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## Federal Election Commission v. Cruz

Myles A. Roth

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# FEDERAL ELECTION COMISSION V. CRUZ

MYLES A. ROTH

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## INTRODUCTION

In 2018, Senator Ted Cruz gave a \$260,000 loan to his reelection campaign—Ted Cruz for Senate (Committee).<sup>1</sup> While a campaign is able to repay a candidate using campaign contributions, the Bipartisan Campaign Reform Act of (BCRA) capped repayment of these loans at \$250,000.<sup>2</sup> If the loan exceeded that amount, the campaign could use pre-election funds for repayment if it is made “within 20 days of the election.”<sup>3</sup> After the twenty-day window, any amount above \$250,000 must be treated as a contribution to the campaign, “precluding later repayment.”<sup>4</sup> After its twenty-day window had expired, the Committee repaid Cruz the maximum allowed amount of \$250,000—leaving \$10,000 unpaid.<sup>5</sup> Cruz and the Committee initiated an action in the District Court for the District of Columbia, “alleging that Section 304 of the BCRA violat[ed] the First Amendment and raising challenges to the FEC’s implementing regulation.”<sup>6</sup>

The District Court granted summary judgment to Cruz and the Committee, holding that the loan repayment limitations burdened “political speech without sufficient justification.”<sup>7</sup> Challenges to the

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1. Fed. Election Comm'n v. Cruz, 142 S. Ct. 1638, 1641 (2022).
  2. *Id.* See 11 C.F.R. § 110.1(b)(3)(i); 52 U.S.C. § 30116(j).
  3. Cruz, 142 S. Ct. at 1641 (quoting 11 C.F.R. § 116.11(c)(1)).
  4. Cruz, 142 S. Ct. at 1641 (quoting 11 C.F.R. § 116.11(c)(2)).
  5. Cruz, 142 S. Ct. at 1641.
  6. *Id.*
  7. *Id.*

regulation were dismissed as moot.<sup>8</sup> The Government appealed.<sup>9</sup> The Supreme Court *held*, affirmed.<sup>10</sup> The statute and regulation were deemed unconstitutional with the Court holding (1) the “Appellees have standing to challenge the threatened enforcement of Section 304,” and (2) that “Section 304 of the BCRA burdens core political speech without proper justification.”<sup>11</sup>

### I. ISSUE: LIMITATIONS ON CANDIDATE LOAN REPAYMENTS AS A VIOLATION OF POLITICAL SPEECH

The fundamental question in *FEC v. Cruz* is whether the \$250,000 repayment limitation within Section 304 of the BCRA violates a candidate’s First Amendment right to engage in political speech.<sup>12</sup> While a candidate can spend an unlimited amount of money on their campaign,<sup>13</sup> and their campaign is able to borrow an unlimited amount,<sup>14</sup> the Court has allowed monetary restrictions to prevent corruption or the appearance of corruption.<sup>15</sup> In *FEC v. Cruz*, the Court noted that Section 304 restricted the use of post-election funds, and that the Federal Election Commission utilized regulations to further this goal.<sup>16</sup> In its decision, the Court addressed if the Appellees had standing “to challenge the threatened enforcement of Section 304,”<sup>17</sup> and examined the constitutionality of the BCRA’s loan repayment limit along with its enforcement regulations.<sup>18</sup>

### II. DEVELOPMENT OF THE LAW IN CAMPAIGN LOAN REPAYMENT LIMITS

Campaigns for election of public office have among the strongest First Amendment protections. The Constitution protects the ability of a candidate “to use personal funds to finance campaign speech, protecting his freedom ‘to speak without legislative limit on behalf of

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8. *See id.*

9. *See id.* at 1646.

10. *See id.* at 1656.

11. *Id.* at 1641.

12. *See id.* at 1645.

13. *See Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976).

14. *See id.*

15. *See e.g.*, *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 206 (2014); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 737 (2008).

16. *Cruz*, 142 S. Ct. at 1645 (detailing three pertinent rules within the C.F.R. to enforce the BCRA).

17. *See discussion infra* Section IV.a.

