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Federal Election Commission v. Ted Cruz for Senate: How the Supreme Court Is Clearing the Way for Corruption in Politics

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Political speech lies at the heart of the First Amendment. Candidates for office have the constitutional right to raise funds to express their viewpoints, run campaigns, and associate with their supporters. However, leaving this flow of money unchecked creates a risk that candidates will sell the promise of political favors for increased monetary support from voters. Congress passed Section 304 of the Bipartisan Campaign Reform Act to prevent the risk of quid pro quo corruption, which is heightened when donors contribute money to candidates after the election for the sole purpose of retiring the candidates' personal loans. Section 304 restricted how and when campaigns could use postelection contributions to repay candidates' loans.

Until recently, the United States Supreme Court used an established First Amendment framework to address campaign contribution and expenditure limits. Under this framework, the Court typically upheld contribution regulations under heightened scrutiny and invalidated expenditure regulations under strict scrutiny. However, the Court fundamentally altered this framework in Federal Election Commission v. Ted Cruz for Senate *when it held that Section 304 was an unconstitutional infringement on First Amendment rights.* FEC v. Cruz *represents a sharp departure from existing precedent toward a new era of judicial skepticism of all campaign finance regulations. This Note examines* FEC v. Cruz *and the unprecedented legal analysis the Court used to hold Section 304 unconstitutional. This Note then discusses the specific implications of this decision on the Court's First Amendment campaign finance jurisprudence and on the integrity of this nation's electoral system.*

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INTRODUCTION

The integrity of the American electoral system is fundamental to the functioning of the country's democratic government. This integrity is threatened by corruption, including actual quid pro quo exchanges between candidates and their donors, as well as the appearance of that

illicit activity.[1] In a time when allegations of rampant fraud have tarnished the public's faith in America's electoral processes, it is more important than ever to prevent corruption where possible.[2]

Candidates for federal office primarily self-finance their campaigns through personal loans.[3] The risk of actual and apparent corruption occurs when these indebted candidates accept postelection contributions from supporters who may expect political favors for helping the candidates get out from under their debt.[4] Section 304 of the Bipartisan Campaign Reform Act ("BCRA") protected against this type of corruption by limiting the amount of postelection contributions campaigns could use to repay candidates' personal debts.[5]

This Note analyzes the outcome of *Federal Election Commission v. Ted Cruz for Senate,*[6] and its impact on First Amendment campaign finance jurisprudence. In *FEC v. Cruz,* the Supreme Court overturned Section 304 of the BCRA ("Section 304") as an unjustified burden on

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1. *See* Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

2. *See generally* Nick Corsaniti & Alexandra Berzon, *Activists Flood Election Offices With Challenges*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html [https://perma.cc/J8F5-6J8R]; Jordan Wilkie & Laura Lee, *'Be like North Carolina': Rightwing Election Efforts Signal Growing US Movement*, GUARDIAN (Oct. 11, 2022 at 7:00 PM), https://www.theguardian.com/us-news/2022/oct/11/election-integrity-north-carolina-voter-suppressionn [https://perma.cc/4DAE-7DRZ]; Beth Reinhard & Yvonne Wingett Sanchez, *As More States Create Election Integrity Units, Arizona is a Cautionary Tale*, WASH. POST (Sept. 26, 2022 at 6:00 AM), https://www.washingtonpost.com/investigations/2022/09/26/arizona-election-integrity-unit/ [https://perma.cc/2XPL-9H4V].

3. *See* Alexei V. Ovtchinnikov & Philip Valta, SELF-FUNDING OF POLITICAL CAMPAIGNS 7 at 35 (2022) (finding that between 1983 and 2018, most of candidates' own-source funding came from personal loans, totaling $2.28 billion, with candidate contributions accounting for only $675 million of own-source funding).

4. *See* Ian Millhiser, *The Supreme Court Just Made It Much Easier to Bribe a Member of Congress*, VOX (May 16, 2022 at 1:30 PM), https://www.vox.com/2022/5/16/23074957/supreme-court-ted-cruz-fec-bribery-campaign-finance-first-amendment-john-roberts-elena-kagan [https://perma.cc/9EXM-C9A9] ("The idea is that, if already-elected officials can solicit donations to repay what is effectively their own personal debt, lobbyists and others seeking to influence lawmakers can put money directly into the elected official's pocket—and campaign donations that personally enrich a lawmaker are particularly likely to lead to corrupt bargains.").

5. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 304(a)(2), 116 Stat. 81 (codified, in part, at 52 U.S.C. § 31116(j)), *invalidated by* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022).

6. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022).

core political speech.[7] This Note argues that the Court incorrectly invalidated Section 304 as unconstitutional under the First Amendment because the law withstands heightened scrutiny—the constitutional test the Court has been using for the past forty years for challenges to campaign contribution restrictions.[8] By striking down the law, the Court has upended the existing framework for analyzing contribution and expenditure limits and appears to establish a new framework that imposes strict scrutiny on all types of campaign finance regulations, regardless of the interests they achieve or the burdens they impose.[9] The Court's holding chips away at federal campaign finance law and enables litigants to more easily challenge and overturn remaining statutory provisions.[10] Furthermore, the removal of a protective measure opens the door for quid pro quo deals between politicians and their supporters and undermines the American public's faith in democracy.[11]

Part I of this Note discusses the background of campaign finance legislation, covering the laws passed by Congress and the Supreme Court cases that have shaped those laws. It also explains Section 304 of the BCRA and its corresponding enforcement mechanisms.

Part II analyzes *FEC v. Cruz*, reviews the facts and procedural history, outlines the majority opinion of the Court, and concludes by reviewing Justice Kagan's dissent.

Part III analyzes the majority and dissenting opinions in *FEC v. Cruz* and discusses how the holding signifies a departure from First Amendment campaign finance law precedent. This Part discusses the burden Section 304 imposed on protected political speech and the corresponding level of scrutiny the Court should have applied to the provision. It further analyzes how the Court disregarded Congress's judgment and its own precedent by imposing a strict evidentiary burden on the Government to prove the existence of a judicially recognized interest.

Part IV predicts the impact that this holding will have on future

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7. *Cruz*, 142 S. Ct. at 1656; *see also* Amy Howe, *Court Sides With Ted Cruz and Strikes Down Campaign Finance Restriction Along Ideological Lines*, SCOTUSBLOG (May 16, 2022 at 1:51 pm), https://www.scotusblog.com/2022/05/court-sides-with-ted-cruz-and-strikes-down-campaign-finance-restriction-along-ideological-lines/ [https://perma.cc/878A-AT4J] (describing *Cruz*'s holding); *see generally* Reese Oxner, *Supreme Court Overturns Law that Barred Ted Cruz from Fully Recouping a Personal Loan He Made to His Campaign*, TEXAS TRIB. (May 16, 2022 at 3:00 PM), https://www.texastribune.org/2022/05/16/ted-cruz-supreme-court-campaign-finance/ [https://perma.cc/M2Q9-VXRG].

8. *See infra* Section I.B.

9. *See infra* Part III.

10. *See infra* Section IV.A.

11. *See infra* Sections VI.B, VI.C.

campaign finance jurisprudence and the ramifications for the public's trust in the government. It asserts that this holding represents a recent trend of the Court toward overturning or drastically altering the existing framework for addressing challenges to campaign finance regulations. It also argues that the Court's decision creates a risk for increased corruption in elections, which threatens the integrity of the entire electoral system.

I. BACKGROUND

This Part will first discuss the history of campaign finance legislation and how the law currently controls campaign contributions and expenditures. Next, it will explain how Section 304 of the BCRA functioned and how it was enforced. Finally, it will cover the development of the Supreme Court's First Amendment campaign finance jurisprudence that shaped the Court's analysis in the *Cruz* decision.

A. Statutes and Regulations

The political leaders of this country have long-recognized the need to control the use of money in politics.[12] Since the first campaign finance law was passed in 1867, there have been continuous efforts to reform the way campaign financing is regulated.[13] Under the current body of federal campaign finance laws, expenditures and contributions to federal elections are regulated through limits, restrictions, and requirements.[14] The modern era of campaign finance reform is a product of the Federal

12. *See* Peter H. Schuck, *Campaign-Finance Reform Revisited*, NATIONAL AFFAIRS 76 (2019) (arguing that legislators have been addressing the issue of the corruptive nature of money in politics since 1758, when George Washington won a political position in-part by buying wine and cider for Virginia citizens); *see also Mission and History*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ (last visited Jan. 28, 2023) [https://perma.cc/3GEM-DL9Q] (describing how, in 1905, President Theodore Roosevelt called for legislation banning corporate contributions in recognition of the need for campaign finance reform); *see also* ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 4–5 (2014) (describing how the exposure of corporate contributions to President Roosevelt's 1904 campaign lead to the first push for campaign finance reform).

13. *See* Schuck, *supra* note 12, at 76 (describing the 1867 law that prohibited government officials from soliciting funds from naval-yard workers); *id.* (arguing that there is widespread agreement that the campaign finance system is broken and in need of reform); Anthony Johnstone, *Recalibrating Campaign Finance Law,* 32 YALE L. & POL'Y REV. 217, 220–26 (2013) (describing three different eras of campaign finance reform, starting with laws passed by state legislatures and Congress in the beginning of the twentieth century to address concerns about large corporate and individual contributions to political parties and campaigns).

14. *See, e.g.*, L. PAIGE WHITAKER, CONG. RSCH. SERV., RL45320, CAMPAIGN FINANCE LAW: AN ANALYSIS OF KEY ISSUES, RECENT DEVELOPMENTS, AND CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATION 1 (Sept. 24, 2018) (explaining the different areas of law that make up campaign finance regulations).

Election Campaign Act of 1971 (FECA),[15] the Bipartisan Campaign Reform Act of 2002 (BCRA),[16] and a series of Supreme Court cases.[17]

Congress passed FECA in 1971 to regulate the financing of federal election campaigns, and later amended the Act in response to increased concerns over corruption.[18] As amended, FECA imposed contribution and expenditure limits on campaigns and established the Federal Election Commission (FEC) as an independent agency to oversee the enforcement of the laws.[19] Congress further amended FECA by enacting the BCRA in 2002 in response to perceived loopholes that allowed for issue advocacy and unrestricted "soft money" to flow into campaigns.[20] In addition to closing those loopholes,[21] Congress included Section 304 in

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15. Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101-30126, 30141-30145.

16. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

17. *See, e.g.*, *Federal Campaign Finance Laws and Regulations*, BALLOTPEDIA, https://ballotpedia.org/Federal_campaign_finance_laws_and_regulations (last visited Aug. 13, 2022) [https://perma.cc/J88G-YK42] ("The Federal Election Campaign Act of 1971, the Bipartisan Campaign Reform Act of 2002, and a series of federal court cases . . . together form the foundation of federal campaign finance law.").

18. *See, e.g.*, Brief for Appellant at 5, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) (stating the purpose of FECA as it was first passed); *see also* Whitaker, *supra* note 14, at 1 (stating that Congress amended FECA in 1974 in response to the Watergate scandal); *see also* Johnstone, *supra* note 13, at 223 (arguing that the Watergate scandal "opened the modern era of campaign finance reform" in response to donors contributing hundreds of thousands of dollars to the president's campaign and to the campaign itself spending tens of millions of dollars).

19. *See* Schuck, *supra* note 12, at 77 (explaining why Congress initially established the FEC); *see also* Johnstone, *supra* note 13, at 223 ("The main innovations of the Federal Election Campaign Act Amendments of 1974 (FECA Amendments) were contribution limits and effective enforcement . . . FECA and the FECA Amendments also imposed expenditure limits, though the Supreme Court invalidated them in *Buckley v. Valeo*."); *see also* Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1181 (2021) (describing how FECA represents the first time the federal government comprehensively regulated campaign contributions and expenditures, imposed source restrictions, and required financial disclosures from candidates, contributors, political committees, and parties).

20. *See* Schuck, *supra* note 12, at 78 (stating that Congress passed the BCRA to address soft money and issue advocacy); *see also* 150 CONG. REC. 12 (daily ed. Feb. 4, 2004) (statement of Rep. McCain) (stating that the bases for the BCRA were "large, unregulated political contributions" causing actual and apparent corruption of elected officials); *see also* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 184 (1998) (defining soft money as "unregulated contributions to state and local parties" that can be used for grass-roots activities specifically advocating for the election of a candidate, like get-out-the-vote drives or yard signs, but not for broadcasting or advertising, as well as money for "issue ads" that do not specifically advocate for the election of a candidate, but may influence voters' perceptions of candidates); *see also* Johnstone, *supra* note 13, at 224 ("However carefully calibrated the FECA [limits] were, the hydraulics of campaign finance reform diverted large contributions into unlimited national political party 'soft money' [groups] . . . engaged in 'issue advocacy' that in fact campaigned for or against targeted candidates by name during the election season.").

21. *See* Johnstone, *supra* note 13, at 224.

the BRCA to limit how candidates could be repaid for loans they made to their campaigns.[22]

Federal campaign finance laws broadly cover all money related to federal elections.[23] The law distinguishes between a campaign contribution and a campaign expenditure.[24] A contribution involves giving money, while an expenditure involves spending money.[25] The distinction between contributions and expenditures is crucial because they are limited in different ways by federal law.[26] As discussed below, courts use different standards when assessing the respective limits' constitutionality.[27]

B. Section 304 of the Bipartisan Campaign Reform Act of 2002

A candidate in a federal election, or their campaign committee, can borrow an unlimited amount of money from a bank to fund their election.[28] If a candidate chooses to self-finance their campaign, they can

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22. *See generally* L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10734, CAMPAIGN FINANCE AND THE FIRST AMENDMENT: SUPREME COURT CONSIDERS CONSTITUTIONALITY OF LIMITS ON REPAYMENT OF CANDIDATE LOANS 1 (Apr. 26, 2022).

23. *See, e.g.,* THE BROOKINGS INSTITUTION, CAMPAIGN FINANCE REFORM: A SOURCEBOOK 5 (Anthony Corrado et al. eds., 1997) ("The intent of Congress [in passing FECA] was to regulate all funds which might be considered federal election related.").

24. A contribution is defined, in relevant part, as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . . ." 52 U.S.C.A. § 30101 (8)(A). In comparison, an expenditure is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . ." 52 U.S.C.A. § 30101(9)(A).

25. *See* Whitaker, *supra* note 22, at 1 (describing the difference between a contribution and an expenditure); *see also* Buckley v. Valeo, 424 U.S. 1, 19–21 (1976) (describing a contribution as "a general expression of support for the candidate and his views" and an expenditure as "money a person or group can spend on political communication during a campaign . . .").

26. Campaigns can accept contributions from individuals and political committees. 52 U.S.C. § 30116(a). Individual contributions to candidates are capped per-election, and the limits are indexed for inflation. 52 U.S.C. § 30116(a) and (c). For the 2021–2022 federal elections, individual contributions to candidates are limited to $2,900 per election. *See generally Contribution Limits*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/ (last visited Sept. 20, 2022) [https://perma.cc/5C3A-YKCR]. In comparison, candidates can spend an unlimited amount of their own money on their campaigns. 11. C.F.R § 110.10 (2017).

