

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 FEDERAL ELECTION COMMISSION,)
4 Appellant,)
5 v.) No. 21-12
6 TED CRUZ FOR SENATE, ET AL.,)
7 Appellees.)
8 - - - - -

9
10 Washington, D.C.
11 Wednesday, January 19, 2022

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16
17 APPEARANCES:

18
19 MALCOLM L. STEWART, Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf
21 of the Appellant.

22 CHARLES J. COOPER, ESQUIRE, Washington, D.C.; on
23 behalf of the Appellees.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Sotomayor is participating remotely this morning.

We will hear argument first this morning in Case 21-12, Federal Election Commission versus Ted Cruz for Senate.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART
ON BEHALF OF THE APPELLANT

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Appellees' suit should be dismissed for lack of standing, but if the Court reaches the merits, it should reverse the district court's judgment and hold that the statutory loan repayment limit is constitutional.

Appellees lack standing for two reasons. First, although they have directed their challenge to the statutory loan repayment limit, Appellees stipulated below that the first \$250,000 of Senator Cruz's loan was repaid with pre-election funds. The statute therefore does not currently restrict the

1 Senator's ability to obtain full repayment of
2 his loan.

3 Second, the current regulatory barrier
4 to repayment is self-inflicted. Appellees
5 could have avoided any injury simply by
6 behaving exactly as they would have if the
7 statute and regulation did not exist. Instead,
8 they went out of their way to engage in
9 transactions that would -- they would not
10 otherwise have undertaken, solely to subject
11 the Senator to a financial loss and thereby lay
12 the groundwork for a lawsuit.

13 That deliberate self-infliction of
14 injury for no purpose other than to facilitate
15 litigation severed the causal link between the
16 challenged laws and Senator Cruz's injury.

17 On the merits, the loan repayment
18 limit is constitutional. It imposes
19 insubstantial burdens on the financing of
20 electoral campaigns, and it targets a practice
21 that has significant corruptive potential. A
22 post-election contributor generally knows which
23 candidate has won the election, and
24 post-election contributions do not further the
25 usual purposes of donating to electoral

1 campaigns.

2 And be -- and because repayment of
3 candidate loans increases the candidate's
4 personal wealth, the conduct the statute
5 regulates implicates the same concerns that
6 underlie limits on gifts to federal officials.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Stewart, other
9 than Section 304, is there any other basis for
10 enforcing the regulation?

11 MR. STEWART: There is -- none has
12 been identified so far. The --

13 JUSTICE THOMAS: So, if Section 304 is
14 gone, there is no enforcement?

15 MR. STEWART: I think there is a
16 substantial practical likelihood that that
17 would be the result. It would still be open to
18 the FEC to examine other provisions of the
19 federal campaign finance laws and ask whether
20 the 20-day limit would continue to serve a
21 valid purpose even without the statute. But we
22 would concede the most likely result, if the
23 statute were declared invalid, is that the
24 regulation would cease to be on the books or
25 would cease to be enforceable.

1 But none of this was litigated below.
2 The district court didn't decide the case on
3 that basis. The district court was under the
4 misimpression that the first \$250,000 of
5 Senator Cruz's loan had been repaid with
6 post-election funds.

7 The other thing I would say is,
8 leaving aside the -- the point that the injury
9 was self-inflicted, which I -- I do want to
10 emphasize, there was a more straightforward way
11 that this case could have been litigated; that
12 is, Appellees could have identified the
13 regulation as the provision of law that was
14 causing their injury and filed suit to have the
15 regulation set aside, and if they had done
16 that, they could have identified as one
17 potential ground for invalidating the
18 regulation the -- the allegation that the
19 regulation rested on an invalid statute.

20 Now, from Appellees' standpoint, there
21 would have been two disadvantages to pursuing
22 the claim that way. First, if they had
23 identified the regulation as the target of
24 their challenge, they wouldn't have been able
25 to invoke the three-judge court mechanism with

1 a right of direct appeal to this Court.

2 And, second, they have alleged in
3 Counts 3 through 5 of their complaint both
4 constitutional and non-constitutional
5 challenges to the regulation. And if they had
6 identified the regulation as the source of
7 their injury, then, under usual principles of
8 constitutional avoidance, the court would have
9 been obliged first to consider their con- --
10 their non-constitutional challenges to the
11 regulation and, only if those were rejected,
12 would it have proceeded to the constitutional
13 issues.

14 And so --

15 JUSTICE ALITO: Mr. Stewart, is it
16 your -- is -- is one of your arguments the
17 following: A party cannot challenge the
18 constitutionality of a law that imposes an
19 allegedly unconstitutional restriction on the
20 exercise of a right if the party could have
21 very easily satisfied the preconditions for the
22 exercise of the right?

23 MR. STEWART: I think we would
24 probably say that, but I don't think it is
25 necessary for the Court to go that far to

1 resolve the case in this --

2 JUSTICE ALITO: Well, how can that
3 possibly be -- be the law? Suppose a -- a
4 state university says that no person of a
5 particular race may enter any of the university
6 buildings unless that person pauses for two
7 seconds, stands still for two seconds, before
8 entering the building.

9 Would you say, well, you can't
10 challenge that racial restriction because it's
11 no big deal to pause for two seconds before you
12 go into the building?

13 MR. STEWART: I mean, the Court in a
14 case like that might say, in the context of
15 race discrimination, that the mere fact of
16 being subject to race -- racially disparate
17 treatment is injury in fact, regardless of
18 whether any other concrete consequence comes of
19 that. And the Court has said, for example --

20 JUSTICE ALITO: Do you think that's
21 limited to an unconstitutional instance of
22 racial discrimination? It wouldn't apply to
23 other -- to -- to free speech rights?

24 MR. STEWART: Well, it's certainly
25 true in -- in general that in order to

1 establish standing, a plaintiff has to show --
2 allege and then show not just a deprivation of
3 a legal right but some practical injury. But
4 the point --

5 JUSTICE ALITO: No newspaper may issue
6 a -- may run an editorial criticizing the
7 President unless it's in a particular font?

8 MR. STEWART: I guess the -- the
9 reason I would say that the Court doesn't need
10 to -- to address those more difficult
11 hypotheticals is that, at least in order to
12 challenge a limitation like that, the newspaper
13 would have to allege, were it not for this
14 restriction, we would use a different font.

15 What makes this case particularly easy
16 in our view is that Appellees could have
17 avoided their injury by doing precisely the
18 thing that they would have done if the statute
19 and regulation were not on the books.

20 JUSTICE ALITO: Well, let me give you
21 one more example. A town passes an ordinance
22 that has two sections. Section 1 says no
23 newspaper may run an editorial criticizing the
24 mayor except as provided in Section 2. Section
25 2 says any editorial criticizing the mayor must

1 be published within -- criticizing a speech
2 made by the mayor must be published within 20
3 days after the speech.

4 Would the newspaper, after the 20 days
5 passed, have standing to challenge Section 1 or
6 only Section 2?

7 MR. STEWART: I'm sorry. Could you --
8 I --

9 JUSTICE ALITO: Yeah. Okay. It's a
10 little complicated. So two -- town passes an
11 ordinance. Section 1, no newspaper may run an
12 editorial criticizing any speech delivered by
13 the mayor except as provided in Section 2.

14 Section 2, any editorial criticizing a
15 speech delivered by the mayor must be published
16 within 20 days after the mayor's speech.

17 Can the newspaper, after the 20 days
18 have passed, challenge Section 1 or only
19 Section 2?

20 MR. STEWART: Well, I think they could
21 probably challenge both, but they could -- they
22 would have to say, were it not for this legal
23 restriction, we would publish an editorial
24 critical of the mayor after 20 days.

25 JUSTICE BREYER: Well, where -- where

1 does this come from? I mean, I think that it's
2 actually easy to find examples such as we've
3 just heard. I mean, all you have to do is take
4 anything that restricts time, the reason they
5 want to do it after 20 days, so that's what
6 they want. They want to do it after 20 days.

7 So -- so -- so where does -- where --
8 where does that fact suddenly take standing
9 away? I mean, all you have to do is take any
10 statute you want that you think might be
11 unconstitutional and you say it doesn't apply
12 on a certain day and then you say, oh, they
13 could do it on that day, or it doesn't apply in
14 a certain place, and you say, oh, they could go
15 to, you know, the Aleutian Islands, I mean, and
16 -- and some people can very easily.

17 And -- and I just don't know of a case
18 where we would look into, when they want to do
19 a thing that the statute forbids, that we've
20 looked how easy it would be to do it in a
21 different way or to do it in a different place
22 or to do it at a different time when they say
23 we don't want to.

24 Now, okay, what is that case? I'm not
25 saying it doesn't exist. All I can say is I

1 can't find it.

2 MR. STEWART: I -- I would say Clapper
3 and it's implicit in TransUnion. But -- but
4 let me come at it this way by saying it's
5 helpful to think of how the standing issue
6 would have played out if the Appellees had
7 filed suit seven days before the election and
8 they had said this provision impairs our
9 constitutional rights by imposing burdens on
10 the use of candidate loans for self-financing.

11 I think, for standing purposes, the
12 first question a court would ask is, if this
13 legal disability -- if this legal restriction
14 were removed or if it didn't exist, would you
15 make a loan to your campaign and would you wait
16 for more than 20 days?

17 And if the answer to that question was
18 no, there would be no standing.

19 That -- that's Carney versus Adams.
20 In Carney versus Adams, the plaintiff
21 challenged Delaware law restrictions on the
22 party affiliations of people who wanted to run
23 for Delaware judgeships.

24 And, basically, the whole standing
25 analysis was an effort to determine, would this

1 plaintiff actually run for a judgeship if these
2 restrictions were removed? And the Court
3 concluded we have insufficient confidence that
4 he would and, therefore, there was no standing.

5 Now, if you'd asked that question of
6 Appellees seven days before the election, the
7 answer would clearly be no standing. They have
8 stipulated that the only reason for making the
9 loan and the only reason for the delay in
10 repayment was to facilitate the lawsuit.

