First Amendment — Freedom of Speech — Campaign Finance — Bipartisan Campaign Reform Act — FEC v. Ted Cruz for Senate

Candidates for federal office may loan an unlimited amount of their own money to their campaign committees.[1] However, under section 304 of the Bipartisan Campaign Reform Act of 2002[2] (BCRA), a candidate may not be repaid more than $250,000 of such loans from contributions made to the campaign after election day.[3] Last Term, in *FEC v. Ted Cruz for Senate*,[4] the Supreme Court held that section 304 violates the First Amendment by burdening core political speech without proper justification. In doing so, *Cruz* evinces the Court's trend toward First Amendment absolutism and establishes a heightened standard of proof for restrictions on speech. In *Cruz*'s wake, laws once thought to be consistent with the First Amendment are at risk of being struck down.

During a campaign for federal office, a candidate may spend an unlimited amount of their own money,[5] and the candidate's campaign committee may borrow from third-party lenders or from the candidate themselves.[6] Campaigns may also accept contributions directly from organizations and individuals[7] — subject to monetary limitations[8] — and may continue to receive contributions after election day.[9] However, section 304 provides that a candidate who loans money to their campaign may not be repaid more than $250,000 of such loans from contributions made to the campaign after election day.[10] To implement section 304, the Federal Election Commission (FEC) promulgated three regulations: First, a campaign may repay up to $250,000 in candidate loans using contributions made at any time.[11] Second, for loans exceeding $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs within twenty days of the election.[12] And, third, if more than $250,000 remains unpaid twenty days post-election, the campaign must treat the portion above $250,000 as a contribution to the campaign, precluding repayment.[13]

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[1] *See* 11 C.F.R. § 110.10 (2022).

[2] Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

[3] 52 U.S.C. § 30116(j).

[4] 142 S. Ct. 1638 (2022).

[5] 11 C.F.R. § 110.10 (2022); *see also* Davis v. FEC, 554 U.S. 724, 740–41 (2008) (holding that a limitation on personal expenditures was not justified by a compelling state interest in violation of the First Amendment); Buckley v. Valeo, 424 U.S. 1, 52–54 (1976) (per curiam) (holding the same).

[6] *See* 11 C.F.R. §§ 100.33, 100.52 (2022).

[7] *See* 52 U.S.C. § 30116.

[8] *See* Federal Election Campaign Act of 1971, 52 U.S.C. § 30116(a)(1)(A), (c).

[9] *See* 11 C.F.R. § 110.1(b)(3)(i) (2022).

[10] *See* 52 U.S.C. § 30116(j).

[11] *See* 11 C.F.R. § 116.12(a) (2022).

[12] *See id.* § 116.11(c)(1).

[13] *See id.* § 116.11(c)(2).

Cognizant of these regulations,[14] Senator Ted Cruz loaned his Committee — Ted Cruz for Senate — $260,000 the day before the general election for his 2018 reelection.[15] After the election, the Committee had $2.38 million in pre-election funds remaining.[16] The Committee could have used those funds to repay Senator Cruz, but it chose not to do so within the twenty-day deadline.[17] If the Committee had used pre-election funds to repay $10,000 to Senator Cruz within that twenty-day window, it could have used post-election funds to repay the remaining $250,000 at any time following the election.[18] However, once the twenty-day deadline elapsed, $10,000 of the $260,000 loan was recharacterized as a contribution from Senator Cruz to his Committee, precluding repayment of such amount.[19]

In April 2019, Senator Cruz[20] sued the FEC in federal court alleging that section 304's loan repayment limit and its implementing regulations violate the First Amendment.[21] He moved for his challenge to be heard by a three-judge district court, as provided for by section 403 of BCRA.[22] Judge Mehta, sitting alone, rejected the FEC's attempt to dismiss Senator Cruz's claim for lack of standing and granted Senator Cruz's application for a three-judge district court.[23] Judge Rao, for a unanimous three-judge panel,[24] then granted Senator Cruz's motion for summary judgment.[25] First, she concluded that the loan-repayment limit burdens the exercise of political speech by constraining the repayment options available to candidates.[26] Limiting the repayment

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[14] *See Cruz*, 142 S. Ct. at 1647 (noting that Senator Cruz's "sole and exclusive motivation" in making the loan "was to establish the factual basis" for the subsequent legal challenge).