27. *See* Whitaker, *supra* note 14, at 4 ("[C]ourts have generally upheld limits on contributions, concluding that they serve the government interest of protecting elections from corruption, while invalidating limits on independent expenditures, concluding that they do not pose a risk of corruption.").

28. *See* 11 C.F.R. § 100.82 ("A loan of money to a political committee or a candidate by a [bank] . . . is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business."); *see also* 11 C.F.R. § 100.52 ("A gift, subscription, loan (except for a loan made in accordance with 11 CFR 100.82

loan an unlimited amount of their own money to their campaign committee.[29] Section 304 dictated how a candidate could be repaid for any personal loans they made to their campaign.[30] Section 304 stated:

> Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 . . . in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election.[31]

Accordingly, a campaign could use up to $250,000 of any postelection contributions received to repay a candidate for the loans they made to their campaign.[32]

Under the FEC's implementation regulations, if a candidate made a personal loan to their campaign, their campaign could repay up to $250,000 of their loans using contributions made before, on, or after the election.[33] Next, the campaign could use preelection contributions to repay the entire amount of the candidate's loans exceeding $250,000 if the repayment occurred within twenty days of the election.[34] If more than $250,000 of the candidate's loans were unpaid after the twenty-day window closed, that portion would be recharacterized as a contribution

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and 100.83), advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office is a contribution."); *Bank Loans*, FEDERAL ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/handling-loans-debts-and-advances/bank-loans/ (last visited Sept. 20, 2022) [https://perma.cc/R8U8-B86C] ("Bank loans are not considered contributions from the bank if they comply with FEC regulations on bank loans. If a loan fails to meet any of these conditions, then a prohibited contribution from the lending institution results.").

29. *See generally supra* notes 24–26.

30. *See* 52 U.S.C. § 30116 (j).

31. *Id.*

32. *See* Brief for Appellant, *supra* note 18, at 3–4 (describing how Section 304 functions); Brief for Appellees at 6, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) (describing how Section 304 functions).

33. *See* 11 C.F.R. § 116.12(a) ("A candidate's authorized committee may repay to the candidate a personal loan . . . of up to $250,000 where the proceeds of the loan were used in connection with the candidate's campaign for election. The repayment may be made from contributions to the candidate or the candidate's authorized committee at any time before, on, or after the date of the election.").

34. *See* 11 C.F.R. § 116.11(b)(1) ("For personal loans that, in the aggregate, exceed $250,000 . . . the authorized committee may repay the entire amount of the personal loans using contributions to the candidate or the candidate's authorized committee provided that those contributions were made on the day of the election or before . . . ."); *see also* 11 C.F.R. § 116.11(c)(1) ("If the authorized committee uses the amount of cash on hand as of the day after the election to repay all or part of the personal loans, it must do so within 20 days of the election.").

from the candidate.[35] These enforcement mechanisms prevented loans exceeding $250,000 from being repaid with postelection contributions.[36]

C. Campaign Finance Jurisprudence

Campaign finance law is not governed solely by regulatory policies like FECA and the BCRA—the Supreme Court's decisions in this area significantly shaped the scope of the laws.[37] In *FEC v. Cruz*, the Court analyzed the constitutionality of Section 304 under the First Amendment by using a framework it developed through a series of campaign finance law cases.[38]

In *Buckley v. Valeo*, the Court considered whether certain FECA provisions, including a $25,000 per-year expenditure limit and a $1,000 individual per-election contribution limit, unconstitutionally interfered with the First Amendment.[39] The Court ultimately upheld the expenditure limit, but struck down the contribution limit as unconstitutional.[40] In reaching its decision, the Court established a framework for analyzing the constitutionality of federal expenditure and contribution limits.[41] The Court held that expenditure limits impose

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35. *See* 11 C.F.R. § 116.11(c)(2) ("Within 20 days of the election date, the authorized committee must treat the portion of the aggregate outstanding balance of the personal loans that exceeds $250,000 minus the amount of cash on hand as of the day after the election used to repay the loan as a contribution by the candidate.").

36. 11 C.F.R. § 116.11(b)(3) ("For personal loans that, in the aggregate, exceed $250,000 . . .. the authorized committee [m]ust not repay . . . the personal loans that exceeds $250,000 from contributions to the candidate . . . if those contributions were made after the date of the election.").

37. *See* Whitaker, *supra* note 14, at 1 (stating that, in addition to the existing statutory provisions that regulate federal campaign finance law, the Supreme Court's "campaign finance jurisprudence" determines how such financing can be regulated under the Constitution). *See also* Michael Bell et al., *Recent Supreme Court Ruling Shakes up Campaign Finance Law and Leaves Future Restrictions in Doubt*, JD SUPRA (May 19, 2022), https://www.jdsupra.com/legalnews/recent-supreme-court-ruling-shakes-up-7057819/ [https://perma.cc/8DZ5-35Q3] (describing recent Supreme Court decisions on campaign finance as "a series of decisions in which the Court has loosened campaign finance restrictions in pursuit of expanding political expression and free speech."); *see also* Schuck, *supra* note 12, at 76–77 (describing how the First Amendment is the "most difficult hurdle" for any campaign finance regulation to overcome).

38. In Fed. Election Comm'n v. Ted Cruz for Senate, the Supreme Court relied on the following precedential cases to develop its holding: Buckley v. Valeo, 424 U.S. 1 (1976), Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011), Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008), McCutcheon v. Fed. Election Comm'n, 572 U.S. 1985 (2014) (plurality opinion), Shrink Mo. Gov't PAC, 528 U.S. 377 (2000), Randall v. Sorrell, 548 U.S. 230 (2006) (plurality opinion). Fed. Election Comm'n v. Cruz, 142 S. Ct. 1638, 1638–57 (2022).

39. *See* Buckley v. Valeo, 424 U.S. 1, 12–13 (1976).

40. *See id.* at 29, 58–59.

41. *See* J. Robert Abraham, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1085 (2010) (describing the decision in *Buckley* as "the key doctrinal switch determining both the level of scrutiny and constitutional merits of campaign finance

substantial restraints on expression,[42] so they are subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest.[43] In comparison, the Court held that contribution limits impose only minor restraints on a candidate's First Amendment rights, particularly associational rights,[44] so they are subject to a lesser form of scrutiny and may be upheld if they are "closely drawn" to a "sufficiently important" government interest.[45] Additionally, the Court held that the expenditure limit was not justified by any proffered government interest,[46] while the contribution limit was justified by a government interest in preventing corruption and the appearance of corruption.[47]

The Court reaffirmed and further defined the *Buckley* framework in its subsequent campaign finance law decisions. In *Nixon v. Shrink Missouri Government PAC*, the Court upheld a Missouri law that imposed contribution limits between $275 and $1,075 on candidates running in state elections.[48] The Court rejected the notion that it must assert a "constitutional minimum" for contribution limits, and instead articulated a test for determining whether a contribution limit is too restrictive: "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[49] The Court also held that there is no necessary amount of evidence required to demonstrate a sufficient justification for contribution limits, especially when the claimed justification is to prevent corruption.[50]

In *Randall v. Sorrell*, the Court addressed a challenge to a Vermont law that restricted individuals', parties', and political committees' contributions to no more than $400 to state candidates per two-year

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restrictions"); *see also* WHITAKER, *supra* note 14, at 2 ("In *Buckley*, the Supreme Court established the framework for evaluating the constitutionality of campaign finance regulation.").

42. *See Buckley*, 424 U.S. at 39. The Court reasoned that restricting how much money a candidate or campaign can spend on "political communication" restrains expression by limiting the quantity and quality of speech and reducing the size of a candidate's audience. *Id.* at 19.

43. *Id.* at 44–45 ("[T]he constitutionality of [the expenditure limit] turns on whether the government interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.").

44. *Id.* at 21 (holding that a contribution limit "involves little direct restraint" on political communication because it still enables the contributor to express support for a candidate but does not restrict the contributor's freedom to discuss candidates and issues).

45. *Id.* at 25 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975)).

46. *Id.* at 55.

47. *Id.* at 26–29.

48. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 383 (2000).

49. *Id.* at 396–97.

50. *Id.* at 390 ("Missouri espouses . . . interests of preventing corruption and the appearance of it that flows from munificent campaign contributions. Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed . . .").

election cycles.[51] The Court, in a plurality opinion, held that the contribution limits violated the First Amendment because they were so low that they were "substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns . . . ."[52] This, the Court reasoned, was enough to show that the contributions limits were not sufficiently tailored to any government interest.[53]

In *Davis v. Federal Election Commission*, the Court struck down the "Millionaire's Amendment" of the BCRA as an unconstitutional burden on political expression under strict scrutiny.[54] The Millionaire's Amendment increased contribution limits for candidates whose opponents significantly self-funded their campaigns.[55] The Court found that the provision was effectively an expenditure limit that punished self-financing candidates and, accordingly, subjected the provision to strict scrutiny.[56] The Court reaffirmed a key *Buckley* holding: that expenditure limits are not justified by an interest in preventing actual or apparent quid pro quo corruption because self-financing reduces a candidate's reliance on third-party funding and lessens the risk of corruption.[57]

In *McCutcheon v. Federal Election Commission*, the most recent major Supreme Court decision involving contribution and expenditure limits prior to *Cruz*, the Court addressed a challenge to a provision of BCRA that limited the amount of money donors could contribute to federal candidates in two-year election cycles.[58] The Court held that preventing quid pro quo corruption or its appearance is the only sufficiently important government interest that can justify a contribution or expenditure limit.[59] The Court ultimately held that, because the

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51. Randall v. Sorrell, 548 U.S. 230, 238 (2006).

52. *Id.* at 253.

53. *Id.* at 261 (concluding that substantial restrictions on campaign fundraising did not further any government interest).

54. *See* Davis v. Fed. Election Comm'n, 554 U.S. 724, 739–44 (2008) (rejecting the challenged provision after applying strict scrutiny).

55. *Id.* at 729.

56. *See id.* at 738–40 (finding that the provision imposed a penalty on a candidate who exercises his First Amendment right to spend personal funds on campaign speech and then applying strict scrutiny to analyze the provision's constitutionality).

57. *Id.* at 740–41 ("The *Buckley* Court reasoned that reliance on personal funds reduces the threat of corruption, and therefore § 319(a), by discouraging use of personal funds, disserves the anticorruption interest.").

58. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 193–95 (2014) (describing the functionality of the challenged provision).

59. *Id.* at 227. The Court stated that the possibility that a contributor may garner influence or

contribution limits did not further an acceptable anticorruption interest, they were unconstitutional burdens on First Amendment rights.[60] While the Court stated it was using heightened scrutiny to analyze the constitutionality of the provision, its subsequent examination functioned akin to strict scrutiny.[61]

The Supreme Court's First Amendment campaign finance jurisprudence that emerged from *Buckley* and its progeny can be summarized as follows: candidate's expenditures should remain unrestricted, but contributions may be limited by closely drawn laws that balance a candidate's ability to raise necessary resources with a concern about corruption in politics.[62] Historically, the Court has been deferential to Congress and its own precedent in this area of law.[63] The Court's decision in *McCutcheon* reflected a shift in the jurisprudence toward increasing the level of scrutiny for contribution limits.[64]

II. DISCUSSION

Part II begins with a review of the facts and procedural history of *FEC v. Cruz*. Next, it examines the majority's decision, authored by Chief Justice Roberts, and Justice Kagan's dissent.

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access to a candidate is not considered quid pro quo corruption, so limiting "mere influence or access" is not a permissible objective. *Id.* at 208.

60. *Id.* at 227.

61. *Compare* McCutcheon v. Fed. Election Comm'n at 218 (using the language of heightened scrutiny to conclude that the challenged limits violate the First Amendment because they are not closely drawn to the proffered government interest), *with id.* at 220, 227 (holding that the limits do not further the acceptable governmental interest because there are "multiple alternatives available," which is closer to the language of strict scrutiny).

62. *See generally* discussion *supra* Part I.C.

63. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 244 (2006) (stating that the principles of the Court's campaign finance jurisprudence have "become settled through iteration and reiteration," and that the notion of stare decisis requires adhering to prior case law); *see also McCutcheon,* 572 U.S. at 230 (Thomas, J., dissenting) (describing the plurality opinion in *McCutcheon* as a "faithful application of [the Court's] precedents"); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 144 (2003) (describing campaign finance law as "an area in which [Congress] enjoys particular expertise," and stating that the Court owes Congress "proper deference" when making decisions in this area); Davis v. Fed. Election Comm'n, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law."); *see also* Nixon v. Shrink Mo. Gov't PAC, 58 U.S. 377, 402 (2000) (Breyer, J., concurring) (stating that the Court defers to legislative judgments where the legislature has more institutional expertise, which includes the "field of election regulation").

64. *See generally supra* note 61 and accompanying text; *see also* WHITAKER, *supra* note 14, at 16 (arguing that the Supreme Court may have signaled in its *McCutcheon* decision a willingness to subject contribution limits to a stricter standard of review that what it has previously used, which would result in more successful challenges to contribution limits).

A. The Facts

Ted Cruz is a United States senator from Texas.[65] He campaigned for reelection in 2018.[66] On the day before the election, Senator Cruz made two loans totaling $260,000 to his campaign, Ted Cruz for Senate.[67] The loans consisted of $5,000 from Cruz's personal bank account and $255,000 from a third-party lender, which Cruz secured with his personal assets.[68] Senator Cruz won reelection.[69]

Following the election, Ted Cruz for Senate was almost $2.5 million in debt.[70] The campaign used the approximately $2.2 million it had on hand to repay vendors and fulfill other obligations, but it chose not to use this cash to repay Cruz's loans.[71] Instead of using preelection funds to repay Cruz within twenty days of the election, which Section 304 would have permitted, the campaign waited until that window closed and then repaid Cruz $250,000, the maximum amount Section 304 allowed, with postelection contributions.[72] Section 304 prohibited the campaign from repaying Cruz the remaining $10,000, since that money was then considered a contribution from Cruz to his campaign.[73]

B. Procedural History in the District Court

Senator Cruz and his campaign ("Cruz") sued the FEC alleging that Section 304 of BCRA and its implementation mechanisms violated the First Amendment.[74] The complaint asserted that the loan-repayment limitation within Section 304 was an unconstitutional infringement on the First Amendment rights of Cruz, his campaign, other candidates, and individuals who make postelection contributions to candidates.[75] Pursuant to Section 403 of BCRA[76] and 28 U.S.C. §

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65. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1646 (2022).

66. *Id.*

67. Ted Cruz for Senate v. Fed. Election Comm'n, 542 F. Supp. 3d 1, 5–6 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022).

68. *Id.*

69. *Id.*

70. *See Ted Cruz for Senate*, 542 F. Supp. 3d at 5–6 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022); *see also* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1646 (2022) (describing Cruz's campaign as "the most expensive Senate race in history").

71. *See Ted Cruz for Senate*, 542 F. Supp. 3d at 6.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (detailing Cruz's argument regarding why Section 304 of the BCRA violated the First Amendment).