11 And if there had been no statute, no
12 regulation, there would have been no lawsuit to
13 facilitate. So, if these laws were not on the
14 books, they wouldn't have made the loan. If
15 they had made the loan, it would have been
16 promptly repaid.

17 They could have avoided injury simply
18 by doing exactly the thing that --

19 CHIEF JUSTICE ROBERTS: Well, but I
20 think --

21 MR. STEWART: -- they would have --

22 CHIEF JUSTICE ROBERTS: -- the
23 analysis in Carney against Adams is a lot more
24 concrete than your First Amendment
25 hypothetical. I mean, these cases are hard

1 enough when you're trying to figure, well, what
2 is the -- the weight of the infringement on the
3 First Amendment values, you know, against what
4 is the protective effect on potential
5 corruption.

6 I mean, I don't -- you know, I don't
7 -- I don't know how you do that in the first
8 place. But to say that the standing is going
9 to depend upon a particular calculation, I
10 think it's much more concrete in Carney against
11 Adams when you're asking would somebody really
12 go to -- you know, go run for office. That's
13 also hard, but not anywhere approaching the
14 indeterminacy of the calculation we're supposed
15 to make here.

16 MR. STEWART: Well, I think the
17 calculation on the merits may be difficult and
18 it may -- and it may involve a complicated
19 balancing. But the calculation on standing, I
20 think, is very straightforward.

21 If -- if the Appellees had filed their
22 suit seven days before the election and they
23 had said in their complaint Senator Cruz has no
24 intention of loaning money to his campaign
25 regardless of the outcome of this suit, but he

1 feels strongly that the statute is
2 unconstitutional and he would like a judicial
3 determination to that effect, clearly, there
4 would have been no standing, whatever the Court
5 thought of the merits of the constitutional
6 claim.

7 And what we have here is essentially
8 that; that is, Appellees have stipulated that
9 if there were no statute, if there were no reg,
10 they never would have made the loan and they
11 would have promptly repaid it if the loan had
12 been made. And so the question --

13 CHIEF JUSTICE ROBERTS: Well, there's
14 just sort of a -- I mean, there's -- test cases
15 are not always -- you don't always have a lack
16 of standing. If you get people challenging
17 discriminatory housing practices and they go in
18 and say, you know, we're thinking about buying
19 this house and they're discriminated against
20 because of their -- of their race, they don't
21 say, well, you know, whatever, you can't buy
22 the -- the -- the house.

23 They don't have to go in and prove
24 that they would actually buy the house, do
25 they?

1 MR. STEWART: Well, if -- if they were
2 -- they might not have to prove that they would
3 buy the house, in -- in the same way, for
4 instance, that in the school admissions cases,
5 where you have use of racial criteria in school
6 admissions, the plaintiffs don't have to show
7 that they would have been admitted if the laws
8 were different, but they do have to show they
9 were ready and able to apply.

10 And the question here really is, if
11 they didn't have standing seven days before the
12 election, can they manufacture standing by
13 voluntarily subjecting themselves to an injury
14 solely for the purpose of facilitating a
15 lawsuit? I mean, imagine --

16 JUSTICE SOTOMAYOR: Mr. Stewart, if I
17 might, sir, I -- I -- I do have difficulty
18 understanding this manufacture business because
19 he wasn't precluded from contributing to his
20 campaign, so he could. He was only precluded
21 from repaying it from certain funds. And so I
22 don't know that this is a manufactured injury
23 as such.

24 Can we go to the specific point or one
25 of your many points on standing, but the one

1 that I'm most concerned about, which is that
2 he, in fact, did -- had no injury because he
3 had used pre-election funds to repay his debt
4 and there was no bar to him using post-election
5 funds to pay the 10,000?

6 MR. STEWART: Yes. I mean, that --
7 that --

8 JUSTICE SOTOMAYOR: That's -- that's a
9 different kind of situation.

10 MR. STEWART: That -- that's a
11 different standing argument. That is an
12 argument that the -- the inability that he
13 currently faces to repay the remaining \$10,000
14 is attributable to the regulation rather than
15 to the statute. But our argument about --

16 JUSTICE SOTOMAYOR: I'm not even sure
17 it's attributable to the statute. The statute
18 says that you can't use post-election funds to
19 pay off more than 250,000 of pre-election
20 funds, but, if you didn't have pre-election
21 debts greater than 10,000, he would still have
22 the money to pay.

23 MR. STEWART: Well, he -- he loaned
24 the campaign \$260,000, so the campaign had a
25 \$260,000 debt to him, and it repaid \$250,000 of

1 that amount and stipulated that --

2 JUSTICE SOTOMAYOR: From pre or post?

3 MR. STEWART: He stipulated that he --
4 he alleged in the complaint that he paid it
5 by -- through post-election funds. And the
6 district court, at the motion to dismiss stage,
7 rejected the standing argument, accepting as
8 true that allegation.

9 But the Appellees subsequently
10 stipulated that none of that 10,000 -- none of
11 that \$250,000 was from money raised after the
12 election, and the stipulation is binding on
13 them. So, if they used pre-election funds,
14 then --

15 JUSTICE SOTOMAYOR: They claim that
16 they used 2024 election money instead of
17 pre-election money. Why don't we get to their
18 allegations and why you think -- I -- I do have
19 -- I have read the deposition of one of the
20 assistant treasurers, who said he wasn't sure
21 which funds were used, pre-election or 2024
22 election money.

23 So the question I have for you is --
24 and he said money is fungible, and our intent
25 was to use 2024 election fund money to pay this

1 debt.

2 MR. STEWART: Well, the 20 --

3 JUSTICE SOTOMAYOR: Why isn't that
4 enough?

5 MR. STEWART: Well, first, the 2024
6 election money that they were talking about was
7 money that was received by the campaign before
8 the 2018 election but was subsequently
9 redesignated for the 2024 campaign because the
10 people who had contributed it were already
11 maxed out for the 2018 election.

12 And we would say those are
13 pre-election contributions because they were
14 received by the campaign before the election.

15 The Appellees say the redesignation
16 effected a simultaneous refund of the earlier
17 contribution and the making of a new
18 post-election contribution. And there --
19 there's a legal dispute about that.

20 I mean, one -- one thing I would say
21 about that legal dispute is the -- the position
22 we've taken is the one that is more favorable
23 to campaigns generally. We're saying, if you
24 give the money before the election and it's
25 redesignated afterwards, that still counts as

1 pre-election contributions, so it doesn't count
2 against the \$250,000 cap.

3 That's the pro-camp -- pro-campaign
4 position. They -- they are taking the
5 anti-campaign position in order to try to
6 buttress their argument that they have been
7 injured. But, at the end of the day, they
8 don't even say we used those funds to repay the
9 debt. They say those funds were available for
10 use and we didn't attempt to trace the money
11 because it was -- money is fungible and there
12 was no point to it.

13 But, again, all that doesn't go to the
14 self-inflicted character of the injury.
15 Imagine a tort suit in which a plaintiff said
16 it came to my attention that McDonald's was
17 selling dangerously hot coffee, and so I went
18 to McDonald's and bought a cup of coffee and
19 poured it upon myself, and I'm suing for costs
20 of medical treatment and for pain and
21 suffering, and I stipulate that my only reason
22 for buying the coffee and my only reason for
23 pouring it on myself was to facilitate this
24 lawsuit.

25 I think we'd all have the strong

1 reaction that suit can't go forward. And I
2 think the best doctrinal basis for saying that
3 the suit can't go forward is, even if we take
4 as true the allegation that McDonald's was
5 behaving negligently by selling the coffee, the
6 plaintiff's own deliberate conduct in visiting
7 injury upon herself solely in order to
8 facilitate a lawsuit severed the causal link
9 between any wrongdoing and her ultimate injury.

10 And that's basically what the Court
11 said in Clapper. The plaintiffs in Clapper
12 said we have paid out money to take protective
13 measures to prevent our own communications from
14 being intercepted. And the Court said, if you
15 would otherwise lack standing to challenge the
16 -- the laws that allow the interception of
17 communications on the grounds that your injury
18 is not sufficiently real and immediate, you
19 can't manufacture standing simply through a
20 self-inflicted harm. And the Court said that's
21 a reason for holding that the injury is not
22 traceable to the allegedly unconstitutional
23 statutes.

24 And that's the -- the same position
25 we're advocating here. They -- they didn't

1 have to adjust their conduct even in the most
2 miniscule way to avoid injury. All they had to
3 do was not make the loan or to repay it
4 promptly if they did. And, crucially, those
5 are exactly the things that they have said they
6 would have done if the statute and reg didn't
7 exist.

8 Again, by saying our only motivation
9 for making the loan and for delaying repayment
10 was to facilitate the -- the lawsuit --

11 JUSTICE BREYER: Yeah, the coffee
12 sounds like -- what's the tort doctrine that
13 used to be, you know, two workers and you say
14 it's his fault, and the other one says, well,
15 you did a lot of this yourself?

16 MR. STEWART: I mean, there's
17 contributory negligence --

18 JUSTICE BREYER: Yeah, that's it,
19 contributory negligence. Thank you. And --
20 and I've never heard -- even in the case if
21 they say, you know, McDonald's is negligent
22 because the coffee was too hot. And then the
23 contributory negligence was, yeah, maybe it
24 was, but you poured it on yourself. I never
25 heard of that as being a stand -- a -- a -- a

1 standing doctrine.

2 MR. STEWART: It wouldn't --

3 JUSTICE BREYER: And so what I think
4 of is the tracing cases where the person says,
5 yeah, I went to see if they'd sell me a house.
6 Because of my race, I think they wouldn't, but
7 I wasn't going to live there. I just did it as
8 a test case.

9 MR. STEWART: Well, contributory
10 negligence generally presupposes that, you
11 know, both sides are behaving unreasonably.
12 But it -- it's not a doctrine that typically
13 applies in circumstances where the plaintiff
14 has deliberately caused harm to herself. The
15 -- the McDonald's hypothetical is not simply
16 the plaintiff herself was negligent in not
17 taking good care of the coffee. It was she
18 deliberately caused herself injury that she
19 would not otherwise have suffered, solely for
20 the purpose of facilitating a lawsuit.

