiff must demonstrate: (1) "an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical"; (2) "causation—a fairly traceable connection between the plaintiff's

injury and the complained of conduct"; and (3) "redressability—a likelihood that the requested relief will redress the alleged injury." *Citizens for a Better Environment*, 523 U.S. at 103 (citations omitted).

FEC does not dispute that Senator Cruz has met the first standing requirement. His principal injury is both concrete and actual: he has been unable to secure repayment of all the funds he loaned to his campaign committee, thereby incurring a $10,000 loss. FEC's challenge to standing focuses primarily on the second requirement; it contends that Appellees' injuries are not fairly traceable to Section 304's $250,000 limitation but rather are traceable only to 11 C.F.R. § 116.11, the regulation FEC adopted to implement Section 304. FEC Br. 16-20.[2]

Appellees convincingly argue that FEC's traceability argument is based on a faulty factual premise. FEC alleges that: (1) all or most of the $250,000 repaid by Senator Cruz's campaign committee must have consisted of funds raised prior to the November 2018 general election because the campaign received very few contributions between election day and the repayment date; (2) because the committee has not used post-election contributions to

[2] FEC also challenges redressability, alleging that the relief he seeks (a declaration that Section 304 violates his First Amendment rights and an injunction against its enforcement) would not redress his injuries. FEC's redressability claim is insubstantial. FEC has never contended that if the district court's injunction is upheld by this Court, it would have any authority to interfere with repayment of the final $10,000 of Senator Cruz's loan.

repay the loan, Section 304's repayment limitation does not stand as an impediment to repayment of the final $10,000; and thus (3) any injury suffered by Appellees is not fairly traceable to Section 304. Appellees have explained that, contrary to FEC's allegation, the Committee received substantially more than $250,000 in contributions in the two months after the election—funds sufficient to repay $250,000 of Senator Cruz's loans and thereby sufficient to exhaust the $250,000 cap on the use of post-election funds. Brief for Appellees at 24-29.

NCLA is not filing this brief to address that factual dispute, however. Rather, NCLA writes separately to explain why Appellees have demonstrated traceability—and thus Article III standing—without regard to the source of funds the campaign used to repay $250,000 of Senator Cruz's loan.

A. Appellees Establish Traceability by Showing that Section 304 Was at Least a But-for Cause of Their Injury

FEC does not contest that Appellees have been injured by one of its regulations, 11 C.F.R. § 116.11(c)(1). That regulation prohibits the campaign committee from paying Senator Cruz the final $10,000 installment on his pre-election loan, because more than 20 days have elapsed since the election. The FEC contends that the injury is *entirely* traceable to that regulation and not at all traceable to Section 304 of the BCRA.

But that contention ignores the source of § 116.11(c)(1). FEC adopted that regulation in 2003 in the immediate aftermath of enactment of the BCRA. Section 304 was adopted as part of the so-called "Millionaires' Amendment," a portion of the BCRA designed to protect incumbent Members of Congress and others being challenged by wealthy, self-financed candidates. The Millionaires' Amendment eased fundraising restrictions on a candidate whose challenger injected very large amounts of his own funds into the campaign, and also limited (by means of Section 304) the ability of such challengers (and other congressional candidates) to obtain repayment of large loans they made to their campaign committees.

When it adopted § 116.11(c)(1) as part of "interim final rules," FEC explained that it was doing so "to implement the various provisions of the Millionaires' Amendment including ... repayment of personal loans." FEC, "Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates—Interim Final Rules," 68 Fed. Reg. 3970 (Jan. 27, 2003). FEC explained that it was issuing interim final rules (rather than following notice-and comment rulemaking procedures) in part because it had determined that § 116.11(c)(1) and the other new regulations were "mandated by BCRA." *Id.* at 3994. In light of that history, FEC cannot seriously contend that § 116.11(c)(1) is not directly traceable to Section 304, or that it derived authority to issue the regulation from any source other than Section 304.

Given that direct relationship between the regulation and the statute, the injury inflicted on

Appellees by § 116.11(c)(1) is also "fairly traceable" to Section 304. Without Section 304, FEC would not have issued § 116.11(c)(1) (indeed, it would have had no authority to do so), and thus Senator Cruz would not have incurred a $10,000 loss. Section 116.11(c)(1)'s existence as an intervening step in the causal chain does not prevent the loss from being "fairly traceable" to Section 304.