76. *See* Bipartisan Campaign Reform Act, 52 U.S.C.A. § 30110 ("The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of

2284,[77] Cruz initially filed the complaint in the District Court for the District of Columbia, but later applied for a three-judge court to hear the case.[78] The district court denied the Government's motion to dismiss for lack of standing and subject matter jurisdiction, and it granted Cruz's application for a three-judge district court.[79]

After a three-judge district court assumed jurisdiction over Cruz's constitutional claim, both parties moved for summary judgment.[80] Cruz argued that Section 304's loan-repayment limit burdened speech by limiting campaign expenditures and contributions.[81] Regarding the appropriate standard of review, Cruz maintained that the court should apply strict scrutiny (used for expenditure limits) or closely drawn scrutiny (used for contribution limits).[82] In contrast, the Government argued that Section 304 did not burden speech, and as such, it should be subject to rational basis review.[83] Additionally, the Government maintained that the loan-repayment limit should survive the court's review because it addressed a heightened risk of actual and apparent quid pro quo corruption coming from elected officials soliciting contributions to pay off their personal loans.[84]

The three-judge district court denied the Government's motion for summary judgment and granted Cruz's motion for summary judgment, holding that the loan-repayment limitation of Section 304 of BCRA was unconstitutional because it violates the First Amendment.[85] The court assessed whether Section 304 burdened protected political speech and whether the limit was appropriately tailored to a legitimate government interest.[86] First, the court acknowledged the precedential requirement to characterize the limit as either a campaign expenditure or contribution, but declared it to be a burden on political expression and association

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President may institute such actions in the appropriate district court of the United States . . . as may be appropriate to construe the constitutionality of any provision of this Act.").

77. *See* 28 U.S.C. § 2284 ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

78. *See* Ted Cruz for Senate v. Fed. Election Comm'n, 542 F. Supp. 3d 1, 6 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022) (explaining the procedural history of Cruz's complaint).

79. *Id.* (citing Ted Cruz for Senate v. Fed. Election Comm'n, No. 19-CV-908 (APM), 2019 WL 8272774, at 5–8 (D.D.C. 2019)).

80. *Id.*

81. *Id.* at 7.

82. *Id.* at 11.

83. *Id.* at 7, 11.

84. *Id.* at 12.

85. *Id.* at 19.

86. *Id.* at 7.

without making this distinction.[87]

In the second part of its analysis, the court held that the Government failed to demonstrate the challenged limit served an interest in preventing quid pro quo corruption or its appearance, which is the only recognized government interest in restricting protected political speech.[88] The court went on to say that even if the limit was justified by such an interest, it was not sufficiently tailored under heightened or strict scrutiny to prevent quid pro quo corruption or its appearance.[89]

C. The Majority Opinion of the Supreme Court

Pursuant to federal law, the Government appealed directly to the Supreme Court.[90] On appeal, the issue was whether Section 304's restriction on the use of postelection funds violated the First Amendment rights of candidates and their campaigns to engage in protected political speech.[91]

In a 6-3 decision, the Court struck down Section 304 of the BCRA as unconstitutional, holding that its restrictions on candidates and their campaigns burdened core political speech without sufficient justification.[92] Chief Justice Roberts, writing for the majority, recognized that the First Amendment's broad protection of political speech includes a candidate's use of personal funds to finance their campaign.[93] The majority went on to analyze how Section 304 burdened protected speech and then whether any burden was justified by a legitimate government interest.[94]

In the first stage of this two-part analysis, the majority found that the provision burdened First Amendment rights by deterring candidates from

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87. *Id.* at 7–10.

88. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 206–07 (2014) ("The only recognized government interest in restricting political speech is 'preventing corruption or the appearance of corruption.'").

89. Ted Cruz for Senate v. Fed. Election Comm'n, 542 F.3d 1, 15–16 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022).

90. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1646 (2022). *See* 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.").

91. *Cruz,* 142 S. Ct. at 1645. Before addressing the constitutionality of Section 304, the Court determined that Cruz and his campaign had standing to challenge the provision and its enforcement mechanisms. *Id.* at 1650. This Note will not discuss the Court's standing analysis.

92. *Id.* at 1656.

93. *Id.* at 1650.

94. *Id.* at 1650–57.

loaning money to their campaigns.[95] The majority reasoned that Section 304 burdened candidates by restricting the sources of funds campaigns could use to repay candidates' loans, which in turn created a risk that their loans would not be repaid.[96] While the majority acknowledged that "the extent of the burden may vary depending on the circumstances of a particular candidate and particular election," it ultimately found that a burden existed.[97]

In assessing the burden on candidates' First Amendment rights, the majority first discussed empirical evidence of Section 304's effect on candidates' behaviors.[98] The majority relied on data from an academic study, even though it recognized that no empirical evidence is necessary to demonstrate a burden in this type of analysis.[99] It specifically cited the study's finding that the percentage of loans by Senate candidates for exactly $250,000 increased substantially since the BCRA was passed.[100] The majority interpreted this to mean that Section 304 disincentivized candidates from making large loans to their campaigns, an impact the majority considered to be a restriction on candidates' political speech.[101]

The majority went on to say that, even without empirical evidence, Section 304's burden on protected political expression was clear when looking at the choice that the restriction forced candidates to make.[102] The majority focused on the provision's indirect effects on a candidate's choice to self-fund their campaign, recognizing that the provision did not directly restrict how much a candidate could spend on their campaign.[103] However, the majority viewed the deterrent effect the restriction imposed as a "drag" on candidates' First Amendment rights, holding that some candidates may choose not to loan money to their campaigns when they otherwise would, in fear of not getting repaid.[104]

In analyzing the size of the burden, the majority focused on the way personal loans are used by candidates in their campaigns.[105] Campaigns

95. *Id.* at 1650.
96. *Id.*
97. *Id.* at 1650–52.
98. *Id.* at 1650–51.
99. *See generally* Ovtchinnikov & Valta, *supra* note 3; Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651 (2022) (citing Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 746 (2011)).
100. *Cruz*, 142 S. Ct. at 1650. *See also* Ovtchinnikov & Valta, *supra* note 3, at 28 ("[T]here is a clear bunching of self-loans in the post-BCRA period at round amounts (such as $200,000, $300,000 and $500,000) and an especially strong bunching at the $250,000 threshold.").
101. *Cruz,* 142 S. Ct. at 1651.
102. *Id.*
103. *Id.*
104. *Id.* (citing Davis v. Fed. Election Comm'n, 544 U.S. 724, 738–40 (2008)).
105. *Id.*

take on a large amount of loans, most of which are in the form of personal loans from candidates.[106] The majority described the importance of self-loaning by highlighting that unknown challengers rely on them to "front-load campaign spending," and positing that such loans may attract voter and donor attention as signals of a candidate's confidence.[107] Thus, the majority reasoned, by inhibiting a candidate from utilizing such a critical form of funding, Section 304's deterrent effect ultimately burdened political speech by creating a barrier to entry for candidates.[108]

In the second part of its analysis, the majority determined that the Government failed to demonstrate that Section 304 furthered a permissible objective.[109] The majority declined to resolve what type of scrutiny should apply in answering whether the restriction was justified.[110] Since both standards would require the Government to first show that it was "pursuing a legitimate objective," and the majority concluded that it was not, the majority reasoned that it did not need to resolve the dispute over the appropriate level of scrutiny to use.[111]

In reaching its conclusion, the majority relied on the precedent set forth in *McCutcheon*,[112] which stated that the only permissible ground for restricting protected political speech is the prevention of quid pro quo corruption or its appearance.[113] Since a cap on individual contributions to candidates already exists, the majority reasoned that Section 304 was a "prophylaxis-upon-prophylaxis approach" and was not necessary to achieve the anticorruption interest it purportedly pursued.[114] The majority viewed the contributions at issue and the contributions regulated by the individual cap as one-and-the-same.[115]

The majority's second point on this issue focused on the evidence the Government presented to prove the existence of an anticorruption goal.[116] The majority found it particularly notable that the Government failed to

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106. *Id. See* Ovtchinnikov & Valta, *supra* note 3, at 1 ("Own-source funding of political campaigns . . . constitutes the second largest source of campaign financing. . . ."); Brief for Appellant, *supra* note 18, at 35 ("[M]ore than 90% of campaign debt consists of candidate loans . . . ."); .

107. *Cruz*, 142 S. Ct. at 1651.

108. *Id.*

109. *Id.* at 1656.

110. *Id.* at 1652.

111. *Id.*

112. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 206–07 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.").

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

114. *Id.* at 1652–53.

115. *Id.* at 31653.

116. *Id.*

identify any case of quid pro quo corruption stemming from the use of postelection contributions used to repay candidate loans.[117] Chief Justice Roberts scrutinized the Government's record of evidence piece-by-piece, beginning with the same academic study he relied on earlier in the opinion.[118] The majority did not give credence to the study's finding regarding the effect of postelection contributions on indebted politicians, calling the analysis "merely a 'first step.'"[119] The majority then addressed a poll, which was conducted by the Government for this litigation, that reported that most respondents believed it very likely that someone who donated money to a candidate's campaign after the election would expect a political favor in return.[120] The majority did not find the poll results to be compelling because of the phrasing of its questions.[121] Finally, the majority found the Government's reliance on statements made by members of Congress surrounding the enactment of BCRA to be misplaced.[122] The majority concluded that the Government's evidence may prove the contributions targeted by Section 304 create a risk of donor influence or access, but that type of corruption is not regulated under the First Amendment.[123]

Finally, the majority rejected the argument that the risk of corruption targeted by Section 304 is "common sense."[124] The majority argued that postelection contributions to winning candidates do not resemble a gift because these candidates typically expect to be repaid in full.[125] Thus, the majority contended, postelection contributions do not enrich

117. *Id.*

118. *See generally supra* notes 98–101 and accompanying text.

119. *Cruz*, 142 S. Ct. at 1654.

120. *Id. See also* Brief for Appellant, *supra* note 18, at 39 ("[A] survey in the record showed that 81% of respondents stated that they considered it 'likely' or 'very likely' that a person who donates money to a campaign after the election expects a political favor in return.").

121. *Cruz*, 142 S. Ct. at 1654. The majority noted that the poll did not ask respondents whether they would feel the same about donors who contributed money to a campaign before the election. *Id.* The majority also found it concerning that the poll did not mention that individual base limits apply to post-election contributions or define "political favor." *Id.*

122. *Id.* One Senator stated that, without Section 304, a winning candidate who loaned money to his campaign could "get it back from [his] constituents [at] fundraising events" where he could ask, "How would you like me to vote now that I am a Senator?" Another Senator state that candidates "have a constitutional right to buy the office, but they do not have a constitutional right to resell it." *Id.* The majority characterized the legislators' statements as "a few stray floor statements" that did not constitute actual evidence that the loan repayment limit was necessary to prevent actual or apparent quid pro quo corruption. *Id.*

123. *Id.*

124. *Id.* at 1655.

125. *Id.* at 1656.

candidates when they are used to repay the candidates' personal debts.[126] Instead, these contributions restore candidates to the financial positions they expected to return to.[127]

Ultimately, the majority concluded that Section 304 does not further the permissible goal of preventing quid pro quo corruption or its appearance, so its burdens on the First Amendment rights of political expression are unjustified and unconstitutional.[128]

D. Justice Kagan's Dissent

Justice Kagan, joined by Justices Breyer and Sotomayor, utilized the same precedential framework as the majority to analyze the constitutionality of Section 304, first assessing the law's burden on protected political speech and then determining whether it was justified by a compelling interest.[129] However, the dissent distinguished Section 304 as a contribution limit when evaluating the burden the law imposed.[130] Additionally, whereas the majority was skeptical of the Government's asserted anticorruption interest, the dissent found the risk of such corruption self-evident and supported by the Government's proffered evidence.[131] The dissent concluded that Section 304 imposed only a marginal restriction on protected speech while targeting a campaign-financing practice that creates a substantial risk of actual and apparent quid pro quo corruption.[132]

The dissent characterized Section 304 as a contribution restriction instead of an expenditure restriction, which is a distinction that the dissent argued is glossed over by the majority.[133] This distinction is critical to the Court's analysis, the dissent argued, because the Court has repeatedly held that contribution restrictions are not significant burdens on First Amendment speech unless they are so low that they prevent candidates from raising resources necessary for effective campaigning.[134] The dissent argued that the majority was incorrect in holding that Section 304 interfered with a candidate's ability to self-fund their campaign (an

126. *Id.* ("[C]ontributions that go toward retiring a candidate's debt could only arguably enrich the candidate if the candidate does not otherwise expect to be repaid.").

127. *Id.* at 1655–56.

128. *Id.* at 1656–57.

129. *Id.* at 1658–60 (Kagan, J., dissenting).

130. *Id.* at 1658.

131. *Compare Cruz*, 142 S. Ct. at 1652 ("We greet the assertion of an anticorruption interest here with a measure of skepticism . . . ."), *with Cruz*, 142 S. Ct. at 1661–62 (Kagan, J., dissenting) (contrasting the evidentiary support for anticorruption interests brought forth by the Government).

132. *Id.* at 1664.

133. *Id.* at 1658.

134. *Id.* (citing Randall v. Sorrell, 548 U.S. 230, 247 (2006)).

expenditure) because the provision allows candidates and their campaigns to spend as much money as they want on speech.[135] In the dissent's view, Section 304 only restricted a candidate's use of third-party contributions postelection, which is how contribution limits typically function.[136]

The dissent went on to argue that, in effect, Section 304 was a narrow contribution limit because it only targeted large, postelection contributions.[137] Under the law, a campaign could always accept donations in order to retire small loans made by a candidate, and could use preelection donations to retire the larger loans.[138] Moreover, the dissent argued, all contribution regulations, including the currently-in-effect individual donor cap, have some indirect effect on protected political speech—but the Court has routinely upheld such restrictions under the First Amendment.[139]

Next, the dissent found that Section 304 served a legitimate interest in preventing actual and apparent quid pro quo corruption.[140] The dissent argued that postelection contributions made to retire a candidate's loans pose a "special danger" because "every dollar given goes straight into the candidate's pocket."[141] Since these donations are made when a candidate's electoral activities are complete, campaigns only use these contributions to repay loans. Thus, postelection contributors "can be confident their money will enrich a candidate personally," while knowing that the candidate is now positioned to perform official favors for them.[142] This scenario, the dissent contended, creates a self-evident threat of actual or apparent corruption.[143]

Next, the dissent addressed the majority's "prophylaxis-upon-prophylaxis" argument.[144] Justice Kagan asserted that the majority's dismissal of Section 304 as a "needless precaution" ignored that the provision targeted a particular subset of contributions (large donations

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135. *Id.*
136. *Id.* at 1658.
137. *Id.* at 1659.
138. *Id.*
139. *Id.*
140. *Id.* at 1660.
141. *Id.*
142. *Id.*
143. *Id.* ("The recipe for quid pro quo corruption is thus in place: a donation to enhance the candidate's own wealth (the quid), made when he has become able to use the power of public office to the donor's advantage (the quo). The heightened threat of corruption—and, even more, of its appearance—is self-evident . . .").
144. *Id.* ("In addressing that special danger, Section 304 is anything but a 'prophylaxis-upon-prophylaxis,' as the majority labels it.").

made after an election) that the individual cap does not reach,[145] and which pose unique risks of corruption.[146] The dissent argued that Congress included Section 304 as a "heightened safeguard" in response to a "heightened threat," explaining that the existence of one protective measure does not prove an additional measure's futility.[147]

The dissent then addressed the majority's contention that postelection contributions do not risk corruption.[148] The dissent argued that a candidate has less money after making a loan to their campaign, so when donors' postelection contributions restore the candidate's "purchasing power," the candidate experiences a personal financial gain which ingratiates them to their donors.[149] Second, the dissent argued that the majority was incorrect in stating that there is no risk of corruption because winning candidates expect to repaid.[150] The dissent pointed out that most winning campaigns do not pay back even small candidate loans,[151] and posited that even if a candidate does expect repayment, he may expect so because he knows donors will pay him in exchange for political benefits.[152]

The dissent's final point addressed the majority's argument that the Government's evidentiary record was insufficient to establish a permissible anticorruption interest. Justice Kagan pointed to the evidentiary precedent from *McConnell*, which holds that the amount of empirical evidence needed to support a campaign finance law depends on the novelty and plausibility of the law's proffered justification.[153] The dissent argued that there is nothing novel or implausible about the Government's contention that Section 304 was justified by an anticorruption interest.[154]

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145. *See* 52 U.S.C. § 30116(a)(1) (requiring dollar limitations on political contribution); 11 C.F.R. § 110.1(b)(3) (regulating contributions by persons other than multicandidate political committees).