18. *See discussion infra* Section IV.b.

his own candidacy.”<sup>19</sup> But in the 1970s, legislative restrictions were imposed to limit the influence of special interest groups in federal elections.<sup>20</sup>

1974 brought amendments to the Federal Election Campaign Act (FECA) which imposed \$1,000 limits on campaign donations by individuals and organizations, and a \$1,000 limit on expenditures in support of a candidate.<sup>21</sup> These prompted instant litigation leading to the 1975 case, *Buckley v. Valeo*.<sup>22</sup> In *Buckley*, the Court upheld the individual contribution limits, but found the limitations “on campaign expenditures, on independent expenditures by individuals and groups . . . and by a candidate from his personal funds [to be] constitutionally infirm.”<sup>23</sup> By limiting independent expenditure, the Act imposed a “far greater restraint[] on the freedom of speech and association than [with] . . . its contribution limitations,” and led to the Court’s bifurcated decision.<sup>24</sup> A decision which has been contentiously debated for decades to follow.<sup>25</sup>

During the end of the twentieth century, and into the twenty first, the Court continued to chip away at campaign expenditure restrictions. In 1984, a section of the Presidential Election Campaign Fund Act making supportive expenditures by independent political committees greater than \$1,000 a criminal act was found to violate the First Amendment.<sup>26</sup> A 2008 case challenging the “Millionaires’ Amendment” of the 2002 Bipartisan Campaign Reform Act (BCRA) which “raised the [funding] limits only for non-self-financing candidates and only when the self-financing candidate’s [personal] expenditures . . . exceeded the \$350,000 limit,” was also declared

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19. *Cruz*, 142 S. Ct. at 1650 (quoting *Buckley*, 424 U.S. at 54).

20. See John J. Martin, *Danger Signs in State and Local Campaign Finance*, 74 ALA. L. REV. 415, 422 (2022).

21. *Id.*

22. 424 U.S. 1 (1976).

23. *Id.* at 143.

24. *Id.* at 44; see Martin, *supra* note 20, at 423.

25. Many critics of the decision viewed it as “artificial.” Justice Thomas believed the contribution limit and independent expenditure limit abrogated First Amendment rights. Justice Stevens claimed that neither limited First Amendment rights because “money is not speech.” Martin, *supra* note 20, at 424 (quoting Ben Goad, John Paul Stevens: ‘Money Is Not Speech’, THE HILL (Apr. 30, 2014, 11:33 AM), <https://thehill.com/regulation/204800-john-paul-stevens-money-is-not-speech>.)

26. See *Fed. Election Comm’n v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480 (1985) (calling the statute a “fatally overbroad response” to the evil of corruption or the appearance of corruption).

unconstitutional.<sup>27</sup> And in 2014, the Court held that aggregate donation limits towards multiple candidates or committees were “invalid under the First Amendment.”<sup>28</sup>

Beyond targeting a reduction of special interest influence and noncandidate campaign expenditure, the BCRA placed a \$250,000 limit on a campaign repaying a candidate for personal loans made to their election campaign.<sup>29</sup> Some argued that this type of legislation was aligned with the Framers’ desire to prevent corruption.<sup>30</sup> Others derided the limitation as a prima facie violation of the First Amendment.<sup>31</sup> This specific provision within the BCRA was not challenged until the Committee and Senator Cruz filed suit against the Federal Election Commission in 2019.<sup>32</sup>

### III. ANALYSIS OF *FEC v. CRUZ*

With the growing costs of political campaigns and concerns of fraud and corruption, attention has increased over campaign finance regulations and their potential constitutional conflicts. The Court has long grappled with protecting First Amendment interests of political expression and association, while allowing the Government to prevent

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27. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 746, 744 (2008) (“imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.”).

28. *McCutcheon*, 572 U.S. at 193 (2014) (“aggregate limits do little, if anything, to address [concerns of corruption], while seriously restricting participation in the democratic process.”).

29. *See* 52 U.S.C.A. § 30116 (West 2014).

30. *See* Brief for Const. Accountability Ctr. as Amicus Curiae Supporting Appellant at 5, *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638 (2022) (No. 21-12), <https://www.theconstitution.org/wp-content/uploads/2021/11/FEC-v-Cruz-CAC-Amicus-FINAL.pdf>

31. These laws which challenge political speech would also require application of strict, or “closely drawn” scrutiny. *See* Brief for Protect the First Found. as Amicus Curiae Supporting Appellees at 5, *Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638 (2022) (No. 21-12), [https://www.supremecourt.gov/DocketPDF/21/21-12/206194/20211222152251125\\_PT1F%20Cruz%20Amicus%20Final%20Version%20-%20for%20filing.pdf](https://www.supremecourt.gov/DocketPDF/21/21-12/206194/20211222152251125_PT1F%20Cruz%20Amicus%20Final%20Version%20-%20for%20filing.pdf); *see generally* *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’) (internal citations omitted).

