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Legal Sidebar

Campaign Finance and the First Amendment: Supreme Court Considers Constitutionality of Limits on Repayment of Candidate Loans

April 26, 2022

Campaign finance is back before the Supreme Court. In *Federal Election Commission (FEC) v. Ted Cruz for Senate*, the Court is faced with a challenge to a federal campaign finance law that establishes a $250,000 limit on the amount of post-election campaign contributions that may be used to repay a candidate for personal campaign loans made pre-election. Specifically, the Court is evaluating whether the appellees, Senator Rafael Edward "Ted" Cruz and his campaign committee, Ted Cruz for Senate (Senator Cruz's principal campaign committee), have standing to challenge the limit and, if so, whether the limit violates the Free Speech Clause of the First Amendment. In June 2021, a three-judge panel of the U.S. District Court for the District of Columbia invalidated the limit as unconstitutional under the First Amendment. If the Court adopts the reasoning of the district court, this case could affect the constitutionality of other current campaign finance laws and legislation going forward. This Legal Sidebar provides background on the law being challenged and an overview of the Supreme Court's framework for analyzing the constitutionality of campaign finance law, discusses the procedural history and lower court rulings in this case, outlines arguments made before the Court, and explores potential implications of this case for Congress.

Background and Framework for Constitutional Analysis

Federal campaign finance law regulates campaign contributions made to candidates for federal office by establishing limits, source restrictions, and public disclosure requirements. The Federal Election Campaign Act (FECA) defines *contribution* to include "any gift, subscription, loan, advance, or deposit of money or anything of value" made "for the purpose of influencing any election for Federal office." A contribution can be distinguished from an expenditure in that a contribution involves giving money to an entity such as a candidate's campaign committee, while an expenditure involves spending money directly to advocate for the election or defeat of a candidate. During the 2021-22 federal election cycle, FECA limits individuals to contributing $2,900 per candidate per election.

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LSB10734

Under FECA, candidates may make loans to their own campaigns in unlimited amounts. In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress amended FECA to limit the repayment of loans made by a candidate to his or her own campaign. Specifically, the law—codified at 52 U.S.C. § 30116(j)—prohibits a campaign from using post-election contributions to reimburse a candidate for a pre-election personal loan to the campaign in excess of $250,000 (hereinafter referred to as the "loan-repayment limit"). Furthermore, under an FEC regulation, campaigns may repay the candidate only for loans exceeding $250,000 with contributions made on or before the election so long as the repayment is made within 20 days of the election. The regulation also provides that within 20 days of the election, any balance remaining of the candidate loan that exceeds $250,000 is required to be treated as a candidate contribution and, therefore, cannot be used to reimburse a candidate.

The Supreme Court has issued a number of rulings evaluating the constitutionality of campaign finance laws. In the landmark case *Buckley v. Valeo*, the Supreme Court established the framework for evaluating the constitutionality of such laws. According to the Court, limits on campaign contributions and expenditures implicate rights of political expression and association under the First Amendment. The Court, however, afforded different degrees of First Amendment protection and levels of scrutiny to contributions and expenditures. FECA's contribution limits were subject to a more lenient standard of review than expenditures, the Court held, because they imposed only a marginal restriction on speech, requiring the government to demonstrate that they were a "closely drawn" means of achieving a "sufficiently important" governmental interest. In contrast, the Court determined that because they impose a substantial restraint on speech and association, FECA's expenditure limits were subject to strict scrutiny, requiring that they be narrowly tailored to serve a compelling governmental interest. In its most recent major campaign finance decision, *McCutcheon v. FEC*, the Supreme Court in a plurality opinion announced that only the prevention of quid pro quo corruption or its appearance constitute a sufficiently important governmental interest to justify limits on contributions and expenditures. Quid pro quo corruption involves "a direct exchange of an official act for money." Moreover, the Court announced that regardless of whether "strict scrutiny" or the "closely drawn" standard applies, a reviewing court must "assess the fit" between the government's stated objective and the means to achieve that objective.

Procedural History and Lower Court Rulings

Senator Ted Cruz and his campaign committee, Ted Cruz for Senate (hereinafter both parties are collectively referred to as "the Cruz campaign"), filed suit against the FEC, arguing that the loan-repayment limit and the implementing FECA regulation violate the First Amendment. A day prior to the November 2018 general election, Senator Cruz loaned his campaign $260,000. Within 20 days of the election, the Cruz campaign did not use any funds raised pre-election to reimburse Senator Cruz, as permitted by the FEC regulation. Instead, using post-election contributions, the Cruz campaign reimbursed Senator Cruz $250,000—the maximum allowable amount under the loan-repayment limit—and categorized the remaining $10,000 owed to Senator Cruz as a campaign contribution from the Senator. A federal district court judge denied a motion to dismiss filed by the FEC, holding that the Cruz campaign and Senator Cruz had standing to sue—a constitutional requirement that a plaintiff have a concrete, personal interest in the litigation instead of a general policy objection or other grievance—and granting the Cruz campaign's application for review by a three-judge federal district court. FECA requires that constitutional challenges to any BCRA provision be filed in the U.S. District Court for the District of Columbia and heard by a three-judge court.

