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Legal Sidebar

Supreme Court Invalidates Cap on Repayment of Candidate Loans Under the First Amendment: Considerations for Congress

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In *Federal Election Commission (FEC) v. Ted Cruz for Senate*, the U.S. Supreme Court invalidated a provision of federal campaign finance law establishing a $250,000 limit on the amount of post-election campaign contributions that may be used to repay candidates for personal loans made to their campaign committees pre-election. On May 16, 2022, by a 6-3 vote, the Court held that the appellees, Senator Rafael Edward "Ted" Cruz and his principal campaign committee, Ted Cruz for Senate, had standing to challenge the loan-repayment limit and that the limit violates the Free Speech Clause of the First Amendment.

This Legal Sidebar examines the Court's ruling in this case and concludes with an analysis of considerations for Congress. An earlier CRS product, *Campaign Finance and the First Amendment: Supreme Court Considers Constitutionality of Limits on Repayment of Candidate Loans*, discusses the facts of this case, the procedural history, and the arguments made before the Court.

Supreme Court Ruling in *FEC v. Ted Cruz for Senate*

Standing

As a threshold matter, the majority opinion written by Chief Justice Roberts held that the appellees, Senator Cruz and his campaign committee (hereinafter collectively referred to as "the Cruz campaign") had standing to sue. Standing is a constitutional requirement that a plaintiff have a concrete, personal interest in the litigation instead of a general policy objection or other generalized grievance. One element of standing is that the plaintiff must have suffered an injury that is "fairly traceable to the challenged action."

The government asserted that, for two reasons, the injuries sustained by the Cruz campaign were not traceable to the enforcement of the loan-repayment limit. First, the government argued that because the Cruz campaign triggered the loan-repayment limit by intentionally failing to repay any part of Senator Cruz's outstanding loan within 20 days of the election—as permitted by an FEC regulation—the injury is traceable to the Cruz campaign instead of to the enforcement of the limit. Rejecting that argument, the Court explained that its precedents show that an injury deriving from the application of a law "remains fairly traceable" to that law even if the plaintiff purposefully incurred the injury. Second, the government maintained that while the Cruz campaign had standing to challenge the FEC regulation implementing the loan-repayment limit, it did not have standing to challenge the statute. According to the government, because the Cruz campaign had not violated the statutory restrictions—only the regulatory restrictions—it "must establish standing separately for each claim that they press and each form of relief that they seek." In most cases, the Court remarked, it would not be relevant for standing purposes whether a plaintiff is challenging the statute or the regulation. Here, however, because the regulation "was expressly promulgated to implement" the loan-repayment law, the Court determined that the inability of the Cruz campaign to repay Senator Cruz was "traceable to the operation of" the statute. The Court explained that, because the Cruz campaign sought "to challenge the one Government action that causes their harm: the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation," it could also "raise constitutional claims against . . . the statutory provision that, through the agency's regulation, is being enforced." Therefore, the Court held that the Cruz campaign had standing to challenge the underlying statute.

Ruling on the Merits

On the merits, the Court held that the loan-repayment limit, which was enacted as Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA) and codified at 52 U.S.C. § 301116(j), violates the Free Speech Clause of the First Amendment. The Supreme Court reached its decision by first assessing the burden on free speech that resulted from the law and then examining whether that burden was justified.

In assessing the burden on speech created by the loan-repayment limit, the Court began by reiterating a key holding from its landmark 1976 campaign finance ruling, *Buckley v. Valeo*. In *Buckley*, the Court held that the First Amendment guarantees candidates the ability to spend unlimited amounts of personal funds for campaign-related speech on their own behalf. In this case, the Court observed that the loan-repayment limit "by design and effect" burdened such candidate-financed speech by those candidates who chose to make personal loans. By limiting the sources of financing that campaigns can use to repay candidate loans, the loan-repayment limit created "the significant risk" that such loans will not be repaid, according to the Court. The Court further reasoned that, in turn, that risk created "an unprecedented penalty" on candidates by deterring them from lending money to their own campaigns and, therefore, burdened core political speech. In support of this conclusion, the Court pointed to data showing that after the enactment of the statute, there was a "clear clustering of [candidate] loans right at the $250,000 threshold," which did not occur prior, and that the percentage of candidate loans in Senate races "for exactly $250,000 has increased tenfold." Further underscoring the burden on speech established by the loan-repayment limit, the Court observed that candidate loans are a commonly used means to finance campaigns, particularly for first-time candidates and challengers.

With the burden on free speech established, the Court turned to examining whether the government had sufficiently justified the burden. As an initial matter, the Court declined to determine whether strict scrutiny or a more lenient, "closely drawn" standard of review applied. Instead, the Court announced that under either standard, the government bore the initial burden of proving that the law serves "a legitimate objective" and that it failed to do so in this case.