Indeed, the Court has found the traceability requirement to have been met in cases in which the causal chain includes multiple links. For example, the Court deemed standing to have been adequately pleaded by plaintiffs who alleged: (1) the Interstate Commerce Commission issued an order allowing railroads to collect surcharges on freight rates; (2) the increased freight rates would increase the costs (and thus prices) for recyclable goods; (3) the increased prices of recyclable goods would cause consumers to purchase more nonrecyclable goods; and (4) increased production of nonrecyclable goods would injure the plaintiffs by increasing litter in national parks frequented by the plaintiffs. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). While the Court later described the *SCRAP* decision as having gone "to the very outer limits of the law" of standing, *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990), *SCRAP* well illustrates that the existence of intervening steps in the causal chain is not an impediment to establishing Article III standing.

An injury is "fairly traceable" to a challenged action so long as the action is a but-for cause of the injury. "Proximate causation is not a requirement of

Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). The but-for causation standard is satisfied whenever, as here, "but for the defendant's unlawful conduct, [the plaintiff's] alleged injury would not have occurred." *Comcast Corp. v. Nat'l Assoc. of African American-Owned Media,* 140 S. Ct. 1009, 1014 (2020). But for the adoption of Section 403, FEC would not have adopted 11 C.F.R. § 116.11(c)(1), and Appellees would not have suffered an injury.[3]

FEC's reliance on *California v. Texas*, 141 S. Ct. 2104 (2021), is misplaced. The plaintiffs in that case sought to establish standing to challenge one provision of the Patient Protection and Affordable Care Act (the minimum essential coverage provision) by showing that they had been injured by totally separate provisions of the Act. In the absence of any allegation that their injury was fairly traceable to the minimum essential coverage provision, the Court held that the plaintiffs lacked Article III standing. 141 S. Ct. at 2120. In sharp contrast to the facts in *California v.*

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[3] Although Appellees are not required to establish proximate causation, they very likely satisfy that more exacting standard as well. Generally, A is deemed a proximate cause of B if B is a "natural and foreseeable result" of A. *Bridge v. Phoenix Bond & Indemnity Co.,* 553 U.S. 639, 658 (2008) (construing the "proximate cause" necessary to state a cause of action for fraud under the federal RICO statute). In light of FEC's statement that Section 403 "mandated" adoption of § 116.11(c)(1), Appellees' injury was a "natural and foreseeable result" of enactment of Section 403.

Texas, Appellees have demonstrated a close relationship between Section 304 and 11 C.F.R. § 116.11(c)(1). Hence, *California v. Texas* is wholly inapposite.

B. Adopting FEC's Theory of Standing Would Significantly Restrict Judicial Challenges to Unlawful Federal Government Action

FEC is asking the Court to adopt a new, heightened standard for establishing that an injury is "fairly traceable" to complained-of conduct. It asserts that a plaintiff lacks standing to challenge an allegedly unconstitutional statute when his injury is most directly attributable to an agency regulation adopted to implement the challenged statute rather than the statute itself.

That assertion finds no support in the Court's case law. *See*, *e.g., Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) ("for purposes of [determining whether plaintiffs have established] traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of the law that is challenged"). But more importantly from NCLA's perspective, FEC's proposed heightened standard would significantly restrict challenges to unlawful government action. NCLA's litigation activity focuses on challenges to regulatory actions that violate people's civil liberties, including actions that ignore separation-of-powers principles central to the U.S. Constitution. If adopted by this Court, FEC's novel proposed standard would seriously hamper NCLA's—and everyone else's—ability to raise

separation-of-powers and similar structural constitutional challenges.

For example, the Court recently agreed to hear four consolidated cases that address EPA's authority to issue sweeping climate-change regulations under the Clean Air Act. *See West Virginia v. EPA*, No. 20-1530, and consolidated cases. Petitioners in those cases argue that EPA regulations issued in 2015 exceeded the scope of its delegated authority under the Clean Air Act; and if the Clean Air Act really does grant EPA its claimed sweeping authority, they argue alternatively that the Act is an unconstitutional delegation of Congress's legislative powers. NCLA has filed an *amicus curiae* brief in support of the Petitioners' nondelegation claims. But if FEC is correct, then all Petitioners lack Article III standing to raise their unconstitutional-delegation claims because their injuries are "fairly traceable" only to EPA's 2015 regulations, not to the Clean Air Act's unconstitutional delegation of legislative powers.