[15] *Id.* at 1646.

[16] Brief for the FEC at 4, *Cruz* (No. 21-12).

[17] *Id.* at 4–5; *see also* Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1, 6 (D.D.C. 2021) ("The campaign 'used the funds it had on hand to pay vendors and meet other obligations instead of repaying [Senator Cruz's] loans.'" (alteration in original) (quoting Complaint for Declaratory & Injunctive Relief ¶ 29, *Cruz*, 542 F. Supp. 3d 1 (D.D.C. 2021) (No. 19-cv-00908))).

[18] *See Cruz*, 142 S. Ct. at 1647.

[19] *See id.* at 1646.

[20] Senator Cruz and his Committee were both named plaintiffs in the suit. *Cruz*, 542 F. Supp. 3d at 6.

[21] *Id.*

[22] Ted Cruz for Senate v. FEC, No. 19-cv-908, 2019 WL 8272774, at *2 (D.D.C. Dec. 24, 2019). Section 403 provides that "[i]f any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act," the action "shall be heard by a 3-judge court," and any judgment may be directly appealed to the Supreme Court, which is obliged to "expedite" any such appeal "to the greatest possible extent." Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a), 116 Stat. 81, 113–14 (codified at 52 U.S.C. § 30110).

[23] *Cruz*, 2019 WL 8272774, at *1–2.

[24] Judge Rao, sitting by designation, was joined by Judges Mehta and Kelly.

[25] *Cruz*, 542 F. Supp. 3d at 6. In a separate order, the three-judge district court had also assumed supplemental jurisdiction over related claims (specifically regarding the implementing regulations). *See* Ted Cruz for Senate v. FEC, 451 F. Supp. 3d 92, 97 (D.D.C. 2020). It then held these claims in abeyance pending resolution of the constitutional challenge. *See* Order at 1, Ted Cruz for Senate v. FEC, No. 19-cv-908 (D.D.C. Apr. 15, 2020).

[26] *Cruz*, 542 F. Supp. 3d at 8.

options, in turn, could "inhibit[]" a candidate from lending money to their campaign.[27] Then, she held that the FEC had not adequately justified this burden because the FEC's position "amounts to speculation" that contributions to pay off a candidate's personal loans carry a danger of quid pro quo corruption.[28] Finally, she explained, even if the FEC had shown an important government interest, section 304 is "insufficiently tailored" to serve it.[29] Having struck down section 304, the court dismissed Senator Cruz's regulatory claims as moot.[30] The FEC appealed to the Supreme Court.[31]

The Supreme Court affirmed.[32] Writing for the majority, Chief Justice Roberts[33] concluded that section 304 violates the First Amendment by burdening core political speech without proper justification.[34] Before turning to the constitutional issue, Chief Justice Roberts established that Senator Cruz had standing to challenge the threatened enforcement of section 304.[35] Because Senator Cruz knowingly triggered the application of section 304, the FEC argued that his injury was traceable to himself,[36] thereby extinguishing the traceability required for Article III standing.[37] Chief Justice Roberts rejected this argument,[38] reasoning that the fact that Senator Cruz chose to subject himself to section 304 did not negate that he was subject to it and would face legal penalties for failing to comply with it.[39]

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[27] *Id.* at 11.

[28] *Id.* at 16.

[29] *Id.* at 19.

[30] Order, Ted Cruz for Senate v. FEC, No. 19-cv-908 (D.D.C. June 3, 2021).

[31] Defendant FEC's Notice of Appeal at 1, Ted Cruz for Senate v. FEC, No. 19-908 (D.D.C. June 11, 2021). The FEC appealed directly to the Supreme Court, as authorized by 28 U.S.C. § 1253. *Cruz*, 142 S. Ct. at 1646.

[32] *Cruz*, 142 S. Ct. at 1657.