21 And that's basically what we have
22 here. And I think, to the -- to the extent
23 there is doubt about the -- the intricacies of
24 the doctrine, it's helpful for the Court to
25 think about the purposes of Article III

1 standing doctrine. It is to limit the
2 jurisdiction of Article III courts to disputes
3 that arise because the plaintiff's conduct of
4 his own life is being interfered with in some
5 way. It is to prevent the courts from being
6 used to resolve purely abstract disputes that
7 don't -- that don't arise out of any actual
8 injury to the plaintiff. And if the plaintiff
9 can circumvent that restriction by
10 manufacturing injury, the principle is lost.

11 I did allude earlier to TransUnion.
12 And, in TransUnion, the Court said, if a
13 plaintiff has not suffered concrete harm as a
14 result of the defendant's legal violation, then
15 the suit can't go forward, even if Congress has
16 created an express cause of action with a
17 statutory damages remedy. And --

18 CHIEF JUSTICE ROBERTS: Well, you have
19 artificial things. Can you get -- turn my
20 question on standing into one on the merits?
21 How are you supposed to weigh such
22 imponderables such as the marginal burden on
23 the exercise of First Amendment rights against
24 the marginal assistance in preventing
25 corruption?

1 I mean, it's -- there -- there isn't a
2 sufficient corruption -- anti-corruption
3 interest sort of up to \$250,000, but then all
4 of a sudden there is. Exactly how is that
5 analysis supposed to proceed in concrete terms?

6 MR. STEWART: I mean, we -- we don't
7 pretend that it's a bright-line rule, but I
8 think we would say two or three different
9 things.

10 The first is there are severe
11 restrictions on gifts to officials in all three
12 branches of the government. So there is an
13 established understanding that the government
14 has a -- a substantial and legitimate interest
15 in preventing the effects that might arise if
16 federal officials were given money that would
17 enrich themselves per -- personally.

18 And the campaign finance laws, in
19 specifying the permissible purpose -- the
20 permissible uses of campaign contributions,
21 draw a line between campaign expenditures that
22 will further the purposes of the campaign and
23 campaign expenditures that will benefit the
24 candidate personally. And so --

25 JUSTICE ALITO: But why is the --

1 JUSTICE BARRETT: But Senator Cruz
2 says that this doesn't enrich him personally
3 because he's no better off than he was before.
4 It's paying a loan, not lining his pockets.

5 MR. STEWART: He's certainly no better
6 off than he was before the loan was made, but
7 the -- the whole thrust of his argument is,
8 after a loan has made -- has been made, there
9 may be a legal entitlement to be repaid, but
10 there will often be practical uncertainty about
11 whether repayment will actually occur. And
12 that uncertainty may be sufficiently burdensome
13 as a practical matter that some candidates will
14 not make the loan at all for fear that they'll
15 be left holding the bag. And so a contributor
16 who eliminates that uncertainty, who pays in
17 the money that ensures that the debt will
18 actually be repaid, is conveying a -- a
19 financial benefit to the candidate just as if a
20 gift had been made.

21 JUSTICE BARRETT: So is everyone -- so
22 is everyone who contributes to a campaign in
23 that respect.

24 MR. STEWART: Well, at the -- at the
25 time that pre-election contributions were --

1 are made, there is still campaign literature to
2 be distributed, there are television ads to be
3 run, there are campaign activities still to be
4 funded.

5 After the campaign is over, the only
6 permissible use of post-election contributions
7 is to repay debts outstanding by the campaign.
8 And, in many instances, the only or the -- the
9 principal debt that the campaign owes is to the
10 candidate himself.

11 And if a donor knows that, then the
12 donor will understand that by giving money, he
13 or she is enriching the candidate personally in
14 the sense of making the candidate richer than
15 she would be but for the repayment.

16 JUSTICE KAVANAUGH: Why isn't the 2900
17 limit that applies sufficient to address the
18 anti- -- government's anti-corruption interest,
19 especially given, as Justice Barrett says, it
20 is a loan, not a gift?

21 MR. STEWART: I think for two reasons.
22 The first is the general \$2900 limit has in
23 mind contributions that will be used for
24 campaign-related activities, for speech, and
25 that is -- and the limits on gifts to -- if I

1 could finish?

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. STEWART: The limits on gifts to
4 federal officials are much lower, reflecting
5 the insight that we worry about corruption at a
6 much lower monetary level when the money is
7 going into the candidate's pocket.

8 And the other thing I would say is, in
9 drafting the -- the \$2900 limit, Congress was
10 attempting to balance the desire to avoid
11 corruption against the desire to enable
12 contributors to participate meaningfully in the
13 electoral process, and that opportunity is
14 basically over once the election occurs.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas, anything further?

17 JUSTICE THOMAS: Mr. Stewart, just a
18 couple of questions to satisfy my curiosity.

19 One on the merits. Could you -- if
20 you determine -- if the government determined
21 that certain media outlets had an outsized
22 influence on an election, could it similarly
23 limit the amount that they spend on editorials
24 to equalize the influence?

25 MR. STEWART: No, it could not do

1 that, and it could not do that with candidates.
2 That is, this is not a limit on the amount of
3 money that a candidate can spend or even the
4 amount of money that the candidate can loan.

5 It's purely a limit on the funds that
6 can be used to repay the candidate loan after
7 it's been made.

8 JUSTICE THOMAS: I don't quite see the
9 difference, but, okay. My final question is,
10 going back to your standing, you said a number
11 of times that these self-inflicted injuries
12 can't be a basis for standing. At least that's
13 what I understand.

14 But how would you -- using that at
15 that level of generality, what would you say
16 about Plessy sitting in the wrong car?

17 MR. STEWART: I would -- we would not
18 say that that is self-inflicted in the relevant
19 sense.

20 JUSTICE THOMAS: Well, why not? I
21 mean, it's just -- all he has to do is go to
22 another car.

23 MR. STEWART: That is, Plessy is
24 attempting to assert a -- a legitimate
25 constitutional right and is attempting to do

1 something in the real world that presumably he
2 would do if the law were not on the books, that
3 is, if there had been no law mandating
4 segregation on the -- the means of
5 transportation, presumably, Plessy would have
6 sat in an integrated section and would have had
7 an interest in doing so.

8 This is self-inflicted not just in the
9 sense -- it's -- it's a different case when
10 plaintiffs stand on their rights and insist on
11 doing what they would do if the law were not in
12 effect and experience injury as a result of it.

13 This is a case in which the plaintiffs
14 did something they would not otherwise have
15 done solely for the purpose of being injured
16 and then filing a suit.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer, anything further?

19 Justice Alito?

20 JUSTICE ALITO: I -- I'm not sure I
21 understand your explanation why the repayment
22 of this loan is a gift when the repayment of
23 other loans is never considered a gift.

24 If we were writing an opinion in your
25 favor on the merits, how would we explain that?

1 MR. STEWART: I -- I mean, suppose you
2 have a federal officer who it -- it -- it has
3 become publicized that he loaned money to
4 somebody and that person defaulted, didn't pay
5 him back. And so the can -- the federal
6 officeholder is out \$10,000.

7 And some other person comes in and
8 says: I want to make this person -- the
9 officer whole because I -- whole because I
10 respect what he's doing, I'm going to give him
11 the \$10,000.

12 That would surely be a gift for
13 purposes of the separate limitations on gifts
14 to federal officeholders.

15 JUSTICE ALITO: I'm curious. In that
16 case, you have the intervention by a third
17 party. You don't have the repayment of the
18 loan by the person who -- to whom the loan was
19 given in the first place.

20 MR. STEWART: I -- I think the gift
21 rules would cover indirect gifts as well. And
22 so, if -- if, rather than giving the money
23 directly to the officeholder in my
24 hypothetical, the -- the person had given money
25 to the borrower, the borrower who was otherwise

1 in default, and said I'm giving you this money
2 on the understanding that you will pay it to
3 the officeholder in satisfaction of your debt,
4 I think that would count as a gift for purposes
5 of the gift rules.

6 It would certainly implicate the
7 interests that underlie the gift rules because
8 it would be apparent that the effect of this
9 practice was to make the officer richer than he
10 otherwise would be at this point in time, even
11 though it didn't make him any richer than he
12 had been before the loan was made.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Counselor, the
16 Chief asked a question about how do you
17 determine where the risk of corruption arises.
18 Congress has chosen the \$250,000 figure. But I
19 guess what he was asking is, is that figure
20 defensible and on the basis of what?

21 MR. STEWART: I think there are two
22 ways you can defend Congress's ability to -- to
23 set some cap and -- and not simply to impose a
24 blanket prohibition on all use of post-con- --
25 post-election contributions for candidate

1 repayment.

2 The first is Congress can balance
3 competing interests, and the Court often says
4 no law pursues its principal objective to -- to
5 the furthest possible degree. So Congress
6 could say: We also want to make it feasible
7 for candidates to use loans as seed money to
8 finance their campaigns and we're going to
9 strike a balance.

10 The other thing I'd say is I do think
11 a large outstanding balance creates a
12 corruptive potential that a small one may not
13 because, if an officeholder is confident that
14 he will be able to receive enough in
15 post-contribution -- post-election
16 contributions to repay the loan, with a
17 substantial cushion, then no one donor can say
18 I made you richer than I otherwise would be.

19 No one donor will have significant
20 leverage over the -- the candidate. And, by
21 contrast, if the loan is large and the
22 candidate is unsure whether repayment will be
23 forthcoming, then each potential donor has
24 greater leverage.

25 And Congress could use a dollar

1 threshold as -- as a rough surrogate for a loan
2 that implicates this uncertainty about whether
3 full repayment will be forthcoming.

4 And with respect to the \$250,000
5 figure in particular, I think that's just the
6 same as what the Court said in Buckley about
7 the individual contribution limit, that once we
8 are satisfied that some limit is warranted, we
9 don't probe with a scalpel to determine whether
10 the -- the one that Congress has chosen is the
11 -- the precisely best one.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Stewart, part of
14 Mr. Cooper's argument is that we should
15 analogize this to an expenditure limit. You
16 know, in the same way that our law has -- has
17 -- has clearly held you can't limit a
18 candidate's ability to spend money on his own
19 campaign, so too it -- it -- it's -- it's --
20 it's -- it's a similar burden to say that the
21 candidate can't loan as much money as he wants
22 to to his campaign.