Indeed, FEC's heightened standing standard would thwart *all* nondelegation doctrine challenges, regardless of who brings them. In every such case, the adoption of the complained-of legislation does not by itself directly inflict injury; the legislation merely invites a federal agency to exercise open-ended, delegated legislative powers. Only when the agency begins to exercise those unlawful powers by adopting regulations do individuals incur injuries. Under FEC's heightened standing standard, those individuals would lack standing to challenge the underlying statute as a violation of Article I, § 1 (which vests legislative power in Congress alone) because (according to FEC) their

injuries are fairly traceable only to the agency regulations, not to the unconstitutional statute that authorized the regulations.

FEC's heightened standard would similarly thwart other types of structural claims that NCLA regularly asserts. NCLA has frequently challenged actions by Executive Branch officials appointed to their positions in violation of the Appointments Clause. U.S. Const., Art. II, § 2. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). Similar Appointments Clause challenges in the future may be thrown out of court for lack of standing if FEC prevails; under FEC's heightened standard, any injury might be deemed "fairly traceable" only to the acts of the appointed official, not to the improper appointment made at an earlier date by other officials. NCLA would anticipate similar standing problems were it to raise constitutional challenges to tenure protection afforded to Executive Branch officials, as it has frequently in the past. *See, e.g., Cochran v. SEC*, __ F.4th __, 2021 WL 5876747 (5th Cir., Dec. 13, 2021) (*en banc*); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). Under FEC's novel heightened standard, any injury might be deemed "fairly traceable" only to the acts of the official who enjoys tenure protection, not to the statute or regulation that unconstitutionally granted the official such tenure protection.

FEC's heightened standard for establishing that an injury is "fairly traceable" to complained-of conduct would have a devastating impact on the ability of individuals to raise judicial challenges to unlawful action by federal officials. NCLA urges the Court to

carefully consider that negative impact when deciding whether to adopt FEC's proposed standard.

II. APPELLEES' INTENTIONAL DELAY OF REPAYMENT DOES NOT DEFEAT THEIR STANDING

FEC also argues that Appellees' $10,000 injury is not traceable to the loan-repayment limit because it was in some sense "self-inflicted." FEC Br. at 20. According to FEC, because repayment "was intentionally delayed … to establish the factual basis for this challenge," the "inability to repay the final $10,000 of Senator Cruz's loan is … 'so completely due to [appellees'] own fault as to' defeat standing." *Id.* at 23 (quoting 13A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3531.5 (2008) (Wright & Miller 2008)).

This argument, however, is foreclosed by the very legal treatise upon which FEC relies to make it: Wright & Miller's treatise explicitly explains that "deliberate provocation of litigation does not defeat the existence of a controversy." Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3531.5 (2019). Wright & Miller's conclusion reflects this Court's longstanding reasoning in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982), which ruled that housing applicants had standing to sue a realty company even when the applicants' sole purpose in applying for housing was to uncover racial discrimination. Thus, "when an individual searches for and finds a violation of the law, it is the violation itself—not the search—that causes the plaintiff

injury." *Kuehl v. Sellner*, 887 F.3d 845, 851 (8th Cir. 2018) (citing *Coleman*, 455 U.S. at 373-74); *see also Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332-33 (11th Cir. 2013).

The same logic applies where, as here, a plaintiff "searches for and finds a violation of the law" by intentionally flouting a legal requirement to create an injury-in-fact for a lawsuit. *Cf. Evers v. Dwyer*, 358 U.S. 202, 204 (1958) ("That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant."). FEC quotes but fails to grasp Wright & Miller's explanation that "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury"—rather "the injury [must be] so completely due to the plaintiff's own fault as to break the causal chain." FEC Br. at 21 (quoting Wright & Miller 2008 § 3531.5). An injury is "completely due to the plaintiff's own fault" only if it fully displaces all other causes. Such displacement does not occur where a plaintiff intentionally violates a law to challenge its constitutionality because the entire point is to preserve the causal chain by ensuring that the challenged law causes the injury. This strategy has been a keystone in the effort to protect constitutional rights through litigation since at least the time of *Plessy v. Ferguson*, 163 U.S. 537, 538-39 (1896), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

The fact that Senator Cruz "has in some sense contributed to his own injury" by intentionally delaying repayment does not break the causal chain

between Section 304's loan-repayment limit and the injury-in-fact. Rather, as FEC acknowledges, the intentional "delay had … been essential to trigger the regulatory requirement that $10,000 of the total loan amount be recharacterized as a contribution," and thus not repayable. FEC Br. at 24. In other words, far from displacing Section 304's repayment limit as a superseding cause, Appellees' intentional delay was designed to and had the effect of inserting that loan-repayment limit as the final domino in the causal chain that directly inflicted the $10,000 injury-in-fact. The injury is therefore indisputably "fairly traceable" to the challenged repayment limit. *Lujan*, 504 U.S. at 560.