[33] Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

[34] *Cruz*, 142 S. Ct. at 1656–57.

[35] *Id.* at 1649.

[36] *See* Reply Brief for the FEC at 8, *Cruz*, 142 S. Ct. 1638 (No. 21-12) ("Appellees delayed repayment of the loan, however, not to achieve any campaign-related purpose or to avoid some other harm, but solely to facilitate this lawsuit. The self-inflicted character of their current injury is a separate reason they lack standing.").

[37] The required elements of Article III standing are well established. A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[38] *Cruz*, 142 S. Ct. at 1647 (citing Evers v. Dwyer, 358 U.S. 202, 204 (1958) (per curiam) (holding that the fact that the plaintiff subjected himself to discrimination "for the purpose of instituting th[e] litigation" did not defeat standing); Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (explaining that a "tester" plaintiff posing as a renter for purposes of housing-discrimination litigation still suffered an injury under Article III)).

[39] *Id.* (citing 52 U.S.C. § 30109(a)(5); 11 C.F.R. § 111.24 (2022)).

Chief Justice Roberts then continued to the question whether section 304 violates the First Amendment.[40] First, Chief Justice Roberts established that section 304 burdens core political speech.[41] He reasoned that by restricting the sources of funds that campaigns may use to repay candidate loans, section 304 increases the risk that such loans will not be repaid.[42] The increased risk of default, in turn, inhibits candidates from loaning money to their campaigns.[43] And this risk, he argued, is "an unprecedented penalty on any candidate who robustly exercises th[eir] First Amendment right."[44]

Chief Justice Roberts then turned to whether the burden was justified. He explained that the only permissible ground for restricting political speech is "the prevention of '*quid pro quo*' corruption or its appearance,"[45] before finding that the FEC had not shown how section 304 furthered a permissible anticorruption goal, rather than "the impermissible objective of simply limiting the amount of money in politics."[46] This conclusion was premised on Chief Justice Roberts's finding that the FEC did not identify tangible examples of quid pro quo corruption[47] and had "merely hypothesize[d]" that the use of post-election contributions to repay a candidate's debt would encourage corruption.[48] Defending against the FEC's arguments that section 304 targeted the appearance of corruption, Chief Justice Roberts remarked that "influence and access 'embody a central feature of democracy'"[49] and that although the "line between *quid pro quo* corruption and general influence may seem vague at times, . . . the distinction must be respected."[50]

In conclusion, Chief Justice Roberts dismissed the argument that the Court should defer to congressional judgment that section 304 furthers an appropriate anticorruption goal.[51] Such deference would be "especially inappropriate" here, he asserted, where the legislative act may have been an effort to insulate those legislators from effective electoral challenge.[52]

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[40] *Id.* at 1650.
[41] *Id.* at 1651.
[42] *Id.* at 1650.
[43] *Id.*
[44] *Id.* at 1651 (quoting Davis v. FEC, 554 U.S. 724, 738–39 (2008)).
[45] *Id.* at 1652 (citing McCutcheon v. FEC, 572 U.S. 185, 207 (2014) (plurality opinion); FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985)).
[46] *Id.* at 1656.
[47] *Id.* at 1653.
[48] *Id.* (quoting Ted Cruz for Senate v. FEC, 542 F. Supp. 3d 1, 15 (D.D.C. 2021)).
[49] *Id.* (quoting *McCutcheon*, 572 U.S. at 192).
[50] *Id.* (quoting *McCutcheon*, 572 U.S. at 209).
[51] *Id.* at 1656 (citing Brief for the FEC, *supra* note 16, at 39; *Cruz*, 142 S. Ct. at 1661 (Kagan, J., dissenting)).
[52] *Id.* (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring)).

