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NEWSLETTER

SCOTUS Sides with Ted Cruz in FEC Loan Repayment Dispute

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On Monday, the U.S. Supreme Court issued its opinion in *FEC v. Ted Cruz for Senate*, the case challenging the loan repayment prohibition in the Bipartisan Campaign Reform Act of 2002 (BCRA). The Court ruled 6-3 along familiar ideological lines to strike down BCRA section 304, which generally prohibits self-funding candidates from repaying more than $250,000 in personal loans after an election.

Congress adopted the prohibition as part of a broader package of legislative amendments, collectively referred to as BCRA's "Millionaire's Amendment." In the words of the provision's sponsors, the Amendment was intended as "an equalizer amendment" or a "let's be considerate of the candidate who isn't rich amendment," so that wealthier candidates would have to think twice before investing heavily in their own campaign. Indeed, one Senator openly mused that "I would like to be able to have a level playing field [for my next campaign]." Other Senators sharply criticized the proposal, explaining that it could "be looked upon as [unconstitutionally] disadvantaging [a] wealthy candidate" and warning that this sort of incumbent-protection measure might not withstand scrutiny. Indeed, in its 2008 *Davis v. FEC* decision, the Supreme Court had already struck down other aspects of the Millionaire's Amendment that had analogous flaws.

Chief Justice John Roberts' opinion for the Court in *Cruz* was measured, largely tracking arguments made by the Cruz campaign and its allied *amici*. Most notably, the Court reaffirmed several key principles that have defined its campaign finance jurisprudence in recent decades:

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- The prevention of *quid pro quo* corruption or its appearance is the only permissible ground for restricting political speech – e.g., attempts "to reduce the amount of money in politics, . . . to level electoral opportunities by equalizing candidate resources, . . . [or] to limit the general influence a contributor may have over an elected official" are not permissible rationales for restricting speech;
- The government must point to record evidence or legislative findings demonstrating that the provision is necessary – i.e., mere conjecture is insufficient; and
- There are reasons to be skeptical of scholarly articles, online polls, and isolated Congressional Record statements that arguably support greater regulation of political speech – e.g., most tend to focus on an overbroad/illegitimate theory of regulable corruption.

The Court's ruling did not go as far as some critics feared, however, and strike down broader portions of BCRA or redefine the legal test for reviewing campaign finance regulations/restrictions.

Disclosure: Wiley Rein filed an amicus brief on behalf of the Republican National Committee in this case supporting the Cruz campaign's position.