23 And I'm wondering what you think the
24 difference is between those two propositions.

25 MR. STEWART: I -- I think there are

1 really two differences.

2 First, one of the reasons that the
3 Court in Buckley gave for why expenditure
4 limits were no good was that a candidate's own
5 expenditures on his campaign will typically
6 reduce the likelihood of corruption because the
7 candidate will be less dependent on outside
8 contributors for the -- the running of the
9 campaign.

10 And -- and a loan, to the extent that
11 it can be repaid with post-election
12 contributions, really has the opposite effect.
13 It causes the candidate to be more dependent on
14 outside contributors not just for running the
15 campaign but for his own personal financial
16 well-being.

17 And the other thing I would say is the
18 -- the Court set in Buckley a -- a limit on the
19 amount of money that you can spend on campaign
20 speech is de facto a limit on the amount --
21 amount of speech that you can engage in
22 because, in the -- even in the 1976 modern
23 world, let alone the -- the current world,
24 effective electoral speech requires
25 expenditures of money, and so a limit on

1 expenditures limits speech.

2 Here, the impact is much more
3 attenuated and uncertain; that is, when they
4 say that speech will be suppressed, what they
5 mean is some number of candidates will be less
6 willing to lend money to their campaigns or
7 will be willing to lend less money and, as a
8 result, fewer funds will be available to the
9 campaigns to engage in speech.

10 There may be some marginal effect of
11 that nature, but it's much less direct and
12 immediate than a limit on the amount of money
13 that the candidate can actually spend.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch, anything further?

16 JUSTICE KAVANAUGH: Yeah. You said
17 earlier, Mr. Stewart, it's not a limit on the
18 amount that a candidate can spend or even loan.
19 And I want to focus on that, or even loan,
20 because it would seem to me that the law puts
21 the candidate to a choice of spending your own
22 money for a loan above \$250,000 or forgoing --
23 forgoing repayment of any amount above 250 --
24 and forgoing any repayment for an amount above
25 \$250,000, so the choice is to spend that

1 without any possibility of -- of getting it
2 back or not spending it at all.

3 And that seems to be, therefore, a
4 chill on your ability to loan your campaign
5 money. Why is that not right?

6 MR. STEWART: I -- I think the third
7 option is loan the cam- -- you can loan the
8 campaign as much money as you want and you can
9 get full repayment as long as the loan is
10 repaid with pre-election funds. And --

11 JUSTICE KAVANAUGH: Well, suppose --
12 sorry to interrupt -- but it's a close
13 election. You're emptying the coffers. It's
14 down to the wire. There are no pre-election
15 funds left. That's how close elections work.
16 You spend it all a lot of times or come close
17 to it, so you have to rely on post-election
18 funds.

19 In that instance, the candidate coming
20 down to the last few days is quite a bit
21 chilled from using his or her own resources
22 above \$250,000 because there's no possibility
23 of repayment under this statute, even in \$2900
24 chunks.

25 MR. STEWART: I -- I think the two

1 things -- I -- I'd first concede your premise
2 that there will be situations in which very
3 close to the election the candidate will be
4 faced with a choice of either limiting the size
5 of the loan he makes or being willing to -- to
6 eat a portion of it.

7 I -- I think the two things I would
8 say are, first, Congress has the -- the
9 objective that it has of reducing candidates'
10 reliance on outside contributors for financial
11 well-being.

12 And Congress can be concerned about
13 candidates who put themselves in their
14 position, where, in order to be repaid in full,
15 they have to solicit post-election
16 contributions from donors who know that the
17 candidate has won and know that the donor is
18 dependent on new money in order to be made
19 whole.

20 The second thing I would say is, even
21 if you thought the statute would be
22 unconstitutional as applied to that particular
23 scenario, it wouldn't be a basis for -- for
24 accepting the as-applied challenge here because
25 the campaign here made the -- the loan for an

1 entirely different purpose. And --

2 JUSTICE KAVANAUGH: One -- one more --
3 one more, sorry, but why allow the \$2900
4 repayments up to the \$250,000 cap then? Aren't
5 those people who give those \$2900 post-election
6 contributions also triggering the same
7 corruption problem that happens with the person
8 who happens to give the \$2900 when the 250 cap
9 has been exceeded?

10 MR. STEWART: I -- I guess the two
11 things I would say are closely related to what
12 I said before.

13 The -- the first is, if the loan is
14 small and the candidate is very confident of it
15 being repaid, then the -- no individual donor
16 will have particular leverage over the
17 candidate.

18 And the second is it -- it --

19 JUSTICE KAVANAUGH: Well, timeout
20 there. It's \$2900 from each person. And the
21 theory has to be that each person's \$2900
22 triggers -- in a post-election contribution,
23 triggers some corruption appearance problem.

24 I don't see why that's different where
25 your \$2900 comes in the wall before or after

1 you exceed the 25 -- 250 cap.

2 MR. STEWART: I agree. And as we said
3 in the opening brief, we think Congress
4 constitutionally could have eliminated all use
5 of post-election contributions to repay
6 candidate loans. Indeed, I think Congress
7 constitutionally could forbid post-election
8 contributions altogether and could say any
9 money that is donated after one election has to
10 be directed to -- to the next one.

11 And the question is just can Congress
12 attempt to balance competing interests, or can
13 it focus on the very worst manifestation --
14 manifestations of the behavior without having
15 the statute held unconstitutional?

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Mr. Stewart, I want
20 to give you a chance to talk a little bit about
21 the other side of the balance. The Chief
22 pointed out we're balancing burdens against the
23 government's interest in stopping corruption.

24 And the court below found that you
25 hadn't introduced sufficient evidence of

1 corruption coming from these post-election
2 contributions, both because there wasn't
3 factual evidence, there was conflicting
4 legislative history, and the difficulties with
5 this YouGov survey.

6 So, given that there wasn't any
7 evidence of actual quid pro quo corruption
8 causing problems, do you want to address that?

9 MR. STEWART: I think the -- maybe the
10 three things I would say are, first, we do
11 think there's an analogy to the gift rules.
12 And so, when Congress is building upon an
13 existing body of law, there -- there's less
14 need to -- four things, actually. There's --
15 there's less need to make a new record.

16 The second is Congress is owed a
17 certain amount of deference, both because it's
18 a coordinate branch of government and because
19 it has special knowledge about the way that
20 campaign financing works. The --

21 JUSTICE BARRETT: But even in a case
22 where some heightened scrutiny applies of some
23 sort?

24 MR. STEWART: I think, to the extent
25 that you are asking is this a -- a realistic

1 fear or is this a -- is this a theoretical
2 practice that we would expect to materialize,
3 then, yes, you would give some weight to
4 Congress's judgment, even if you're applying
5 heightened scrutiny. Certainly, with respect
6 to contribution limits, the Court has given
7 some deference to the legislative judgment even
8 though it applies closely drawn scrutiny.

9 The third thing I would say is we have
10 introduced, I think, significant evidence
11 showing that people in the real world think
12 this is a problem. People in the real -- not
13 -- not -- I don't mean the -- the recipients of
14 the surveys. I mean the commentators, the
15 people who follow politics closely. They --
16 they may disagree as to the extent, but they --
17 they agree that this is actually a practice of
18 concern.

19 And then the fourth thing I would say
20 is BCRA is -- has been on the books for 20
21 years, and so, in the nature of things, it's
22 difficult to amass empirical evidence about
23 what would have happened if BCRA had not been
24 the law.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. STEWART: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Cooper.

4 ORAL ARGUMENT OF CHARLES J. COOPER

5 ON BEHALF OF THE APPELLEES

6 MR. COOPER: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 The government's arguments against
9 Senator Cruz's standing are meritless.

10 First, even assuming, as the
11 government claims, that Cruz's \$10,000 injury
12 was directly caused by the 20-day regulation
13 and not by operation of Section 304 itself, the
14 government cannot escape the fact that the
15 20-day rule is parasitic to Section 304. It
16 has no life independent of the authorizing
17 statute. And so, if Section 304 is invalid,
18 then the 20-day rule is per force also invalid.

19 Nor does it matter whether Cruz's
20 \$10,000 injury was self-inflicted. At least
21 since Mr. Plessy sat down in the train car
22 reserved for whites, this Court has repeatedly
23 held that a plaintiff who deliberately subjects
24 himself to the injury of unconstitutional
25 government action for the admitted purpose of

1 challenging it has created his standing, not
2 defeated it.

3 On the merits, the government defends
4 Section 304 as a measure that serves to protect
5 against what it says is the special threat of
6 quid pro quo corruption from the use of
7 post-election contributions to repay candidate
8 loans.

9 But Section 304 permits up to \$250,000
10 worth of such post-election contributions. So,
11 according to the government, Congress
12 effectively gives a corruption hall pass to the
13 first 86 donors who max out after an election
14 but abruptly closes the corruption window on
15 donor number 87.

16 That incongruity alone -- and there
17 are many others -- betrays the genuine and
18 illegitimate purpose of the loan repayment
19 limit. It is to level the playing field, as
20 its sponsor in the Senate openly proclaimed.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Cooper, could you
23 just take a minute and tell us exactly whose --
24 how this loan repayment regulation or provision
25 affects speech or impedes speech? Is it the

1 speech of candidate -- of Senator Cruz? Is it
2 the speech of his donors?

3 It's one thing to -- to say that,
4 well, it burdens it in some way, but I -- I'd
5 like you just to precisely tell us whose speech
6 and what speech and how it does that.

7 MR. COOPER: Well, thank you, Mr.
8 Justice.

9 It -- it most dominantly burdens and
10 creates a drag on the campaign's speech, on the
11 candidate's speech. If -- if a candidate has
12 to go through the calculus of deciding whether
13 or not I'm going to loan more than \$250,000 to
14 my campaign because my ability to have it
15 repaid is going to be compromised by the
16 statute and by the regulation, Your Honor, to
17 whatever extent the candidate doesn't loan that
18 additional money, that candidate is foregoing
19 the speech that that additional money would --
20 would -- would purchase, as Justice Kavanaugh
21 mentioned.