146. *Cruz*, 142 S. Ct. at 1660.

147. *Id.* at 1660–61.

148. *Id.*

149. *Id.* at 1661.

150. *Id.*

151. *Id.*; *see also* Ovtchinnikov & Valta, *supra* note 3, at 15 ("During the 2003 – 2018 period, 83.19% of all campaigns with candidate self-loans still have candidate debt outstanding at the campaign end.").

152. *Cruz*, 142 S. Ct. at 1661–62 (Kagan, J., dissenting).

153. *Id.* at 1662; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 144 (2003) ("[T]he quantum of empirical evidence needed" to sustain a campaign finance law "var[ies] up or down with the novelty and plausibility of the [law's] justification.").

154. *Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting); Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1652 (2022) ("This Court has recognized only one permissible ground for restricting political speech: the prevention of 'quid pro quo' corruption or its appearance."); *Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting) ("Preventing quid pro quo corruption or its appearance is a compelling interest by any measure.").

Moving to the Government's evidentiary record, the dissent disagreed with the majority that the lack of examples of proven quid pro quo corruption stemming from loan repayment shows that the provision did not prevent such corruption.[155] Justice Kagan pointed out that quid pro quo exchanges in any context are extremely difficult to prove, which is why a law like Section 304 was passed.[156] The dissent then analyzed the rest of the Government's proffered evidence, contending that it was sufficient to show the loan repayments targeted by Section 304 create the risks of corruption that the provision was passed to prevent.[157]

First, the dissent argued that the examples in the record of documented instances of election-related corruption demonstrated that the provision targeted the suspect loan repayments that Congress was concerned about when passing the law.[158] Second, it argued that the findings of the empirical study the Government included in its record demonstrated that Section 304 accomplished what Congress designed it to do—prevent candidates from being overly-responsive to their donors when voting on legislation.[159] While the majority dismissed these findings as inconclusive and premature, the dissent found the study to be compelling and reliable.[160] Additionally, the dissent found the results of the government-commissioned public survey to be convincing proof that postelection contributions, at the very least, create a danger of the appearance of quid pro quo corruption,[161] dismissing the majority's concerns about the adequacy of the poll questions.[162] Finally, the dissent argued that the majority ignored the risk of the appearance of quid pro quo corruption, which is just as sufficient of an interest as actual corruption.[163]

III. ANALYSIS

This Part explores how the majority's two-part analysis of Section 304 departs from precedent, misconstrues the functionality of the provision,

155. *Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 1663.
160. *See generally supra* notes 118 and 119, and accompanying text; *see also Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting) (describing the academic study as "good social science" and arguing that the authors made reasonable deductions from the data they compiled).
161. *Id.* at 1663–64.
162. *Id.* ("The majority flyspecks the polling questions: Why didn't the poll define 'political favor'? Did the poll mention that the contributions had to comply with the $2,900 cap? And so forth . . . But really—is it likely that such tinkering would have made a real difference?").
163. *Id.* at 1661, 1663–64.

and ignores the congressional intent behind it. It further explains how Justice Kagan's analysis in the dissent is more consistent with the Court's First Amendment campaign finance jurisprudence.

A. Section 304 Imposed a Minimal Burden on Freedom of Speech

1. Contribution Limits vs. Expenditure Limits

The majority's first departure from precedent is in its analysis of what type of restriction Section 304 was and how it impacted First Amendment rights.[164] The *Buckley* framework is the centerpiece of the Court's campaign finance jurisprudence.[165] Pursuant to *Buckley*, the Court must identify any challenged regulation as an expenditure or contribution limit to determine how it burdens protected First Amendment rights and what corresponding level of scrutiny should apply.[166] A contribution to a campaign is a way for a donor to express support for a candidate, and accepting contributions enables candidates to shift the costs of their electoral activities onto others.[167] In comparison, campaign expenditures comprise all the ways that candidates spend money on their electoral activities.[168] The majority alternated between describing Section 304 as

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164. *See generally* discussion *supra* Part II.C.

165. *See generally* Abraham, *supra* note 41 (describing the *Buckley* framework and how subsequent cases used it as a foundation to further shape and define campaign finance law); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137–38 (2003) (holding that stare decisis and the respect between the legislative and judicial branches of government support the Court's decision to adhere to contribution limits that the Court has followed since the *Buckley* decision); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 199 (2014) ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."); Randall v. Sorrell, 548 U.S. 230, 242 (2006) ("Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints, including those on expenditure limits.").

166. *See* Buckley v. Valeo, 424 U.S. 1, 23 (1976) (explaining that different levels of scrutiny are warranted because expenditure limitations "impose significantly more severe restrictions on protected freedoms of political expression and association" than contributions limitations do); Ted Cruz for Senate v. Fed. Election Comm'n, 542 F. 3d 1, 7 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022) ("Since *Buckley*, the Court's decisions have focused on identifying whether a restriction on campaign finance burdens expenditures or contributions, in part because the distinction can affect the standard of review."); *McConnell*, 540 U.S. 93, 138–39 (assessing whether the challenged BCRA provision functions as a spending or contribution limit).

167. *See Buckley*, 424 U.S. at 21 (describing a contribution as a "general expression of support for the candidate"); *see also* Brief for Appellant, *supra* note 18, at 27 (stating that making a contribution allows a contributor to "pool resources with others to fund speech" and receiving contributions allows for candidates to "amass resources necessary to run a campaign"); Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1658 (2022) (Kagan, J., dissenting) (describing accepting contributions as "the ability to shift the costs of [the candidate's] speech to others").

168. *See Buckley*, 424 U.S. at 19 (describing an expenditure as "money a person or group can spend on political communication during a campaign").

an expenditure limit and a contribution limit, but did not definitively characterize it as either.[169] In failing to distinguish what kind of restriction Section 304 was, the Court ignores its own well-established precedent that recognizes the important difference between the two.[170]

As explained above, identifying Section 304 as a contribution or expenditure limit is essential in determining how the provision burdens First Amendment rights and ultimately whether it is constitutional.[171] Under the Court's jurisprudence, a regulation is a burden on protected speech if it restricts how much a candidate may spend on political speech or so severely limits contributions that a candidate cannot engage in effective advocacy.[172] The majority did not claim that Section 304 limited candidate spending,[173] nor did it assert that Section 304 was an impermissibly restrictive contribution restriction.[174] According to the majority, Section 304 restricted "the sources of funds that campaigns may use to repay candidate loans," which, by definition, is a restriction on contributions.[175] However, the majority then claimed the provision's restriction "inhibits candidates from loaning money to their campaigns," which describes an expenditure limitation."[176] This a confusing, circular analysis that conflates expenditure and contribution limits and sharply departs from the way the Court has historically analyzed campaign

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169. The majority first describes the provision as an expenditure restriction. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651 (2022) ("This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans."). Almost immediately after, it recognizes that Section 304 "does not impose a cap on a candidate's expenditure of funds." *Id.* Later in the opinion, the majority appears to recognize that Section 304 targeted contributions when it compares the provision to the individual contribution cap. *Id.* at 1652 (describing the $2,900 individual contribution cap and then stating, "the contributions at issue remain subject to these requirements").

170. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 U.S. 2806, 2817 (2011) (listing cases where the Court has overturned laws that limited expenditures and upheld laws that limited contributions); *Cruz*, 142 S. Ct. at 1658 (Kagan, J., dissenting) ("In assessing a law's burden on speech, this Court's decisions all distinguish between restricting expenditures and restricting contributions.").

171. *See* Brief of Brennan Center for Justice at N.Y.U School of Law as Amicus Curiae in support of Appellant at 4–5, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) (arguing that, as a limit on the use of campaign funds, Section 304 imposes minimal burdens, so it should not be subject to the heightened scrutiny reserved for expenditure limits); Abraham, *supra* note 41, at 1085 ("[C]ontribution limitations are subject to lesser judicial scrutiny, implicate concerns of quid pro quo corruption and are generally upheld; while . . . expenditure limitations trigger the strictest scrutiny and are generally unconstitutional.").

172. *See* discussion *supra* Part I.C.

173. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1650–51 (2022).

174. *See id.* at 1650–52 (arguing that the law regulates the use of contributions and is a burden because it "may deter" candidates from making large loans).

175. *Id.* at 1650.

176. *Id.*

finance restrictions.[177]

Furthermore, the majority's assertion that Section 304 inhibited campaign funding is incorrect.[178] Section 304 did not restrict a candidate or their campaign from spending any amount of money on speech, it only limited the campaign's use of third-party contributions after the election when the candidate is no longer engaging in electoral speech.[179] Since the candidate is no longer engaging in electoral activities when these donations are made, postelection contributions do not fund political speech and can only be used to pay outstanding debts from the election.[180] Therefore, the provision did not limit the amount of money a candidate can raise, spend, or loan during their campaign to finance their political speech.[181] The majority appears to willfully ignore how Section 304 functioned to subject the provision to a stricter level of scrutiny than is warranted.[182]

Instead of labeling Section 304 as a contribution or expenditure limit, the majority contended that Section 304 created a risk that a candidate may not be repaid in full if they loaned their campaign more than

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177. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1658 (2022) (Kagan, J., dissenting) (stating that when the Court previously assessed a law's burden on speech, it distinguished between campaign and expenditure restrictions, and arguing that the majority's opinion "glosses over that distinction"); *see also* Buckley v. Valeo, 424 U.S. 1, 19–23 (1976) (describing the differences between campaign and expenditure limits and how each limit should be assessed for constitutionality); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 199 (2014) ("[W]e see no need . . . to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review."); Randall v. Sorrell 548 U.S. 230, 244 (2006) (stating that the Court has applied the reasoning from *Buckley* in subsequent cases).

178. *See Cruz*, 142 S. Ct. at 1651 (arguing that Section 304 burdened candidates who want to spend on behalf of their candidacy).

179. *Cruz*, 142 S. Ct. at 1659 (Kagan, J., dissenting) ("Under Section 304, a campaign can always accept donations for small loans a candidate makes. And it can use preelection donations to retire even his sizable loans. The statute just insists that donations for that purpose occur when speech is ongoing . . . .").

180. *See* Brief for Appellant, *supra* note 18, at 28 (explaining that Section 304's limit only applies to postelection contributions which, by definition, do not fund political speech); Brief of Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Common Cause, and Democracy as Amici Curiae in support of Appellant at 7, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) at 6 (arguing that Section 304's function is to "regulate the solicitation and receipt of post-election contributions").

181. *See* Brief of Campaign Legal Center, *supra* note 180, at 7 (explaining that Section 304 does not restrict the expenditures a campaign committee can make, how much a candidate can spend on or loan to his campaign, or how much a contributor can donate); Brief of Brennan Center for Justice, *supra* note 171, at 6 ("Section 304 does not limit the amount that a candidate may donate or loan to their own campaign, or how much they may raise from other contributors to spend on advocacy.").

182. *See* discussion *infra* Section III.B. (discussing how the majority reaches its conclusion that Section 304 does not further a compelling government interest).

$250,000.[183] This risk, the majority argued, *may* have led to some candidates choosing not to loan money to their campaigns, which *could* have resulted in less political speech. In the majority's view, this was a consequence of a "statutorily imposed choice," and the consequence was a "drag" on a candidate's First Amendment right to engage in political speech.[184] The majority focused on the hypothetical, indirect effect the limit may have had on candidates in a misconceived attempt to equate Section 304 to the provision overturned in *Davis*.[185]

The provision overturned in *Davis* imposed a clear penalty on a self-financing candidate by raising contribution limits for their opponents, forcing the self-financing candidate to "choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."[186] In *Davis*, the Court found that the choice particular candidates had to make impermissibly dissuaded self-financing.[187] Although the provision was a contribution restriction, it functioned like an expenditure restriction and was subject to strict scrutiny, which it failed to satisfy.[188] However, under Section 304, a candidate loaning himself more than $250,000 did not trigger any action against their opponent.[189] The provision applied to all candidates

183. *Id.*

184. *Id.* (citing *Davis v. Fed. Election Comm'n*, 554 U.S.724, 739 (2008)).

185. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651 (2022) ("Although Section 304 'does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.'") (quoting *Davis*, 554 U.S. 724, 738–39).

186. *Davis*, 554 U.S. 724, 739; *see also* Johnstone, *supra* note 13, at 225 (explaining that Section 319, which *Davis* overturned, provided for increasing the contribution limits for candidates running against substantially self-funded opponents).

187. *See Davis*, 554 U.S. at 740 ("Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits."); *id.* at 740–71 (holding that the provision is in an impermissible burden because it is not justified by a government interest in preventing actual or apparent corruption); *see also* Brief of Constitutional Accountability Center, as Amicus Curiae in support of Appellant at 21–22, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) (describing the Court's holding in *Davis*).

188. *See Davis*, 554 U.S. at 738–39 ("While BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."); *id.* at 740 (holding that Section 319 imposes a substantial burden on First Amendment rights so it can only be upheld if it is justified by a compelling state interest); *see also* Abraham, *supra* note 41, at 1090 ("Even though the statutory provision [in *Davis*] dealt with a system of contribution limitations normally subject to intermediate scrutiny, the Court held that the differential treatment functioned as a restraint on a self-funding candidate's First Amendment right to engage in direct political speech via personal expenditures.").