Justice Kagan dissented.[53] First, she argued that the majority overlooked a key distinction between expenditure restrictions and contribution restrictions.[54] Finding that section 304 limits "only the candidate's ability to shift the costs of his electoral speech to others"[55] and that "Section 304 places no limits on the amount a candidate can spend for expression,"[56] Justice Kagan reasoned that section 304 should be evaluated under the same standard of review as other contribution restrictions: whether the contribution limit is "so low as to prevent candidates from raising 'the resources necessary for effective advocacy.'"[57] Against this standard, Justice Kagan suggested that section 304 should be upheld.[58]

Alternatively, Justice Kagan argued that even under the majority's heightened standard of review, section 304 should be upheld. She suggested that the FEC "marshalled significant evidence" that section 304 targeted the prevention of quid pro quo corruption or its appearance[59] and detailed several examples of such corruption from the record.[60] She argued that the "*quid*" in these examples was "a donation paying off a successful candidate's personal loan" and the "*quo*" was "a government contract, or a key vote."[61] The majority's claim that the FEC was "unable to identify a single case of *quid pro quo* corruption,"[62] Justice Kagan reasoned, indicated that Chief Justice Roberts improperly expected the FEC to "prove[] beyond a doubt that the trades in fact occurred."[63]

Justice Kagan further argued that — absent explicit evidence of quid pro quo corruption — preventing the appearance of such corruption is sufficient justification for limiting political speech.[64] She reasoned that the appearance of corruption is "self-evident" when a campaign uses a donation to repay the candidate's loan because every dollar given goes

[53] Justice Kagan was joined by Justices Breyer and Sotomayor.

[54] *Cruz*, 142 S. Ct. at 1658 (Kagan, J., dissenting).

[55] *Id.*

[56] *Id.* at 1659.

[57] *Id.* at 1658 (quoting Randall v. Sorrell, 548 U.S. 230, 247 (2006) (plurality opinion)).

[58] *See id.*

[59] *Id.* at 1662 (citing Brief for the FEC, *supra* note 16, at 37–40; Brief of Campaign Legal Center et al. as Amicus Curiae in Support of Appellant at 27–29, *Cruz* (No. 21-12)).

[60] These examples included that in Ohio, law firms donated almost $200,000 to help the newly elected attorney general recoup his personal loans and later received more than two hundred state contracts worth nearly $10 million in legal fees; in Alaska, a lobbyist collected almost $100,000 for post-election repayment of the governor's personal loans, and a business in which the lobbyist held an interest later received a $9 million state contract; in Kentucky, two governors loaned their campaigns millions of dollars, only to be repaid after the election by contributors seeking no-bid contracts; and, in San Diego, three city council members cast critical votes benefiting lobbyists who had raised funds to retire their campaign debts. *Id.* at 1662–63.

[61] *Id.* at 1663 n.3.

[62] *Id.* at 1653 (majority opinion).

[63] *Id.* at 1663 n.3 (Kagan, J., dissenting).

[64] *Id.* at 1663.

straight into the candidate's pocket.[65] And, as a final argument, Justice Kagan pushed for congressional deference and judicial restraint, critiquing the majority for "second-guess[ing] Congress's experience-based judgment about the specially corrupting effects of post-election donations to repay candidate loans."[66]

Cruz follows the Court's trend toward First Amendment absolutism,[67] and, while it does not display an entirely novel approach, the case establishes a heightened standard of proof under which laws and regulations once thought to be consistent with the First Amendment are now at risk of being struck down.[68]

The Roberts Court — arguably the most speech-protective Court in history[69] — "has extended near absolute protection to expression."[70] Through sweeping rhetoric,[71] it has expanded the zone of protected speech to encompass even speech that is "overtly nonpolitical,"[72] "hateful, offensive, illiberal, and dangerous"[73]: lies about military honors;[74]

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[65] *Id.* at 1660 ("However much money the candidate had before he makes a loan to his campaign, he has less after it: The amount of the loan is the size of the hole in his bank account. . . . [When] donors pay him back[,] [t]hen, the hole is filled, the bank account replenished, and the purchasing power restored." *Id.* at 1661.).

[66] *Id.* at 1661.

[67] *See* Ronald K.L. Collins, *Foreword: Exceptional Freedom — The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 410 (2013); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 582 (2011); Morton J. Horwitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109–10 (1993) (describing the "generalization and universalization of freedom of speech" and the "Court's concomitant devotion to its abstract doctrine," *id.* at 110).