Cases cited by FEC in support of its "self-inflicted injury argument" do not alter this conclusion. *See Clapper v. Amnesty International*, 568 U.S. 398 (2013); *McConnell v. FEC*, 540 U.S. 93 (2003); and *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam), cited at FEC Br. at 21-23. Unlike here, the statutory provisions challenged in FEC's cases did not directly inflict the plaintiffs' alleged injuries.

In *McConnell*, which also concerned BCRA, a group of politicians challenged BCRA's campaign contribution limits as being too high. 540 U.S. at 228. They asserted a supposed "competitive injury" in elections because, unlike opposing candidates, they did not "wish to solicit or accept large campaign contributions as permitted by BCRA." *Id.* The Court rejected this standing argument, observing that politicians' "inability to compete stems *not from the operation of* [*BCRA*], but from their own personal 'wish'

not to solicit or accept large contributions." *Id.* (emphasis added). In other words, the final link in the causal chain to the "competitive injury" was not the allegedly high contribution limit, but rather the politicians' independent choice not to seek higher contributions.

The statute challenged in *Clapper*, 568 U.S. at 417, likewise lacked a direct relationship with the injury alleged in that case. Plaintiffs challenged provisions of the Foreign Intelligence Surveillance Act authorizing surveillance of certain international electronic communications. *Id.* at 401. They attempted to establish Article III standing by alleging they took "costly and burdensome measures to protect the confidentiality of their communications," such as "travel so that they can have in-person conversations." *Id*. at 415. This Court rejected that argument because the costly measures were not the direct product of any surveillance authorized by FISA, but rather "the product of their fear of surveillance." *Id*. at 417. Injuries sustained based on "such a fear [are] insufficient to create standing" because they were entirely the result of plaintiffs' own decisions, rather than the operation of FISA. *Id*.

The same is true of *Pennsylvania*, 426 U.S. 660. There, the Court held that the decisions by a group of States to reimburse their own residents for taxes levied by other States was not a basis for standing. *Id.* at 661-62. Notably, nothing in the challenged taxes forced the plaintiff States to offer reimbursements. As such the reimbursements were the independent decisions that broke any possible causal chain

connecting the taxes and injury to the fisc of the plaintiff States.

In contrast to the independent actions taken by plaintiffs in *McConnell*, *Clapper*, and *Pennsylvania*, Appellees' decision to delay repayment was not an independent response to the operation of Section 304's loan-repayment limit—quite the opposite. Application of the loan-repayment limit was triggered by Appellees' delay and was the final link in the causal chain that led to Appellees' $10,000 injury. FEC's argument that Appellees' intentional delay somehow broke the chain of causation thus fails, and there is no option but to conclude that the injury-in-fact in this case is fairly traceable to the loan-repayment limit.

FEC's second "self-inflicted" argument—that Appellees could easily have taken lawfully available steps to avoid the $10,000 injury, *see* FEC Br. at 23-24—is likewise unavailing. According to FEC, Appellees could have avoided application of the loan-repayment limit simply by repaying Senator Cruz with $10,000 in pre-election contributions. *Id*. at 24. By choosing not to do so, Appellees voluntarily subjected Senator Cruz to the $10,000 injury caused by application of the loan-repayment limit. *Id.* This logic, however, would require Appellees to avoid an injury by subjecting themselves to the loan-repayment framework they contend is unconstitutional. For standing purposes, the Court must accept Senator Cruz's claim that Section 304's loan-repayment limitation unconstitutionally burdens free speech. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). If so, then Senator Cruz had a First Amendment right to repay the loan using post-election rather than pre-election

contributions. Mandating that Senator Cruz instead use pre-election funds, as FEC urges, therefore would require him to forfeit a right he is assumed to have, and to subject himself to the very framework that is assumed to unconstitutionally burden his free speech. Such a "heads I win, tails you lose" principle has no place in the law. *See Libertarian National Committee, Inc. v. FEC*, 924 F.3d 533, 536 (D.C. Cir. 2019) (rejecting FEC's argument that political committee lacked standing because it did not subject itself to statutory requirements that, it contended, violated the First Amendment).

CONCLUSION

The Court should affirm the district court's holding that Appellees possess standing to challenge the constitutionality of Section 304 of the BCRA.

Respectfully submitted,

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