189. 52 U.S.C. § 30116(j); *see also* Ted Cruz for Senate v. Fed. Election Comm'n, 542 F. 3d 1, 6 (D.D.C. 2021), *aff'd*, S. Ct. 1638 (2022) (In comparison to the limit in *Davis,* "the loan-repayment limit has no similar penalty—by loaning his campaign more than $250,000 a candidate does not indirectly fund his opponent through . . . liberalized, asymmetrical contribution limits . . . .").

in the same way and did not impose a competitive burden on anyone.[190] Unlike the provision at issue in *Davis*, Section 304 did not force candidates to choose between exercising their First Amendment rights and subjecting themselves to unfair contribution limits, so it was not a contribution limit functioning like an expenditure limit.[191] Therefore, the reasoning from *Davis* that the majority so heavily relies on in its burden analysis is inapplicable to Section 304.[192]

In comparison, the dissent correctly asserted that Section 304 was a contribution limit.[193] Logically, Justice Kagan concluded that Section 304 regulated contributions because it prevented candidates from using postelection contribution to retire their large personal loans.[194] This measure in no way impeded a candidate or their campaign from spending any amount of money on speech.[195] Section 304's loan-repayment limit was a contribution limit, not an expenditure limit, since it regulated how a candidate could use a specific subset of contributions.[196]

2. The Majority Fails to Adequately Analyze the Size of Section 304's Burden on Political Speech

The majority continued its departure from precedent by failing to analyze the weight of Section 304's "drag" on candidates' protected

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190. *See* Brief for Brennan Center for Justice, *supra* note 171, at 10 ("Nor does Section 304 impose a competitive burden on particular candidates. . . . It applies to all candidates equally.").

191. *See* Brief for Brennan Center for Justice, *supra* note 171, at 10 (arguing that Section 304 does not deter candidates from choosing to loan money to their campaigns).

192. *See* Brief of Constitutional Accountability Center, *supra* note 187, at 21–22 (arguing that Section 304 is distinct from the provision at issue in *Davis*); Brief for Brennan Center for Justice, *supra* note 171, at 10 (explaining why Section 304 is not analogous to the provision invalidated in *Davis*).

193. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1657 (2022) (Kagan, J., dissenting) ("The law impedes only his ability to use other 'people's money to finance his campaign—much as standard (and permissible) contribution limits do.").

194. *Id.*

195. *Id.* at 1658 ("The provision leaves a campaign free to spend any amount of money for speech. Likewise, it leaves the candidate himself—here, Senator Ted Cruz—free to do so . . . Section 304 restricts only the use of third-party contributions . . . It prevents post-election campaign contributions from going to repay large loans that the candidate has made to his campaign.").

196. *Id.* ("Section 304 . . . regulates contributions alone.") (internal citation omitted); *see also* Brief of Appellant, *supra* note 18, at 28 ("The restriction simply means that contributions used for a given purpose (repaying candidate loans) must be made at a given time (before rather than after election day."); *see also* Brief of Brennan Center for Justice, *supra* note 171, at 5 (describing Section 304 as "a limit on the use of post-election contributions to recoup money a candidate has lent to their campaign"); Brief of Campaign Legal Center, *supra* note 180, at 7, Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (No. 21-12) ("The Limit restricts neither the expenditures a campaign committee may make . . . nor how much a candidate can spend on or loan to his campaign . . . ."); Brief of Constitutional Accountability Center, *supra* note 187, at 18 ("[T]he BCRA provision does not affect campaign expression at all; it targets only those post-election contributions that inure directly to a candidate's personal benefit.").

political speech.[197] It described the burden as "no small matter" and appropriately recognized that the extent of the burden will vary depending on the candidate and election.[198] However, the majority stopped short of engaging in the nuanced analysis its precedent required.[199]

As explained in previous sections, the *Buckley* framework requires analyzing the nature *and* size of a restriction's burden on First Amendment rights to determine what level of scrutiny should be applied.[200] Section 304 was a contribution limit,[201] and according to the Court's precedent, contribution limits impose only minor burdens on protected speech.[202] The majority correctly recognized that, under *Davis*, a contribution limit may be subject to strict scrutiny if it functions like an expenditure limit to restrict spending.[203] However, the majority did not acknowledge that part of assessing the constitutionality of a contribution limit requires analyzing whether its burden is within permissible limits set by the Court's precedents.[204] In *Buckley*, the Court articulated a test for this analysis by asking whether the challenged contribution limits were so low that they "prevented candidates and political committees from amassing the resources necessary for effective advocacy."[205] This test has been repeatedly recognized and used to analyze other contribution regulations, but the majority did not even address its existence.[206] The majority's burden analysis is incorrect, insufficient, and

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197. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1650 (2022) ("This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans."); *id.* at 1651 ("By inhibiting a candidate from using this critical source of campaign funding, however, Section 304 raises a barrier to entry—thus abridging political speech."); *id.* ("[T]here is no doubt that the law does burden First Amendment electoral speech . . . .").

198. *Id.* at 1651 ("The 'drag,' moreover, is no small matter."); *id.* ("[T]he extent of the burden may vary depending on the circumstances of a particular candidate and particular election.").

199. *See generally infra* notes 200–206 and accompanying text; *see also* Brief of Campaign Legal Center, *supra* note 180, at 6 (arguing that the lower court's conclusion about the burden imposed by Section 304, which the Court adopts and upholds, was not based on a "functional analysis of how the provision operates," which is against the instructions of the Court's precedents).

200. *See* discussion *supra* Part II.C. (describing how the *Buckley* framework functions).

201. *Supra* text accompanying notes 193–196.

202. *See generally* discussion *supra* Part II.C.

203. *See supra* note 55 and accompanying text (describing the *Davis* holding); *see also supra* note 104 and accompanying text (describing how the majority applied the *Davis* holding in its analysis of Section 304's burden on protected speech).

204. *See* discussion *supra* Part II.C. (describing the majority's assessment of the burden imposed by Section 304).

205. Buckley v. Valeo, 424 U.S. 1, 21 (1976).

206. *See* Davis v. Fed. Election Comm'n, 554 U.S. 724, 737 (2008) (acknowledging that contribution limits that are too low cannot be upheld); Nixon v. Shrink Mo. Gov't PAC, 58 U.S.

a complete departure from precedent.

In comparison, the dissent correctly analyzed Section 304's burden as a contribution restriction and concluded that its burden on free speech was minor.[207] Section 304 did not severely burden a candidate's political expression under either the *Davis* framework[208] or the *Buckley* test.[209] First, the provision did not function as an expenditure restriction because it did not impose a penalty on a candidate's choice to self-finance.[210] Candidates remained free to spend as much of their own money on their campaigns as they wanted.[211] Second, even if Section 304 had an indirect impact on electoral spending, it did not prohibit candidates from raising enough money to mount effective campaigns.[212] Section 304 merely regulated when candidates could solicit and use contributions made with the limited purpose of retiring campaign loans, which was a modest restriction.[213] The provision was less restrictive than those the Court has

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377, 397 (2000) (holding that the test for determining whether a contribution limit is too low is "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless"); Randall v. Sorrell, 548 U.S. 230, 248 (2006) (holding that *Buckley* requires determining whether contribution limits are too low and too strict by asking "whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage"). *See also Shrink*, 58 U.S. at 21 (holding that there was no showing that the challenged contribution limits prevented candidates or their campaigns from "amassing the resources necessary for effective advocacy") (quoting *Buckley*, 424 U.S. at 21); *Randall*, 548 U.S. at 253 (striking down a contribution limit as too restrictive because it impeded candidates from raising funds necessary to run competitive elections and restrained citizens from volunteering their time to campaigns).

207. *Supra* notes 137–139 and accompanying text.

208. *Supra* note 55 and accompanying text.

209. *Supra* notes 201–206 and accompanying text.

210. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1659 (2022) (Kagan, J., dissenting) (arguing that Section 304 has an indirect effect on lending, not spending, money); Brief of Brennan Center for Justice, *supra* note 171, at 8 (arguing that there is no evidence that the enactment of Section 304 led to a reduction in candidate self-funding); Brief of Campaign Legal Center, *supra* note 180, at 2 ("[T]he [l]imit does not meaningfully burden campaign speech or candidate self-financing . . . ."); Brief for Appellees, *supra* note 32, at 40 (recognizing that a candidate lending his own money to his campaign is different from the candidate spending his personal money on campaign activities).

211. *See* Brief of Campaign Legal Center, *supra* note 180, at 2 ("The [l]imit leaves candidates free to self-finance . . . in whatever sums they deem appropriate."); Brief of Constitutional Accountability Center, *supra* note 187, at 22 ("Here, nothing in the BCRA provision dissuades self-financing by candidates . . . .").

212. *See Cruz*, 142 S. Ct. at 1658–59 (Kagan, J., dissenting) (arguing that every contribution regulation has some indirect effect on political speech, but Section 304's indirect effects are not problematic because they do not "preclude effective advocacy"); Brief of Brennan Center for Justice, *supra* note 171, at 8 ("[T]here can be no credible argument that this provision has deprived candidates of the ability to amass resources necessary to mount effective campaigns.").

213. *See Cruz*, 142 S. Ct. at 1657 (Kagan, J., dissenting) (arguing that the provision only impacts a candidate's ability to use other people's money and that this restriction is "modest" because it

upheld, like the individual contribution limits at issue in *Buckley* and *Shrink*.[214] A full analysis of Section 304 demonstrates that it imposed only a marginal burden on protected political speech, and thus should have been subject to a lesser form of scrutiny.[215]

B. Section 304 Was Justified by an Anticorruption Interest

Laws that limit campaign expenditures or contributions are only upheld if they are justified by a sufficiently compelling government interest.[216] Preventing quid pro quo corruption or its appearance is the only government interest the Court recognizes.[217] Quid pro quo corruption occurs when an officeholder exchanges an official act for money.[218]

The majority held that Section 304 was unconstitutional because the Government failed to show that Section 304 is justified by a "legitimate

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only applies to post-election donations made to retire sizable, not small, loans); Brief of Campaign Legal Center, *supra* note 180, at 2–3, (stating that the burdens imposed by Section 304 are "marginal at most" because the provision only regulates "the times at which candidates can solicit and use contributions to repay personal loans"). *See also* Brief of Brennan Center for Justice, *supra* note 171, at 8 (arguing that Section 304 does not prevent candidates from amassing necessary resources because candidates remain free to contribute unlimited amounts of money to their campaigns, loan their campaigns unlimited amounts of money and repay those loans with reelection contributions, and receive preelection contributions within legal limits); Brief for Appellant, *supra* note 18, at 29 ("Any such indirect effect, however, does not amount to a substantial burden on speech. . . . The limit, again, operates only as a narrow timing restriction; it requires the funds used to re-pay the increment of a candidate loan above $250,000 to be raised before rather than after the election.").

214. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (upholding individual contribution limits because they imposed "little direct restraint" on donors' freedom to discuss candidates and issues and express their support); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 396-97 (2000) (upholding a Missouri law that imposed limits on contributions to state candidates, even though the limits were lower than the limit upheld in *Buckley*). *See also Cruz*, 142 S. Ct. at 1659 (Kagan, J., dissenting) (arguing that the individual contribution ceiling gives campaigns much less money to spend, but Section 304's restriction on post-elections contributions has much smaller indirect effects on campaigns compared to an individual contribution cap, which the Court has repeatedly upheld); Brief of Constitutional Accountability Center, *supra* note 187, at 20–21 ("The manner in which this law operates . . . makes it significantly less restrictive of speech than laws that limit campaign contributions, which this Court has repeatedly upheld as valid");"); Brief for Appellant, *supra* note 18, at 30 ("The burden imposed by the loan-repayment limit is significantly more modest than the burden imposed by contribution limits, which this Court has upheld.").

215. *See Cruz*, 142 S. Ct. at 1659 (Kagan, J., dissenting) (asserting that Section 304 imposes a minor burden on protected political speech so it should be treated the same way as other, similar contribution regulations the Court has analyzed); *see* Brief of Campaign Legal Center, *supra* note 180, at 2 (arguing that strict scrutiny is inappropriate for analyzing the constitutionality of Section 304).

216. *See generally* discussion *supra* Part II.C.

217. *Supra* note 59 and accompanying text.

218. *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. at 192 (defining quid pro quo corruption in politics).

objective."[219] It contended that the provision did not further the acceptable goal of preventing actual or apparent quid pro quo corruption because postelection contributions do not create a unique risk of corruption requiring additional preventive measures.[220] This conclusion is misguided; by equating pre and postelections, the Court ignores the unique and heightened risk of apparent and actual corruption created by postelection contributions.

1. The Majority's Prophylaxis-Upon-Prophylaxis Argument

The majority first attempted to argue that Section 304 was not justified by a permissible government interest by claiming that it was an unnecessary "prophylaxis-upon-prophylaxis approach."[221] The majority supported this argument by pointing out that contributions are subject to other limitations, like the individual contribution cap.[222] This analysis is wrong on two fronts. First, the individual contribution limit restricts the amount of money a single donor may give to a candidate or their campaign for a current or future election.[223] However, a campaign may receive contributions for a *past* election only to repay outstanding debts from that election.[224] Therefore, contrary to what the majority asserts, postelection contributions were *only* subject to Section 304 and its enforcement mechanisms. Second, the "prophylaxis-upon-prophylaxis" argument does not apply to the situation at hand. According to the Court's reasoning in previous cases, a campaign finance law is an unnecessary prophylaxis-upon-prophylaxis approach if it was passed to prevent circumventing existing limits, not to address any new or unique issue.[225] However, as explained above, Section 304 was distinct from the

219. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1652 (2022).

220. *Cruz*, 142 S. Ct. at 1656 ("[H]ere the Government has not shown that Section 304 furthers a permissible anticorruption goal . . . ."); *id.* at 1653–54 (holding that the Government failed to prove that post-election contributions lead to quid pro quo corruption because the Government didn't identify a case of quid pro corruption in this context, and the evidence the Government provided only concerns the risk of increased influence or access).

221. *Id.* at 1652.

222. *Id.* ("Individual contributions to candidates for federal office, including those made after the candidate has won the election, are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election . . . the contributions at issue remain subject to these requirements.").

223. *See generally* 52 U.S.C. § 30116(a)(1); 11 C.F.R. § 110.1(b)(3). *See also supra* note 26 (discussing the laws regulating contributions).

224. 11 C.F.R § 110.1(b)(3)(i).