[68] *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 883–84 (1987); *see also* Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 332 (2016); Robert Post & Amanda Shanor, Commentary, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 174 (2015); Elizabeth Sepper, *Free Speech Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 174.

[69] *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT 3 (2017); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

[70] Collins, *supra* note 67, at 413. Of course, the Roberts Court has not invariably ruled in favor of free speech claims; it has allowed the government, in some circumstances, to censor student speech, *see* Morse v. Frederick, 551 U.S. 393, 403 (2007), government employee speech, *see* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006), and speech supporting terrorist organizations, *see* Holder v. Humanitarian L. Project, 561 U.S. 1, 6 (2010).

[71] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))); Citizens United v. FEC, 558 U.S. 310, 339, 349 (2010) (noting that "[p]olitical speech is 'indispensable to decisionmaking in a democracy,'" *id.* at 349 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)), and that it "is an essential mechanism of democracy, for it is the means to hold officials accountable to the people," *id.* at 339 (citing Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam))).

[72] Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1278 (2020).

[73] Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 818 (2018).

[74] *See* United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (plurality opinion).

the sale and rental of violent video games to minors;[75] offensive speech targeted at the family of a deceased soldier on the day of his funeral;[76] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors;[77] the commercial creation, sale, or possession of depictions of animal cruelty;[78] and independent corporate expenditures for electioneering communications.[79] And, while the Court has purported to balance the government justifications for particular restrictions on such speech,[80] it has consistently held that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits";[81] that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs";[82] and that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[83] Under this paradigm, the Court — while professing that "[n]o right is absolute"[84] and that freedom of expression must inevitably be weighed against other substantive considerations[85] (like a desire to "prevent corruption or its appearance"[86]) — effectively preordains the First Amendment to prevail in all subsequent challenges.[87]

Cruz evinces this trend. By emphasizing that political spending is the essence of protected speech[88] and that the First Amendment "prohibits . . . attempts to tamper with the 'right of citizens to choose who shall govern them,'"[89] the Court presented the First Amendment as a

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[75] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011).

[76] *See Snyder*, 562 U.S. at 461.

[77] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

[78] *See* United States v. Stevens, 559 U.S. 460, 482 (2010).

[79] *See* Citizens United v. FEC, 558 U.S. 310, 372 (2010).

[80] *See, e.g.*, *Cruz*, 142 S. Ct. at 1651–52 (conceding that restrictions on free speech must be balanced against government justifications for such limitations); McCutcheon v. FEC, 572 U.S. 185, 210 (2014) (plurality opinion) (same); *Stevens*, 559 U.S. at 470 (same).

[81] *Stevens*, 559 U.S. at 470.

[82] *Id.*

[83] *Citizens United*, 558 U.S. at 340.

[84] McDonald v. City of Chicago, 561 U.S. 742, 879 (2010) (Stevens, J., dissenting); *see also McCutcheon*, 572 U.S. at 191 (conceding that First Amendment rights are not absolute).

[85] *See Cruz*, 142 S. Ct. at 1651–52 (arguing that any law that burdens the First Amendment "must at least be justified by a permissible interest").

[86] *Id.* at 1652 (quoting *McCutcheon*, 572 U.S. at 207).

[87] *See* Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 36, 43 (2018); *see also* Lakier, *supra* note 72, at 1245 ("In recent decades the Supreme Court has embraced a highly academic conception of freedom of speech — one that largely fails (and in some contexts, adamantly refuses) to consider the economic and social forces that as a practical matter shape the exercise of First Amendment rights.").

[88] *See Cruz*, 142 S. Ct. at 1650; *see also McCutcheon*, 572 U.S. at 191 (arguing that giving financial support to a candidate or cause is as valid and valued a method of exercising First Amendment free speech rights as handing out leaflets on a street corner or speaking on a soapbox).