22 JUSTICE KAGAN: Of -- of course, Mr.
23 Cooper, the candidate can spend all the money
24 he wants of his own money. I mean, put aside
25 the loan question. He can spend a gazillion

1 dollars of his own money if he wants to on his
2 campaign, right?

3 MR. COOPER: That's true --

4 JUSTICE KAGAN: So -- so --

5 MR. COOPER: -- by Constitution.

6 JUSTICE KAGAN: I'm sorry?

7 MR. COOPER: Under the First
8 Amendment.

9 JUSTICE KAGAN: So -- so this
10 restriction, which is a restriction on loan
11 repayment, is really a restriction on how a
12 candidate can use third parties to finance his
13 speech, isn't it?

14 MR. COOPER: Your Honor, no more so
15 than any other campaign contribution.

16 JUSTICE KAGAN: Correct.

17 MR. COOPER: Every time -- every --

18 JUSTICE KAGAN: I think -- I think
19 that that's exactly right. It's a restriction
20 on how a candidate can use third parties to
21 finance his speech, which is exactly what
22 contribution limits are. From the candidate's
23 perspective, it's one and the same thing. Is
24 that -- is that right?

25 MR. COOPER: No, Your Honor. A loan

1 is clearly a form of self-financing by the
2 candidate. Obviously, to whatever extent --
3 whatever extent that that loan is not repaid,
4 it does become a contribution. But the
5 important thing is that that --

6 JUSTICE KAGAN: I guess I don't really
7 quite understand the distinction. If -- if --
8 if this is a restriction on how a candidate can
9 use third parties to finance his speech, not a
10 restriction on how the candidate finances his
11 own speech but a restriction on third-party
12 financing of the campaign, why isn't it
13 completely identical to contribution limits,
14 which we have a well-established set -- law
15 which is very different from our law respecting
16 expenditures?

17 MR. COOPER: Your Honor, when a --
18 when a candidate loans his own money to his own
19 campaign to purchase speech to increase the
20 amount of expression in the advocacy of his own
21 election, as Buckley protects, that candidate
22 is calling upon the candidate's own financial
23 wherewithal. That is an expenditure --

24 JUSTICE KAGAN: Well, for -- for --
25 for --

1 MR. COOPER: -- the statute itself --

2 JUSTICE KAGAN: -- for a time, until
3 the third parties repay that money. So it's
4 not an expenditure. It's -- it's -- it's just
5 a financing mechanism. It's a timing mechanism
6 that puts contributions -- that enables you to
7 switch contributions at one time to
8 contributions at another time.

9 MR. COOPER: And, Your Honor, the --
10 the -- the Congress has placed no limit
11 whatsoever on the amount of loans that a
12 candidate may make and may be paid back with
13 pre-election contributions.

14 The -- the -- the -- the place where
15 this loan restriction creates a drag, Your
16 Honor, is with particularly challengers. And
17 that was its purpose. It -- it creates a drag
18 because a challenger who needs and can't rely
19 on contributions early in a campaign and has to
20 get his campaign off the ground often has to
21 loan that campaign money, Your Honor, and --
22 and that becomes critical to the campaign's
23 ability to speak on that day, on that day.

24 JUSTICE KAGAN: But it --

25 MR. COOPER: So, to the extent --

1 JUSTICE KAGAN: -- it just limits the
2 amount of speech that a candidate can make on
3 somebody else's dime. It does not limit the
4 amount of speech that a candidate can make on
5 his own dime.

6 And what I'm suggesting is that when
7 we think about limits on the amount of speech
8 that a candidate can make on somebody else's
9 dime, the appropriate place to look in the law
10 of campaign finance is to the law respecting
11 contribution limits rather than expenditure
12 limits.

13 MR. COOPER: Well, Your Honor, I would
14 simply push back by saying the statute itself
15 defines loans as a thing of value. It defines
16 loans as an expenditure.

17 The Congress recognizes that when a --
18 when a candidate calls upon his own financial
19 resources to -- to fund his campaign, even if
20 it is ultimately a loan and hopefully is going
21 to be repaid by contributions and any other
22 fundraising by the campaign itself, those are
23 the candidate's own funds.

24 And -- and, again, Congress has -- has
25 itself defined that as an expenditure.

1 JUSTICE BREYER: However you
2 characterize it, haven't you just answered your
3 own question? You started out by saying this
4 is very incongruous because they let you --
5 you're limited before election to 2900 and --
6 \$2900.

7 Why? Because we're afraid, take as a
8 given, that \$2901 will be seen as buying
9 something else and the election will be seen as
10 a corrupt thing, a possibility. That's why
11 that's supposed to be okay, all right?

12 So you say now Mr. Jones gives Mr.
13 Smith the same \$2901, but he gives it having
14 known that Mr. Smith was elected. So whatever
15 -- whatever appearance was there beforehand, it
16 seems to be worse after, you see, but why then
17 do they allow 250,000?

18 And you just answered it: Because,
19 with 250,000, you can help candidates challenge
20 incumbents. We can help the candidate who
21 isn't too popular at the beginning but has
22 assurance that I will become.

23 So Congress has two conflicting
24 interests. On the one hand, it wants to help
25 those candidates challenge the incumbents or

1 poor candidates or ones who have great
2 confidence, and, on the other hand, it doesn't
3 want the 200 -- 2,901 appearance. You have two
4 conflicting interests. We'll resolve them.
5 Raise the amount. Instead of 2,901, it becomes
6 250,000. Okay?

7 So what's incongruous about that? I
8 don't see anything incongruous. I just see
9 conflicting interests, and, here, they have a
10 -- a compromise. What's wrong with that?

11 MR. COOPER: Your Honor, the -- the
12 contribution base limits apply whether the
13 contribution is made before the election or
14 made after the election. And, Your Honor, this
15 Court said in McCutcheon that, so long as the
16 contribution base limits apply, then Congress
17 has determined that there is no cognizable risk
18 of corruption.

19 So a -- a limit -- a -- a contribution
20 made after the election has no more cognizable
21 risk of corruption than one made before the
22 election. It still --

23 JUSTICE BREYER: But you say, yes, it
24 does, you're right, absolutely right. The only
25 problem here is, in addition to being a

1 contribution or however you want to
2 characterize it, you are also helping the
3 candidate put money up front, and that is a
4 pro, that is a pro-competitive democratic
5 interest.

6 And, therefore, the interest with --
7 the interest that we're trying to deal with --
8 the same point I just made -- it's not
9 incongruous. There is a risk of corruption
10 once you get to 2901, but it isn't a pure
11 contribution. It is paying back money that the
12 candidate advanced, and that's a plus, and it's
13 a big plus.

14 And so we say we will, with this
15 particular kind of contribution -- which isn't
16 really a contribution, it's a payback -- with
17 this particular kind, we'll offset. That's the
18 same point I just made. I just don't see an
19 incongruity in that.

20 MR. COOPER: Your Honor, it -- it
21 seems, and I would submit to you, it is very
22 incongruous. If Congress, as the government
23 suggests, is concerned about the corrupting
24 effect of post-election contributions, that it
25 has allowed \$250,000 worth of those very

1 post-election corrupting contributions.

2 JUSTICE BREYER: Correct.

3 MR. COOPER: Everybody is, Your Honor,
4 limited by the base contribution limits. All
5 contributors are.

6 JUSTICE BREYER: Yeah.

7 MR. COOPER: But, here, we have 86
8 contributors who get to come in and --

9 JUSTICE BREYER: Yeah.

10 MR. COOPER: -- and make this alleged
11 gift --

12 JUSTICE BREYER: Why?

13 MR. COOPER: -- to -- to --

14 JUSTICE BREYER: Why? Why do -- why
15 might Congress want to let them do that? I've
16 -- I've -- I've said the same thing in my
17 question. I don't know if I need to repeat it.
18 But you haven't quite said why that's a bad
19 reason.

20 Why might they want to do that? They
21 want to do it -- and I'll repeat for the third
22 time -- because they want to encourage
23 candidates to loan money to their campaign at
24 least for a while until they take off.

25 MR. COOPER: They --

1 JUSTICE BREYER: That's a
2 pro-democratic interest.

3 MR. COOPER: They actually want to
4 discourage candidates. The whole purpose of
5 the -- of -- of -- of Section 304 is to deter
6 candidates from loaning money to their
7 campaign, at least money that might make a
8 difference, money above the \$250,000 level.

9 JUSTICE KAVANAUGH: On -- on Justice
10 Breyer's question, I think you're saying, if
11 the interest were truly anti-corruption, they
12 shouldn't allow any post-election contributions
13 because each person is similarly situated in
14 terms of threatening that corruption interest,
15 whether it's the first one or the 87th one. Is
16 that --

17 MR. COOPER: That's precisely --

18 JUSTICE KAGAN: Well, each --

19 MR. COOPER: -- my point.

20 JUSTICE KAGAN: -- person might be
21 similarly situated, the first and the 87th, but
22 the candidate is not similarly situated. The
23 candidate with \$3,000 of debt is a lot less
24 likely to start thinking about how he can sell
25 his votes than the candidate with \$500,000 of

1 debt.

2 So the candidate is in a very
3 different situation the more the debt mounts.
4 And Congress here came in and said these are
5 hard things. We're striking balances. We're
6 picking \$250,000 at the time where candidates
7 really start worrying about the kind of debt
8 that they have and the kinds of things that
9 they can do to reduce that debt.

10 So even though it is formally true
11 that the 87th person is the same as the first
12 person in terms of they both spent \$2900, at
13 the 87th person, the candidate is in a very
14 different situation and is thinking about those
15 quid pro quos.

16 MR. COOPER: He's thinking about them,
17 Your Honor, because Congress has not allowed
18 the 87th person to come in and make that claim.
19 And I'm glad you have focused on the candidate,
20 and the candidate as the candidate is deciding
21 whether he's going to call upon his own
22 financial wherewithal to fund speech, Your
23 Honor, First Amendment political speech.