In *Ted Cruz for Senate v. FEC*, a three-judge federal district court held the loan-repayment limit unconstitutional under the First Amendment guarantees of free speech and association. As a threshold matter, the court determined that it was appropriate to "follow the approach" taken by the Supreme Court in *McCutcheon v. FEC* and, therefore, first evaluated whether the law burdens First Amendment political speech. The court held that "the loan-repayment limit burdens political speech and thus implicates the

protection of the First Amendment." According to the court, the loan-repayment limit specifically burdens those candidates who choose to exercise their right to "speak" by making expenditures with funds derived from personal loans instead of from funds derived from other types of loans that may be reimbursed with post-election contributions. The court also observed that the loan-repayment limit "places a particular burden on relatively unknown challengers" who may need more funding early in a campaign to be competitive against better-funded incumbents. Further evidencing the burden imposed on candidate lending, the court pointed out that since the enactment of the loan-repayment limit in 2002, while House and Senate campaign expenditures have more than doubled, candidate loans still remain near the $250,000 level. Reasoning that the loan-repayment limit therefore discourages personal loans over a certain amount, the court determined that the law imposes a burden on a candidate's speech and association rights. In response to the FEC's argument that the loan-repayment limit does not implicate political speech because it does not directly ban personal loans by candidates, the court held that even laws that indirectly deter speech may violate the First Amendment.

After determining the law's burden on free speech and association, the court turned to assessing whether the government had met its "burden of proving the constitutionality of its actions." In view of its determination that the loan-repayment limit burdens "expressive and associational interests in political campaigns," the court concluded that "heightened scrutiny, either strict or closely drawn" applies. Further taking its lead from the *McCutcheon* decision, the court observed that under either standard, the court needed to evaluate the government's proffered interest in burdening speech "and the fit between that interest and the means the government has chosen to fulfill it." Concluding that the law fails to meet even the less rigorous closely drawn standard, the court found "no need to 'parse the differences' between the standards of scrutiny."

Turning to the government's proffered interest for burdening political speech, i.e., "address[ing] the heightened risk and appearance of quid pro quo corruption that results from elected officeholders soliciting contributions that will be used to repay their personal loans," the court concluded that the FEC failed to show that the loan-repayment limit serves to avoid quid pro quo corruption or its appearance, as required under the Supreme Court's jurisprudence. In rejecting the FEC's position, the court concluded that the FEC had failed to "identif[y] a single case of actual quid pro quo corruption in this context," even though many states permit unrestricted post-election contributions to reimburse candidates for campaign loans. Mere "speculation" that a law serves to avoid quid pro quo corruption is inadequate, the court admonished. Underscoring that while even a robust record evidencing the anti-corruption interests served by a law may be insufficient to justify a burden on free speech, the court cautioned that "the absence of *any* record of such corruption undermines the government's proffered interest."

Moreover, the court determined that even if the challenged law was justified by a sufficiently important government interest, there is "a substantial mismatch" between the government's proffered interest and the loan-repayment limit, as the loan-repayment limit is not "closely drawn" to protect First Amendment rights. According to the court, the loan-repayment limit is over-inclusive because it applies equally to candidates who win or lose even though the purported governmental interest of avoiding quid pro quo corruption would apply only in the context of a winning candidate. The court also determined that the law is under-inclusive with regard to the FEC's asserted interest because apart from the loan-repayment limit and base contribution limits, FECA does not otherwise restrict post-election contributions for retiring other kinds of campaign debts. Finally, in response to the FEC's argument urging the court to defer to Congress's judgment that the loan-repayment limit is required to prevent corruption, the court said it would not "defer on the question of whether a particular legislative choice is in fact constitutional."

Arguments Before the Supreme Court

In constitutional challenges to BCRA provisions, FECA requires direct appeal to the Supreme Court. On appeal, the FEC first argues that the Cruz campaign lacks standing to sue in this case. Specifically, the FEC alleges that the Cruz campaign's asserted injury is neither traceable to nor would be redressed by the enforcement of the loan-repayment limit because the campaign did not repay the candidate loan solely with post-election funds and thus has not exhausted the $250,000 limit on the use of post-election campaign contributions. According to the FEC, based on disclosure reports, it is "mathematically impossible" for the campaign to have repaid Senator Cruz $250,000 using campaign contributions made after the election because the campaign received contributions of less than $250,000 between Election Day and the day it repaid the loans. The FEC also asserts that an FEC regulation—not the statutory loan-repayment limit—prohibits the campaign from reimbursing Senator Cruz with the additional $10,000 he loaned to the campaign, and therefore the Cruz campaign lacks standing to challenge the statute. Further, the FEC argues that the "self-inflicted" nature of the alleged injury—evidenced by the Cruz campaign intentionally failing to repay any part of Senator Cruz's loan within 20 days of the election—precludes standing.