[89] *Cruz*, 142 S. Ct. at 1652 (quoting *McCutcheon*, 572 U.S. at 227).

lofty, abstract principle.[90] In contrast, while purportedly balancing these First Amendment rights against the government justifications for section 304, the Court framed such justifications in concrete detail — seemingly to trivialize them — and argued that section 304 is "yet another in a long line of 'prophylaxis-upon-prophylaxis approach[es]' to regulating campaign finance."[91] When so framed, the Court easily dismissed the government justifications as "pretty meager, given that we are considering restrictions on 'the most fundamental First Amendment activities.'"[92] So, while Chief Justice Roberts facially reached his holding through a technical analysis of the considerations proffered in support of section 304, the decision was actually driven by how these considerations are framed to emphasize the inviolability of the First Amendment.[93]

Moreover, *Cruz* introduced a heightened standard of proof, placing the burden squarely and onerously on the state, to uphold any restriction on expression.[94] Chief Justice Roberts overlooked empirical evidence that post-election repayments of candidates' loans lead to corrupt quid pro quo transactions, dismissing it, with little justification, as "scant."[95] But the empirical evidence provided by the FEC distinguished *Cruz* from precedents on which the majority relied — like *Citizens United v. FEC*[96] and *McCutcheon v. FEC*[97] — where no such evidence was actually marshalled.[98] By rejecting this evidence, *Cruz* effectively established that in addition to presenting evidence of "'*quid pro quo*' corruption or its appearance,"[99] the government must "prove[] beyond a doubt" that corruption in fact occurred.[100] The creation of this new, heightened evidentiary requirement was hardly surprising given the sanctity with which Chief Justice Roberts regards the First Amendment, but it is significant: no longer is it sufficient to provide evidence of a

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[90] *Id.* at 1650 ("The First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971))); *id.* at 1653 ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it." (quoting *McCutcheon*, 572 U.S. at 209)).

[91] *Id.* at 1652 (alteration in original) (quoting *McCutcheon*, 572 U.S. at 221).

[92] *Id.* at 1654 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

[93] *See* Lakier, *supra* note 72, at 1342 ("Current doctrine obscures the difficult questions posed when the government restricts the freedom of some in order to protect the freedom of others by making the analysis unduly formalistic — or . . . 'abstract.'").

[94] *See Cruz*, 142 S. Ct. at 1663 n.3 (Kagan, J., dissenting).

[95] *Id.* at 1656 (majority opinion).

[96] 558 U.S. 310 (2010).

[97] 572 U.S. 185 (2014) (plurality opinion).

[98] *See Citizens United*, 558 U.S. at 357 (noting that the government did not claim that the political process was corrupted in the twenty-six states that allowed unrestricted independent expenditures by corporations); *McCutcheon*, 572 U.S. at 209 n.7 (explaining that the government presented no evidence of corruption in the thirty states that did not impose aggregate limits on individual contributions).

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

[100] *Id.* at 1663 n.3 (Kagan, J., dissenting).

valid justification for restricting speech; rather, it must be proven beyond a doubt.

Cruz illustrated two obvious defects of the Court's absolutist approach. First, its faux modesty. The juxtaposition of a grand, abstract right and a slight, trivial consideration made the result of *Cruz* feel inevitable.[101] However, the air of inevitability that produced Chief Justice Roberts's absolutism did not eliminate the discretion and true balancing used to reach the holding — it merely concealed it.[102] Being absolute about freedom of expression "does not mean that the [Court] has not made a judgment between competing considerations, but rather that [the Court's] judgment absolutely goes one way."[103]

And, second, *Cruz* illustrated how the Court's growing absolutism enlists the First Amendment as a deregulatory tool that enfeebles functional government.[104] The potential of the First Amendment as a deregulatory tool has been no secret to opportunistic litigants[105] who have successfully formulated legal challenges to encompass First Amendment rights[106]: the requirement to bake a cake for a same-sex wedding,[107] to pay union dues,[108] to give women accurate information about available health services,[109] or even to engage in partisan gerrymandering[110] have been successfully construed as speech infringements. That the First Amendment is so "pressed into service for tasks on the periphery of its central purposes is a product of its success."[111] And the rewards of "squeezing" these claims under the First Amendment

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[101] *See* Joshua Banafsheha, Rationalism and Its Errors: A Study in Judicial Discretion 21–22 (Aug. 10, 2022) (unpublished manuscript) (on file with the Harvard Law School Library).