24 He is going to think twice, yes, if he
25 can't afford to just give his campaign money,

1 he's going to think twice whether or not he
2 loans more than \$250,000 in -- in -- in -- in
3 order to advocate his -- of his own money to
4 advocate his own election. And that was the
5 purpose of Section 304, to make sure that --
6 that the challenger didn't loan more than
7 \$250,000 to his campaign or at least that if he
8 did --

9 JUSTICE KAGAN: Well, this goes back
10 --

11 MR. COOPER: -- he accepted that risk.

12 JUSTICE KAGAN: -- to my first
13 question, which I think we've probably covered
14 in sufficient detail, but it's just the same as
15 Congress saying we're not going to allow a con-
16 -- a -- a -- a candidate to go get a \$500,000
17 contribution from somebody.

18 That's another way that the candidate
19 could finance his campaign. So -- so --

20 MR. COOPER: I -- I'm -- I'm -- I'm
21 sorry.

22 JUSTICE KAGAN: -- this is not
23 candidate expenditure. This is candidate
24 financing of a campaign. It's a structure to
25 allow a candidate to finance a campaign without

1 spending any of his own money.

2 MR. COOPER: Your Honor, if I
3 understood your -- your -- your point
4 correctly, I -- I don't think it's at all
5 comparable that you -- that you have many
6 contributors contributing only the base limit
7 at most versus a single contributor
8 contributing \$500,000.

9 The base limits, again, under
10 McCutcheon and under common sense, are
11 Congress's judgment that anything at that
12 amount or below has no cognizable risk of
13 corruption.

14 JUSTICE KAGAN: Right. I was just
15 suggesting that the kind of burden this is is
16 the kind of burden that expended -- that
17 contribution limits are, not the kind of burden
18 that expenditure limits are.

19 And our law treats those two burdens
20 very differently. That's --

21 MR. COOPER: Yes.

22 JUSTICE KAGAN: -- that's the point I
23 was making.

24 MR. COOPER: And I well understand
25 that. And my -- my response is that these are

1 expenditures, Your Honor, and the -- and the
2 law that governs contributor limits applies to
3 all of them across the board.

4 JUSTICE KAVANAUGH: But don't you have
5 --

6 MR. COOPER: It doesn't say to the
7 first 86 --

8 JUSTICE KAGAN: I don't understand,
9 Mr. Cooper --

10 MR. COOPER: -- are preferred to the
11 87.

12 JUSTICE KAGAN: -- why you contest
13 that this is like a gift. I -- I guess this
14 puzzles me. If I have a debt of \$10,000 and
15 somebody comes along and says you're doing such
16 a good job, I'm going to re- -- I'm going to
17 pay that debt off for you, isn't that a
18 financial benefit to me?

19 MR. COOPER: Of course.

20 JUSTICE KAGAN: It's a gift.

21 MR. COOPER: And that would be --
22 you're describing a gift. But the repayment of
23 a loan, Your Honor, is not a gift.

24 JUSTICE KAGAN: But a third party is
25 repaying my loan, and so the third party is

1 providing a gift to me.

2 MR. COOPER: Your Honor --

3 JUSTICE KAGAN: I mean that's just
4 like of course, right?

5 MR. COOPER: Your Honor --

6 JUSTICE KAGAN: If a third party says
7 you're doing such a good job, I want to repay
8 your loan for you, I mean, one day I had a
9 \$10,000 loan; the next day I don't. I'm
10 \$10,000 richer. Somebody just made me a
11 \$10,000 gift.

12 MR. COOPER: Your Honor, if -- if a
13 contributor comes in and gives the -- the
14 candidate a \$10,000 gift, then, yes, that --
15 that violates not just the gift statutes but --
16 but, if -- if there's a quid pro quo involved,
17 the bribery statutes.

18 This is a -- we're -- we're talking
19 about campaign --

20 JUSTICE KAGAN: But that's the entire
21 point of this law. I mean, the entire point of
22 this law is that we start getting worried when
23 people start repaying the candidate's
24 indebtedness because that's just another way of
25 putting money in his pocket.

1 MR. COOPER: Your Honor, it -- what
2 about the rest of the campaign's debts? This
3 campaign ended up with \$2.7 million worth of
4 debt. Only 10 percent, less than 10 percent of
5 it, was the candidate's debt. Is every
6 contribution made after the election a gift to
7 all of those creditors? Of course it's not.

8 And nobody would view it that way.
9 It's not a gift, Your Honor, when a -- a -- the
10 -- when the debtor pays the creditor what the
11 creditor is owed. And that's -- and that's
12 what we have here.

13 Yes, it is true that all of the
14 campaign's debts are paid by contribute --
15 contributions limited by the base contribution
16 limits. All of them are. But the -- the
17 candidate's debts don't stand in any different
18 shoes from the ad agency's or the consultants'
19 or the landlord's of a campaign.

20 JUSTICE KAGAN: Well, it stands --

21 JUSTICE ALITO: Mr. Cooper, is -- does
22 this statute apply any differently to
23 candidates who lose than to candidates who win?

24 MR. COOPER: No, Your Honor, it
25 doesn't. It applies to losers as well as to

1 winners. And that's -- in that respect, it's
2 over-inclusive. It's under-inclusive in many
3 respects, but it's over-inclusive in that
4 respect.

5 JUSTICE SOTOMAYOR: Counsellor, what
6 is the possibility that a loser is going to
7 necessarily or in most instances get
8 contributions afterwards?

9 MR. COOPER: Your Honor, certainly
10 losers of elections typically are not able to
11 generate post- --

12 JUSTICE SOTOMAYOR: So, generally, we
13 don't look at people who are not likely to be
14 injured when we're deciding the
15 constitutionality of a statute?

16 MR. COOPER: Your Honor, to whatever
17 extent the -- the -- Section 304 and the loan
18 repayment limit does operate with respect -- on
19 a loser to prevent repayment of a loan, it
20 operates in the same way. Yes, I certainly
21 concede that the opportunity for losers to --
22 to -- to generate post-election contributions
23 are nothing like winners'.

24 CHIEF JUSTICE ROBERTS: And so --

25 JUSTICE ALITO: Well, they may not

1 have the same -- I'm sorry.

2 CHIEF JUSTICE ROBERTS: Just to return
3 briefly to this standing issue, accepting your
4 stipulation, as Mr. Stewart does, about the
5 \$250,000 being paid out of pre-election funds,
6 the statute itself imposes no burden on you
7 paying the remaining 10,000 out of
8 post-election funds, right?

9 MR. COOPER: The statute does not --

10 CHIEF JUSTICE ROBERTS: The statute
11 itself.

12 MR. COOPER: The statute does not.
13 The regulation does --

14 CHIEF JUSTICE ROBERTS: The regulation
15 does.

16 MR. COOPER: -- if you accept his
17 reading of that --

18 CHIEF JUSTICE ROBERTS: I know. We're
19 -- we're beyond that.

20 MR. COOPER: Yes, sir. If you accept
21 it.

22 CHIEF JUSTICE ROBERTS: But at least
23 for purposes of the hypothetical.

24 MR. COOPER: Yes, Your Honor.

25 CHIEF JUSTICE ROBERTS: So it's only

1 the regulation that imposes the injury on you.
2 Now, you say, well, it's a -- in your evocative
3 manner, it's a parasite on the -- the Act, and
4 so you should be able to challenge the Act.
5 And I'll give you that, again, for purposes of
6 the hypothetical.

7 But that's not the question. The
8 question is, do you get a three-judge court?
9 And in that respect, your challenge is only to
10 the regulation, not to the constitutionality of
11 the statute. So -- and the parasite doesn't
12 help you because, yes, if you're in district
13 court, I think you're -- you're right that you
14 can challenge the statute that gave birth to
15 the regulation, if you don't want to use the
16 parasite, then -- but that's a different
17 question.

18 The question is your access to the
19 three-judge district court.

20 MR. COOPER: Mr. Chief Justice, with
21 respect, I don't believe it is a different
22 question. And it's not because the -- the --
23 it is true that the regulation is the immediate
24 cause of the injury to -- to the campaign and
25 its inability to pay back \$10,000 of that loan.

1 But, Your Honor, that -- the -- the
2 cause, it is fairly traceable to the statute
3 itself. And even if we had never made a claim,
4 any independent claim against the regulation,
5 and had only --

6 CHIEF JUSTICE ROBERTS: But you win --

7 MR. COOPER: -- made a constitutional
8 claim --

9 CHIEF JUSTICE ROBERTS: Sorry to
10 interrupt. But you win, regardless of whether
11 the statute is constitutional or
12 unconstitutional, if you're able to strike the
13 regulation. For example, that it's arbitrary
14 and capricious or some other administrative law
15 basis.

16 So you do not have the requirement of
17 a constitutional challenge that is necessary to
18 trigger the three-judge district court.

19 MR. COOPER: Your Honor, if -- if I
20 had a independent constitutional challenge
21 against the regulation, then I would not need
22 to --

23 CHIEF JUSTICE ROBERTS: Right.

24 MR. COOPER: -- to challenge and
25 defeat the --

1 CHIEF JUSTICE ROBERTS: Right, if you
2 had a constitutional --

3 MR. COOPER: -- authorizing statute.

4 CHIEF JUSTICE ROBERTS: -- a
5 constitutional challenge to the regulation.

6 MR. COOPER: I don't know what
7 constitutional challenge I would have to the
8 regulation, other than the notion that it was
9 arbitrary and capricious. And, yes, we did
10 make that claim.

11 But -- but -- but, Your Honor, if --
12 if my only challenge to the regulation is that
13 its authorizing statute is unconstitutional, I
14 can still challenge the authorizing statute.
15 Again, the --

16 CHIEF JUSTICE ROBERTS: I don't -- I
17 think that's right. If you're in --

18 MR. COOPER: Yes.

19 CHIEF JUSTICE ROBERTS: -- district --
20 normal district court. You have one judge up
21 there. But if you're seeking a three-judge
22 district court, I don't know that a challenge
23 to the regulation is enough to get you in.

24 MR. COOPER: Well --

25 CHIEF JUSTICE ROBERTS: Because you

1 can -- you prevail if you strike the regulation
2 down under arbitrary and capricious grounds,
3 and you would be making that argument. And
4 that's not a constitutional argument. That's
5 an administrative law argument.