Turning to the merits, the FEC contends that the loan-repayment limit comports with the First Amendment because it imposes, at the most, "a modest burden" on speech, and it is sufficiently tailored to further the compelling governmental interest of avoiding quid pro corruption and its appearance. The burden on speech is small, the FEC argues, because the loan-repayment limit applies only to campaign contributions made *post*-election, which "by definition, do not fund additional political speech." Further, the FEC emphasizes that while the First Amendment protects candidates who self-finance campaigns, the loan-repayment limit "does not severely burden that right" because it still allows candidates to make loans of any amount. The FEC also maintains that, as applied in this case, the loan-repayment limit did not burden the right to any political speech because the Cruz campaign stipulated that the motivation behind the loan "was to establish the factual basis for this challenge." In view of the small burden imposed on speech, the FEC asserts that the loan-repayment limit should be subject to "at most" the standard of "'closely drawn' scrutiny,'" which the FEC argued it satisfies by serving the compelling governmental interest in avoiding actual and apparent quid pro quo corruption. According to the FEC, the contributions regulated by the law present an increased risk of corruption because they will be used to repay a personal loan made by a candidate.

In response, the Cruz campaign maintains that it has standing to sue. First, the Cruz campaign argues that the FEC is wrong on the facts and that the campaign raised sufficient campaign contributions post-election to repay Senator Cruz's loan. In response to the FEC's argument that the Cruz campaign's injury is traceable only to the relevant regulation—and not the statute itself—the Cruz campaign argues that because the regulation was promulgated under the authority of the loan-repayment limit statute, the injury to the campaign is directly traceable to that statute. Finally, the Cruz campaign refutes the relevancy of the "self-inflicted" nature of the injury alleged, citing Court precedent establishing standing by plaintiffs even if they intentionally violated a law for the purposes of a lawsuit.

On the merits, the parties argue that the loan-repayment limit violates the First Amendment because it creates "a direct and significant burden" on the right of a candidate to spend his or her own funds for a campaign. Therefore, they argue that the law must be subject to strict scrutiny or at least "closely drawn" scrutiny, both of which the law fails to meet, they posit. Further, the Cruz campaign maintains that Congress did not enact the loan-repayment limit to avoid quid pro quo corruption as required under Supreme Court precedent and that it "was impermissibly designed to level the playing field."

During the almost 90-minute oral argument in January 2022, the Justices questioned the attorneys representing the parties on issues of both standing and constitutionality. Regarding standing, several Justices expressed skepticism with the FEC's contention. For example, Chief Justice Roberts remarked

that a lawsuit brought as a "test case[]" does not necessarily mean that a plaintiff lacks standing. Turning to the constitutionality of the loan-repayment limit, the Justices focused on whether the law serves to prevent quid pro corruption. Justice Kavanaugh, questioning the justification of the loan-repayment limit, asked the attorney representing the FEC why the $2,900 limit on individual contributions was insufficient to serve the government's interest in avoiding corruption. Likewise, the Chief Justice queried how to analyze, "in concrete terms," how much the loan-repayment limit serves to avoid corruption, emphasizing that the law implies the absence of an anti-corruption interest until a loan reaches $250,000, "but then all of a sudden" an anti-corruption interest appears. In contrast, Justice Kagan stated that by preventing contributors from repaying candidates "so as to make the candidate himself financially better off, richer," the loan-repayment limit "screams quid pro quo corruption."

Considerations for Congress

The district court ruling in this case continues a trend by the courts to invalidate campaign finance restrictions as unconstitutional under the First Amendment. For example, in the 2008 case of *Davis v. FEC*, the Supreme Court invalidated a BCRA provision that established a series of staggered increases in contribution limits for candidates whose opponents significantly self-finance their campaigns. In the 2010 case of *Citizens United v. FEC*, the Court invalidated a BCRA provision, along with an earlier-enacted law, that prohibited certain expenditures by corporations and labor unions. Most recently, as discussed, in the 2014 case of *McCutcheon v. FEC,* the Court invalidated a BCRA provision establishing aggregate contribution limits.

As discussed, the lower court in this case signaled that, absent evidence of "actual quid pro quo corruption," a campaign finance restriction cannot pass muster under the First Amendment and held that unlimited loan repayments funded with post-election contributions do not give rise to such corruption. Further, the court emphasized that unless there is a specific record of corruption, the government's proffered interest is affirmatively "undermine[d]." If the Supreme Court adopts the reasoning of the lower court, this case could affect the constitutionality of other campaign finance laws going forward. That is, First Amendment challenges to other provisions of FECA could be successful if the government is unable to present specific evidence to the courts in support of proffered anti-corruption interests. In that same vein, future campaign finance legislation passed by Congress may be less likely to be upheld as constitutional absent evidence of actual cases of corruption that the legislation seeks to ameliorate.

As in prior Congresses, campaign finance legislation is pending in the 117th Congress. For example, while not addressing the loan-repayment limit, the House has passed bills that would amend FECA in various ways, including H.R. 1, the For the People Act, and H.R. 5746, the Freedom to Vote: John R. Lewis Act.

The Supreme Court is expected to issue a decision in this case by summer 2022.

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