32. *See Candidate loan repayment limitation ruled unconstitutional in Ted Cruz for Senate, et al. v. FEC*, FED. ELECTION COMM’N (June 7, 2021), <https://www.fec.gov/updates/candidate-loan-repayment-limitation-ruled-unconstitutional-in-ted-cruz-for-senate-et-al-v-fec-ddc-119-cv-00908/>.

quid pro quo corruption and the appearance of corruption.<sup>33</sup> As these issues cut to the “fundamental nature of the right to associate,” any freedom-curtailing provisions, including the law in question here, are subject to strict scrutiny.<sup>34</sup>

In *Cruz*, the Court made two important holdings in its 6-3 decision. First, the Appellees had standing to challenge a threatened enforcement of Section 304 of the BCRA.<sup>35</sup> Second, it was held that Section 304 unconstitutionally burdened core political speech without proper justification.<sup>36</sup> The dissent adamantly disagreed with Chief Justice Roberts’s majority opinion, believing Section 304 presented a marginal restriction furthering the compelling governmental interest of preventing corruption.<sup>37</sup>

### A. *Standing*

To establish standing under Article III of the Constitution, the 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.”<sup>38</sup> It was documented that the Committee was unable to repay Senator Cruz his final \$10,000, and this was deemed an injury in fact to both Cruz and the Committee.<sup>39</sup> The government argued that the injuries were not fairly traceable as the inability to repay the loans was “self-inflicted,” and also because the harm would be caused by enforcement of an agency regulation instead of the statute itself—thus it was the regulation, and not the statute which caused the harm.<sup>40</sup>

The Court did not find the government’s “self-infliction” claim compelling. Even though the appellees knowingly acted to invoke the limitation and trigger the litigation, the Court stated, “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.”<sup>41</sup> Cases provided by the government failed to alter the court’s conclusion.<sup>42</sup> The majority also highlighted that while the FEC

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33. *See Buckley*, 424 U.S. at 26-27.

34. *See id.* at 25.

35. *See Cruz*, 142 S. Ct. at 1641

36. *See id.*

37. *See id.* at 1657.

38. *Id.* at 1646; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

39. *Cruz*, 142 S. Ct. at 1646.

40. *See id.* at 1647.

41. *Id.* *See Evers v. Dwyer*, 358 U.S. 202, 204, (1958).

42. *See Cruz*, 142 S. Ct. at 1647.

provided the Committee an alternative to avoid liability: “repaying Cruz’s loans in full with pre-election funds, within 20 days of the election,” the argument failed because the Court accepts merits of an appellees’ legal claim as valid for standing purposes, and it must be assumed that the repayment limitation is an unconstitutional burden on free speech.<sup>43</sup>

The Court then turned to the Government’s argument that it was the regulation, and not the statute, which caused the harm. Section 304 only restricted post-election funds from being used to repay the candidate’s personal loans; it did not restrict using funds raised prior to an election.<sup>44</sup> The restriction on repayment via pre-election funds is based within Section 304’s implementing regulation, 11 C.F.R. § 116.11, which specifies that neither pre-election or post-election funds “may be used to repay candidate loans above \$250,000 outstanding 20 days after the election.”<sup>45</sup> The Government believed the Committee did not reach the Section 304 cap on post-election funds, and could repay its \$10,000 balance without breaking the statutory restriction.<sup>46</sup> And that it was specifically the regulation with its 20-day limit which prevented the desired repayment.<sup>47</sup> Per the Government, the Committee was challenging the regulation, which was separate from challenging the statute authorizing the regulation.<sup>48</sup>

Noting the nontraditional arguments, the Court agreed that the appellees did not show an exhaustion of the Section 304 cap on post-election funds.<sup>49</sup> However, the appellees “would have standing to bring a pre-enforcement challenge . . . 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.”<sup>50</sup> Additionally, it ordinarily does not matter if a challenge is made to a statute’s enforcement or instead to a regulation’s enforcement which then raises an argument concerning the validity of the statute that authorized the regulation.<sup>51</sup> The Court chose not to follow the theoretical rabbit hole, and found the appellees had

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43. *Id.* at 1647-48.

44. *See Id.* at 1648; 11 C.F.R. § 116.11

45. *Cruz*, 142 S. Ct. at 1648; *see* 11 C.F.R. § 116.12.