6 MR. COOPER: But if -- but if I had
7 never made those claims and I had only --

8 JUSTICE BREYER: It isn't absolute.
9 Can I --

10 MR. COOPER: -- surely --

11 JUSTICE BREYER: Go ahead.

12 MR. COOPER: Surely, Your Honor, the
13 -- the injury, the actual injury, is fairly
14 traceable, that's the standing, the standard
15 here, fairly traceable to the host, if you
16 will, authorizing statute.

17 JUSTICE BREYER: Think of this. Think
18 of this, because this is actually, I think, an
19 unanswered question, and I don't know the
20 answer.

21 But, look, imagine there's a challenge
22 to the SEC, okay? Improperly constituted.

23 MR. COOPER: Yes.

24 JUSTICE BREYER: And the person is
25 hurt because of a regulation. He says the

1 agency is improperly constituted. And I don't
2 think there's any problem. We haven't had a
3 problem reaching the constitutional issue.

4 But does this three-judge court
5 statute intend to pick up that kind of
6 constitutional issue where the distance between
7 what you're complaining about and the
8 regulation that actually hurts you is pretty
9 broad? Now, I have a hard time thinking the
10 answer is, yes, always you can, and I have a
11 hard time thinking, no, you never can.

12 So any light you can shed on that to
13 me would be appreciated.

14 MR. COOPER: Your Honor, my -- the
15 light I want to shed on that is the -- this
16 Court's standard with respect to the
17 traceability of the -- of the injury itself.
18 And I -- I just don't think there's any
19 question that the -- the injury is fairly
20 traceable to the statute that gave birth,
21 Mr. Chief Justice, as you say, to the
22 regulation itself. It -- it did, indeed, visit
23 the immediate injury on us.

24 But -- but it's -- you know, it's like
25 saying the murder committed by Frank Nitti is

1 not traceable to Al Capone, the man who ordered
2 and paid for it. It's clearly traceable. Our
3 injury is clearly traceable.

4 JUSTICE KAGAN: Mr. Cooper, do you
5 think that this regulation is, in fact,
6 authorized by the statute?

7 MR. COOPER: I -- I haven't -- we --
8 we did -- we did not have an APA challenge that
9 it was in excess of statutory authority. We --
10 we did not advance that argument.

11 And as I sit here today, I can't think
12 of that argument. I think that the -- that --
13 that -- that the quest -- or at least I don't
14 believe we did. I -- I -- I -- but I -- but,
15 Your Honor, our claim from the beginning was
16 that the 20-day regulation cannot survive an
17 unconstitutional authorizing Section 304.

18 JUSTICE KAGAN: I mean --

19 CHIEF JUSTICE ROBERTS: Your --

20 JUSTICE KAGAN: -- one of the things
21 that --

22 CHIEF JUSTICE ROBERTS: No, go ahead.

23 JUSTICE KAGAN: -- that makes this
24 standing argument sort of weird and interesting
25 is that -- is that the regulation actually

1 doesn't seem to have all that much to do with
2 the statute. In other words, the regulation
3 imposes its own requirement that's separate and
4 apart from what the statutory requirement is.

5 And usually where we see something
6 like that and we say, well, the regulation went
7 beyond the bounds of the statute, that's its
8 own legal problem.

9 MR. COOPER: Yeah.

10 JUSTICE KAGAN: I mean, here, we sort
11 of -- we're sort of thinking about this because
12 of the way the standing arguments were
13 presented, but separate and apart from
14 standing, it just seems as though it's its own
15 legal problem that this 20-day requirement is
16 in there in the regulation when it's -- it's --
17 it's -- it's not mentioned or -- or in some
18 sense comprehended by the statute itself.

19 And I'm wondering whether we have a
20 statutory question before we get to any
21 constitutional question?

22 MR. COOPER: Your Honor, to -- to
23 whatever extent there are statutory objections
24 to the 20-day regulation, the parties did not
25 join that issue.

1 CHIEF JUSTICE ROBERTS: Well, I
2 mean --

3 MR. COOPER: And I --

4 CHIEF JUSTICE ROBERTS: -- to whatever
5 extent, I mean, you can see it. It jumps off
6 the page. I mean, you've got a statute that
7 does not impose a First Amendment inhibition on
8 a -- on a -- a -- a candidate, but some
9 administrator in an agency said, well, I'm
10 going to add a 20-day limit on these First
11 Amendment rights.

12 I mean, you're the one telling us how
13 important they are. Why would you let an
14 agency make this up on their own? I would have
15 thought that would be the first -- Count 1 in
16 your -- your complaint. And the only problem
17 is that would have had to have been brought
18 before a single-judge district court.

19 MR. COOPER: That claim would, Your
20 Honor, if we had brought it as Count 1. But
21 Count 2, Your Honor, that -- that is the
22 authorizing statute itself, is
23 unconstitutional, and so the regulation cannot
24 survive it, would articulate a -- a claim over
25 which a three-judge court would have -- would

1 have constitutional jurisdiction or statutory
2 jurisdiction.

3 JUSTICE ALITO: Mr. Cooper, we
4 generally don't ask questions during rebuttal,
5 so I'm going to ask a question now that is
6 similar to the one that you're being asked, and
7 I hope Mr. Stewart will address it when he
8 delivers his rebuttal, and that is whether the
9 FEC is conceding that the 20-day limit is un-
10 -- is unlawful? I mean, there's pressure --

11 JUSTICE KAGAN: Because not
12 authorized, is that --

13 JUSTICE ALITO: Yeah, he hasn't --
14 they haven't done it up to this point. I mean,
15 neither one of you -- I don't think either of
16 you should be pressed to express a view on this
17 issue which is not the issue in the case.

18 MR. COOPER: Well, it wasn't --

19 JUSTICE ALITO: But Mr. Stewart can
20 respond to that as -- as he chooses.

21 CHIEF JUSTICE ROBERTS: I would just
22 say it's an interesting issue. I don't know if
23 it --

24 (Laughter.)

25 JUSTICE KAVANAUGH: Mr. Cooper, can I

1 follow up on Justice Kagan's questions earlier,
2 because you were discussing with her whether it
3 should be analyzed as an expenditure or as a
4 contribution, and you were pushing back and
5 saying it should be an expenditure.

6 But, in your brief, you also argued, I
7 believe, that even if the other level of
8 scrutiny, closely drawn scrutiny, applied that
9 attaches to other than expenditures, you still
10 prevail. And I just wanted you to tell us why
11 you think that.

12 MR. COOPER: Thank you, Your Honor.
13 Yes, we believe that any level of heightened
14 scrutiny, closely drawn scrutiny under
15 contribution limits, would doom this statute
16 for the incongruities, if you will, that make
17 it quite clear, I would submit to you, Justice
18 Kavanaugh, that the statute itself does not --
19 it does not advance the interest that Congress
20 may have in quid -- preventing quid pro quo
21 corruption.

22 Rather, it advances the illegitimate
23 interest of incumbent protection and equalizing
24 and -- and leveling the playing field, that
25 those interests fit this Section 304 like a

1 glove, Your Honor.

2 The quid pro quo claim -- the -- the
3 quid pro quo corruption costume that the
4 government knows it has to dress this -- this
5 statute in, because it's the only interest that
6 this Court has accepted as sufficiently
7 compelling to justify a drag on First Amendment
8 rights, just -- just doesn't fit. It just
9 doesn't fit.

10 JUSTICE KAGAN: Mr. Cooper, I have --
11 I have to say the opposite intuition. I mean,
12 I understand the equalization argument, and if
13 I think about it, I can understand how an
14 equalization interest would support this law.

15 But, honestly, the thing that to me
16 jumps off the page is that when contributors
17 find a way to put money not in the campaign but
18 into a candidate's own personal pocket, when --
19 when -- when -- when the question is
20 contributors repaying indebtedness of the
21 candidate so as to make the candidate himself
22 financially better off, richer, that to me
23 screams quid pro quo corruption -- corruption
24 interest, not equalization interest.

25 MR. COOPER: Well, even -- even if you

1 attribute that interest to this statute, it
2 just doesn't do it in a rational way. It -- it
3 places no limit, Your Honor, on the
4 pre-election contributions that a candidate may
5 use to repay the candidate. And those alleged
6 gifts to the candidate, it makes no limit on
7 that.

8 It only makes a limit on \$250,000 of
9 post-election contributions, and, Your Honor,
10 again, it only does that for the 87th max-out
11 contributor. It makes no sense to say that the
12 first 86 get to -- get to make that gift, Your
13 Honor.

14 It -- it -- it -- those gifts apply no
15 less to every other creditor of the campaign
16 than they apply to the -- the candidate
17 himself, and the idea that those gifts is just
18 not, I would submit --

19 JUSTICE SOTOMAYOR: Counsel --

20 MR. COOPER: -- a serious point.

21 And, finally, those gifts are limited
22 by the base contribution limits that this Court
23 in McCutcheon made clear that Congress had --
24 made the judgment that they don't reflect or
25 represent a cognizable risk of quid pro quo

1 corruption.

2 JUSTICE BREYER: Now I finally got it.
3 I finally got it. Your point is, with
4 \$250,000, you're saying, the 86 real evil
5 people, see, who are trying to --

6 MR. COOPER: Corrupters.

7 JUSTICE BREYER: -- corrupt
8 everything, they jump in on second one because
9 they know who to get and because he's been
10 elected.

11 And -- and, actually, the -- the other
12 people who are a little slower on the mark,
13 well, they -- they can't give even a dime on
14 this. And -- and they're the ones who are more
15 honest. That's your point there. And with
16 that arise, I see the point now finally and --
17 and that's progress.

18 And the -- the -- the -- but the --
19 the -- it's a -- it's a -- it's an interesting
20 argument, but I think it's probably true of any
21 dollar amount that's greater than the
22 individual amount, that problem will arise.

23 And then the question is, is there
24 something good about this that your client
25 should love because it's bigger than 20 -- than

1 -- you know, than 2900, and the reason that
2 it's bigger is because there are interests on
3 the other side.