225. *See* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007) (arguing that applying the government interest in preventing quid pro quo corruption to issue advocacy to protect against the circumvention of rules against express advocacy and contributions would be a "prophylaxis-upon-prophylaxis approach"); McCutcheon vs. Fed. Election Comm'n, 572 U.S. at

individual contribution cap because it targeted a different subset of contributions.[226] Accordingly, Section 304 was not designed to prevent the circumvention of the individual contribution cap, so the prophylaxis-upon-prophylaxis argument does not apply. Not only is the majority's characterization of Section 304 incorrect, but it is a clear attempt to trivialize the legitimate justifications the Government offered in support of the provision.[227]

The dissent responded to the majority's prophylaxis-upon-prophylaxis argument by correctly asserting that Section 304 was necessary because it targeted a unique risk of quid pro quo corruption that existing contribution limits do not.[228] The individual contribution cap prevents corruption from "normal campaign contributions," while Section 304 targeted a different subset of contributions with their own inherent risks.[229] Therefore, the dissent correctly argued that pointing to an existing "basic protection" does nothing to demonstrate the "pointlessness" of a supplemental protection.[230]

2. A Strict Evidentiary Standard for Proving an Anticorruption Interest Is Unnecessary and Against Precedent

Next, the majority argued that Section 304 was not justified because the Government failed to prove that it furthered a permissible anticorruption interest.[231] Congress recognizes the self-evident risk associated with large postelection donations to indebted candidates.[232] However, the majority incorrectly asserted that the Government had to provide an evidentiary record to prove this risk existed.[233] This conclusion creates an onerous, unnecessary, and unprecedented evidentiary standard that stands in sharp contrast to the Court's previous

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221 (holding that, because the challenged aggregate limits are "layered on top" of direct contribution limits to prevent circumvention of those base limits, the Court considered them to be a prophylaxis-upon-prophylaxis approach requiring the Court to be "particularly diligent in scrutinizing the law's fit").

226. *Supra* notes 223–224 and accompanying text.

227. *See* FEC v. Ted Cruz for Senate, 136 HARV. L. REV. 330, 337 (2022) (arguing that the majority characterized Section 304 as a "prophylaxis-upon-prophylaxis approach" to trivialize the Government's justifications for the provision and dismiss them as meager).

228. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1652, 1660 (2022) (Kagan, J., dissenting) ("[T]hat claim ignores that Section 304 targets only a subset of contributions, which raise . . . unique corruption risks.").

229. *Cruz*, 142 S. Ct. at 1660–61; *supra* notes 223–224 and accompanying text.

230. *Id.* at 1660 (Kagan, J., dissenting).

231. *See* FEC v. Ted Cruz for Senate, *supra* note 227, at 337 (arguing that the *Cruz* decision introduced a heightened standard of proof that places the burden "onerously" on the government to uphold any restriction on expression).

232. *See generally* notes 236–238 and accompanying text.

233. *Cruz*, 142 S. Ct. at 1654.

campaign finance decisions.[234]

The majority argued that a strong evidentiary record was needed because the Court has never accepted "mere conjecture" of a problem to support the justification of a First Amendment burden.[235] However, as the Court held in *Shrink*, the amount of evidence required to satisfy the Court's scrutiny "will vary up or down with the novelty and plausibility of the justification raised."[236] Since its decision in *Buckley*, the Court has recognized that large contributions create the danger of corruption and raise suspicions.[237] Thus, as the dissent correctly stated, the rationale behind Section 304—that large donations going directly to candidates to retire their personal loans create "an especial risk of corruption"—is neither novel nor implausible.[238]

For these reasons, the Court has declined to articulate a minimum amount of evidence that must be included to support a proffered anticorruption interest.[239] Furthermore, the Court has upheld campaign finance regulations where there was less evidence than what the Government provided in *Cruz*.[240] The Government provided an

234. *See* Brief of Campaign Legal Center, *supra* note 180, at 17 (describing the Court's evidentiary burden as "divorced from four decades of campaign finance precedents establishing that contribution restrictions further a compelling interest in combating quid pro quo corruption and its appearance"); FEC v. Ted Cruz for Senate, *supra* note 227, at 339 (arguing that the *Cruz* decision established a heightened standard of proof that places an onerous burden on the government to uphold any limitation on the First Amendment's protection of political speech).

235. *Cruz*, 142 S. Ct. at 1653 (citing McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 210 (2014)).

236. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

237. *See* Buckley v. Valeo, 424 U.S. at 26 (holding that Congress may seek to regulate "large contributions [that] are given to secure a political quid pro quo from current and potential office holders"); *Shrink*, 528 U.S. at 391 ("*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."); *McCutcheon*, 572 U.S. at 225 ("[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself.").

238. *Cruz*, 142 S. Ct. at 1660 (Kagan, J., dissenting); *see also* Brief of Campaign Legal Center, *supra* note 180, at 16–17 (arguing that the Government's evidentiary burden should be light because "[t]he notion that a payment that personally benefits a candidate . . . might give rise to actual or apparent corruption" is not novel or implausible); McConnell v. Fed. Election Comm'n, 540 U.S. at 144 ("The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible."); Brief of Brennan Center for Justice, *supra* note 171, at 13 ("This Court has long held that the government has an interest in the prevention of corruption and its appearance . . .").

239. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 58 U.S. at 391–92 (declining to define what is a necessary evidentiary showing to demonstrate sufficient justification for contribution limits).

240. *See, e.g., Shrink*, 58 U.S. at 393–94 (holding that the evidence introduced—an affidavit from a state senator, a newspaper account of "large contributions supporting inferences of impropriety," and the results of a statewide vote that a majority of voters determined that contributions limits were necessary to combat corruption and its appearance—were sufficient to substantiate concerns

extensive record to support its argument that Section 304 supported an anticorruption interest.[241] The majority dismissed this record as "meager" and insufficient to prove the existence of an anticorruption goal.[242] On the contrary, the Government's evidence sufficiently demonstrated the risks of corruption because it was in line with what the Court has previously deemed as acceptable.[243]

Furthermore, the majority incorrectly relied on the lack of identified instances of quid pro quo corruption associated with postelection contributions.[244] The Government properly asserted a permissible anticorruption interest without this type of evidence.[245] The Court has recognized that proof of quid pro quo corruption is elusive and unnecessary to establish that contribution limits prevent corruption and its appearance.[246] Thus, the Government's failure to identify any cases

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about corruption). Furthermore, in *McConnell,* the Court held that "common sense" and the "ample record" provided by the Government confirmed Congress' recognition that large donations to national party committees give rise to actual or apparent corruption. *McConnell*, 540 U.S. at 146. The Government's record consisted of declarations made by Congress members and expert reports. *Id.* at 146–53.

241. The record compiled by the Government contained an academic study concluding that indebted politicians are more sensitive in their voting decisions to contributions, statements from the legislative record from the debates surrounding Section 304, media reports from around the country describing politicians who accepted large contributions to repay debts from their campaign, and a finding from a national poll that a majority of the respondents thought it was likely that a person who donates money to a campaign after the election expects a political favor in return. *See* Ted Cruz for Senate v. Fed. Election Comm'n, 542 F.3d 1, 12–15 (D.D.C. 2021), *aff'd*, 142 S. Ct. 1638 (2022) (summarizing the Government's evidentiary record); Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. at 1662–64 (Kagan, J., dissenting) (summarizing the Government's evidentiary record).

242. *Cruz,* 142 S. Ct. at 1654.

243. *Id.* at 1662 (Kagan, J., dissenting) ("[T]he Government and its *amici* have marshalled significant evidence showing that the loan repayments Section 304 targets have exactly the dangers Congress thought."). *See also* Brief of Campaign Legal Center, *supra* note 180, at 16–17 (arguing that the Government's evidentiary burden should have been light); FEC v. Ted Cruz for Senate, *supra* note 227, at 337–38 (arguing that the majority dismisses the Government's evidence with little justification despite relying on cases like *Citizens United* and *McCutcheon* where no evidence was offered to support the proffered justifications for the challenged provisions).

244. *Supra* note 117 and accompanying text.

245. *Contra Cruz*, 142 S. Ct. at 1653–54 (holding that the Government did not meet its burden of proving that Section 304 had permissible anticorruption objectives because the Government's record did not "identify a single case of quid pro quo corruption in this context").

246. *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (holding that the problem of quid pro quo corruption related to donor contributions is not "an illusory one" despite the fact that "the scope of such pernicious practices can never be reliably ascertained"); *Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting) ("But quid pro quo exchanges, in that and every other setting, are nigh-impossible to detect and prove. That is indeed why we have campaign finance laws like Section 304."); *McCutcheon,* 572 U.S. at 240–41 (stating that the Court in *McConnell* found that the proffered record detailing the "relationships and understandings" among candidates and donors was sufficient

of quid pro quo corruption related to postelection contributions is not determinative of the legitimacy of Section 304's anticorruption interest.[247]

Requiring a strong evidentiary record also goes against the Court's long-standing deference to Congress in this area.[248] Congress has constitutional power to regulate elections, which it has used to pass campaign finance laws.[249] Until now, the Court recognized that Congress passed FECA and the BRCA to prevent corruption.[250] In doing so, the Court preserved Congress's power to pursue its anticorruption interests while ensuring that the statutory remedies and protective measures do not infringe on the First Amendment.[251] In *Cruz*, the majority sharply departs from this deferential precedent by concluding that postelection contributions do not create a risk of actual or apparent corruption, even though Section 304 served the same congressional objectives the Court

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to demonstrate the danger of quid pro quo corruption even though the record did not contain evidence of "bribery or vote buying in exchange for donations"). *See also McConnell*, 540 U.S. at 137 (arguing that deference to Congress' "ability to weigh competing constitutional interests in an area in which it enjoys particular expertise" is warranted to conclude that the challenged regulations were "designed to protect the integrity of the political process").

247. *See Cruz*, 142 S. Ct. at 1662 (Kagan, J., dissenting) ("To strike down Section 304 because the Government has not proved to a certainty some number of loan-repayments-for-political-paybacks is to miss the provision's essential point."); *id.* at 1660 (arguing that the majority has no reason to be skeptical of Congress' determination that Section 304 is needed as a "heightened safeguard"). *See also* Brief of Constitutional Accountability Center, *supra* note187, at 22 (arguing that requiring the government to provide examples of quid pro quo corruption goes against the Court's recognition that Congress can regulate campaign contributions to protect against corruption or its appearance).

248. *See, e.g.*, *McConnell*, 540 U.S. at 165 (holding that the Court must give substantial deference to judgments of Congress relating to the corruption risks associated with contributions because Congress' judgments are "so firmly rooted in relevant history and common sense"); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 395 (2000) ("[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system . . . ."); *see also* Brief for Appellant, *supra* note 18, at 39 ("To the extent the matter is otherwise in doubt, this Court owes deference to the legislative judgment that the practices targeted by the loan-repayment limit pose a special risk of corruption."). *See also Cruz,* 142 S. Ct. at 1662 (Kagan, J., dissenting) ("The common sense of Section 304—the obviousness of the theory behind it—lessens the need for the Government to identify past cases of quid pro quo corruption involving candidate loan repayments.").

249. *See, e.g., Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established.").

250. *See id.* at 26 (stating that the primary purpose of FECA was to limit the actual and apparent corruption that results from large financial contributions to candidates); *McConnell*, 540 U.S. at 115 (stating that BCRA was enacted to address the "pernicious influence" of large campaign contributions); 150 CONG. REC. 12 (daily ed. Feb. 4, 2004) (statement of Rep. McCain) (describing the notion that large, unregulated contributions cause actual and apparent corruption as "self-evident").

251. *See McCutcheon*, 572 U.S. at 227 (holding that the Court's campaign finance jurisprudence is focused on balancing the Government's power to combat corruption in elections with the need to maintain "the political responsiveness at the heart of the democratic process").

has historically supported.[252]

The majority's onerous standard of proof is also unnecessary considering the common-sense corruptive danger of using postelection contributions for debt retirement.[253] Candidates rely on preelection contributions to conduct successful campaigns, and this reliance creates a risk that the candidate will secure political benefits for their large donors if they win.[254] The risk of corruption becomes more apparent on both sides of the deal when candidates accept postelection contributions after electoral spending has ended and the results are in.[255] Postelection donations go straight to the candidates because the money can only be used for the repayment of their loans.[256] The candidates are relying on postelection donations to get themselves out of debt just as they rely on

252. *Supra* note 117 and accompanying text. *See also* Brief of Campaign Legal Advocacy Center, *supra* note 180, at 20 (arguing that the validity of contribution limits does not depend on a factual showing that all or most contributions amount to bribes because the Court has repeatedly accepted Congress' stance that contribution limits prevent corruption and the appearance of corruption); FEC v. Ted Cruz for Senate, *supra* note 227, at 333 (arguing that, by holding that Section 304 did not further a permissible government interest, the majority dismissed the argument that the Court should defer to congressional judgment that Section 304 furthered an appropriate anticorruption goal). Ruth Marcus, *The Supreme Court Just Made Corruption a Little Easier*, WASH. POST (May 17, 2022, 5:17 PM), https://www.washingtonpost.com/opinions/2022/05/17/supreme-court-takes-yet-another-whack-campaign-finance-restrictions/ [https://perma.cc/6U5S-6R45] ("As much as the majority [in *Cruz*] demonstrated undue solicitude toward self-funding candidates, it showed scant respect for congressional concern about the corrupting potential or appearance of successful candidates vacuuming up post-election donations from donors interested in currying favor.").

253. *See Cruz*, 142 S. Ct. at 1660 (Kagan, J., dissenting) (arguing that the risk of actual and apparent quid pro corruption associated with post-election contributions is self-evident). *See also* Five Four Pod, Federal Election Commission v. Ted Cruz for Senate, at 0:26:22.2-0:26.58.1 (Jun. 7, 2022), https://www.fivefourpod.com/episodes/federal-election-commission-v-ted-cruz-for-senate/ [https://perma.cc/DX4R-CT4Y] (arguing that the potential for quid pro quo deals connected to post-election contributions is clear because, when people donate to candidates after the election, the obvious reason for doing so is to "curry favor with the candidate").

254. *See Buckley*, 424 U.S. at 26 (explaining how candidates depend on financial contributions during their campaigns).

255. *See Cruz,* 142 S. Ct. at 1664 (Kagan, J., dissenting) (arguing that post-election contributions, which can only be used to repay a candidate's loan after the election is over, do not serve the usual purposes of a contribution because they do not support the candidate's campaign activities since the campaign is over when the contributions are received); Brief for Appellant, *supra* note 18, at 35 ("A preelection donor may believe that his contribution will incrementally improve the favored candidate's chances of prevailing in the election, but a post-election donor can be reasonably confident that the contribution will help the candidate on a personal level."); Brief of Brennan Center for Justice, *supra* note 171, at 19 (arguing that repaying a candidate's debt increases the candidate's incentive to perform political favors); Ovtchinnikov & Valta, *supra* note 3, at 2 (explaining that prompt debt reduction shows a candidate's leadership qualities and viability as a politician, and arguing that this leads self-financing candidates to feel pressure to "sell their votes" to donors in exchange for campaign contributions) (internal quotation marks omitted).