The Court began its analysis by reiterating a determination from its prior campaign finance cases that the only permissible justification for restricting campaign speech is the prevention of quid pro quo corruption or its appearance. In this case, the government argued that the loan-repayment limit serves to avoid quid pro quo corruption because with a post-election contribution, the campaign contributor is aware that the winning candidate recipient "will be in a position to do him some good." Rejecting this argument, the

Court characterized the law as yet another in a long line of campaign finance restrictions that unnecessarily serve as a "prophylaxis-upon-prophylaxis." That is, according to the Court, because contributions to federal office candidates are already regulated through limits and disclosure requirements to avoid corruption or its appearance—including contributions made to winning candidates—the *additional* restriction imposed by the loan-repayment limit seems unnecessary. The Court also addressed the government's argument to defer to Congress when evaluating whether a campaign finance restriction serves an anticorruption goal. Highlighting the lack of data and "scant" evidence in this case, the Court concluded that deferring to Congress here "would be especially inappropriate" because the loan-repayment limit "may have been an effort to insulate [] legislators from effective electoral challenge."

Justice Kagan wrote a dissent, joined by Justices Breyer and Sotomayor. The dissent criticized the majority opinion for overstating the burden on speech imposed by the loan-repayment limit by relying on a "hard to fathom" theory. That is, in the dissent's view, the law does not deter a candidate from self-financing—as the majority opinion determined—but instead impedes the candidate from using "*other people's* money to finance his campaign," similar to how contribution limits operate. In other words, the dissent viewed the loan-repayment limit fundamentally as a cap on how much a candidate can shift the costs of a campaign to others while preserving a candidate's ability to self-finance without limits. Furthermore, the dissent maintained that the Court understated how the law serves to avoid quid pro quo corruption. According to the dissent, the notion of quid pro quo corruption is broader than criminal bribery and also includes "less blatant and specific arrangements," which the loan-repayment limit serves to avoid. When donors make contributions to help a winning candidate pay off a loan that the candidate made to his campaign, the dissent observed that "they know—not merely hope—he will be in a position to perform official favors," thereby creating a "recipe for *quid pro quo* corruption."

Analysis of Considerations for Congress

FEC v. Ted Cruz for Senate marks another case in a series where the Supreme Court has invalidated a provision of BCRA. BCRA contains the most recent, significant amendments made by Congress to federal campaign finance law. For example, in the 2003 case of *McConnell v. FEC*, the Court invalidated a BCRA provision prohibiting individuals age 17 or younger from making contributions; in the 2008 case of *Davis v. FEC*, the Court invalidated a BCRA provision that established a series of staggered increases in contribution limits for candidates whose opponents significantly self-finance their campaigns; and in the 2010 case of *Citizens United v. FEC*, the Court invalidated a BCRA provision that prohibited certain expenditures by corporations and labor unions. In its most recent campaign finance case prior to *FEC v. Ted Cruz for Senate*, the 2014 case of *McCutcheon v. FEC*, the Court invalidated a BCRA provision establishing aggregate contribution limits.

While the Court's ruling in *FEC v. Ted Cruz for Senate* does not appear to forge significantly new doctrinal ground, it may serve to clarify and reiterate for Congress (and the states) the constitutional bounds of campaign finance law and legislation. As explained by the Court, the only acceptable government interest justifying restrictions on campaign speech under the First Amendment is the prevention of quid pro quo corruption or its appearance. Other government interests, while well-meaning, the Court emphasized, do *not* justify such laws, including interests in

- decreasing the amount of money in politics,
- leveling the playing field among candidates, or
- limiting the influence that a campaign contributor has over elected officials.

Further, the Court detailed key reasons that the federal government in this case failed to show that the invalidated law served to avoid quid pro quo corruption or its appearance. The Court's criticisms could be relevant in assessing the constitutionality of campaign finance legislation that Congress might wish to consider in the future. For example, the Court criticized the government for

- failing to identify actual cases of quid pro quo corruption (according to the Court, the government is required to show an evidentiary record or legislative findings that demonstrate the necessity for addressing "a special problem");
- relying on media reports and anecdotes that "merely hypothesize" how the subject law is intended to lessen the appearance of donor influence or access to elected officials instead of presenting evidence of how the law would target quid pro corruption or its appearance;
- citing an academic article that fails to differentiate between legislator voting patterns based on appropriate donor influence or access to elected officials and legislator voting patterns based on unlawful quid pro quo corruption;
- relying on online polling data that asked respondents whether they thought it "very likely" or "likely" that campaign contributors who donate after an election anticipate "a political favor in return" but failing to inquire whether the respondents thought that it was likely that contributors who donate *before* an election would have the same expectations (the Court further criticized the poll for failing to inform respondents that the subject contributions were limited and failing to expressly define "political favor" as an "official act[]," which is a required element of quid pro quo corruption); and
- putting "great weight" on floor statements by Members of Congress even though the statements do not present "actual evidence" that the law was needed to avoid quid pro quo corruption or its appearance (according to the Court, "a few stray floor statements" do not constitute legislative findings).

Finally, the Court did not address the standard of review for contribution limits. As discussed in an earlier CRS Legal Sidebar, under the current constitutional framework for evaluating campaign finance restrictions, contribution limits are subject to a more lenient standard of review—closely drawn scrutiny—not the strict scrutiny standard of review that applies to spending limits. Should the Supreme Court in a future case interpret the First Amendment to require that contribution limits be evaluated under strict scrutiny, courts would be unlikely to uphold such limits as constitutional.

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