[102] *See id.* at 22 ("[A] categorical principle that decides the case for us can only serve to hide the considerations . . . truly being weighed and disregarded."); *see also* Lakier, *supra* note 72, at 1254–57 (arguing that First Amendment jurisprudence "illegitimately transfer[s] to judges power that properly belonged to the democratically elected branches of government," *id.* at 1254).

[103] Banafsheha, *supra* note 101, at 22.

[104] *See* Lakier, *supra* note 72, at 1322 (arguing that the threat First Amendment cases "pose to the government's ability to regulate markets is a consequence of the Court's increasing tendency . . . to construe the First Amendment as a grant to speakers of almost-absolute freedom to use the expressive resources that they happen to possess or control for whatever purposes they desire").

[105] *See* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); *see also* Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1377 (2020) ("At the urging of powerful interests, the Court is following an antiregulatory agenda and forgetting the lessons of the now-discredited *Lochner v. New York* decision, by using the Constitution's protection of speech to strike down a host of socioeconomic regulations.").

[106] *See* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1209 (2015) ("[A]ntiregulatory sentiment [can] suddenly look like a speech claim to any litigant who can remotely characterize her activity as one that involves communication.").

[107] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

[108] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2368–70 (2018).

[109] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018).

[110] Gill v. Whitford, 138 S. Ct. 1916, 1924 (2018).

[111] Schauer, *supra* note 105, at 176.

umbrella have been great.[112] Post-*Cruz*, the prospects of success have only improved.[113]

Altogether, *Cruz* illustrated that the First Amendment is becoming an inviolable principle[114] — "a classic trump" — that is absolute but for a few exceptional circumstances in which it may be limited.[115] And it established a heightened standard of proof, placing the burden squarely and onerously on the state, to uphold any such limitation.[116] The danger post-*Cruz* is not only that section 304 has been invalidated[117] but also that the Court's absolutist paradigm may be applied to construe justifications for other First Amendment restrictions as equally "meager" as those advanced for section 304.[118] This paves the way for the Court to invalidate other laws and regulations, even those that are empirically substantiated.

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[112] *See* Kendrick, *supra* note 106, at 1209.

[113] *See* Lakier, *supra* note 72, at 1276 ("A rule that required heightened scrutiny whenever the government regulates speech, let alone expressive conduct, would effectively constitutionalize great swathes of both criminal and civil law."); *see also id.* at 1324 (describing "the Court's increasing tendency to construe the First Amendment as a shield that private market actors can wield against government regulation").

[114] Banafsheha, *supra* note 101, at 16, 22.

[115] Greene, *supra* note 87, at 36.

[116] *See Cruz*, 142 S. Ct. at 1663 n.3 (Kagan, J., dissenting).

[117] For an argument that *Cruz* — combined with FEC rulings that allow candidates to make loans to their campaign at "a 'commercially reasonable rate' of interest" — creates a significant chance that lawmakers will enrich themselves by making high-interest loans to their campaign, see Ian Millhiser, *The Supreme Court Takes Up a Case, Brought by Ted Cruz, That Could Legalize Bribery*, VOX (Jan. 12, 2022, 8:00 AM), https://www.vox.com/2022/1/12/22877010/supreme-court-ted-cruz-fec-campaign-finance-bribery-loan [https://perma.cc/5WNZ-9CRS].

[118] *Cruz*, 142 S. Ct. at 1654 (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)). For example, Professor Richard Hasen has argued that the "end of all contribution limits" is likely, "hasten[ing] a world in which individuals could give unlimited sums directly to candidates, buying all the ingratiation and access they want." Richard L. Hasen, *Unlimited Donations to Candidates, Coming Soon?*, THE ATLANTIC (July 26, 2019), https://www.theatlantic.com/ideas/archive/2019/07/campaign-finance-supreme-court/594751 [https://perma.cc/ZDX9-EP3T].