256. *See* Brief for Appellant, *supra* note 18, at 33–34 (arguing that postelection contributions provide financial gains to the candidate, thus creating a larger threat of corruption than preelection contributions, which go to the campaign's treasury and are used for campaign purposes).

preelection donations to fund their electoral activities.[257] Meanwhile, donors know that the now-officeholders are under pressure to retire their debts and may be susceptible to requests for favors.[258] Contrary to the majority's view, without Section 304, the potential for actual or apparent quid pro quo corruption is clear.[259] By holding that the Government did not meet its burden of asserting an anticorruption interest, the Court creates an unreachable evidentiary standard for any First Amendment challenge to campaign finance regulations.[260]

3. The Majority Ignores the Appearance of Corruption

The majority's analysis is also incomplete because it ignores the accepted notion that contribution limits are justified by an interest in preventing the *appearance* of quid pro quo corruption.[261] Without the force of Section 304, the public will perceive that corruption is inherent in giving and receiving postelection contributions even if illicit exchanges do not occur.[262] The Court has long-recognized that the appearance of corruption is just as concerning as the danger of actual quid

257. *See Cruz,* 142 S. Ct. at 1664 (Kagan, J., dissenting) (arguing that candidates with outstanding loans have reasons to be anxious and to view the repayment of their loans as a personal benefit which induces within them gratitude towards their donors); *id.* at 1659–60 ("When a candidate lends substantial funds to his campaign, he wants (maybe desperately needs) them returned; he thus risks— indeed, invites—dependence on donors, who alone can make him financially whole."). *See also* Brief of Brennan Center for Justice, *supra* note 171, at 19 (arguing that repaying a candidate's debt increases the candidate's incentive to perform political favors); Ovtchinnikov & Valta at 2, *supra* note 3 (explaining that prompt debt reduction shows a candidate's leadership qualities and viability as a politician, and arguing that this leads self-financing candidates to feel pressure to "sell their votes" to donors in exchange for campaign contributions) (internal quotation marks omitted).

258. *See Cruz,* 142 S. Ct. at 1660 (Kagan, J., dissenting) (positing that post-election contributions are valuable to candidates, which their donors know when they choose to donate after the election); *see also id.* at 1657 ("The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it.").

259. *See* Brief of Brennan Center for Justice, *supra* note 171, at 18 ("Candidates recouping personal loans to their campaigns by soliciting post-election contributions presents exactly the heightened corruption risk courts have found to justify more stringent regulation . . . .")

260. *See* FEC v. Ted Cruz for Senate, *supra* note 227, at 337–38 (arguing that under the new evidentiary standard created by the Court, it is no longer sufficient to provide evidence of a valid justification for restricting speech, "it must be proven beyond a doubt").

261. *See Cruz*, 142 S. Ct. at 1660 (Kagan, J., dissenting) (arguing that the majority opinion makes almost no mention of the appearance of corruption). *See also* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014) (holding that the purpose of FECA was to limit quid pro quo corruption and its appearance).

262. *See* Brief of Constitutional Accountability Center, *supra* note 187, at 20 ("[E]ven if a donor expects nothing in return after giving to a campaign following an election, there is, at a minimum, a risk of the appearance that the donor expected political favors based on the donor's knowledge that the candidate would be in a position to grant such favors."); Schuck, *supra* note 12, at 82 ("The problem with money in politics is the scent of corruption that it leaves on the democratic process.").

pro quo deals.[263] Preventing the appearance of corruption is an acceptable justification for contribution limits because such perceptions reduce voters' willingness to participate in the democratic process.[264] The majority concluded that Section 304 was not justified by an anticorruption interest without conducting a full analysis, which should include a discussion of whether the provision prevented the appearance of quid pro quo corruption.[265]

4. Conflating Influence and Access with Corruption

A final issue with the majority's analysis is its failure to differentiate between quid pro quo corruption and improper influence and access.[266] Interestingly, the Court previously recognized broader definitions of corruption.[267] However, in recent cases, the Court restricted its view of corruption to exclusively encompass quid pro quo corruption and held that preventing improper access and influence is not a sufficient justification.[268] The majority contended that the Government's evidentiary record only demonstrated the dangers of influence or access, which the Court cannot regulate.[269] It recognized that the line between

263. *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976) (holding that the appearance of corruption is equally as important of a concern as actual quid pro quo deals).

264. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (arguing that ignoring the dangers of the appearance of quid pro quo corruption will leave the assumption that large donors control the outcome of elections unchecked, which in turn decreases voters' willingness to participate in the democratic system); *see also* Schuck, *supra* note 12, at 82 (describing how the fact that most campaign funds come from only a small number of people creates a skepticism among the public that their representatives are more interested in serving their donors than their constituents).

265. *Supra* notes 262–264 and accompanying text.

266. *See supra* note 123 and accompanying text (describing the majority's discussion of the interest furthered by Section 304).

267. *See* Abraham, *supra* note 41, at 1086 (explaining that, in a series of cases decided immediately after *Buckley*, the Court expanded the definition of corruption beyond the quid pro quo focus). *See also* Austin v. Mich. Chamber of Com., 494 U.S. 652, 659–60 (1990), overruled by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that an interest in preventing corruption included preventing the "immense aggregations of wealth" from corporations that have no correlation to the corporations' political ideals); *Shrink Missouri PAC*, 528 U.S. at 389 (holding that corruption included the broader threat of "politicians too compliant with the wishes of large contributors").

268. *See, e.g.*, *Citizens United* , 558 U.S. at 359–60 (holding that having influence over or access to elected officials does not mean those officials are corrupt, and that the appearance of influence or access does not cause the public to lose faith in democracy); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 218 (2014) (holding that the preventing influence or access or the appearance thereof is not a permissible government interest); Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1657 (2022) (Kagan, J., dissenting) (stating that the distinction between influence and access and quid pro quo corruption "underlies this Court's recent campaign finance decisions").

269. *Supra* note 123 and accompanying text.

quid pro quo corruption and improper influence and access is vague.[270] However, instead of using this case as an opportunity to clarify this distinction, the majority merely agreed with the lower court that the Government only proved postelection donors may have greater influence or access to candidates with outstanding debts.[271] Even if the line between donor influence or access and quid pro quo corruption is weak, a donation that pays off a successful candidate's personal loan crosses it.[272]

IV. IMPACT

This Part discusses how the *Cruz* decision upended federal campaign finance law by fundamentally altering established precedent. First, it examines how the decision demonstrates the Court's willingness to strike down limitations in favor of the First Amendment. It further explores how this decision will increase public doubt in the functioning of democracy and the judicial branch. Finally, it examines how the removal of Section 304's protective measures may lead to an increase in political corruption.

A. The Restructuring of Campaign Finance Jurisprudence

The Court's decision in *Cruz* marks a sharp departure from, and a potential restructuring of, the constitutional framework for analyzing the constitutionality of a campaign finance restriction. By striking down Section 304, a contribution limit, under a level of scrutiny previously reserved for expenditure limits, the Court is signaling a precedential shift in its jurisprudence.[273]

As argued and explained above, the Court used a heightened form of scrutiny in determining that Section 304 of the BCRA imposed a heavy burden on First Amendment rights that was not justified by a compelling

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270. *Cruz*, 142 S. Ct. at 1653 ("To be sure, the line between quid pro quo corruption and general influence may seem vague at times . . . .") (internal quotation marks omitted). *See McCutcheon*, 572 U.S. at 209 (stating that the distinction between quid pro quo corruption and general influence is vague but must be respected to protect First Amendment rights).

271. *See* Ted Cruz for Senate v. Fed. Election Comm'n, 542 F. Supp. 3d 1, 15 (D.D.C. 2021), *aff'd*, 142 S. Ct. 1638 (2022) (finding that the Government's evidence "merely hypothesize[s] that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate"); *Cruz*, 142 S. Ct. at 1653 (holding that the type of corruption the Government's evidence purports to show is not the type of quid pro quo corruption that can be targeted by regulations). *But see* Five Four Pod at 0:32:58-0:35:02, *supra* note 252 (arguing that neither the majority or the dissent adequately explain the difference between buying influence and buying political favors despite the confusing nature of the distinction).

272. *Cruz*, 142 S. Ct at 1664, n.3 (Kagan, J., dissenting).

273. *See* discussion *supra* Part III (describing how the Court departed from the *Buckley* framework).

government interest in preventing actual or apparent quid pro quo corruption.[274] Historically, the Court reserved this level of scrutiny for expenditure limits and was deferential when reviewing whether a contribution limit was justified by a claimed anticorruption interest.[275] By imposing a strict standard of proof for establishing an anticorruption interest, the Court established a new approach under which all campaign finance regulations are at risk.[276]

The *Cruz* decision is the latest in a line of major Supreme Court cases where the Court has applied a stricter form of scrutiny to strike down campaign finance regulations.[277] Despite different Justices raising the possibility of overturning *Buckley*'s hallmark precedent over the years, the Court has steadfastly refused to definitively invalidate the long-standing framework.[278] While the Court in *Cruz* did not address this possibility, its decision is squarely inapposite with what *Buckley* and its

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274. *See generally* discussion *supra* Parts II.A. and II.B.

275. *See* Abraham, *supra* note 41, at 1085 ("Contribution limitations are subject to lesser judicial scrutiny, implicate concerns of quid pro quo corruption and are generally upheld; while . . . expenditure limitations trigger the strictest scrutiny and are generally unconstitutional."). *See also* Johnstone, *supra* note 18, at 228 ("Courts are deferential in their review of fit between the particular limit and the anti-corruption purpose."); *id.* at 231 (arguing the post-*Buckley* system is one of "regulated contributions and unregulated expenditures").

276. *See* FEC v. Ted Cruz for Senate, *supra* note 227, at 335, 339 (arguing that the *Cruz* decision established a heightened standard of proof for analyzing the constitutionality of campaign finance limits, under which laws and regulations that were previously thought to be consistent with the First Amendment are now at risk of being struck down).

277. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (striking down an Arizona campaign finance provision that increased public funding for candidates facing well-funded private opponents and outside groups); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 193 (2014) (striking down aggregate limits on the amount of campaign contributions an individual donor can make); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 481-82 (2007) (holding that the electioneering communication financing restrictions of the BCRA were unconstitutional because there was no sufficiently compelling government interest to justify the burden the restrictions imposed); Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516–17 (2012) (reversing a decision by the Montana Supreme Court that upheld a Montana state law that prohibited corporations from spending to support or oppose candidates or political parties).

278. *See* Abraham, *supra* note 41, at 1091–92 (describing how different Justices have criticized the *Buckley* opinion through dissents and concurrences, some wanting to subject contribution and expenditure limits to strict scrutiny and others calling for an approach that would subject both limits to more deferential review); *id.* at 1093 (arguing that the Court under Chief Justice Roberts appears to be willing to overrule *Buckley* and replace that framework with an approach that would apply strict scrutiny to all challenged campaign finance restrictions). *See also* Randall v. Sorrell, 548 U.S. 230, 266–67 (2006) (Thomas, J., concurring) (expressing a desire to overrule *Buckley* in order to subject both contribution and expenditure limits to strict scrutiny so both types of restrictions would fail); Davis v. Fed. Election Comm'n, 554 U.S. 724, 750–51 (2008) (Stevens, J., concurring in part, dissenting in part) (arguing that *Buckley*'s treatment of expenditure limits is flawed because it is overly strict).

progeny require.[279] This Court is shifting its deference away from Congress and stare decisis toward unfettered political freedom.[280] It is possible that the Court may continue chipping away at its own precedent until *Buckley* is rendered obsolete.[281]

Furthermore, any change to the Court's campaign finance framework impacts the future of American elections.[282] It is unlikely that this new approach will be limited to contribution and expenditure limits, as demonstrated in the Court's recent decision, *Americans for Prosperity Foundation v. Bonta.*[283] In *Bonta*, the Court struck down a California law that required charities to provide the state with information about their donors for the purported purpose of protecting consumers from fraud and the misuse of their contributions.[284] The Court found that the type of disclosure the law entailed was a restraint on the protected First Amendment freedom of association, and subjected the law to heightened scrutiny.[285] The Court ultimately held that the law was unconstitutional.[286] In reaching this holding, the Court held that the law was not narrowly tailored to achieve the state's purported interest in preventing wrongdoing by charitable organizations, despite the Court

279. *See* discussion *supra* Parts II.A. and II.B.

280. *See, e.g.,* Citizens United v. Fed. Election Comm'n, 558, U.S. 310, 361 (2010) ("When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. . . . The remedies enacted by law, however, must comply with the First Amendment."); *McCutcheon*, 572 U.S. at 227 (stating that preserving the government's power to combat corruption in elections must be balanced against preserving the "political responsiveness at the heart of the democratic process").

281. *See* Abraham, *supra* note 41, at 1092 ("It is unclear, however, whether the Roberts Court will be content with merely reasserting the core principles of *Buckley*, or is on an incremental path to over-ruling *Buckley* in favor of strict scrutiny of all campaign finance restrictions.").

282. *See, e.g.,* Anthony J. Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J. L., ETHICS & PUB. POL'Y 553, 569 (2022) (stating that the Court has heard several important election law cases in the past ten years that affect each political party's "competitive standing" on election day); Johnstone, *supra* note 13, at 226–27 ("For the moment, at least, lawmakers enjoy ample room to innovate and recalibrate contribution limits and disclosure thresholds. Yet the margins of permissible regulation are unstable due to the doctrine controlling these areas.").

283. *See generally* Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021). *See also The Impact of* Americans for Prosperity Foundation v. Bonta *on Donor Disclosure Laws*, PROSKAUER: TAX TALKS BLOG (July 30, 2021), https://www.proskauer.com/blog/the-impact-of-americans-for-prosperity-foundation-v-bonta-on-donor-disclosure-laws [https://perma.cc/9VKC-PXSL] (describing the effect of the Court's decision in *Bonta* on disclosure requirements and arguing that Court created higher standards that will make it easier to challenge such requirements); *Bonta*, 141 S. Ct. at 2394 (Sotomayor, J., dissenting) (arguing that the majority's decision "marks reporting and disclosure requirements with a bull's-eye").

284. *Bonta*, 141 S. Ct. at 2389.

285. *Id.* at 2382–85.

286. *Id.* at 2389.

initially stating it was applying heightened, not strict, scrutiny.[287] The *Bonta* and *Cruz* decisions reflect the Court's increasing willingness to depart from precedent and subject campaign finance laws to stricter standards of review than is warranted under its own precedent.[288] In the wake of *Cruz*, the campaign-financing system is at an increased risk of deregulation.[289]

B. The Dangers for Democracy

The impact of the *Cruz* decision extends beyond the halls of the Supreme Court. The decision was made in a political climate suffering from the effects of the public's diminishing faith in democracy. Voters are doubting the legitimacy of the electoral system.[290] Supreme Court decisions were leaked.[291] Elected officials are lying to their constituents. Members of Congress are under real threats of attack.[292] The Court's holding will likely decrease the public's faith in the functioning of

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287. *Id.* at 2389.

288. *See Bonta*, 141 S. Ct. at 2396 (Sotomayor, J., dissenting) (arguing that the majority departed from the Court's long-standing precedent mandating that the appropriate level of scrutiny used in First Amendment campaign finance challenges should be proportionate to the burden the challenged regulation actually imposes on protected rights); Lindsay Hemminger, Americans for Prosperity v. Bonta*: The Dire Consequences of Attacking a Major Solution to Dark Money in Politics*, 81 MD. L. REV. 1007, 1007 (2022) (arguing that the Court in *Bonta* inappropriately applied a heightened scrutiny standard by requiring the challenged disclosure law to be narrowly tailored to a government interest); *id.* at 1039 (surmising that it will be difficult for any state disclosure requirement to survive the Court's new, stricter standard of review it created and applied in *Bonta*). *See also* FEC v. Ted Cruz for Senate, *supra* note 227, at 339 (arguing that the *Cruz* decision "paves the way for the Court to invalidate other laws and regulations, even those that are empirically substantiated").