4 It seems -- that's how I've got it
5 thought in my mind. And you can say I still
6 don't understand it at all if you want.

7 MR. COOPER: I -- Your Honor, I'm
8 hesitant to say you don't understand it. I --
9 I just would respectfully say that -- that our
10 submission about the total mismatch, the
11 incongruities, the lack of fit between the
12 claim of quid pro quo corruption prevention and
13 what this statute actually does to my
14 submission reflects what its genuine purpose
15 was.

16 CHIEF JUSTICE ROBERTS: Thank you.
17 Justice Thomas, anything further?

18 JUSTICE THOMAS: Nothing for me,
19 Chief, no.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer?

22 Justice Kagan?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: Counsel, we know
25 that after an election that your contribution

1 as a contributor is not being used to promote a
2 candidate because the candidate has already
3 won. So it's not going to be an expenditure to
4 promote your speech in electing the candidate.

5 So my normal reaction is, why do you
6 give after an election to a candidate who's not
7 going to spend it on getting elected? He's
8 going to spend it on something in the past but
9 certainly nothing with respect to the actual
10 election and his getting his post.

11 And to me, that's a natural quid pro
12 quo. I'm giving because I want to draw my
13 attention to you. I guess I'm having a hard
14 time understanding your counter-argument that
15 that needs to be somehow proven. I mean, there
16 were studies that the court below discounted.
17 I'm not quite sure what the ground -- complete
18 ground of discounting -- it wasn't enough,
19 basically. But, you know, they showed that
20 voting patterns by senators seemed to tie into
21 post-election contributions.

22 And I think that's enough to support
23 the sensical thinking that if money that I give
24 is being used to pay the candidate, the
25 candidate's going to pay more attention to me.

1 What more do you need to prove that
2 simple proposition?

3 MR. COOPER: Your -- Your Honor,
4 Congress hasn't limited post-election
5 contributions. It allows post-election
6 contributions both to be designated for the
7 past election, if the individual contributor
8 hasn't maxed out already, and it allows
9 post-election contributions to be designated
10 for the upcoming election.

11 Congress obviously does not believe
12 that in a -- a post-election contribution,
13 whether it's designated for the last election
14 or for the next election, either -- either of
15 which can be used to retire all debts,
16 including candidate debts, of the previous
17 election. So Congress does not see those
18 post-election contributions as being payoffs,
19 quid pro quo.

20 Now, in terms of the -- I think the
21 question implies and the government has stated
22 that there can't be any legitimate reason for a
23 post-election contribution. But, Your Honor, I
24 -- I would beg to differ with that.

25 The -- first of all, as I've just

1 mentioned, Congress hasn't in any way limited
2 that. So Congress certainly believes there's a
3 legitimate reason for post-election
4 contributions. But even if they are just what
5 the government has called makeup contributions,
6 designed for no purpose other than to associate
7 now -- exercise the First Amendment right to
8 associate with the winner, and to hope that
9 that will result in the -- the kind of
10 influence and access that support for a
11 candidate -- that support for a candidate
12 begets and that this Court has in several
13 different cases recognized that Congress cannot
14 seek to -- to deter, as opposed to seeking to
15 deter and to prevent actual quid pro quo
16 corruption, then those are reasons -- Your
17 Honor, those are reasons enough for a -- a
18 contributor to come after an election and make
19 a contribution to the winner.

20 It's just that what -- the candidate
21 has now become effectively an incumbent.

22 JUSTICE SOTOMAYOR: But you just said
23 the magic words, to make a contribution to the
24 winner. Not to a campaign and for its debts,
25 but for the pockets of the winner. That's a

1 very different corrupting influence.

2 MR. COOPER: Your Honor, to the -- to
3 the extent that the -- that the post-election
4 contribution pays for pre-election speech, it
5 is paying for speech. If I go to a restaurant
6 tonight and pay for my meal with a credit card,
7 a month from now I will have to repay the
8 credit card company for that meal.

9 That's -- that's what these
10 post-election contributions that actually
11 retire debts pay for. Whether they're paying
12 -- whether they're retiring the debt of the
13 candidate or any of the other creditors, it's
14 paying for speech that was uttered before and
15 was financed through -- through credit, the
16 candidates and others uttered before the
17 election.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?
20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: One question. You
22 had also mentioned that you think the statute
23 is designed for or has the effect of incumbency
24 protection. And I just wanted you to connect
25 the dots and spell out why you say that.

1 MR. COOPER: Your Honor, I -- I -- I
2 -- the -- the millionaire's amendment, of which
3 this was a part and -- and which this Court
4 struck down the other part, obviously in the
5 Davis case, was enacted by Congress with
6 explicit references to the fact that
7 well-financed challengers to incumbents
8 represented a threat and that the -- and that
9 the -- the then incumbents in Congress wanted
10 to make sure there was a level -- level playing
11 field.

12 The -- the -- the ability of a
13 candidate to loan without repayment limits such
14 as the Section 304 places on the candidate, to
15 loan money to his campaign, to advocate his own
16 election, is a threat to incumbents, Your
17 Honor, just as much as -- as the ability to
18 contribute or to make expenditures on behalf of
19 the challenger's campaign.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Thank you, counsel.

23 MR. COOPER: Thank you, Mr. Chief
24 Justice.

25 CHIEF JUSTICE ROBERTS: Mr. Stewart,

1 rebuttal?

2 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

3 ON BEHALF OF THE APPELLANT

4 MR. STEWART: Thank you, Mr. Chief
5 Justice.

6 Let me respond first to Justice
7 Alito's question. We're not prepared to
8 concede that the FEC regulation is invalid, but
9 Appellees did challenge that in this lawsuit,
10 that is, at page 26 of the Joint Appendix,
11 count 4 of a Appellees' complaint alleged that
12 the 20-day limit in the regulation was
13 arbitrary, capricious, and not in accordance
14 with law, and count 5 asserted a different
15 non-constitutional challenge to the regulation.

16 And the three-judge district court
17 exercised supplemental jurisdiction over the
18 regulatory challenges but held them in abeyance
19 while it adjudicated the constitutional
20 challenge to the statute. And I think that was
21 for two reasons.

22 First, the district court was under
23 the misimpression that the statute itself was
24 the current legal barrier to full repayment.
25 And, second, the three-judge court

1 understandably viewed its mandate as being the
2 resolution of challenges to the
3 constitutionality of the statute. And then
4 having held that the statute was
5 unconstitutional, it said we're dismissing the
6 regulatory claims as moot.

7 The implication was, if the statute
8 had been held constitutional, then the court
9 would have proceeded to the -- the
10 non-constitutional challenges to the regulatory
11 provisions.

12 And so the way the case was litigated
13 produced this weird inversion of the way that
14 litigation is supposed to be handled. That is,
15 it's bedrock that if you have both
16 non-constitutional and constitutional claims
17 before you, the court is supposed to resolve
18 the non-constitutional issues first and proceed
19 to the constitutional issues only if it is
20 necessary to do so. And here the district
21 court did the reverse because of the -- the way
22 that the -- the case was pleaded and the fact
23 that it was a three-judge court.

24 The -- the second thing I'd like to
25 say is -- to follow up on something that

1 Justice Kagan said when she pointed out this is
2 really not a limit on self-financing or the
3 ability to -- of a candidate to spend money on
4 his own campaign; it's a limit on the
5 candidate's ability essentially to -- to pass
6 the expenses of campaigning along to others.

7 And the Court has sometimes -- and the
8 Appellees' response is the existence of this
9 limit will create a disincentive to the making
10 of candidate loans and that, in turn, will
11 result in less campaign speech.

12 And the Court has sometimes resolved
13 very similar claims where a candidate, as
14 opposed to a contributor, will challenge
15 contribution limits on the ground that they
16 have an indirect effect on the campaign's
17 ability to engage in speech.

18 And the Court has said, from the
19 candidate's perspective, so long as the limits
20 are not so low that they prevent the candidate
21 from amassing funds sufficient for effective
22 advocacy, then the candidate has no valid
23 constitutional challenge.

24 The contributor may still have a
25 constitutional challenge because the -- the

1 limits may impinge unduly on his own ability to
2 affiliate himself with campaigns to assist in
3 the electoral process.

4 But the -- the limit here really
5 doesn't have that effect. The contributor can
6 still donate as much as -- as he wants up to
7 the base limit, can do so at any point up until
8 the election, can continue to do so after the
9 election subject to the proviso that the funds
10 can't be used for repayment of candidate loans.

11 But since a contributor ordinarily has
12 no legal right to insist that his donations be
13 used for a particular purpose, that -- that's a
14 very small intrusion on any liberty that he
15 might have.

16 The third thing I wanted to say is
17 about the leveling the playing field. The
18 companion provision that was at issue in Davis,
19 there was a leveling purpose apparent on the
20 face of the statute because the statute said if
21 one candidate spends a lot of his own money,
22 then the other candidate will be able to raise
23 more money himself. And so the rules that
24 applied to one candidate were kind of
25 contingent on what the other candidate did.

1 That was leveling on its face, but
2 there's nothing similar going on here.

3 The -- yes, it's true that the loan
4 repayment limit applies to each candidate in
5 the race, but the rules that apply to one
6 candidate don't depend on what his opponent
7 does.

8 The other thing about the fact that
9 the loan repayment limit applies to losing
10 candidates, I'd say three things.

11 The first is what Justice Sotomayor
12 said, that it doesn't have much practical
13 impact on losing candidates because they can
14 rarely raise sufficient post-election
15 contributions to be over the limit.

16 The second thing is that, as we see in
17 Davis, ordinarily the presumption is that the
18 same rules will apply to all candidates in a
19 race. And, indeed, there can be constitutional
20 problems if -- even if they don't.

21 And the third is, as the Court said in
22 Buckley, there are some circumstances where
23 Congress decides that the same rules should
24 apply to each candidate, even though the
25 interests underlying a particular rule may not

1 be as directly implicated by minor party
2 candidates, for instance, who are unlikely to
3 win and, therefore, are unlikely to -- to do
4 favors for the -- the donor.

5 Thank you, Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:29 a.m., the case
9 was submitted.)

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