46. *See Cruz*, 142 S. Ct. at 1648.

47. *See id.*

48. *See id.*

49. *Id.* (declaring the arguments “to have an Alice in Wonderland air about them,” as the Government argued the appellees “would not violate the statute by repaying Cruz,” and the appellees argued they would be violating the statute).

50. *Id.* at 1649.

51. *See id.*



“standing to challenge the threatened enforcement of Section 304.”<sup>52</sup> The inability of Cruz to collect the \$10,000 he loaned to his campaign, even if caused by threatened enforcement of an agency regulation, was traceable to Section 304 itself.<sup>53</sup>

A regulation cannot operate independently from the statute which authorized it.<sup>54</sup> In this case, the 20-day rule was “expressly promulgated to implement Section 304.”<sup>55</sup> If that section was found to be “invalid and unenforceable,” then so would be the 20-day rule.<sup>56</sup> An order “enjoining the Government from taking any action to enforce the loan-repayment limitation,” as sought by the appellees in District Court, “would redress [the] Appellees’ harm by preventing enforcement of the [ ] 20-day rule.”<sup>57</sup> While “a litigant cannot ‘by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him,’” in this case, the Appellees were specifically challenging the single Government action causing them harm—the threatened enforcement of the loan-repayment limitation via its implementing regulation.<sup>58</sup> Determining that standing was satisfied, and there was proper jurisdiction within the District Court, the Court moved to the merits.<sup>59</sup>

### B. *Constitutionality of Section 304*

Within Chief Justice Robert’s majority opinion, it was found that by design, Section 304 burdened a candidate who wished to spend on their own behalf through personal loans.<sup>60</sup> Restricting sources of loan repayments increased the risk of a campaign to not repaying their loans, and that prevented candidates from loaning money to their campaigns in the first place—burdening core speech.<sup>61</sup> Data concerning a clustering of loans at the \$250,000 threshold was reviewed; and it was determined there was no clustering before the repayment limitation went into effect.<sup>62</sup> While the Court stressed that

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52. *Id.*

53. *See id.*

54. *See California v. Texas*, 141 S. Ct. 2104, 2119-2120 (2021).

55. *Cruz*, 142 S. Ct. at 1649.

56. *Id.*

57. *Id.*

58. *Id.* (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, n. 5 (2006)).

59. *See Cruz*, 142 S. Ct. at 1650.

60. *See id.* *See* 52 U.S.C. § 30101(9)(A)(i) (defining “expenditure” to include loans).

61. *See Cruz*, 142 S. Ct. at 1650.

62. *See id.*

empirical data is not required, it found an “evident and inherent” burden on the First Amendment.<sup>63</sup>

Though Section 304 did not impose an expenditure cap on personal funds, it enacted “an unprecedented penalty on any candidate who robustly exercises [their] First Amendment right.”<sup>64</sup> The penalty specifically being a risk the candidate will not be repaid if they loan over \$250,000 to their campaign.<sup>65</sup> Justice Roberts then dove into the importance of debt on campaigns, discussing the significance of lending money for “new candidates and challengers.”<sup>66</sup> Noting these high First Amendment costs, the decision moved to potential justifications for the loan-repayment limitation.

Disregarding a debate amongst the parties on the level of judicial scrutiny, Roberts declared that the Government failed to prove it was pursuing a legitimate objective.<sup>67</sup> The Court “has recognized only one permissible ground for restricting political speech: the prevention of ‘quid pro quo’ corruption or its appearance,”<sup>68</sup> with previous attempts restricting campaign speech for other legislative aims being rejected.<sup>69</sup> Roberts met the Government’s argument that these contributions increase a risk of corruption with skepticism, deriding “the loan-repayment limitation [as] yet another in a long line of ‘prophylaxis-upon-prophylaxis approach[es]’ to regulating campaign finance.”<sup>70</sup> And that the “prophylaxis-upon-prophylaxis approach” is a “significant indicator that the regulation may not be necessary for the interest it seeks to protect.”<sup>71</sup>

As this statute poses a restriction on speech, the Government must point to “record evidence or legislative findings” that demonstrate a need to attack this specific problem.<sup>72</sup> And per the

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63. *Id.* at 1651; see *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745, (2011).

64. *Id.* (quoting *Bennett*, 564 U.S. at 738-39).

65. See *Cruz*, 142 S. Ct. at 1651

66. *Id.*

67. The parties debated if strict, or “closely drawn scrutiny should apply to the Court’s analysis. See *id.* at 1652; see *Buckley*, 424 U.S. at 25.