289. *See* FEC v. Ted Cruz for Senate, *supra* note 227, at 338 (arguing that the Roberts Court is using the First Amendment as a "deregulatory tool"). *See also* JD SUPRA, *supra* note 37 ("The Court's reasoning seemed to reject all but the narrowest of campaign finance restrictions and placed the burden squarely with the Government to justify its restrictions. Absent a legitimate, sufficiently tailored restriction to remedy anticorruption, future campaign finance restrictions are likely to meet a similar fate."); Whitacker, *supra* note 22, at 5 (arguing that subsequent First Amendment challenges to other provisions of FECA may be successful, based on the *Cruz* reasoning, if the government cannot present specific evidence demonstrating anticorruption interests).

290. *See generally* Nicolas Berlinski, *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, J. EXPERIMENTAL POL. SCI. 1 (2021) (describing the corrosive effect of election fraud claims on faith in the election system).

291. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2002 at 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/8UJR-M632] (describing an initial draft of a Supreme Court opinion striking down *Roe v. Wade* obtained by Politico).

292. *See generally* Kierra Frazier, *Pelosi Assault Is Latest in Series of Threats, Attacks Against Political Figures*, POLITICO (Oct. 29, 2022, 2:31 PM), https://www.politico.com/news/2022/10/29/pelosi-assault-attacks-threats-political-figures-00064113 [https://perma.cc/9XJN-MH5M].

democracy even further while increasing the growing doubt in the political neutrality of the Supreme Court.[293]

Democracy only functions when the citizenry have faith in their elected leaders and the integrity of the electoral system as a whole.[294] Only 20 percent of American adults say they trust the federal government to "do the right thing" most of the time.[295] Not only are most Americans distrustful of the government, most also believe there is corruption in politics and want more limits on candidate spending and donor contributions.[296] Congress shares these concerns and has regulated campaign financing to preserve the integrity of the government.[297] By striking down Section 304 and making it easier to challenge remaining regulations, the Court reaffirmed the public's perception that the government does not act in their best interests, threatening the electoral integrity that this democracy rests on.[298]

Moreover, the public has an increasingly negative view of the Supreme

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293. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1658 (2022) (Kagan, J., dissenting) ("[T]oday's decision can only bring this country's political system into further disrepute.").

294. *See, e.g.,* United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961) ("[D]emocracy is effective only if the people have faith in those who govern . . . ."); Nixon v. Shrink Mo. Gov't PAC, 58 U.S. 377, 390 (2000) (arguing that cynical voters may become unwilling to take part in democratic governance); Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 107 (2017) (describing electoral integrity as voters and candidates having confidence in the legitimacy of an efficient and reliable process).

295. *See Americans' View of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR., at 4 (Sept. 14, 2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/09/PP_09.14.20_views.of_.government.full_.report.pdf [https://perma.cc/ZD4B-HCS3] (describing the results of a study assessing Americans' view of the Government).

296. *See* Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/ [https://perma.cc/K7AJ-UZ7Y] (finding that 77 percent of the public thinks there should be limits on the amount of money individuals and organization can spend on political campaigns and 74 percent of the public thinks it's important that major political donors do not have more influence than others); Schuck, *supra* note 12, at 76 ("[M]ost Americans still think there is too much money in politics.") .

297. *See, e.g.*, Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (describing how preventing actual corruption and the appearance of corruption implicates the integrity of the electoral process); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 235–36 (2014) (Breyer, J., dissenting) (stating that Congress regulates campaign contributions to maintain the "integrity of our public governmental institutions").

298. *See* Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1664 (2021) (Kagan, J., dissenting) ("In discarding the statute, the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process.").

Court and doubts that justices are apolitical.[299] The public's view is correct—the Court has become increasingly politically polarized.[300] In the most recent election law cases, the Republican-appointed Justices have voted in alignment with the positions of the Republican Party and the Democratic-appointed Justices have voted in alignment with the positions of the Democratic Party.[301] Now more than ever, it is crucial that the Court try to restore the public's faith in democracy, the political process, and the Court itself.[302] *Cruz* is likely to do the opposite.[303] The decision feeds the public's perceptions that the government does not do the right thing and reinforces the view that the Court is poisoned by partisanship.[304]

C. Opening the Door for Political Corruption

Finally, the Court's decision in *Cruz* will likely lead to an increase in political corruption or, at the very least, its appearance.[305] After Section

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299. *See Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/4F5F-2Y23] (finding that the number of adults with favorable views of the court has gone down 15 percent in the past three years and 84 percent of adults surveyed did not want Supreme Court Justices to bring their own political views into the cases they decide).

300. *See* Gaughan, *supra* note 282, at 102–03, 105 (arguing that partisan influences did not affect most of the election law cases in the twentieth century, but the Court has become so polarized that the Justices' partisan affiliation, the party of the President who appointed them, are accurate predicators of the positions they take in election law cases).

301. *See* Gaughan, *supra* note 282, at 123 ("[T]he votes of each Republican-appointed justice often mirror the position of the Republican Party and the votes of each Democratic-appointed justice often mirror the position of the Democratic Party."); Millhiser, *supra* note 4 ("The Supreme Court's conservative majority has been at war with campaign finance laws for more than a dozen years.").

302. *See* Gaughan, *supra* note 282, at 103 ("At a time of hyperpolarization in the country at large, it has never been more important for the Court to avoid the appearance—and reality—of partisan favoritism."); Abraham, *supra* note 41, at 1093 ("The system's inability to increase public faith in the democratic system. . . further erode[s] the viability of the present campaign finance framework.").

303. *See Cruz,* 142 S. Ct. at 1664 (Kagan, J., dissenting) ("In discarding the statute, the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process.").

304. *See, e.g.*, Five Four Pod at 0:31:33.5, *supra* note 252 ("There might not be a better summation of this court's poisonous impact on American democracy than Robert's explicitly stating that purchasing access and influence is a central feature of democracy."); Gaughan, *supra* note 282, at 103 ("[I]f the justices persist in their polarized approach to election law cases, they risk permanent damage to the Court's standing as a neutral arbiter of justice.").

305. *See* Anna Massoglia, *Following Supreme Court Decision, Self-funding Candidates Are Using Campaign Funds to Pay Themselves Back*, OPENSECRETS, https://www.opensecrets.org/news/2022/10/following-supreme-court-decision-self-funding-

304 was struck down as unconstitutional, the FEC removed the regulatory restrictions on the use of postelection donations for debt retirement.[306] Since then, congressmembers have had hundreds of thousands of dollars in personal loans repaid by their campaigns using donor contributions.[307] This deregulation comes at a time when the amount of money in politics is at a historic high.[308] Individual contributions have consistently comprised the largest source of funding for political campaigns, with individuals collectively contributing over $14 billion to political campaigns over the past thirty years.[309] Candidate self-financing is the second largest source of funds,[310] with a majority of self-financing coming in the form of personal loans.[311] Without the protection Section

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candidates-are-using-campaign-funds-to-pay-themselves-back/ (Oct. 20, 2022, 3:57 PM) [permalink] ("The new rule opens the door for candidates to loan their campaigns huge sums of money, then go to donors after an election win to solicit money to pay the candidate back.").

306. *See generally* Order Approving FEC Removal of Regulatory Restrictions on Repayment of Candidate Personal Loans, 87 Fed. Reg. 54862 (Sept. 8, 2022) (to be codified at 11 C.F.R. pts 110, 116).

307. *See* Massoglia, *supra* note 305 (describing how, since Section 304 was struck down, Senator Cruz's campaign repaid him $555,000 for personal loans from the 2012 and 2018 elections, Representative Harley Rouda's campaign repaid him $116,000 for personal loans from his 2018 campaign, and Representative Vicente Gonzalez had $1.4 million in loans reinstated to be repaid by his campaign).

308. *See Statistical Summary of the 12-Month Campaign Activity of the 2021-2022 Election Cycle*, FEDERAL ELECTION COMMISSION, https://www.fec.gov/updates/statistical-summary-of-12-month-campaign-activity-of-the-2021-2022-election-cycle/ (April 13, 2022) [https://perma.cc/X5UD-WUQW] (stating that, during the 2022 election cycle, Congressional candidates amassed $1.3 billion and disbursed $720 million, political parties received $862.2 million and spent $668.3 million, and PACs raised $3.2 billion and spent $2.5 billion); Taylor Giorno & Pete Quist, *Total Cost of 2022 State and Federal Elections Projected to Exceed $16.7 Billion*, OPENSECRETS (Nov. 3, 2022, 12:55 PM), https://www.opensecrets.org/news/2022/11/total-cost-of-2022-state-and-federal-elections-projected-to-exceed-16-7-billion/ [https://perma.cc/3NGN-DWVD] (finding that election-related spending at the federal level surpassed the 2018 record-setting amount); Bill Allison, *Spending on US Midterm Elections to Exceed $16.7 Billion, Setting New Record*, BLOOMBERG (Nov. 3, 2022, 12:44 PM), https://www.bloomberg.com/news/articles/2022-11-03/spending-on-us-midterm-elections-to-exceed-16-7-billion-setting-new-record?leadSource=uverify%20wall [https://perma.cc/Y696-PN3S] (describing how the total spending on state and federal elections during the 2022 midterm election cycle broke the record amount spent in the 2016 midterm election cycle).

309. *See, e.g.*, Ovtchinnikov & Valta, *supra* note 3, at 7–8 (describing the results of aggregated campaign financing data).

310. *See id.* at 1 (stating that almost half of the candidates running for a Congressional seat contribute their own money to their campaigns and, in 2020, 55 percent of Congressional candidates collectively contributed $256 million of personal wealth to their campaigns); *id.* at 8 (describing the results of aggregated campaign financing data); Massoglia, *supra* note 305 (finding that Congressional candidates spent a total of $283 million of their own money to self-fund their campaigns in the 2022 midterm elections).

311. *See, e.g.,* Ovtchinnikov & Valta, *supra* note 3, at 8 (describing how the results of aggregating

304 offered, it is possible that the public will assume that at least some of the astronomical amount of money going to candidates to retire their substantial personal debts was given in exchange for political favors. Consider the hypothetical situation posed by Justice Kagan in her dissent: A candidate lends $500,000 to his campaign, hoping to get repaid from his supporters' postelection contributions.[312] After he wins the election, he solicits donations to refill his personal bank account, making it clear to his contributors that the money will be going directly to him to repay his loan.[313] Out of his gratitude to them for helping him repay his debts, he provides government benefits to them throughout his time in office.[314]

The increased risk of political corruption is not merely a hypothetical threat. A recent academic study shows that candidates who lend money to their own campaigns vote differently in Congress, feeling pressure to sell favors to their supporters in order to raise enough money to pay off the debts they took on.[315] Moreover, there are documented instances of winning candidates openly soliciting donations to retire their personal debts and rewarding the donors who contributed money after elections.[316] This is the type of corruption Section 304 prevented for the past forty years,[317] and the type of corruption that is at risk of increasing now that

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campaign financing data from the past thirty years show that most of candidate own-source funding comes in the form of personal loans, an amount equaling $2.28 billion); Brief of Brennan Center for Justice, *supra* note 171, at 1 (showing that over 24 percent of Congressional candidates used personal loans to finance their campaigns from 2003–2020).

312. Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1657 (Kagan, J., dissenting).

313. *Id.*

314. *Id.*

315. *See* Ovtchinnikov & Valta, *supra* note 3, at 26 (describing findings from their study of whether candidates who self-finance campaigns behave differently in Congress compared to other competitions).

316. *See, e.g.*, Steven V. Roberts, *Debt Retirement Party Becoming an Institution*, N.Y. TIMES (Nov. 29, 1982), https://www.nytimes.com/1982/11/29/us/debt-retirement-party-becoming-an-institution.html [https://perma.cc/4645-N64K] (describing parties held by newly elected Democratic and Republican House members to solicit donations to retire their campaign debts, and stating, "The legislators need money, the lobbyists need access, and trading one commodity for the other is probably the second oldest profession in Washington"); Andrew Zajac, *Interest on Campaign Loans*, L.A. TIMES (Feb, 19, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-feb-14-me-napolitano14-story.html [https://perma.cc/4XFW-S5FB] (describing how a Congresswoman on the House Transportation and Infrastructure Committee solicited donations from lobbyists representing transportation interests at debt retirement fundraisers to retire a personal loan she took out a decade earlier for her campaign); Laura A. Bischoff, *Donations Helping DeWine Pay Down Campaign Loan*, SPRINGFIELD NEWS-SUN (Feb. 2, 2012), https://www.springfieldnewssun.com/news/national-govt—politics/donations-helping-dewine-pay-down-campaign-loan/UakVmO6kothwHSzC6tNJiP/ [https://perma.cc/MEM4-WHWB] (describing how the former Ohio Attorney General Mike DeWine raised $1.7 million to pay off his campaign debt from contributors who held contracts awarded by his office).

317. *See Cruz,* 142 S. Ct. at 1664 ("Section 304 has guarded against that threat for two decades,

the provision has been invalidated.[318]

CONCLUSION

By striking down Section 304 of the BCRA as unconstitutional under the First Amendment, the Supreme Court is clearing the way for the deregulation of federal campaign financing. The Court was incorrect in overstating Section 304's burden on protected political speech and understating its risk of actual and apparent quid pro quo corruption. The ruling relieves future plaintiffs of the burden of proving how a contribution limit impacts political speech while imposing onerous and unnecessary standards on the government to prove that campaign laws are justified by a desire to combat corruption. The decision is a sharp departure from First Amendment campaign finance precedent and an encroachment on Congress's power to legislate in this area. The ruling also has significant ramifications for future of campaign finance regulation and for the faith of the American public in our system of government.

Thus, the Court should have held that Section 304 imposed only a minor burden on First Amendment rights, and therefore was justified by a compelling government interest in preventing quid pro quo corruption or its appearance.

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but no longer."); Ovtchinnikov & Valta, *supra* note 3, at 28 ("[T]he implementation of BCRA had a material impact on the propensity of politicians to make large self-loans. . . . [T]here is a clear bunching of self-loans in the post-BCRA period at round amounts (such as $200,000, $300,000 and $500,000) and an especially strong bunching at the $250,000 threshold."); Brief of Constitutional Accountability Center, *supra* note 187, at 22 ("It is hard to imagine why a candidate would care whether campaign funds used to repay his personal loan came in before or after the campaign unless he specifically intended to use the offer of political favors after winning an election for more effective fundraising—the precise situation that this law guards against.").

318. *See* Marcus, *supra* note 252 ("The court's decision enables blatant political corruption in the supposed service of the First Amendment."); *see* Milihiser, *supra* note 4 (arguing that without Section 304 in place, candidates "may be inclined to reward donors who help them recoup the cost of personal loans").