68. *Cruz*, 142 S. Ct. at 1652 (quoting *McCutcheon*, 572 U.S. at 207).

69. See *Cruz*, 142 S. Ct. at 1652; *McCutcheon*, 572 U.S. at 191 (denying the reduction of money in politics); *Bennett*, 564 U.S. at 749-50 (rejecting leveling electoral opportunities by equalizing candidate resources); *Citizens United*, 558 U.S. at 359-60 (preventing a limit on general influences contributors can have over an elected official).

70. *Cruz*, 142 S. Ct. at 1652 (quoting *McCutcheon*, 572 U.S. at 221 (internal quotations omitted)).

71. *Cruz*, 142 S. Ct. at 1652.

72. See *id.*; *McCutcheon*, 572 U.S. at 210 (“[The Court has] never accepted mere conjecture as adequate to carry a First Amendment burden.”).

majority, it failed to “identify a single case of quid pro quo corruption” in the context of candidate loan repayment.<sup>73</sup> The Court viewed the reports and anecdotes provided by the government as a mere hypothesis that those who help reduce a candidate’s debt after an election could have increased influence or access.<sup>74</sup> And that is “not the type of quid pro quo the Government may target.”<sup>75</sup> The majority made clear there is a line drawn between quid pro quo corruption and general influence, and while it may be vague, it must be distinguished to protect First Amendment rights.<sup>76</sup> In its analysis of when to draw the line, “the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it.”<sup>77</sup>

The Government’s remaining evidence failed to impress the majority. Academic articles did not distinguish between voting patterns based on influence of donors versus that of illicit quid pro quo.<sup>78</sup> An online poll conducted by the Government, and statements by members of Congress also drew the Court’s ire.<sup>79</sup> Robert’s took aim at the Government’s, and the dissent’s “common-sense” analogy where post-election contributions were akin to a gift “because they add to the candidate’s personal wealth;” stating that the comparison fails here because this case concerned a loan and not a gift.<sup>80</sup> Calling the evidence scant, Roberts refused to defer to Congress’s legislative judgment of “further[ing] an anticorruption goal.”<sup>81</sup> Asserting it is the Court’s role to decide if a legislative choice is constitutional, Roberts concluded that the Government did not show Section 304 furthered a permissible anticorruption goal—and instead used an impermissible objective of limiting money in politics.<sup>82</sup>

In the dissenting opinion, Justice Kagan argued the statute furthered a legitimate and compelling interest. By “striking down the law[], the Court [greenlit] all the sordid bargains Congress thought right to stop.”<sup>83</sup> Section 304, Kagan stated, did not prevent interference with a candidate self-funding their campaign, but only prohibited using other people’s money to finance it.<sup>84</sup> The majority

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73. *Cruz*, 142 S. Ct. at 1653.

74. *See id.*

75. *Id.*

76. *See id.*

77. *Id.* (quoting *McCutcheon*, 572 U.S. at 209).

78. *See Cruz*, 142 S. Ct. at 1654.

79. *See id.*

80. *Id.* at 1654-55.

81. *Id.* at 1655.

82. *See id.*

83. *Id.* at 1657.

84. *See id.*

overstated “the First Amendment burdens Section 304 imposes,” while also understating “the anti-corruption values Section 304 serves.”<sup>85</sup>

Looking to precedent, the dissent believed Section 304 brought only a marginal restriction on speech, as it only regulates contributions.<sup>86</sup> Kagan noted that the statute simply requires donations for repayment “when the speech is ongoing, and before everyone knows which candidate won (and so is in a position to return the favor by delivering government benefits).”<sup>87</sup> Providing that quid pro quo corruption extends beyond overt bribery, the dissent centered on the significant dangers that Section 304 aimed to regulate.<sup>88</sup> It was the common sense behind Section 304 and the obviousness of its theory, which the dissent argued lessened specific identification of cases of quid pro quo corruption that candidate loan repayment prevented.<sup>89</sup> The dissent concluded that faith in democracy is required for its success, and Section 304 of the BCRA was a narrow regulation used for decades and prevented corruption and the appearance of corruption which otherwise would erode faith in democracy.<sup>90</sup>

#### IV. IMPLICATION OF *FEC V. CRUZ*

This decision shows an ongoing trend of the Court’s staunch protection of First Amendment rights related to money in elections. While not as broad in scope as other election spending cases,<sup>91</sup> *Cruz* signals the Roberts Court’s philosophy of restricting political speech

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85. *Id.*

86. *See id.*; *Buckley*, 424 U.S. at 20.

87. *Cruz*, 142 S. Ct. at 1659.

88. Justice Kagan provided a similar analogy to the version Justice Roberts rejected:

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.

*Id.* at 1660; *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-89 (2000).

89. *See Cruz*, 142 S. Ct. at 1662.

90. *See id.* at 1664.

91. *See e.g., Citizens United*, 558 U.S. at 365 (providing no basis for the Government to limit independent corporate expenditures during elections).

only upon the narrow grounds of preventing quid pro quo corruption or its appearance.<sup>92</sup> It is highly likely that future campaign finance decisions will be held upon similar grounds. While the majority is comfortable in its analysis that Section 304 did not combat corruption, others see it differently.<sup>93</sup> In one study, a survey of over 2,400 participants viewed a considerably higher likelihood of quid pro quo corruption with the repayment of personal loans from donor contributions compared to using the contributions to cover campaign expenses.<sup>94</sup> With the Section 304 restriction found unconstitutional, it is likely that other regulations on campaign loan repayment limits will be challenged.<sup>95</sup> This could have a damaging impact on the views of corruption within elections at a time when many voice concern of partisanship within the Court.<sup>96</sup>

*Cruz* demonstrates the ongoing philosophical battle between money in elections and the First Amendment. Some view this decision as one of many in which the Roberts Court cuts back the scope of campaign finance regulation.<sup>97</sup> These commentators believe this allowance of increased campaign spending will sever the link between representatives and their constituents—replacing voters with monied interests.<sup>98</sup> Others, including a majority of current Supreme Court Justices, focus nearly entirely on the importance of First Amendment within elections, and its prohibitions on tampering of the rights of citizens to choose who governs them.<sup>99</sup> For these Justices, it is not money in politics that should be limited,<sup>100</sup> but rather any government limitation against political speech unless that speech enables corruption.

This case has not yet made a markable impact in campaign finance law, but it has been used in determining standing under Article III. In a Sixth Circuit case concerning economic harms caused

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92. See *Cruz*, 142 S. Ct. at 1652.

93. See John J. Martin, *The Unique Appearance of Corruption in Personal Loan Repayments*, 108 COLUM. L. REV. (Forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4211506](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211506).

94. See *id.* at 8.

95. See *id.* at 69.

96. See e.g., Anthony J. Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 553, 554-55 (2022) (discussing a timeline of the Court's increasing political partisanship within the latter half of the twentieth and early twenty-first century).

97. See Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1137 (2023).

98. See *id.* at 1137.

99. See *Cruz*, 142 S. Ct. at 1652; *McCutcheon*, 572 U.S. at 227; see also *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 742 (2008).

100. See *McCutcheon*, 572 U.S. at 191.

by the COVID-19 pandemic, compliance costs related to the American Rescue Plan Act of 2021 (ARPA) Offset Provision were determined by the Court to be a recognized harm for Article III purposes.<sup>101</sup> The Court held that even though Tennessee's injuries were most proximately traceable to a rule, those injuries allowed standing to challenge the Offset Provision itself.<sup>102</sup> Comparable arguments concerning a plaintiff's challenge to a regulation and its underlying statute were taken up in the Fifth Circuit and met with similar analysis and results—standing was found.<sup>103</sup> While the impact of *Cruz* will be seen over time, it is already reverberating in arguments considering standing.

#### CONCLUSION

*FEC v. Cruz* demonstrates the Modern Court's steadfast belief in a First Amendment that prohibits government interference over campaign spending. Holding that the FEC cannot place a monetary limit on repayments of candidate loans to their campaigns, the Court affirms that the only government interest in prohibiting political speech is to prevent quid pro quo corruption. As campaigns continue to grow in cost, all eyes will be on the increasing reliance of monetary contributions from donors, and now increasingly from the candidates themselves.

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101. See *Kentucky v. Yellen*, 54 F.4th 325, 342 (6th Cir. 2022).

102. See *id.* at 345.

103. In *Franciscan All., Inc. v. Becerra*, the Government made a similar argument to that in *Cruz*: that the plaintiffs were “suing” a regulation and therefore had no standing to request injunctive relief against enforcement of a statute. This was unsuccessful, and standing was granted. See *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 378 (5th Cir. 2022).